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Panel Presentation

INCORPORATING THE NEWLY ADOPTED EMPLOYMENT REGULATIONS INTO A WINNING LITIGATION STRATEGY

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The California Family Rights Act entitles eligible employees to 12-weeks of unpaid, job protected leave to either tend to their own serious health condition, to care for the serious health condition of a parent, spouse, child, or registered domestic partner, or to bond with a new child in the home.[1] To be eligible for protection under the CFRA, an employee must meet the following three eligibility requirements: 1) work for an employer who has at least 50 employees within a 75-mile radius; 2) have worked for that employer for at least one year; and 3) have worked 1250 hours in the year immediately preceding the leave of absence.[2]

The revised CFRA regulations became effective July 1, 2015. This paper will set out the regulatory changes and explain their positive and negative impact on employees.[3] Because situations involving CFRA bonding leave are often juxtaposed with potential pregnancy discrimination issues, this paper will also briefly address several notable revisions to the pregnancy provisions of the FEHA regulations.

[1] Cal. Gov't Code § 12945.2.
[2] *Id.*
[3] The full text of the regulatory changes to the CFRA is available at the Department of Fair Employment and Housing's website, at http://www.dfeh.ca.gov/res/docs/FEHC/FinalCFRAText.pdf (last visited May 1, 2016).

I. Regulatory changes to the CFRA that could reduce employee protections.

Adoption of 2013 FMLA Regulations.

Perhaps the most drastic global change to the CFRA regulations involved the incorporation of their 2013 FMLA counterparts, to the extent that those FMLA regulations were not inconsistent with the CFRA statute, CFRA regulations or other California law.

Earlier versions of the CFRA regulations had incorporated the 1995 FMLA regulations where the latter were not conflicting. The adoption of the less employee-friendly 2013 FMLA regulations was a source of concern for the plaintiffs' bar, who feared that the adoption would roll back CFRA protections that have been available to California employees for decades and which predated the FMLA.

During the comment period, the plaintiffs' bar made diligent efforts to ensure that the CFRA regulations were not silent with regard to important employee protections, especially where the new FMLA regulations would roll back certain protections. And though the final version of the amended CFRA regulations maintains many of the longstanding protections available to California employees, the new CFRA regulations have adopted the 2013 FMLA regulations, not only where California law and regulations are silent, but in some cases by directly incorporating language from the 2013 FMLA regulations into the new CFRA regulations.

Plaintiffs' representatives must be cognizant of the application of these less protective regulations. Care must be taken especially where the regulations at issue involve new and more stringent obligations of which employees should be advised, preferably prior to requesting leave under the CFRA. Notable changes resulting from these adoptions affect the following issues:

Tenure Eligibility Requirement. Section 11087(e)(2) codifies the 2013 FMLA regulation[4] which limits employee eligibility for leave by providing that employers need not count work prior to a break in service of more than seven years in calculating whether the employee has met the one-year-in-service eligibility requirement.

Demonstrating a "serious health condition." Section 11087(q)'s wholesale incorporation of the 2013 FMLA regulations restricts one of the ways in which an employee may establish a serious health condition. Under the 2013 FMLA regulations, for purposes of the "incapacity and treatment" prong of the serious health condition definition, an employee must now see a health care provider for the first time within seven days of the onset of the incapacity, and in some circumstances must make a second visit within 30 days. Further, for chronic conditions, a worker must now make at least two visits per year to a health care

[4] 29 C.F.R. § 825.110(b)(1).

provider.[5] This requires workers to make costly visits to their health care provider even when it is medically unnecessary.

Exemption from protection where leave proven fraudulent. Section 11089(d)(3) was added to clarify that, where an employer can prove that employee attempted to take CFRA leave on a fraudulent basis, that employee is not covered by CFRA protections. This anti-fraud provision now exists in addition to the already-existing CFRA regulation (§ 11091(b)(2)(A)) permitting an employer to obtain a second opinion in the event that it doubts a medical certification's validity regarding the employee's own serious health condition.

Employee's obligation to try to avoid disruption when scheduling intermediate appointments. Section 11090(c)(2) expressly adopts the 2013 FMLA regulation[6] which requires an employee to make a "reasonable effort to schedule [intermittent] treatment so as not to disrupt unduly the employer's operations." This new standard places an unnecessary burden on workers who must already contend with the busy schedules of physicians as well as those of friends or family members they may need to rely on for transportation to/from appointments. Given these scheduling complexities, what is considered "reasonable" by an employer may well be impossible for a worker to accommodate.

We have heard from a number of workers whose employers are insistent that they schedule vital medical appointments before or after work hours or on weekends. Although plaintiffs' advocates should advise clients of their duty to make these attempts when scheduling appointments, they should also push back on employers who argue that unsuccessful efforts to do so do not meet the "reasonable effort" requirement and attempt to deny employees' leave on that basis.

Effect of "required" versus "voluntary" overtime hours on calculation of CFRA entitlement. Section 11090(c)(4) expressly adopts 28 C.F.R. § 825.205(c), stating that where an employee is on CFRA leave, overtime hours that she "normally would be required to work" were she not on leave should count against her CFRA leave entitlement. The adoption of this regulation opens the door to confusion among employers and employees regarding what constitutes regularly "required" overtime versus what constitutes "voluntary" overtime. Not only does this introduce a new and confusing record-keeping requirement for employers, but it also has the potential to result in miscalculations wherein "voluntary" overtime is mischaracterized as "required" and thus improperly and unlawfully counted against an employee's leave entitlement.

[5] 29 C.F.R. § 825.115(a), (c).
[6] 29 C.F.R. § 825.203.

Employees' notice obligations for foreseeable and unforeseeable leaves. Section 11091(a)'s wholesale incorporation of the 2013 FMLA regulations narrows the window of time and method by which an employee must notify an employer of her need for leave. Under the 2013 FMLA regulations, for unforeseeable leaves, an employee must use the employer's usual and customary notice and procedural requirements for requesting leave.[7] This regulation means that in a time of family medical crisis, workers have the added burden of complying with these procedures even if they have otherwise informed their employer of their need for leave for a qualifying reason. If they do not, and no unusual circumstances justify noncompliance, leave can be delayed or denied. Further, a worker who did not give 30 days' notice of foreseeable leave can be required to explain the reason for not meeting this requirement and must provide notice within one day of learning of the need for leave.[8]

Permissible employer communication with employee healthcare provider. Section 11091(b) adopts the 2013 FMLA regulation[9] allowing employers to contact an employee's medical provider for clarification and authentication of a complete and sufficient medical certification. The adoption of this regulation jeopardizes workers' privacy and creates the risk that employers will gain access to employees' or their family members' medical information. This provision is inconsistent with the California Constitution, which has strong medical privacy protections.[10] The corresponding 1995 FMLA regulation, while arguably still violating California privacy law, at least limited required that such contact with an employee's physician be between "a health care provider representing the employer."[11] Although the new CFRA regulations only allow an employer to contact a health care provider for the limited purpose of authenticating a previously-provided medical certification, it mirrors the 2013 FMLA regulation by allowing for such direct contact by a human resources representative, leave representative, or management official violates this important privacy right.

Requirements for using employer-provided paid leave. Section 11092(b) adopts the 2013 FMLA regulation requiring an employee to meet the employer's requirements for using paid vacation or personal leave in order to receive such pay while on FMLA leave.[12] Many employers have policies restricting the use of vacation or other paid leave (*e.g.*, requiring 5 days' notice before using paid vacation), which could make it difficult or impossible for a worker to receive pay during a FMLA/CFRA leave—and thus may mean that eligible workers who need leave will not take it because they cannot afford to take unpaid leave, or will be forced to go without critical pay. (*E.g.*, a worker whose chronic condition flares up

[7] 29 C.F.R. § 825.303(c).
[8] 29 C.F.R. § 825.302.
[9] 29 C.F.R. § 825.307.
[10] CAL. CONST. art. I, § 1.
[11] 29 C.F.R. § 825.307 (1995).
[12] 29 C.F.R. § 825.207(a).

suddenly may not have the opportunity to provide sufficient advance notice for use of paid leave.) Also, many employers have policies requiring vacation or other personal pay to be used in certain size increments, which would mean that a worker wishing to receive such pay during leave could be forced to use more FMLA/CFRA leave than she needs.

II. Regulatory changes with positive or neutral effects.

Paid Time Off During Leave: Section 11092(b) provides a detailed clarification of both optional and mandatory used of different types of paid leave during CFRA leave.

- *Vacation / PTO*: An employer may require or an employee may elect to use vacation or undifferentiated paid time off during an otherwise unpaid portion of CFRA leave. If an employee is receiving partial wage replacement, she and the employer can agree to the use of partial vacation / PTO benefits to supplement the partial benefits.

- *Sick*: An employer may require or an employee may elect to use sick time during an otherwise unpaid portion of CFRA leave taken for her own serious health condition or another reason if mutually agreed upon by the employee and employer. If an employee is receiving partial wage replacement, she and the employer can agree to the use of partial sick pay to supplement the partial benefits.

- *Short- or Long-term Disability:* An employee may use state- or employer-provided short-term disability benefits (as long as their condition qualifies under the requirements of those benefits) during an otherwise unpaid portion of CFRA leave taken for her own serious health condition. Because the leave is not considered "unpaid" if an employee is receiving disability benefits, an employer cannot require an employee to use vacation pay in this situation.

- *Paid Family Leave*: An employee may use California Paid Family leave, a six-week partial wage replacement benefit, while on leave to bond with a new child in the home or care for a family member with a serious health condition. Notably, the new regulations specify that an employee receiving Paid Family Leave benefits is not considered "unpaid," and that an employer can therefore not require the employee to use PTO, vacation, or sick leave during this time. However, this exemption seemingly conflicts with the statutory language governing Paid Family Leave, which allows an employer to require an employee to use two weeks' of vacation or PTO prior to beginning the use of Paid Family Leave.[13]

[13] See Cal. Unempl. Ins. Code § 3303.1(c)(" As a condition of an employee's initial receipt of [Paid Family Leave] benefits…an employer may require an employee to take up to two weeks of earned but unused vacation leave prior to the employee's initial receipt of these benefits.")

Rights Upon Return. Section 11089 clarifies an employee's entitlement to the same position or one equivalent in pay, benefits, shift, schedule, geographic location, and working conditions upon return from CFRA leave. However, the regulation further clarifies that CFRA does not prohibit an employer from accommodating an employee's request to transfer to a different position, accept a promotion, or have aspects of a position changed as a reasonable accommodation. The regulation further clarifies that while an employer may not have to comply with this reinstatement obligation where a legitimate business reason necessitated changes to or the elimination of the position held by employee on leave, this defense does not exist where the changes to or elimination of the position occurred as a consequence to the employee being on CFRA leave.

Defenses regarding "key employees." Section 11089 also clarifies that an employer cannot refuse to reinstate a "key employee" (an employee among the highest paid 10 percent of employees within 75 miles of their worksite) because of minor inconveniences or costs that would be experienced in the normal course of business, but that such a denial must be based on substantial and grievous economic injury. The regulation further clarifies an employer's notification obligations to a key employee to whom it believes that it can deny reinstatement. Notably, should such a key employee not return after receiving such notice, an employer must still maintain its contributions to that employees health benefits until it denies reinstatement at the conclusion of the CFRA leave or until the key employee gives notice that she no longer wishes to return to work.

Becoming Eligible During a Leave. Section 11087(e)(5) clarifies that an employee may meet the "one year" tenure requirement for CFRA eligibility (though not the 1250-hour requirement) while already on leave. For instance, an employee who goes on out Pregnancy Disability Leave after working for an employer for ten months, although not meeting the one-year tenure requirement at the time she begins her pregnancy leave, will become eligible by reaching her one-year anniversary two months into her leave. However, this does not affect the 1250-hour requirement – if she has not worked 1250 hours in those ten months, she must return and work additional hours in order to meet that separate requirement for CFRA eligibility.

Employees counted toward employer-size eligibility requirement. For an employer to be covered under the CFRA, it must have employed at least 50 full- or part-time employees within 75-miles of an eligible employee's worksite for each working day during each of 20 or more calendar workweeks in the current or preceding year. Section 11087(d)(1) clarifies that, when determining whether an employer has the requisite number of employees to be covered under the CFRA, "[e]mployees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted."

Section 11087(d)(3) further defines what might constitute a joint employer covered under the CFRA. The new regulations acknowledge that the existence of a joint employer relationship must be determined by analyzing the totality of the circumstances. However, § 11087(d)(3) suggests that a joint employment relationship generally exists "[w]here the employee performs work with simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, and where the employers have an arrangement to share or interchange employees; one employer acts in the interest of the other employer in relation to the employee, or one control controls the other employer in some way."

Where an employee is employed by joint employers, for purposes of determining that employee's eligibility under the CFRA, the regulations explain that the office from which the employee is assigned or reports (the "primary employer's office") should be considered the employee's worksite, unless that employee has physically worked for at least one year at a facility of the a secondary employer.[14] However, the employee should be counted by both employers for purposes of determining whether each employer has at least 50 employees for purposes of CFRA coverage.[15]

Finally, § 11087(e)(4) clarifies that where an employee has no fixed worksite (e.g., a traveling salesperson who typically works from home), the worksite for that employee is "their home base, from which their work is assigned or to which they report." The regulation clarifies that this worksite need not be in California. As long as there are 50 or more employees within 75-miles of that employee's "home base," wherever it may be, the employer meets the CFRA coverage criterion based on the number of employees.

Revised definition of "spouse." Section 11087(r) revises the definition of spouse to include both registered domestic partners as well as same-sex partners in marriage.

Consequences of employer's failure to establish method of for determining 12-month period. Should an employer fail to choose a consistent method for determining the 12-month period during which the 12-week CFRA entitlement occurs (whether that be the calendar year, another fixed "leave year," or a rolling year) and to notify employees of that method, Section 11090(b) clarifies that an employee is entitled to the calendaring method with the most beneficial outcome.

Retroactive designation generally prohibited. Section 11091(a) clarifies that an employer may not retroactively designate a leave as CFRA qualifying after an employee has returned to work, except where the employer has provided proper notice to the employee and where the retroactive designation does not cause harm or injury to the employee.

[14] § 11087(e)(4)(B).
[15] *Id*.

What constitutes verbal notice of leave. Section 11091(a) specifies that where an employer has information indicating that a requested leave of absence could be for a CFRA-qualifying reason, they are obligated to seek further information concerning the leave to determine whether the employee is requesting CFRA leave. Likewise, an employee has an obligation to respond to its employer's questions for the purpose of determining whether a requested leave is CFRA-qualifying. *Id.* Notably, the new regulations specify that if an employee requests time-off from work for a CFRA-qualifying reason, but pairs that request with a mention of wanting to take "vacation" or other paid time off or needing to "resign" in order to attend to the qualifying reason, such mentions do not render the employee's notice of a need for CFRA-qualifying leave insufficient. Where such mentions are made, an employer should still carry out its obligation to investigate whether the need for leave is CFRA-qualifying, and if so, notify the employee of her right to take job-protected leave and designate the leave accordingly. Section 11091 also revises an employer's required response time to an employee's leave request from 10 calendar days to five days.

No fitness-for-duty may be required upon return from leave, unless job-related and consistent with business necessity. Section 11091(b) clarifies that an employer may not require a fitness-for-duty exam as a condition of an employee's return from CFRA-qualifying leave. (However, this section does permit an employer in some circumstances to require a release to return from medical leave in limited situations, including where it can demonstrate safety concerns regarding the employee's ability to perform her duties.)

Continued employer contributions toward employee health coverage under PDL and CFRA leave are separate entitlements. Section 11092(c) clarifies that pregnant employees who are eligible for CFRA bonding leave are entitled to continued employer health benefit coverage during both their Pregnancy Disability Leave, which could last up to four months, as well as for the duration of the 12 weeks of CFRA bonding leave following the PDL. Therefore, this entitlement could require that an employer continue their benefit contribution for up to seven months while a pregnant employee (and then new parent) is on leave under the PDL and then the CFRA.

Possible employee entitlement to extended leave or other accommodation post-CFRA leave. Section 11093 clarifies that the right to CFRA leave is a separate and distinct entitlement from the right to take pregnancy disability leave and/or leave as an accommodation under the disability provisions of the FEHA. Thus, while an employee has no obligation to provide more CFRA leave than that to which an employee is entitled, that does not excuse an employee from providing a reasonable accommodation for a disability under the FEHA. This clarification is especially important for cases in which a pregnant employee needs additional leave due to continuing disability after exhausting her Pregnancy Disability Leave and CFRA bonding leave. In such cases, although the employee may have exhausted seven months of leave, she may nevertheless be entitled to an

extension of leave (or another accommodation) under the disability provisions of the FEHA.

Changes to employer notice requirements. Section 11095 clarifies an employer's duty to post a conspicuous notice, available in every language spoken by at least 10% of its workforce, in an area in which it can be easily seen by employees. The posting may be done electronically as long as it meets the aforementioned requirements.

III. Positive changes to pregnancy-related regulations under the FEHA

In addition to several positive changes to the CFRA regulations, the Council also adopted several changes to FEHA pregnancy regulations that clarify important employee protections. These changes took effect on April 1, 2016

Harassment protection: Section 11036 now clarifies that it is an unlawful employment practice to harass an employee or applicant because of childbirth, breastfeeding, or any related medical condition, in addition to the previous protection against harassment on the basis of pregnancy or perceived pregnancy. This clarification is especially significant for employees who may need to express breastmilk at the workplace.

Per-pregnancy leave entitlement: Section 11042 clarifies that an employee is eligible for up to four months of leave for pregnancy-related disability per pregnancy (*not* per year), and that such leave need not be taken in one continuous period.

Employer notice obligations: Section 11049(d) clarifies that an employer must provide advance notice of employee rights and obligations regarding pregnancy, childbirth, and related medical conditions. Notice must be easily readable and posted in a conspicuous location, and it must explain the provisions of the FEHA as well as provide contact info for filing a complaint with the DFEH or learning more about employee rights and obligations. Additionally, § 11051 explains that the notice should explain employees are required to provide advance notice of their need for leave where possible, and it should also notify employees of their potential entitlement to CFRA leave.

IV. Best Practice Tips for Plaintiff Representatives Pursuing FEHA or CFRA Claims Post-Regulatory Changes

Although the adoption of the 2013 FMLA regulations have generally increased the burden on employees with regard to CFRA notice and procedural requirements, the new CFRA regulations also include some helpful clarifications of employee rights and protections, as do the generally positive revisions of the FEHA pregnancy regulations.

Practitioners should therefore keep in mind the following tips when addressing a complicated PDL, CFRA, or pregnancy-related FEHA claim:

- Where there are CFRA claims, always look to the CFRA regulations first. Although many of the 2013 FMLA regulations have been adopted, the CFRA regulations on balance remain more protective than the 2013 FMLA regulations.

- Encourage employees to provide early (at least 30 days') notice of a need for leave wherever possible, given the greater emphasis on employee notice requirements in the new version of the regulations.

- Remember that pregnancy disability leave, CFRA bonding leave, and other (non-PDL) disability leave are separate entitlements. Also remember that an employee who is disabled for more than seven months may be entitled to additional job-protected leave as a reasonable accommodation under the general disability provisions of the ADA and FEHA.

- Watch out for situations where employees who work from home in California report to an out-of-state worksite. Employers often attempt to argue that in such situations, the 50-employee eligibility requirement is not met. Remember that it *is* met as long as the worksite to which the employee reports or from which she receives assignments has at least 50 employees within a 75-mile radius.

- Don't assume that an employee is ineligible for CFRA leave simply because she began her PDL leave before reaching one year of tenure. Remember that she can meet this eligibility requirement if her one-year anniversary falls during her PDL leave.

- Don't forget California's strong privacy protections! Employees need not reveal diagnoses in order to obtain leave under the CFRA! Employers generally cannot require fitness-for-duty exams for employees returning from CFRA leave unless such exams are job-related and consistent with business necessity! While a greater range of employer representatives can contact an employee's health care provider under the new regulations, they are still limited to requesting only authentication and clarification of the medical certification. (And "clarification" ***does not*** mean providing additional information (e.g., a diagnosis) but clarifying what is already written on the certification, to the extent it is not legible.)[16]

- When assisting a client with filing a DFEH complaint, don't assume that the consultant is aware of the above regulatory changes. Some are, but many are not.

[16] 29 C.F.R. § 825.307(a).

For similar reasons, maintain a relationship with the consultant, and request that they contact you prior to closing the case. Otherwise, your client is likely to receive a closure letter citing a lack of evidence and including a potentially damaging legal and factual analysis. Often, consultants will permit you to request a withdrawal and right-to-sue before they issue an "insufficient evidence" letter, as long as you request that they give you notice prior to closure.

Regulatory Changes to the California Family Rights Act

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California Family Rights Act (CFRA), Cal. Gov't Code §12945.2

- CFRA leave may be taken for the:
  - birth of a child for purposes of bonding
  - placement of a child in an employee's family for adoption or foster care
  - serious health condition of an employee's child, parent, spouse or registered domestic partner, including same-sex partners and
  - serious health condition of the employee.

CFRA Protections

An eligible employee has 3 basic rights:

1. An absolute entitlement to 12 weeks of leave in a 12-month period (26 weeks for FMLA military caregiver).
2. The right to have health benefits continued as if still actively working.
3. The right to reinstatement to the same or equivalent job.

CFRA Eligibility Requirements

- Must work for an employer who has at least 50 employees within 75 miles of an employee's worksite
- Must have worked for that employer for at least one year
- Must have worked at least 1,250 hours immediately prior to the request for leave

Amended CFRA Regulations

- Effective July 1, 2015
- Located at 2 CCR §§ 11087 – 11097
- California Family Rights Act statute has not been amended, just the regulations
- Incorporate the March 8, 2013 FMLA regulations to the extent not inconsistent with CFRA statute and regulations, other CA law, or the CA Constitution

Potentially Problematic Adoptions of 2013 FMLA Regulations

- Limitation on what may count toward tenure eligibility requirement (employer does not have to look beyond seven years) - *§ 11087(e)(2)*
- Possibly more difficult to demonstrate “incapacity and treatment” for purposes of establishing serious health condition - *§ 11087(q)*
- Expressly stated exemption from CFRA protections where employer can show basis for leave was fraudulent - *§ 11087(d)(3)*
- Employee’s obligation to make reasonable efforts to avoid disruptions for employer when scheduling medical appointments - *§ 11090(c)(2)*

More Potentially Problematic Adoptions

- “Required” versus “voluntary” overtime hours effect on calculation of CFRA leave entitlement - § 11090(c)(4)
- More stringent notice obligations for employees - § 11091(a)
- Permissible employer communications with employee health care provider - § 11091(b)
- Requirements for using employer-provided paid leave - § 11092(b)

Helpful / Positive Regulatory Revisions

Clarifications Regarding Use of Paid Time Off during CFRA Leave - *§ 11092*

- Vacation / PTO
  - Employer may require OR employee may elect during otherwise unpaid portion of CFRA leave
  - Employer and employee can agree to supplement partial wage replacement with vacation / PTO
- Sick Time
  - Employer may require OR employee may elect during otherwise unpaid portion of CFRA leave for employee's own serious health condition (or another reason, if agreed upon by employer and employee)
  - Employer and employee can agree to supplement partial wage replacement with sick time

Clarifications Regarding Use of Paid Time Off during CFRA Leave - *§11092* (cont.)

- Short- or Long-term Disability Benefits
  - Employee may use state- or employer-provided short-term disability benefits (as long as their condition qualifies under the requirements of those benefits) during an otherwise unpaid portion of CFRA leave taken for her own serious health condition
  - Because leave is not considered "unpaid" if an employee is receiving disability benefits, an employer cannot require an employee to use vacation pay in this situation
- Paid Family Leave
  - Employee-funded, state-provided benefit providing up to six weeks' of partial wage replacement while employee is on leave to care for a family member with a serious health condition or to bond while a new child in the home
  - Because leave is not considered "unpaid" if an employee is receiving paid family leave, an employer cannot require an employee to use vacation pay in this situation
    - NOTE: Potentially conflicts with the Paid Family Leave statute (Cal. Unempl. Ins. Code § 3303.1(c)) which permit an employer to require that an employee use two weeks' of vacation prior to receiving Paid Family Leave benefits

Employee Rights Upon Return - *§ 11089*

- Right to return to same position or one equivalent in pay, benefits, shift, schedule, geographic location, and working conditions
- Does not prohibit employer from accommodating an employee's request to transfer to a different position, accept a promotion, or have aspects of a position changed as a reasonable accommodation
- Employer cannot rely on change to / elimination of position due to legitimate business reason where that change / elimination occurred as a consequence to the employee being on CFRA leave

“Key Employee” Defense – *§ 11089*

- Clarifies that an employer cannot refuse to reinstate a “key employee” (an employee among the highest paid 10 percent of employees within 75 miles of their worksite) because of minor inconveniences or costs that would be experienced in the normal course of business
- Denial must be based on substantial and grievous economic injury
- Should key employee not return after receiving notice of key employee status, employer must still maintain its contributions to that employee’s health benefits until it denies reinstatement at the conclusion of the CFRA leave or until the key employee gives notice that she no longer wishes to return to work

Ability to Become CFRA-eligible while on non-CFRA leave - *§ 11087(e)*

- Clarifies that an employee may meet the **“one year” tenure** CFRA eligibility requirement while already on (non-CFRA) leave (e.g., while on Pregnancy Disability Leave)
- However, employee ***cannot*** meet **1250-hour** requirement during leave (because hours requirement is based on actual hours worked)

Clarification of employees to be counted to determine 50+ eligibility requirement - *§ 11089*

- Clarifies both the types of employees that should be counted as well as the appropriate worksite from which those employees should be counted to determine whether an employer meets the coverage requirement of having at least 50 employees within 75 miles of the requesting employee's worksite
- Employees on paid or unpaid leave should be counted
- For employees with no fixed worksite (e.g., salesperson who works out of her home), relevant worksite is that from which they receive assignments or to which they report (even if out-of-state)

Clarification of employees to be counted to determine 50+ eligibility requirement - *§ 11089 (cont.)*

- For joint employers:
  - The requesting employer's worksite is the office from which work is assigned to her or to which she reports, unless she has physically worked at the other employer's facility for at least one year
  - An employee who is jointly employed by two or more employers should be counted by each employer for purposes of determining each employer's eligibility requirement

What constitutes sufficient verbal notice of need for leave - *§ 11091*

- Employer is obligated to request further clarification, if necessary, once they receive information possibly indicating that an employee is requesting leave for a CFRA-qualifying reason
  - Likewise, employee obligated to provide (limited) additional information to clarify whether leave is for CFRA-qualifying purpose
- An employee is not waiving her right to CFRA leave merely by asking for vacation or stating her intention to resign for a reason that would be CFRA-qualifying; instead, she is triggering an employer's obligation to notify her of her leave rights and, if necessary, seek further clarification

Fitness-for-Duty Examinations – *§ 11091*

- No fitness-for-duty examination permitted as requirement of returning from CFRA leave, unless job-related and consistent with business necessity
- However, employer can require a medical release in some circumstances, including where it has safety concerns about a returning employee's ability to safely perform job duties

Separate Entitlements to Health Benefits Coverage while on PDL and CFRA - *§ 11092(c)*

- Clarifies that an employer's obligation to continue its contributions toward an employee's health benefits exists **both** during
  - Up to four months' of leave during which an employee is disabled due to pregnancy or childbirth; **AND**
  - Twelve weeks of CFRA bonding leave

PDL, CFRA, and FEHA provide for Separate and Distinct Leave Entitlements - *§ 11093*

- Especially important where an employee continues to be disabled beyond the four months' of PDL (or even the seven months' of PDL and CFRA combined)
- In such a situation, an employer is required to consider further extending a job-protected leave of absence (or providing another reasonable accommodation) for an employee under the disability provisions of the Fair Employment and Housing Act
- However, this does not necessarily require an employee to provide more than 12 weeks of CFRA leave – in practice, this arguably means that an employee cannot "hold" her CFRA bonding leave until after using an extended leave of absence as a reasonable accommodation under the FEHA.

Other regulatory changes to the CFRA

- Redefinition of “spouse” to include same-sex partners in marriage - *§ 11087(r)*
- Clarification that employer’s failure to designate a method of calculating 12 month leave calendar will result in the adoption of the calendar most advantageous to the employee - *§ 11090(b)*
- Changes to employer notice requirements (and revised notices) - *§ 11095*

Regulatory Changes to the Pregnancy-Related Provisions of the FEHA

- Unlawful to harass an employee because of childbirth, breastfeeding, or any related medical condition - *§ 11036*
- Four month Pregnancy Disability Leave is per pregnancy, not per year - *§ 11042*
- Enhanced notice requirements - *§ 11049(d)*

Questions??

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INCORPORATING THE NEWLY ADOPTED EMPLOYMENT REGULATIONS INTO A WINNING LITIGATION STRATEGY[1]

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On April 1, 2016 the Fair Employment and Housing Council's (FEHC) most recent revisions to the general employment regulations under the Fair Employment and Housing Act (FEHA) became effective. These revisions were long overdue. The pre-existing regulations were not much more than a barebones outline of what the statute provided, without much usefulness or guidance beyond the mere words of the statute. In 2014, the FEHC embarked on the task of bringing the regulations up to date to reflect the many legislative amendments to the FEHA, as well as to endeavor to make the regulations generally more useful guidance to all stakeholders. In the end, the goal of regulations is to provide all interested parties with a better understanding of their rights and obligations under the law, with the ultimate goal being increased voluntary compliance. In this article, I highlight what I view as the most significant changes. However, I recommend a thorough read of the entire set of regulations for a full understanding of all the myriad changes, large and small.

[1] This article does not address the modifications to the FEHA regulations under Subchapter 5: Contractor Nondiscrimination and Compliance.

Free online access to all California regulations is available at www.govt.westlaw.com/calregs. To find all regulations cited in this article, go to through the following path from the main page: Title 2: Administration > Division 4.1 Department of Fair Employment and Housing > Subchapter 2: Discrimination in Employment.

I. GENERAL DEFINITIONS

The general definition section of the regulations was reorganized in significant fashion to make more readable and usable. There also were a few significant substantive changes.

Under the definition of "employer," the FEHC added clarifying language in two subsections. First, Section 11008(d)(1) was modified to clarify that when assessing whether an employer is a covered entity under the Act, it is permissible to count employees situated outside of California. It is important to keep in mind, those out-of-state employees are not, themselves, covered by the Act. Then, Section 11008(d)(2) clarified that for purposes of counting the number of employees for coverage purposes, employees on leave (for any reason, even disciplinary suspension) are counted.

The most significant addition to this section is the addition of the definition of "unpaid interns and volunteers." Section 11008(k) provides as follows:

> For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

This section was promulgated in accordance with the amendments to FEHA pursuant to AB 1443 (effective Jan. 1, 2015) which provided that unpaid interns and volunteers were covered by the Act's protections against discrimination and harassment. This additional coverage and protection is reflected throughout the new regulations, including the following sections: 11009(e) (Discrimination), 11019(b) (Harassment), 11059(d) (Religious Discrimination).

II. ESTABLISHING DISCRIMINATION

One of the major significant overhauls reflected in these new regulations is contained within Section 11009(c) "Establishing Discrimination." This section was rewritten in order to capture the Supreme Court's holding in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203. In that case, the California Supreme Court ruled that a plaintiff bringing an employment discrimination claim under the FEHA has the burden of proving that their protected characteristic at issue was a "substantial motivating reason" behind the adverse action. While the Court went on to address other issues related to "mixed motive," the lasting sweep of the decision is really contained in the "substantial motivating reason" standard. Because prior to the *Harris* case the generally

accepted standard was "motivating reason," a change to the regulations was required. After much consideration, tinkering, and wordsmithing, the FEHC adopted the following regulation:

2 CCR § 11009(c):

> Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

There are several aspects of this regulation that are significant to practitioners. First, the regulation specifically limits the "substantial motivating reason" standard to claims of discrimination under Section 12940(a) or retaliation under Section 12940(h). Excluded from this standard are all other claims, including harassment, failure to accommodate, failure to engage in the interactive process, and failures to provide leaves of absence for serious health condition or pregnancy. The clear intent of the regulation is to differentiate between claims where the issue is a denial of a tangible job benefit – in other words, involves an adverse job action – and all other protections under the FEHA. The importance of this distinction cannot be understated. In the years since the *Harris* decision came down, practitioners have reported instances where the management bar has attempted to expand the application of the "substantial motivating reason" standard beyond the holding in *Harris* into other areas of the FEHA such as claims for failure to accommodate. Some judges have adopted these arguments and held plaintiffs to this standard. The new regulation now ensures this erosion will not continue as practitioners will have clear authority to counter any such attempts in the future.

The second significant aspect of this regulation is the clear articulation of the definition of "substantial motivating reason." Prior to this regulation, the definition was left to jury instructions and the whims of the CACI committee writing such instructions. The definition articulated by the FEHC is the proper definition as supported by existing California Supreme Court jurisprudence. *See People v. Caldwell* (1984) 36 Cal.3d 210, 220 ["[n]o cause will receive judicial recognition if the part it played was so infinitesimal or so theoretical that it cannot properly be regarded as a substantial factor in bringing about the particular result."]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978 ["[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause to be more than negligible or theoretical."]; *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79 ["a force which

plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does cause harm is a substantial factor." (citations omitted).].

III. RULES FOR PREVENTION OF HARASSMENT, DISCRIMINATION & RETALIATION

One of the most groundbreaking aspect of these regulations is the entirely new section addressing rules for prevention of harassment, discrimination, and retaliation. The FEHA has long required covered entities to ensure that the workplace is free from harassment and discrimination. *See* Gov. Code § 12940(k). And, most practitioners plead a cause of action for failing to maintain such a workplace as a separate claim within a complaint for harassment or discrimination. Until now, however, there were no succinct rules or guidelines describing how to best achieve that result. Instead, the provision generally has been seen as an "add-on" claim. With these amendments, the FEHC has put forth guidelines

2 CCR § 11023:

(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department's DFEH- 185 brochure on sexual harassment, or an alternative writing that complies with Government Code section 12950, an employer shall develop a harassment, discrimination, and retaliation prevention policy that:

(1) Is in writing;

(2) Lists all current protected categories covered under the Act;

(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;

(4) Creates a complaint process to ensure that complaints receive:

(A) An employer's designation of confidentiality, to the extent possible;

(B) A timely response;

(C) Impartial and timely investigations by qualified personnel;

(D) Documentation and tracking for reasonable progress;

(E) Appropriate options for remedial actions and resolutions; and

(F) Timely closures.

(5) Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following:

(A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or

(B) A complaint hotline; and/or

(C) Access to an ombudsperson; and/or

(D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

(6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training, pursuant to section 11024 of these regulations.

(7) Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.

(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.

(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

To begin, the new regulation articulates a key core concept: covered entities have an "affirmative duty" to take actions ensuring a workplace free from harassment, discrimination, and retaliation. The concept of "affirmative duty" is a familiar one borrowed from the realm of disability discrimination. *See Prilliman v. United Air Lines* (1997) 53 Cal.App.4th 935; 2 CCR § 11068(a). While this concept should have been apparent in the past, articulating it as part of the

regulation sends a powerful, clear message to covered entities of the importance of taking steps to *prevent* such offenses from happening, not just responding to them when they arise.

In practice, this regulation should provide an incredibly useful tool for employee advocates. It will take very little effort to transform this regulation into interrogatories and document requests. Also, it will be a useful guide in preparation for depositions of company human resources representatives. Finally, expert human resources should incorporate the backbone of the regulation into their reports and testimony to support opinions related to 'best practices' and 'standard of care.'

IV. NATIONAL ORIGIN DISCRIMINATION

The National Origin Discrimination provisions of the regulations were updated to ensure that Californian residents who carry a driver's license issued pursuant to Section 12801.9 of the California Vehicle Code (allowing DMV to issue licenses to residents who cannot prove their citizenship) were not discriminated against for having been issued such a license. 2 CCR § 11028(e). These licenses are readily identifiable by their markings. The FEHC determined that taking an adverse employment action against someone because of their status as holding such a license amounts to taking an adverse action against someone because of their national origin.

V. SEX DISCRIMINATION

The sex discrimination section of the regulations underwent substantial revision. Of importance, the FEHC added language to the definition section of the regulations reflecting the several amendments to the FEHA since the regulations were last updated, including definitions for "gender expression," "gender identity," and "transgender." 2 CCR § 11030. The FEHC also revised the definitions of "sex" and "sex stereotype" in important ways.

In two places, the FEHC added language to the regulations to reflect the legislative action clarifying that proving "sexual desire" has no role in the legal analysis of a harassment claim. Section 11034(f) states affirmatively that an employee is not required to prove "sexual desire" as an element of a sex harassment claim and Section 11031(d) clarifies that it is *not* a defense to sex harassment claim to say that the harasser was not motivated by sexual desire.

The remainder of Section 11031(f) goes on to describe the general standards governing claims of sexual harassment.

VI. RELIGIOUS CREED DISCRIMINATION

The FEHC made several discrete modifications to the regulations in regards to religious creed discrimination. As noted above, the new statutory protections provided to unpaid interns and people in the apprenticeship programs apply equally to the religious creed discrimination provisions of the FEHA. The FEHC also clarified that religious creed discrimination

"encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926."

The FEHC also modified Section 11062 in regards to reasonable accommodation for religion. First, the FEHC clarified that "refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination." This is an important clarification as its ensures that employees who needed accommodation for a religious practice are not screened out because of that need. The second modification incorporated by the FEHC in the new regulations is the adoption of language to incorporate the holdings in the *EEOC vs. Abercrombie & Fitch Stores, Inc.* (2015) 135 S.Ct. 2028, i.e., that "a reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement." This is an important concept and helps practitioners understand, in the context of religious accommodation, what it means to be an effective accommodation.

Finally, the FEHC adopted a new provision in the regulations to reflect the 2015 amendments to the FEHA which clarified that the act of requesting reasonable accommodation for religious practices is "protected activity" under the FEHA for which an employee may not be retaliated against. This amendment to the FEHA, spearheaded by the California Employment Lawyers Association, was enacted in order to clarify that the holding in the *Rope v. Auto-Chlor Syst.* (2013) 220 Cal.App.4th 635 case did not comport with the intent of the legislature.

VII. DISABILITY DISCRIMINATION

The sections of the regulations related to disability discrimination were overhauled in 2012. There were only three substantive changes made during this round of modifications. First, a portion of the language contained in Section 11066 "Establishing Disability Discrimination" was eliminated. Instead of having language applicable to just disability discrimination cases, the section now cross-references Section 11009(c). *See supra* § II. This change was made to comport with the *Harris* decision and to ensure uniformity.

The second substantive change was the addition of some clarifying language to the definition of "assistive animal" and clarifying that the use of a "support animal" may be a form of reasonable accommodation. *See* 2 CCR § 11065(a)(3).

Finally, the FEHC adopted language identical to the language adopted in the religious creed discrimination sections in order to reflect the clarifying amendment to the FEHA that the act of requesting a reasonable accommodation is considered "protected activity" under the law. *See supra* § VI.

VIII. AGE DISCRIMINATION

The modifications to the age discrimination section of the regulations primarily were organizational without any significant substantive changes.

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Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment and Housing Council

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CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
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Chapter 5. Fair Employment & Housing Council

Subchapter 1. Administration

Article 1. Administration

§ 11000. Generally.

The authority for the rules and regulations set forth in this chapter is briefly described at the beginning of each subchapter herein and in some cases is set out with more particularity at the beginning of a constituent article within a subchapter. Special definitions or rules of construction, which only apply to a particular subchapter or article, are set forth at the beginning of the subchapter or article to which they pertain.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2, Government Code.

§ 11001. Construction.

(a) These rules and regulations are to be construed liberally so as to further the policy and purposes of the statutes they interpret and implement.

(b) Except as required by the Supremacy Clause of the United States Constitution, federal laws and their interpretations regarding discrimination in employment and housing are not determinative of the construction of these rules and regulations and the California statutes they interpret and implement but, in the spirit of comity, shall be considered to the extent practical and appropriate.

(c) Unless the context dictates otherwise, terms used herein that are in the singular include the plural, and terms that are in the plural include the singular.

(d) If any rule or regulation, or portion thereof, in this chapter is adjudged by a court of competent jurisdiction to be invalid, or if any such rule or regulation, or portion thereof, loses its force and effect by legislative action, that judgment or action does not affect the remainder of the rules and regulations.

(e) Pursuant to the Governor's Reorganization Plan No. 1 (1980), the Fair Employment Practice Act is renamed the Fair Employment and Housing Act and renumbered in Part 2.8 of Division 3 of Title 2 of the Government Code.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2 of the Government Code.

§ 11002. Definitions.

Unless a different meaning clearly applies from the context, the meaning of the words and phrases as defined in this section shall apply throughout this chapter:

(a) "Council or FEHC" means the State Fair Employment and Housing Council created by section 12903 of the Government Code pursuant to Senate Bill 1038 (2011-2012 Reg. Sess.) (State. 2012, ch. 46).

(b) "Department or DFEH" means the Department of Fair Employment and Housing created by section 12901 of the Government Code pursuant to the Governor's Reorganization Plan No. 1 (1980).

(c) "Person" includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(d) "Complainant" means the person who files a timely, verified complaint with the DFEH alleging aggrievement by an unlawful practice.

(e) "Respondent" means the person who is alleged to have committed an unlawful practice in a complaint filed with the

DFEH.

(f) “Act” means the California Fair Employment and Housing Act, created by Government Code section 12900.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12903 and 12925, Government Code.

Article 2. Powers and Duties of the Council

§ 11003. Rules, Regulations and Guidelines.

(a) The Council shall adopt, promulgate, amend and rescind suitable rules, regulations and guidelines as are necessary to interpret, implement and apply laws within its jurisdiction and as are necessary to carry out all of its other functions and duties.

(b) All rules and regulations shall be adopted pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2, Government Code.

§ 11004. Other Powers and Duties.

The functions, powers and duties of the Council shall also include, but are not limited to, the authority to:

(a) Make inquiries into general discrimination problems and issue informal and formal findings, including published reports;

(b) Establish such advisory agencies and councils as will assist in fostering goodwill, cooperation and conciliation among groups and elements of the population of the state through studies, conciliation, hearings, and recommendations to the Council;

(c) Hold hearings, issue publications, results of inquiries and research, and reports to the Governor and the Legislature that, in its judgment, will tend to aid in effectuating the purpose of the Fair Employment and Housing Act, promote good will, cooperation and conciliation, and minimize or eliminate unlawful discrimination, or advance civil rights in the State of California.

(d) Advise and concur with the Secretary of Health and Human Services in establishing standards and guidelines determining unlawful practices of state contractors under section 11135, et seq.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11139.5, 12935, 12946 and 12990, Government Code.

Subchapter 2. Discrimination in Employment

Article 1. General Matters

§ 11005. Fair Employment and Housing Council - Conflict of Interest Code.

The Political Reform Act (Gov. Code § 81000 et seq.) requires state and local government agencies to adopt and promulgate conflict of interest codes. The Fair Political Practices Commission has adopted a regulation (Cal. Code Regs., tit. 2., § 18730), which contains the terms of a standard conflict of interest code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of California Code of Regulations, title 2, section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission are hereby incorporated by reference and, along with the attached appendix in which officials and employees are designated and disclosure categories are set forth, constitute the conflict of interest code of the Fair Employment and Housing Council.

Designated employees shall file statements of economic interests with their agency. Upon receipt of the statements of the Council members, the agency shall make and retain a copy and forward the original of these statements to the Fair Political Practices Commission. The statements for all other designated positions shall be retained with the agency and made available for public inspection and reproduction upon request. (Gov. Code, § 81008.)

Appendix A

Designated Positions	*Disclosure Category*
Council Members	1
Consultants[1]	[1]

[1] With respect to Consultants, the Chairperson may determine in writing that a particular consultant is hired to perform a range of duties that are limited in scope and thus is not required to comply with the disclosure requirements described in these categories. Such determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Chairperson's determination is a public record and shall be retained for public inspection at offices of the Fair Employment and Housing Council. Nothing herein excuses any such consultant from any other provision of this Conflict of Interest Code.

Appendix B

General Provisions

When a designated employee is required to disclose investments and sources of income, he or she need only disclose investments in business entities and sources of income that do business in the jurisdiction, plan to do business in the jurisdiction or have done business in the jurisdiction within the past two years. In addition to other activities, a business entity is doing business within the jurisdiction if it owns real property within the jurisdiction. When a designated employee is required to disclose interests in real property, he/she need only disclose real property that is located in whole or in part within or not more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the Fair Employment and Housing Council.

Designated employees shall disclose their financial interests pursuant to the appropriate disclosure category as indicated in appendix A.

Disclosure Categories

Category 1

Designated officials and employees assigned to this disclosure category must report all investments and business positions in business entities, sources of income and interests in real property.

Category 2

Designated officials and employees assigned to this disclosure category must report investments and business positions in business entities and sources of income of the type which within the past two years have contracted to provide services, supplies, materials or equipment to the Department.

Note: Authority and reference cited: Section 81000 et seq., Government Code.

§ 11005.1. Department of Fair Employment and Housing - Conflict of Interest Code. [Renumbered to 10500]

Note: Authority and reference cited: Section 81000 et seq., Government Code. (Section filed 6-6-83, operative 7-6-83; approved by Fair Political Practices Commission 4-18-83; Register 83, No. 24).

§ 11006. Statement of Policy and Purpose.

The public policy of the State of California is to protect and safeguard the civil rights of all individuals to seek, have access to, obtain, and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age for individuals over forty years of age, military and veteran status, and sexual orientation. Employment practices should treat all individuals equally, evaluating each on the basis of individual skills, knowledge and abilities and not on the basis of characteristics generally attributed to a group enumerated in the Act. The objectives of the California Fair Employment and Housing Act and these regulations are to promote equal employment opportunity and to assist all persons in understanding their rights, duties and obligations, so as to facilitate achievement of voluntary compliance with the law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920 and 12921(a), Government Code.

§ 11007. Authority.

The FEHC issues these regulations under the authority vested in the Council by the Fair Employment and Housing Act, specifically Government Code section 12935(a).

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2, Government Code.

§ 11008. Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(b) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(c) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) “Employee” does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d) “Employer.” Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) “Regularly employing” means employing five or more individuals for each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year regardless of whether the employee’s worksite is located within or outside of California. While employees located outside of California are counted in determining whether employers employ five or more individuals for coverage purposes, the employees located outside of California

are not themselves covered by the protections of the Act if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California.

(2) For purposes of "counting" the (five or more) employees, the individuals employed need not be employees as defined above; nor must any of them be full-time employees. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) "Employer" includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

(e) "Employer or Other Covered Entity." Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(g) "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, "employment benefit" includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) "Employment benefit" also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) "Provision of a discrimination-free workplace" is a provision of a workplace free of harassment, as defined in section 11019(b).

(h) "Employment Practice." Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual's employment benefits or consideration for an employment benefit.

(i) "Labor Organization." Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j) "Person performing services pursuant to a contract." A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) "Unpaid interns and volunteers." For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12925, 12926, 12940, 12941 and 12942, Government Code; Campbell v. Arco Marine, Inc. (1996) 42 Cal.App.4th 1850; Sims v. Worldpac Inc. (N.D. Cal. Feb. 22, 2013) 2013 WL 663277.

§ 11009. Principles of Employment Discrimination.

(a) Unlawful Practices and Individual Relief. In allegations of employment discrimination, a finding that an employer or other covered entity has engaged in an unlawful employment practice is not dependent upon a showing of individual back pay or other compensable liability. Upon a finding that an employer or other covered entity has engaged in an unlawful employment practice and on order of appropriate relief, a severable and separate showing may be made that the complainant, complainants or class of complainants is entitled to individual or personal relief including, but not limited to, hiring, reinstatement or upgrading, back pay, restoration to membership in a labor organization, or other relief in furtherance of the purpose of the Act.

(b) Liability of Employers. In view of the common law theory of *respondeat superior* and its codification in California Civil Code section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in section 11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, the applicant or employee has suffered a loss of or has been denied an employment benefit.

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.

(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

Note: Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941, 12942 and 12961, Government Code; Harris v. City of Santa Monica (2013) 56 Cal.4th 203.

§ 11010. Affirmative Defenses to Employment Discrimination.

If employment discrimination is established, this employment discrimination is nonetheless lawful where a proper, relevant affirmative defense is proved and less discriminatory alternatives are not shown to be available. Except where otherwise specifically noted, one or more of the following affirmative defenses may be appropriate in a given situation to justify the employment practice in question. The following defenses are generally referred to in the text of these regulations as "Permissible Defenses:"

(a) Bona Fide Occupational Qualification (BFOQ). Where an employer or other covered entity has a practice that on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

(b) Business Necessity. Where an employer or other covered entity has a facially neutral practice that has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate

business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact.

(c) Job-Relatedness. See section 11017(e) for the defense of job-relatedness, which is permissible in employee selection cases.

(d) Security Regulations. Notwithstanding a showing of discrimination, an employment practice that conforms to applicable security regulations established by the United States or the State of California is lawful.

(e) Non-Discrimination Plans or Affirmative Action Plans. Notwithstanding a showing of discrimination, an employment practice that conforms to the following is lawful:

(1) A bona fide voluntary affirmative action plan as discussed below in section 11011;

(2) A non-discrimination plan, pursuant to Government Code section 12990; or

(3) An order of a state or federal court or administrative agency of proper jurisdiction.

(f) Otherwise Required by Law. Notwithstanding a showing of discrimination, such an employment practice is lawful where required by state or federal law or an order of a state or federal court of proper jurisdiction.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941, 12942, 12961 and 12990, Government Code.

§ 11011. Affirmative Action Programs.

Voluntary action by employers and other covered entities is an effective means for eliminating employment discrimination. The Council hereby adopts the *Affirmative Action Guidelines* of the federal Equal Employment Opportunity Commission (EEOC). [(29 C.F.R. Section 1608 (1979).)]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12935, 12940, 12941 and 12942, Government Code.

§ 11013. Recordkeeping.

Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent California Employer Information Report (CEIR) or appropriate substitute and applicant identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Council or Department.

(a) California Employer Information Report. All employers regularly employing one hundred or more employees, apprenticeship programs with five or more apprentices and at least one sponsoring employer with 25 or more employees and at least one sponsoring union, which operates a hiring hall or has 25 or more members, and labor organizations with 100 or more members shall prepare an annual CEIR in conformity with guidelines on reporting issued by the Department.

(1) Substituting Federal Reports. An employer or other covered entity may utilize an appropriate federal report in lieu of the CEIR. Appropriate federal reports include the EEOC's EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).

(2) Sample Forms and Guidelines. Appropriate copies of sample forms and applicable guidelines shall be available to any employer or other covered entity from the Department of Fair Employment and Housing.

(3) Special Reporting. If an employer or other covered entity is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be required. In such case, the employer or other covered entity should so advise the Department and submit a specific proposal for an alternative reporting system prior to the date on which the report should be prepared. If it is claimed that the preparation of the report would create undue

hardship, an employer may apply to the Department for an exemption from the requirements of this section.

(4) Remedy for Failure to Prepare or Make Reports Available. Upon application by the FEHC or DFEH for judicial relief, any employer failing or refusing to prepare or to make available reports as required under this section may be compelled to do so by a Superior Court of California.

(5) Penalties for False Statements. The willful making of false statements on a CEIR or other required record is a violation of California Government Code section 12976, and is punishable by fine or imprisonment as set forth therein.

(b) Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.

(1) For recordkeeping purposes only, "applicant" means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall either retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be preserved for the time period set forth in subdivisions (c)(1) and (2) below.

(c) Preservation of Records. Any personnel or other employment records made or kept by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee (including all applications, personnel, membership or employment referral records or files) shall be preserved by the employer or other covered entity for a period of two years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. However, the State Personnel Board shall maintain such records and files for a period of one year.

(1) California Employment Information Report. Every employer subject to subsection (a) above shall preserve for a period of two years from the date of preparation of the CEIR such records as were necessary for completion of the CEIR.

(2) Applicant Identification Records. Every employer subject to subsection (b) above shall preserve applicant identification information for a period of two years from the date it was received.

(3) Separate Records on Sex, Race, and National Origin. Records as to the sex, race, or national origin of any individual accepted for employment shall be kept separately from the employee's main personnel file or other records available to those responsible for personnel decisions. For example, such records could be kept as part of an automatic data processing system in the payroll department.

(4) After Filing of Complaint. Upon notice of or knowledge that a complaint has been filed against it under the Act, any respondent, including the State Personnel Board, shall maintain and preserve any and all relevant records and files until such complaint is fully and finally disposed of and all appeals from related proceedings have concluded.

(A) For purposes of this subsection, "related proceedings" shall include any action brought in Superior Court pursuant to section 12965 of the Government Code.

(B) The term "records and files relevant to the complaint" shall include, but is not limited to, personnel or employment records relating to the complaining party and to all other employees holding similar positions to that held or sought by the complainant at the facility or other relevant subdivision where the discriminatory practice allegedly occurred. The term also includes applications, forms or test papers completed by the complainant and by all other candidates for the same position at that facility or other relevant subdivision where the employment practice occurred. All relevant records made or kept pursuant to subsections (a) and (b) above shall also be preserved.

(C) The term “fully and finally disposed of and all appeals from related proceedings have concluded” refers to the expiration of the statutory period within which a complainant or respondent may bring an action in Superior Court, or an agreement has been reached by the parties whereby no further judicial review is available to any of the parties, or a final order has been entered by a body of judicial review for which the time for filing a notice of appeal has expired.

(d) Posting of Act. Every employer or other covered entity shall post in a conspicuous place or places on its premises a notice to be prepared and distributed by the Department, which sets forth excerpts of the Act and such relevant information the Department deems necessary to explain the Act. Such employers employing significant numbers, no less than 10% of their work force, of non-English-speaking persons (e.g., Chinese or Spanish speaking) at any facility or establishment must also post in the appropriate foreign language at each such facility or establishment. Such notices may be obtained from the Department.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12946, Government Code.

Article 2. Particular Employment Practices

§ 11014. Statement of Purpose.

Certain employment practices have the effect, either directly or indirectly, of discriminating against individuals on a basis enumerated in the Act. Such practices are discussed in this article and the provisions are applicable to all discriminatory actions as more specifically discussed in the following articles.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11015. Definitions.

(a) “Recruitment.” The practice of any employer or other covered entity that has the purpose or effect of informing any individual about an employment opportunity, or assisting an individual to apply for employment, an activity leading to employment, membership in a labor organization, acceptance in an apprenticeship training program, or referral by an employment agency.

(b) “Date of Determination to Hire.” The time at which an employer or other covered entity has made an offer of employment to the individual.

(c) “Pre-employment Inquiry.” Any oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment.

(d) “Application.” Except for recordkeeping purposes, any writing or other device used by an employer or other covered entity to make a pre-employment inquiry or submitted to an employer or other covered entity for the purpose of seeking consideration for employment.

(e) “Placement.” Any status, category, rank, level, location, department, division, program, duty or group of duties, or any other similar classification or position for which an employee can be selected or to which an employee can be assigned by any employment practice. Employment practices that can determine placement in this way include, but are not limited to: hiring, discharge, promotion, transfer, callback, or other change of classification or position; inclusion in membership in any group or organization; any referral assignment to any place, unit, division, status or type of work.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940 and 12942, Government Code.

§ 11016. Pre-Employment Practices.

(a) Recruitment.

(1) Duty Not to Discriminate. Any employer or other covered entity engaged in recruitment activity shall recruit in a non-discriminatory manner. However, nothing in these regulations shall preclude affirmative efforts to utilize recruitment practices to attract minorities, individuals of one sex or the other, individuals with disabilities, individuals over 40 years of age, and any other individual covered by the Act.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity that:

(A) Restricts, excludes, or classifies individuals on a basis enumerated in the Act;

(B) Expresses a preference for individuals on a basis enumerated in the Act; or

(C) Communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.

(b) Pre-Employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. §12101 et seq.) and the regulations adopted pursuant thereto, nothing in Government Code section 12940(d) or in this subdivision, shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in section 11013(b) of these regulations or in other provisions of state and federal law.

(c) Applications.

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Separation or Coding. Application forms shall not be separated or coded or otherwise treated so as to identify individuals on a basis enumerated in the Act unless pursuant to a permissible defense or for recordkeeping or statistical purposes.

(d) Interviews. Personal interviews shall be free of discrimination. Notwithstanding any internal safeguards taken to secure a discrimination-free atmosphere in interviews, the entire interview process is subject to review for adverse impact on individuals on a basis enumerated in the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related, as defined in section 11017(e). The Council herein adopts the *Uniform Guidelines on Employee Selection Procedures* promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) Placement. Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be "protective" of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under

Title VII of the federal Civil Rights Act of 1964.)

(c) Promotion and Transfer. An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

(1) Requests for Transfer or Promotion. An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

(2) Training. Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.

(3) No-Transfer Policies. Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) Specific Practices.

(1) Criminal Records. Except as otherwise provided by law (e.g., 12 U.S.C. § 1829; Labor Code section 432.7), it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning:

(A) Any arrest or detention that did not result in conviction;

(B) Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45); any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code section 1203.4; or

(C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5.

(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device or other means of selection that is facially neutral, but that has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use. (See section 11017(a).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940 and 12941, Government Code.

§ 11018. Compensation. (Reserved.)

§ 11019. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. (Reserved.)

(b) Harassment.

(1) For all purposes related to the Act's protections of individuals from unlawful harassment, the term "employee" shall include unpaid interns, volunteers, and persons providing services pursuant to a contract.

(2) Harassment includes but is not limited to:

(A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, e.g., unwanted sexual advances, which condition an employment benefit upon an exchange of sexual favors. [See also section 11034(f)(1).]

(E) In applying this subsection, the rights of free speech and association shall be accommodated consistently with the intent of this subsection.

(3) Harassment of an applicant or employee by an employer or other covered entity, its agents or supervisors is unlawful.

(4) Harassment of an applicant or employee by an employee other than those listed in subsection (b)(3) above is unlawful if the employer or other covered entity, its agents or supervisors knows of such conduct and fails to take immediate and appropriate corrective action. Proof of such knowledge may be direct or circumstantial. If the employer or other covered entity, its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer or other covered entity can establish that it took reasonable steps to prevent harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

(5) An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the aggrievement; however, an employee's failure to give such notice is not an affirmative defense.

(6) An employee who engages in unlawful harassment of a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(c) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an employee physical appearance, grooming, or dress standards. However, if such a standard discriminates on a basis enumerated in the Act and if it also significantly burdens the individual in his or her employment, it is unlawful.

(d) Reasonable Discipline. Nothing in these regulations may be construed as limiting an employer's or other covered entity's right to take reasonable disciplinary measures, which do not discriminate on a basis enumerated in the Act.

(e) Seniority. (Reserved.)

Note: Authority: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11020. Aiding and Abetting.

(a) Prohibited Practices.

(1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination.

(2) It is unlawful to solicit or encourage any person or individual to violate the Act, whether or not the Act is in fact violated.

(3) It is unlawful to coerce any person or individual to commit unlawful employment discrimination with offers of cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit.

(4) It is unlawful to conceal or destroy evidence relevant to investigations initiated by the Department or its staff.

(5) It is unlawful to advertise for employment on a basis prohibited in the Act.

(b) Permissible Practices.

(1) It shall not be unlawful, without more, to have been present during the commission of acts amounting to unlawful discrimination or to fail to prevent or report such acts, unless it is the normal business duty of the person or individual to prevent or report such acts.

(2) It shall not be unlawful to maintain good faith lawful defenses or privileges to charges of discrimination.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11021. Retaliation.

(a) Retaliation Generally. It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment that the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Council or Department or its staff.

(1) Opposition to practices prohibited by the Act includes, but is not limited to:

(A) Seeking the advice of the Department or Council, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is ultimately sustained;

(B) Assisting or advising any person in seeking the advice of the Department or Council, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is ultimately sustained;

(C) Opposing employment practices that an individual reasonably believes to exist and believes to be a violation of the Act;

(D) Participating in an activity that is perceived by the employer or other covered entity as opposition to discrimination, whether or not so intended by the individual expressing the opposition; or

(E) Contacting, communicating with or participating in the proceeding of a local human rights or civil rights agency regarding employment discrimination on a basis enumerated in the Act.

(2) Assistance with or participation in the proceedings of the Council or Department includes, but is not limited to:

(A) Contacting, communicating with or participating in the proceedings of the Department or Council due to a good faith belief that the Act has been violated; or

(B) Involvement as a potential witness, which an employer or other covered entity perceives as participation in an activity of the Department or the Council.

(b) Exception for Reasonable Discipline. Nothing in these regulations shall be construed to prevent an employer or other covered entity from enforcing reasonable disciplinary policies and practices, nor from demonstrating that the actions of an applicant or employee were either disruptive or otherwise detrimental to legitimate business interests so as to justify the denial of an employment benefit.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11022. Association.

(a) It is unlawful for an employer or other covered entity to deny employment benefits to, harass, or intimidate any applicant

or employee because the employer or other covered entity disapproves generally of the applicant's or employee's association with individuals because they are in a category enumerated in the Act.

(b) It shall be unlawful for an employer or other covered entity to deny equal consideration to any applicant or employee on the basis that he or she sympathizes with, encourages or participates in groups organized for the protection or assertion of rights protected under the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11023. Harassment and Discrimination Prevention and Correction.

(a) Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. (Gov. Code, § 12940(k).)

(1) A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.

(2) There is no stand-alone, private cause of action under Government Code section 12940(k). In order for a private claimant to establish an actionable claim under Government Code section 12940(k), the private claimant must also plead and prevail on the underlying claim of discrimination, harassment, or retaliation.

(3) However, in an exercise of its police powers, the Department may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation.

(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department's DFEH-185 brochure on sexual harassment, or an alternative writing that complies with Government Code section 12950, an employer shall develop a harassment, discrimination, and retaliation prevention policy that:

(1) Is in writing;

(2) Lists all current protected categories covered under the Act;

(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;

(4) Creates a complaint process to ensure that complaints receive:

(A) An employer's designation of confidentiality, to the extent possible;

(B) A timely response;

(C) Impartial and timely investigations by qualified personnel;

(D) Documentation and tracking for reasonable progress;

(E) Appropriate options for remedial actions and resolutions; and

(F) Timely closures.

(5) Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following:

(A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or

(B) A complaint hotline; and/or

(C) Access to an ombudsperson; and/or

(D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

(6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training, pursuant to section 11024 of these regulations.

(7) Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.

(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.

(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

(c) Dissemination of the policy shall include one or more of the following methods:

(1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;

(2) Sending the policy via e-mail with an acknowledgment return form;

(3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;

(4) Discussing policies upon hire and/or during a new hire orientation session; and/or

(5) Any other way that ensures employees receive and understand the policies.

(d) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the policy into every language that is spoken by at least 10 percent of the workforce.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940 and 12950, Government Code; *Scotch v. Art Institute of California-Orange County, Inc.* (2009) 173 Cal.App.4th 986; *Trujillo v. No. County Transit Dist.* (1998) 63 Cal.App.4th 280, 289; *Dept. Fair Empl. & Hous. v. Lyddan Law Group, LLP*. (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C)].

§ 11024. Sexual Harassment Training and Education.

(a) Definitions. For purposes of this section:

(1) “Contractor” is a person performing services pursuant to a contract with an employer, meeting the criteria specified by Government Code section 12940(j)(5), for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(2) “Effective interactive training” includes any of the following:

(A) “Classroom” training is in-person, trainer-instruction, whose content is created by a trainer and provided to a supervisor by a trainer, in a setting removed from the supervisor’s daily duties.

(B) “E-learning” training is individualized, interactive, computer-based training created by a trainer and an instructional designer. An e-learning training shall provide a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.

(C) “Webinar” training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training’s interactive content, discussion questions, hypothetical scenarios, polls, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. For a period of two years after the date of the webinar, the employer shall maintain a copy of the webinar, all written materials used by the trainer and all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar.

(D) Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training. These, however, are supplemental tools that cannot, by themselves, fulfill the requirements of this subdivision.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training. Examples include pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor’s work environment.

(3) “Employee” includes full time, part time, and temporary workers.

(4) “Employer” means any of the following:

(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered “political subdivisions of the state.”

(5) “Having 50 or more employees” means employing or engaging 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(6) “Instructional Designer” under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

(7) “New” supervisory employees are employees promoted or hired to a supervisory position after the date the employer last provided sexual harassment prevention training.

(8) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926. Attending training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

(9) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a combination of training and experience have the ability to train supervisors about the following: 1) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors’ obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 5) how

to respond to a harassment complaint; 6) the employer's obligation to conduct a workplace investigation of a harassment complaint; 7) what constitutes retaliation and how to prevent it; 8) essential components of an anti-harassment policy; and 9) the effect of harassment on harassed employees, co-workers, harassers and employers.

(A) A trainer shall be one or more of the following:

1. "Attorneys" admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

2. "Human resource professionals" or "harassment prevention consultants" working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a. designing or conducting discrimination, retaliation and sexual harassment prevention training; b. responding to sexual harassment complaints or other discrimination complaints; c. conducting investigations of sexual harassment complaints; or d. advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or

3. "Professors or instructors" in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

(B) Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, professor or instructor because they lack the requisite years of experience may team teach with a trainer, in accordance with 1. through 3. immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

(10) "Training," as used in this section, is effective interactive training as defined at section 11023(a)(2).

(11) "Two hours" of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

(b) Training.

(1) Frequency of Training. An employer shall provide two hours of training, in the content specified in section 11023(c), once every two years, and may use either of the following methods or a combination of the two methods to track compliance.

(A) "Individual" Tracking. An employer may track its training requirement for each supervisory employee, measured two years from the date of completion of the last training of the individual supervisor.

(B) "Training year" tracking. An employer may designate a "training year" in which it trains some or all of its supervisory employees and thereafter must again retrain these supervisors by the end of the next "training year," two years later. Thus, supervisors trained in training year 2005 shall be retrained in 2007. For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer's other supervisors.

(2) Documentation of Training. To track compliance, an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years, including but not limited to the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider.

(3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within

six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.

(4) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(5) Duplicate Training. A supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

(6) Duration of Training. The training required by this section does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features, which allow a supervisor to pause his or her individual training so long as the actual e-learning program is two hours.

(c) Objectives and Content.

(1) The learning objectives of the training mandated by Government Code section 12950.1 shall be: 1) to assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment," as that term is defined in California and federal law; 2) to provide trainees with information related to the negative effects of abusive conduct (as defined in Government Code section 12950.1(g)(2)) in the workplace; and 3) to develop, foster, and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing, effectively responding to incidents of sexual harassment, and implementing mechanisms to promptly address and correct wrongful behavior.

(2) Towards that end, the training mandated by Government Code section 12950.1 shall include, but is not limited to:

(A) A definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.

(B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

(C) The types of conduct that constitutes sexual harassment.

(D) Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.

(E) Strategies to prevent sexual harassment in the workplace.

(F) Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware.

(G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(H) The limited confidentiality of the complaint process.

(I) Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.

(J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an

effective workplace investigation of a harassment complaint.

(K) Training on what to do if the supervisor is personally accused of harassment.

(L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

(M) A review of the definition of "abusive conduct" as used in this context (and as defined by Government Code section 12950.1(g)(2)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers - including a reduction in productivity and morale. The training should specifically discuss the elements of "abusive conduct," including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards). Examples of abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

(d) Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.

(e) Compliance with section 12950.1 prior to effective date of Council regulations. An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its supervisors prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding training as though it had been done under these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12950 and 12950.1, Government Code.

§ 11025. Apprenticeship Programs. (Reserved.)

§ 11026. Employment Agencies. (Reserved.)

Article 3. Race and Color Discrimination (Reserved)

Article 4. National Origin and Ancestry Discrimination

§ 11027. Defenses.

These regulations incorporate the defenses set forth in section 11010.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12940, Government Code.

§ 11028. Specific Employment Practices.

(a)-(c) (Reserved)

(d) An employer may have a rule requiring that employees speak only in English at certain times, so long as the employer can show that the rule is justified by business necessity (See section 11010(b)) and the employer has effectively notified its employees of the circumstances and time when speaking only in English is required and of the consequences of violating the rule.

(e) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under section 12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver's license is required by state or federal law; or

(B) Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law. An employer's or other covered entity's policy requiring applicants or employees to present or hold a driver's license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver's license is not needed in order to perform an essential function of the job).

(2) Nothing in this subsection shall limit or expand an employer's authority to require an applicant or employee to possess a driver's license.

(3) Nothing in this subsection shall alter an employer's or other covered entity's rights or obligations under federal immigration law.

(f) Citizenship requirements. Citizenship requirements that have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12926 and 12940, Government Code.

Article 5. Sex Discrimination

§ 11029. General Prohibition against Discrimination on the Basis of Sex.

(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing Council pursuant to sections 12935, 12940, 12943, and 12945 of the Government Code.

(b) Statement of Purpose. The purpose of the laws against discrimination and harassment in employment because of sex is to eliminate the means by which individuals, by virtue of their sex, gender identity, or gender expression, are treated differently, paid less, treated adversely based on stereotyping, subjected to conduct of a sexual nature, subjected to hostile work environments, or made to suffer other forms of adverse action, and to guarantee that in the future equal employment benefits will be afforded regardless of the individual's sex.

(c) Incorporation of General Regulations. These regulations pertaining to discrimination on the basis of sex incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless a provision is specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11030. Definitions.

(a) "Gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.

(b) "Gender identity" means a person's identification as male, female, a gender different from the person's sex at birth, or transgender.

(c) "Sex" has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender identity; and gender expression.

(d) "Sex Stereotype" means an assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex.

(e) "Transgender" is a general term that refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12940, 12943 and 12945, Government Code.

§ 11031. Defenses.

Once employment discrimination on the basis of sex has been established, an employer or other covered entity may prove one or more appropriate affirmative defenses as generally set forth in section 11010, including, but not limited to, the defense of Bona Fide Occupational Qualification (BFOQ).

(a) Among situations that will not justify the application of the BFOQ defense are the following:

(1) A correlation between individuals of one sex and physical agility or strength;

(2) A correlation between individuals of one sex and height;

(3) Customer preference for employees of one sex;

(4) The necessity for providing separate facilities for one sex; or

(5) The fact that members of one sex have traditionally been hired to perform the particular type of job.

(b) Personal privacy considerations may justify a BFOQ only where:

(1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and

(2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and

(3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(c) Employers or other covered entities shall assign job duties and make other reasonable accommodations so as to minimize the number of jobs for which sex is a BFOQ.

(d) It is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see section 11015(a)) shall recruit individuals of both sexes for all jobs unless pursuant to a permissible defense.

(2) It is unlawful for any publication or other media to separate listings of job openings into male and female classifications.

(b) Pre-Employment Inquiries and Applications.

(1) For all employers or other covered entities who provide, accept and consider applications, it shall be unlawful to refuse to provide, accept and consider applications from individuals of one sex unless pursuant to a permissible defense.

(2) It is unlawful for an employer or other covered entity to ask the sex of the applicant on an application form or pre-employment questionnaire, unless the question is asked pursuant to a permissible defense or for recordkeeping purposes. After an individual is hired, the employer or other covered entity may record the employee's sex for non-discriminatory personnel purposes.

(3) It is unlawful for an employer or other covered entity to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. A test of physical agility or strength shall not be used unless the test is administered pursuant to a permissible defense. No applicant or employee shall be refused the opportunity to demonstrate that he or she has the requisite strength or agility to perform the job in question.

(b) Height and Weight Standards.

(1) Use of height or weight standards that discriminate against one sex or the other is unlawful unless pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless pursuant to a permissible defense.

(c) Hiring Applicants of Childbearing Age. It is unlawful to refuse to hire a female applicant because she is of childbearing age.

(d) Prior Work Experience. If an employer or other covered entity considers prior work experience in the selection or assignment of an employee, the employer or other covered entity shall also consider prior unpaid or volunteer work experience.

(e) Sex Stereotypes. Use of any criterion that is based exclusively or in part on a sex stereotype is unlawful unless pursuant to a permissible defense.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11034. Terms, Conditions, and Privileges of Employment.

(a) Compensation.

(1) Except as otherwise required or permitted by regulation, an employer or other covered entity shall not base the amount of compensation paid to an employee, in whole or in part, on the employee's sex.

(2) Equal Compensation for Comparable Work. (Reserved.)

(b) Fringe Benefits.

(1) It is unlawful for an employer to condition the availability of fringe benefits upon an employee's sex.

(2) Insofar as an employment practice discriminates against one sex, an employer or other covered entity shall not condition the availability of fringe benefits upon whether an employee is a head of household, principal wage earner, secondary wage earner, or of other similar status.

(3) Except where otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated male and female employees to fringe benefit plans, nor shall different amounts of basic benefits be established under fringe benefit plans for similarly situated male and female employees.

(4) It shall be unlawful for an employer or other covered entity to have a pension or retirement plan that establishes different optional or compulsory retirement ages based on the sex of the employee.

(c) Lines of Progression.

(1) It is unlawful for an employer or other covered entity to classify a job as male or female or to maintain separate lines of progression or separate seniority lists based on sex unless it is justified by a permissible defense. For example, a line of progression or seniority system is unlawful that:

(A) Prohibits a female from applying for a job labeled “male” or for a job in a “male” line of progression, and vice versa; or

(B) Prohibits a male scheduled for layoff from displacing a less senior female on a “female” seniority list, and vice versa.

(2) An employer or other covered entity shall provide equal opportunities to all employees for upward mobility, promotion, and entrance into all jobs for which they are qualified. However, nothing herein shall prevent an employer or other covered entity from implementing mobility programs to accelerate the promotion of underrepresented groups.

(d) Dangers to Health, Safety, or Reproductive Functions.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of the other sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer; or

(B) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education.

(2) An employer or other covered entity may require an applicant or employee to provide a physician’s certification that he or she is endangered by the working conditions.

(3) The existence of a greater risk for employees of one sex than the other shall not justify a BFOQ defense.

(4) An employer may not discriminate against members of one sex because of the prospective application of this subsection.

(5) With regard to protections due on account of pregnancy, childbirth, or related medical conditions, see section 11035.

(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in Labor Code section 6300 et seq.

(e) Working Conditions.

(1) Where rest periods are provided, equal rest periods must be provided to employees of both sexes.

(2) Equal access to comparable and adequate toilet facilities shall be provided to employees of both sexes. This requirement shall not be used to justify any discriminatory employment decision.

(3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee’s sex.

(4) Job duties shall not be assigned according to sex stereotypes.

(5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual of one sex and not the other on the grounds that the individual is not sterilized or refuses to undergo sterilization.

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services

of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) Sexual Harassment. Sexual harassment is unlawful as defined in section 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment. Sexually harassing conduct may be either "quid pro quo" or "hostile work environment" sexual harassment:

(1) "Quid pro quo" (Latin for "this for that") sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.

(2) Hostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment.

(A) The harassment must be severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.

(B) An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

(C) An employer or other covered entity may be liable for sexual harassment committed by a supervisor, coworker, or third party.

1. An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.

2. An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.

3. An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

4. An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(g) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code; *Meritor Savings Bank v. Vinson* (1986) 477 US 57, 67-68; *Harris v. Forklift Systems* (1993) 510 US 17, 23; *Lyle v. Warner Bros.* (2006) 38 Cal.4th 264, 273; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446.

Article 6. Pregnancy, Childbirth or Related Medical Conditions

§ 11035. Definitions.

The following definitions apply only to this article:

(a) "Affected by pregnancy" means that because of pregnancy, childbirth, or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.

(b) “Because of pregnancy” means due to an employee’s actual pregnancy, childbirth or a related medical condition.

(c) “CFRA” means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) “CFRA leave” means family care or medical leave as those leaves are defined at section 11087.

(d) A “condition related to pregnancy, childbirth, or a related medical condition,” as set forth in Government Code section 12945, means a physical or mental condition intrinsic to pregnancy or childbirth that includes, but is not limited to, lactation. Generally lactation without medical complications is not a disabling related medical condition requiring pregnancy disability leave, although it may require transfer to a less strenuous or hazardous position or other reasonable accommodation.

(e) A “covered entity” is any person (as defined in Government Code section 12925), labor organization, apprenticeship training program, training program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of Government Code sections 12940, 12943, 12944 or 12945 apply.

(f) A woman is “disabled by pregnancy” if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy’s successful completion, or to other persons. An employee also may be considered to be disabled by pregnancy if, in the opinion of her health care provider, she is suffering from severe morning sickness or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth, loss or end of pregnancy. The preceding list of conditions is intended to be non-exclusive and illustrative only. Nothing in this Article shall exclude a transgender individual who is disabled by pregnancy.

(g) An “eligible female employee” is an employee who qualifies for coverage under her employer’s group health plan. An employee’s pregnancy, childbirth, or related medical conditions are not lawful bases to make an employee ineligible for coverage. “Eligible female employee” includes a transgender employee who is disabled by pregnancy.

(h) “Employer,” as used in these regulations, except for section 11036, is any employer with five or more full or part time employees, who is an employer within the meaning of Government Code section 12926, and section 11008(d), of these regulations. “Employer” includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees.

(i) “Employment in the same position” means employment in, or reinstatement to, the position that the employee held prior to reasonable accommodation, transfer, or disability leave because of pregnancy.

(j) “Employment in a comparable position” means employment in a position that is virtually identical to the employee’s position held prior to reasonable accommodation, transfer, or disability leave in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from the employee’s prior position and ordinarily has the same shift or the same or an equivalent work schedule.

(k) “FMLA” means the federal Family and Medical Leave Act of 1993 and its implementing regulations. “FMLA leave” means family care or medical leave taken pursuant to FMLA.

(*l*) “Four months” means the number of days the employee would normally work within four calendar months (one-third of a year equaling 17 1/3 weeks), if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee’s schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee’s normal work month.

(m) “Group health plan” means medical coverage provided by the employer for its employees, as defined, as of December 30, 2012, in the Internal Revenue Code.

(n) “Health care provider” means:

(1) 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’s or employee’s pregnancy, childbirth or a related medical condition, or “a condition related to pregnancy, childbirth, or a related medical condition,” as set forth in Government

Code section 12945, or

(2) 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 nurse practitioners, nurse midwives, licensed midwives, clinical psychologists, clinical social workers, chiropractors, physician assistants, who directly treats or supervises the treatment of the applicant's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

(3) 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.

(o) "Intermittent leave" means leave taken in separate periods of time because of pregnancy, rather than for one continuous period of time. Examples of intermittent leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time over a period of several months for purposes related to pregnancy, childbirth or a related medical condition.

(p) "Medical certification" means a written communication, as specified in section 11050(b)(6) and (b)(7), from the employee's health care provider to the employer stating that the employee is disabled because of pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or duties or otherwise to be reasonably accommodated.

(q) "Perceived pregnancy" means being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition.

(r) "Pregnancy disability leave" is any leave, whether paid or unpaid, taken by an employee for any period(s) up to a total of four months during which she is disabled by pregnancy.

(s) "Reasonable accommodation" of an employee affected by pregnancy is any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. Reasonable accommodation may include, but is not limited to an employer:

(1) modifying work practices or policies;

(2) modifying work duties;

(3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);

(4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices; or

(5) providing a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code.

(t) "Reduced work schedule" means permitting an employee to work less than the usual number of hours per work week, or hours per work day.

(u) A "related medical condition" is any medically recognized physical or mental condition related to pregnancy, childbirth or recovery from pregnancy or childbirth. This term includes, but is not limited to, lactation-related medical conditions such as mastitis; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy; or recovery from loss or end of pregnancy.

(v) "Transfer" means reassigning temporarily an employee affected by pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944, 12945, 12945.1 and 12945.2, Government Code; Family and Medical Leave Act, (FMLA) 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. §2000e; and J.E. Robinson v. Fair Employment & Housing Com . (1992) 2 Cal. 4th 226.

§ 11036. Prohibition against Harassment.

As set forth in Government Code sections 12926 and 12940, it is an unlawful employment practice for any employer with one or more employees or other covered entities to harass an employee or applicant because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical conditions.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code.

§ 11037. No Eligibility Requirements.

There is no eligibility requirement, such as minimum hours worked or length of service, before an employee affected or disabled by pregnancy is eligible for reasonable accommodation, transfer, or disability leave.

Note: Authority cited: Sections 12935(a), Government Code. Reference: Section 12945, Government Code.

§ 11038. Responsibilities of Covered Entities Other than Employers.

Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under Government Code sections 12926, 12940, 12943 and 12944.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944 and 12945, Government Code.

§ 11039. Responsibilities of Employers.

(a) Employer Obligations

(1) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;

(B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(C) refuse to promote an employee because of pregnancy or perceived pregnancy;

(D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;

(F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c). Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;

(H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;

(I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or because she has filed a complaint, testified, or assisted in any proceeding under the FEHA; or

(J) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any

practice that is prohibited on the basis of sex.

(2) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to provide employee benefits for pregnancy as set forth at section 11044, if the employer provides such benefits for other temporary disabilities;

(B) refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave, as set forth at section 11044, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 11040;

(D) refuse to transfer an employee affected by pregnancy as set forth at section 11041;

(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section 11042; or

(F) deny, interfere with, or restrain an employee's rights to reasonable accommodation, to transfer or to take pregnancy disability leave under Government Code section 12945, including retaliating against the employee because she has exercised her right to reasonable accommodation, to transfer or to take pregnancy disability leave.

(b) Permissible defenses, as defined at section 11010, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. §2000e, §701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.); *Cal. Federal Sav. and Loan Ass'n v. Guerra* 479 U.S. 272.

§ 11040. Reasonable Accommodation.

(a) It is unlawful for an employer to deny a request for reasonable accommodation made by an employee affected by pregnancy if:

(1) The employee's request is based on the advice of her health care provider that reasonable accommodation is medically advisable; and

(2) The requested accommodation is reasonable.

(A) Whether an accommodation is reasonable is a factual determination to be made on a case-by-case basis, taking into consideration such factors, including but not limited to, the employee's medical needs, the duration of the needed accommodation, the employer's legally permissible past and current practices, and other such factors, under the totality of the circumstances.

(B) The employee and employer shall engage in a good faith interactive process to identify and implement the employee's request for reasonable accommodation as set forth in section 11050(a).

(b) When a reasonable accommodation, such as a change of work duties or job restructuring, is granted, it shall not affect the employee's independent right to take up to four months for pregnancy disability leave. If the requested reasonable accommodation, however, involves a reduction in hours worked such as a reduced work schedule, or intermittent leave, the employer may consider this as a form of pregnancy disability leave and deduct the hours from the employee's four month leave entitlement.

(c) An employer may, but need not, require a medical certification substantiating the employee's need for reasonable accommodation, as set forth in sections 11049(a) and (b), and 11050(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926 and 12945, Government Code.

§ 11041. Transfer.

(a) Transfer - All Employers

(1) It is unlawful for an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions or duties for the duration of the disability, including disabilities or conditions resulting from on-the-job injuries, to fail to apply the policy, practice or collective bargaining agreement to transfer an employee who is disabled by pregnancy and who so requests.

(2) It is unlawful for an employer to deny the request of an employee affected by pregnancy to transfer provided that:

(A) The employee's request is based on the advice of her health care provider that a transfer is medically advisable; and

(B) Such transfer can be reasonably accommodated by the employer. To provide a transfer, an employer need not create additional employment that the employer would not otherwise have created, discharge another employee, violate the terms of a collective bargaining agreement, transfer another employee with more seniority, or promote or transfer any employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no obligation to do so.

(C) An employer may, but need not, require a medical certification substantiating the employee's need for transfer, as set forth in sections 11049(a) and (b), and 11050(b).

(b) Burden of Proof. The burden shall be on the employer to prove, by a preponderance of the evidence, that such transfer cannot be reasonably accommodated for one or more of the enumerated reasons listed in section 11041(a)(2).

(c) Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule. If an employee's health care provider provides medical certification that an employee has a medical need to take intermittent leave or leave on a reduced work schedule because of pregnancy, the employer may require the employee to transfer temporarily to an available alternative position that meets the needs of the employee. The employee must meet the qualifications of the alternative position. The alternative position must have the equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than her regular job, but does not have to have equivalent duties.

(d) Right to Reinstatement after Transfer. When the employee's health care provider certifies that there is no further medical advisability for the transfer, intermittent leave, or leave on a reduced work schedule, the employer must reinstate the employee to her same or comparable position in accordance with the requirements of section 11043.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945, Government Code; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. §825.

§ 11042. Pregnancy Disability Leave.

The following provisions apply to leave taken for disability because of pregnancy.

(a) Four-Month Leave Requirement for all Employers. All employers must provide a leave of up to four months, as needed, for the period(s) of time an employee is actually disabled because of pregnancy, even if an employer has a policy or practice that provides less than four months of leave for other similarly situated, temporarily disabled employees. Pregnancy disability leave does not need to be taken in one continuous period of time.

(1) Employees are eligible for up to four months of leave per pregnancy, not per year. A "four month leave" means time off for the number of days or hours the employee would normally work within four calendar months (one-third of a year or 17 1/3 weeks). For a full time employee who works 40 hours per week, "four months" means 693 hours of leave entitlement, based on 40 hours per week times 17 1/3 weeks.

(2) For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis.

(A) For example, for an employee who works 20 hours per week, "four months" means 346.5 hours of leave entitlement. For an employee who normally works 48 hours per week, "four months" means 832 hours of leave entitlement.

(B) Leave on an intermittent leave or a reduced work schedule.

An employer may account for increments of intermittent leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour. For example, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, the employer must account for pregnancy disability leave in increments of 30 minutes or less. If an employer accounts for other forms of leave in two-hour increments, the employer must account for pregnancy disability leave in increments no greater than one hour.

(C) If a holiday falls within a week taken as pregnancy disability leave, the week is nevertheless counted as a week of pregnancy disability leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's pregnancy disability leave entitlement.

(3) Although all pregnant employees are eligible for up to four months of leave, if that leave is taken in one period of time, taking intermittent or reduced work schedule throughout an employee's pregnancy will differentially affect the number of hours remaining that an employee is entitled to take pregnancy disability leave leading up to and after childbirth, depending on the employee's regular work schedule.

(A) For example, a full-time employee, who normally works a 40-hour work week is entitled to 693 working hours of leave. If that employee takes 180 hours of intermittent leave throughout her pregnancy, she would still be entitled to take 513 hours, or approximately three months leading up to and after her childbirth.

(B) In contrast, a part-time employee who normally works 20 hours per week, would be entitled to 346.5 hours of leave. If that employee takes intermittent leave of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of leave, approximately two months of leave, leading up to and after her childbirth.

(4) Minimum Duration. Leave may be taken intermittently or on a reduced work schedule when an employee is disabled because of pregnancy, as determined by the health care provider of the employee. An employer may account for increments of intermittent leave using the shortest period of time that the employer's payroll system uses to account for other forms of leave, provided it is not greater than one hour, as set forth in section 11042(a)(2)(B).

(b) Employers with More Generous Leave Policies. If an employer has a more generous leave policy for similarly situated employees with other temporary disabilities than is required for pregnancy purposes under these regulations, the employer must provide the more generous leave to employees temporarily disabled by pregnancy. If the employer's more generous leave policy exceeds four months, the employer's return policy after taking the leave would govern, not the return rights specified in these regulations.

(c) Denial of Leave is an Unlawful Employment Practice. It is an unlawful employment practice for an employer to refuse to grant pregnancy disability leave to an employee disabled by pregnancy.

(1) who has provided the employer with reasonable advance notice of the medical need for the leave, and

(2) whose health care provider has advised that the employee is disabled by pregnancy.

The employer may require medical certification of the medical advisability of the leave, as set forth in sections 11049(a) and (b), and 11050(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272.

§ 11043. Right to Reinstatement from Pregnancy Disability Leave.

The following rules apply to reinstatement from any leave or transfer taken for disability because of pregnancy.

(a) Guarantee of Reinstatement. An employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 11043(c)(1), to a comparable position, and the

employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

An employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 11043(c)(1), to a comparable position, and the employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

(b) Refusal to Reinstate

(1) Definite Date of Reinstatement. Where a definite date of reinstatement has been agreed upon at the beginning of the leave or transfer, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave or transfer was granted by the employer and that the employer failed to reinstate the employee to the same position or, where applicable, to a comparable position, by the date agreed upon, as specified below in subdivisions (c)(1) and (c)(2).

(2) Change in Date of Reinstatement. If the reinstatement date differs from the employer's and the employee's original agreement or if no agreement was made, the employer shall reinstate the employee within two business days, or, when two business days is not feasible, reinstatement shall be made as soon as it is possible for the employer to expedite the employee's return, after the employee notifies the employer of her readiness to return to the same, or, where applicable, a comparable position, as specified below in subdivisions (c)(1) and (c)(2).

(c) Permissible Defenses - Employment Would Have Ceased

(1) Right to Reinstatement to the Same Position. An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than those rights she would have had if she had been continuously at work during the pregnancy disability leave or transfer period. This is true even if the employer has given the employee a written guarantee of reinstatement. A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

(2) Right to Reinstatement to a Comparable Position. An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the employer is excused from reinstating the employee to her same position, or with the same duties, a refusal to reinstate the employee to a comparable position is justified if the employer proves, by a preponderance of the evidence, either of the following:

(A) The employer would not have offered a comparable position to the employee if she would have been continuously at work during the pregnancy disability leave or transfer period.

(B) There is no comparable position available.

1. A position is available if there is a position open on the employee's scheduled date of reinstatement or within 60 calendar days for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement.

2. An employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or email, or by links to postings on the company's Web site if there is a section for job openings.

3. If a comparable position is not available on the employee's scheduled date of reinstatement, but the employee is later reinstated under the 60 calendar day period set forth in section 11043(c)(2)(B)1., the period between the employee's scheduled date of reinstatement and the date of her actual reinstatement shall not be

counted for purposes of any employee pay or benefit.

(3) If an employee is laid off during pregnancy disability leave or transfer for legitimate business reasons unrelated to her leave or transfer, the employer's responsibility to continue the pregnancy disability leave or transfer, maintain benefits, and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement, or otherwise.

(d) Right to Reinstatement to Job if Additional Leave Taken Following End of Pregnancy Disability Leave; Equal Treatment. If an employee disabled by pregnancy remains on some form of leave following the end of her pregnancy disability leave (e.g., employer's disability leave plan, etc.), an employer shall grant the employee reinstatement rights that are the same as any other similarly situated employee who has taken a similar length disability leave under the employer's policy, practice or collective bargaining agreement. For example, if the employer has a policy that grants reinstatement to other employees who are temporarily disabled for up to six months, the employer must also grant reinstatement to an employee disabled by pregnancy for six months. An employer and employee also may agree to a later date of reinstatement.

(e) Right to Reinstatement to Job if CFRA Leave is Taken Following Pregnancy Disability Leave. At the expiration of pregnancy disability leave, if an employee takes a CFRA leave for reason of the birth of her child, the employee's right to reinstatement to her job is governed by CFRA and not section 11043(c)(1) and (c)(2). Under CFRA, an employer may reinstate an employee either to her same or a comparable position.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272.

§ 11044. Terms of Pregnancy Disability Leave.

(a) Paid Leave. An employer is not required to pay an employee during pregnancy disability leave unless the employer pays for other temporary disability leaves for similarly situated employees. An employee may be entitled to receive state disability insurance for a period of disability because of pregnancy and may contact the California Employment Development Department for more information.

(b) Accrued Time Off

(1) Sick Leave. An employer may require an employee to use, or an employee may elect to use, any accrued sick leave during the otherwise unpaid portion of her pregnancy disability leave.

(2) Vacation Time and Other Accrued Time Off. An employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off (PTO)) for which the employee is eligible.

(c) Continuation of Group Health Coverage

(1) An employer shall maintain and pay for group health coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period per pregnancy, beginning on the date the pregnancy disability leave begins, at the same level and under the same conditions that coverage would have been provided if the employee had not taken pregnancy disability leave.

(A) An employer may maintain and pay for coverage for a group health plan for longer than four months.

(B) If the employer is a state agency, the collective bargaining agreement shall govern the continued receipt by an eligible female employee of health care coverage under the employer's group health plan.

(2) The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.

(3) An employer may recover from the employee the premium paid while the employee was on pregnancy disability leave if both of the following conditions occur:

(A) The employee fails to return at the end of her pregnancy disability leave.

(B) The employee's failure to return from leave is for a reason other than one of the following:

1. Taking CFRA leave, unless the employee chooses not to return to work following the CFRA leave.

2. The continuation, recurrence or onset of a health condition that entitles the employee to pregnancy disability leave, unless the employee chooses not to return to work following the leave.

3. Non-pregnancy related medical conditions requiring further leave, unless the employee chooses not to return to work following the leave.

4. Any other circumstance beyond the control of the employee, including, but not limited to, circumstances where the employer is responsible for the employee's failure to return (e.g., the employer does not return the employee to her same position or reinstate the employee to a comparable position), or circumstances where the employee must care for herself or a family member (e.g., the employee gives birth to a child with a serious health condition).

(d) Other Benefits and Seniority Accrual. During her pregnancy disability leave, the employee shall accrue seniority and participate in employee benefit plans, including, but not limited to, life, short-term and long-term disability or accident insurance, pension and retirement plans, stock options and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability.

(1) If the employer's policy allows seniority to accrue when employees are on paid leave, such as paid sick or vacation leave, and/or unpaid leave, then seniority will accrue during any part of a paid and/or unpaid pregnancy disability leave.

(2) The employee returning from pregnancy disability leave shall return with no less seniority than the employee had when the leave commenced.

(e) Employee Status. The employee shall retain employee status during the period of the pregnancy disability leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, or other qualifying provisions.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. § 2000e, § 701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

§ 11045. Relationship between Pregnancy Leave and FMLA Leave.

(a) A Pregnancy Leave May Also Be a FMLA Leave. If the employer is a covered employer and the employee is eligible for leave under the federal Family Care and Medical Leave Act (FMLA), the employer may be able to count the employee's pregnancy disability leave under this article, up to a maximum of 12 weeks, against her FMLA leave entitlement.

(b) FMLA Coverage. For more information on rights and obligations under FMLA, consult the FMLA regulations regarding family care and medical leave.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq.; and FMLA regulations, 29 C.F.R. § 825.

§ 11046. Relationship between CFRA and Pregnancy Leaves.

(a) Separate and Distinct Entitlements. The right to take a pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take leave under the California Family Rights Act (CFRA), Government Code sections 12945.1 and 12945.2.

(b) Serious Health Condition - Pregnancy. An employee's own disability due to pregnancy, childbirth, or related medical conditions is not a serious health condition under CFRA.

(c) CFRA Leave after Pregnancy Disability Leave. At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.

(1) There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave for the birth of her child. There is also no requirement that the employee no longer be disabled by her pregnancy before taking CFRA leave for the birth of her child.

(2) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, as a reasonable accommodation, allow the employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled under CFRA.

(d) Maximum Entitlement. The maximum statutory leave entitlement for California employees, provided they qualify for CFRA leave, for both pregnancy disability leave and CFRA leave for reason of the birth of the child and/or the employee's own serious health condition is the working days in 29 1/3 workweeks. This assumes that the employee is disabled by pregnancy for four months (the working days in 17 1/3 weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945, 12945.1 and 12945.2, Government Code.

§ 11047. Relationship between Pregnancy Disability Leave and Leave of Absence as Reasonable Accommodation for Physical or Mental Disability - Separate and Distinct Rights.

The right to take pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation under Government Code section 12940. At the end or depletion of an employee's pregnancy disability leave, an employee who has a physical or mental disability (which may or may not be due to pregnancy, childbirth, or related medical conditions) may be entitled to reasonable accommodation under Government Code section 12940. Entitlement to leave under section 12940 must be determined on a case-by case basis, using the standards provided in the disability discrimination provisions article 9) of these regulations, and is not diminished by the employee's exercise of her right to pregnancy disability leave.

Note: Authority cited: Sections 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code.

§ 11049. Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, to Transfer and to Take Pregnancy Disability Leave.

(a) Employers to Provide Reasonable Advance Notice Advising Employees Affected by Pregnancy of Their FEHA Rights and Obligations. An employer shall give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth, or related medical conditions as set forth at section 11049(e) and as contained in the Notice as set forth at section 11051(a), or its equivalent.

(b) Content of Employer's Reasonable Advance Notice. An employer shall provide its employees with information about:

(1) an employee's right to request reasonable accommodation, transfer, or pregnancy disability leave;

(2) employees' notice obligations, as set forth in section 11050, to provide adequate advance notice to the employer of the need for reasonable accommodation, transfer or pregnancy disability leave; and

(3) the employer's requirement, if any, for the employee to provide medical certification to establish the medical advisability for reasonable accommodation, transfer, or pregnancy disability leave, as set forth in section 11050(b).

(c) Consequences of Employer Notice Requirement

(1) If the employer follows the requirements in section 11049(d), such compliance shall constitute reasonable advance notice to the employee of the employer's notice obligations.

(2) Failure of the employer to provide reasonable advance notice shall preclude the employer from taking any adverse action against the employee, including denying reasonable accommodation, transfer or pregnancy disability leave, for failing to furnish the employer with adequate advance notice of a need for reasonable accommodation, transfer, or pregnancy disability leave.

(d) Distribution of Notices

(1) Employers shall post and keep posted the appropriate notice on its premises, in conspicuous places where employees are employed. The notice shall explain the Act's provisions and provide information about how to contact the Department of Fair Employment and Housing to file a complaint and learn more about rights and obligations under the Act. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it is posted electronically in a conspicuous place or places where employees would tend to view it in the workplace.

(2) An employer is also required to give an employee a copy of the appropriate notice as soon as practicable after the employee tells the employer of her pregnancy or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves.

(3) If the employer publishes an employee handbook that describes other kinds of reasonable accommodation, transfers or temporary disability leaves available to its employees, that employer shall include a description of reasonable accommodation, transfer, and pregnancy disability leave in the next edition of its handbook that it publishes following adoption of these regulations. In the alternative, the employer may distribute to its employees a copy of its Notice at least annually. Distribution may be by electronic mail.

(4) Non-English Speaking Workforce. Any FEHA-covered employer whose work force at any facility or establishment is comprised of 10 percent or more persons whose spoken language is not English shall translate the notice into every language that is spoken by at least 10 percent of the workforce. In addition, any FEHA-covered employer shall make a reasonable effort to give either verbal or written notice in the appropriate language to any employee who the employer knows is not proficient in English, and for whom written notice previously has not been given in her primary language, of her rights to pregnancy disability leave, reasonable accommodation, and transfer, once the employer knows the employee is pregnant.

(e) Notice. An employer may provide a leave policy that is more generous than that required by FEHA if that more generous policy is provided to all similarly-situated, disabled employees. An employer may develop its own notice or it may choose to use the text provided in section 11051, unless it does not accurately reflect its own policy.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

§ 11050. Employee Requests for Reasonable Accommodation, Transfer or Pregnancy Disability Leave: Advance Notice; Medical Certification; Employer Response.

The following rules apply to any request for reasonable accommodation, transfer, or disability leave because of pregnancy.

(a) Adequate Advance Notice

(1) Verbal or Written Notice. An employee shall provide timely oral or written notice sufficient to make the employer aware that the employee needs reasonable accommodation, transfer, or pregnancy disability leave, and, where practicable, the anticipated timing and duration of the reasonable accommodation, transfer or pregnancy disability leave.

(2) 30 Days Advance Notice. An employee must provide the employer at least 30 days advance notice before the start of reasonable accommodation, transfer, or pregnancy disability leave if the need for the reasonable accommodation, transfer, or leave is foreseeable. The employee shall consult with the employer and make a reasonable effort to schedule any planned appointment or medical treatment to minimize disruption to the employer's operations, subject to the health

care provider's approval.

(3) When 30 Days Is Not Practicable. If 30 days advance notice is not practicable, because it is not known when reasonable accommodation, transfer, or leave will be required to begin, or because of a change in circumstances, a medical emergency, or other good cause, notice must be given as soon as practicable.

(4) Prohibition against Denial of Reasonable Accommodation, Transfer, or Leave in Emergency or Unforeseeable Circumstances. An employer shall not deny reasonable accommodation, transfer, or pregnancy disability leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide adequate advance notice of the need for the reasonable accommodation, transfer, or leave.

(5) Employer Response to Reasonable Accommodation, Transfer, or Pregnancy Disability Leave Request. The employer shall respond to the reasonable accommodation, transfer, or pregnancy disability leave request as soon as practicable, and, in any event no later than 10 calendar days after receiving the request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(6) Consequences for Employee Who Fails to Give Employer Adequate Advance Notice of Need for Reasonable Accommodation or Transfer. If an employee fails to give timely advance notice when the need for reasonable accommodation or transfer is foreseeable, the employer may delay the reasonable accommodation or transfer until 30 days after the date the employee provides notice to the employer of the need for the reasonable accommodation or transfer. However, under no circumstances may the employer delay the granting of an employee's reasonable accommodation or transfer if to do so would endanger the employee's health, her pregnancy, or the health of her co-workers.

(7) Direct notice to the employer from the employee rather than from a third party regarding the employee's need for reasonable accommodation, transfer, or pregnancy disability leave is preferred, but not required. The content of any notice must meet the requirements of this section and the employer may require medical certification.

(b) Medical Certification. As a condition of granting reasonable accommodation, transfer, or pregnancy disability leave, the employer may require written medical certification. The employer must notify the employee of the need to provide medical certification; the deadline for providing certification; what constitutes sufficient medical certification; and the consequences for failing to provide medical certification.

(1) An employer must notify the employee of the medical certification requirement each time a certification is required and provide the employee with any employer-required medical certification form for the employee's health care provider to complete. An employer may use the form provided at section 11050(e), or may develop its own form. Notice to the employee of the need for medical certification may be oral if the employee is already out on pregnancy disability leave because the need for the leave was unforeseeable. The employer shall thereafter mail or send via electronic mail or by facsimile a copy of the medical certification form to the employee or to her health care provider, whomever the employee designates.

(2) When the leave is foreseeable and at least 30 days' notice has been provided, the employee shall provide the medical certification before the leave begins. When this is not practicable, the employee shall provide the requested certification to the employer within the time frame requested by the employer (which must be at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(3) When the employer requires medical certification, the employer shall request that an employee furnish medical certification from a health care provider at the time the employee gives notice of the need for reasonable accommodation, transfer or leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the reasonable accommodation, transfer, or leave or its duration.

(4) At the time the employer requests medical certification, the employer shall also advise the employee of the anticipated consequences of an employee's failure to provide adequate medical certification. The employer shall also advise the employee whenever the employer finds a medical certification inadequate or incomplete, and provide the employee a reasonable opportunity to cure any deficiency.

(5) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the medical certification requirements of these regulations, and the employee or employer elects to substitute sick, vacation, personal or family leave for unpaid pregnancy disability leave, only the employer's less stringent leave certification requirements may be imposed.

(6) The medical certification indicating the medical advisability of reasonable accommodation or a transfer is sufficient if it contains:

(A) A description of the requested reasonable accommodation or transfer;

(B) A statement describing the medical advisability of the reasonable accommodation or transfer because of pregnancy; and

(C) The date on which the need for reasonable accommodation or transfer became or will become medically advisable and the estimated duration of the reasonable accommodation or transfer.

(7) The medical certification indicating disability necessitating a leave is sufficient if it contains:

(A) A statement that the employee needs to take pregnancy disability leave because she is disabled by pregnancy, childbirth or a related medical condition;

(B) The date on which the employee became disabled because of pregnancy and the estimated duration of the leave.

(8) If the certification satisfies the requirements of section 11050(b), the employer must accept it as sufficient. The employer may not ask the employee to provide additional information beyond that allowed by these regulations. Upon expiration of the time period that the health care provider originally estimated the employee would need reasonable accommodation, transfer, or leave, the employer may require the employee to obtain recertification if additional time is requested.

(9) The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(c) Failure to Provide Medical Certification

(1) In the case of a foreseeable need for reasonable accommodation, transfer, or pregnancy disability leave, an employer may delay granting the reasonable accommodation, transfer or leave to an employee who fails to provide timely certification after the employer has requested the employee to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(2) When the need for reasonable accommodation, transfer or leave is not foreseeable, or in the case of recertification, an employee shall provide certification (or recertification) within the time frame requested by the employer (which must be at least 15 days after the employer's request) or as soon as reasonably possible under the circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of the reasonable accommodation, transfer or pregnancy disability leave.

(d) Release to Return to Work. As a condition of an employee's return from pregnancy disability leave or transfer, the employer may require the employee to obtain a release to return-to-work from her health care provider stating that she is able to resume her original job or duties only if the employer has a uniformly applied practice or policy of requiring such releases from other similarly situated employees returning to work after a non-pregnancy related disability leave or transfer.

(e) Medical Certification Form. Employers requiring written medical certification from their employees who request a reasonable accommodation, transfer or disability leave because of pregnancy may develop their own form, utilize one provided by the employee's health care provider or use the form provided below.

CERTIFICATION OF HEALTH CARE PROVIDER FOR PREGNANCY DISABILITY LEAVE, TRANSFER AND/OR REASONABLE ACCOMMODATION

Employee's Name: _____

Please certify that, because of this patient's pregnancy, childbirth, or a related medical condition (including, but not limited to, recovery from pregnancy, childbirth, loss or end of pregnancy, or post-partum depression), this patient needs (check all appropriate category boxes):

☐ Time off for medical appointments.

Specify when and for what duration:

_____

_____

☐ A disability leave. [Because of a patient's pregnancy, childbirth or a related medical condition, she cannot perform one or more of the essential functions of her job or cannot perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons.]

Beginning (Estimate): _____

Ending (Estimate): _____

☐ Intermittent leave. Specify medically advisable intermittent leave schedule:

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

☐ Reduced work schedule. [Specify medically advisable reduced work schedule.]

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

☐ Transfer to a less strenuous or hazardous position or to be assigned to less strenuous or hazardous duties [specify what would be a medically advisable position/duties].

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

☐ Reasonable accommodation(s). [Specify medically advisable needed accommodation(s). These could include, but are not limited to, modifying lifting requirements, or providing more frequent breaks, or providing a stool or chair.]

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

Name, license number and medical/health care specialty [printed] of health care provider.

_____

_____

_____

_____

Signature of health care provider:

_____

Date:

_____

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq., and FMLA regulations, 29 C.F.R. § 825.

§ 11051. Employer Notice.

YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE

If you are pregnant, have a related medical condition, or are recovering from childbirth, PLEASE READ THIS NOTICE.

• California law protects employees against discrimination or harassment because of an employee's pregnancy, childbirth or any related medical condition (referred to below as "because of pregnancy"). California law also prohibits employers from denying or interfering with an employee's pregnancy-related employment rights.

• Your employer has an obligation to:

° reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);

° transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and

° provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17 1/3 weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.

° provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code.

• For pregnancy disability leave:

° PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care

provider determines how much time you will need.

° Once your employer has been informed that you need to take PDL, your employer must guarantee in writing that you can return to work in your same position if you request a written guarantee. Your employer may require you to submit written medical certification from your health care provider substantiating the need for your leave.

° PDL may include, but is not limited to, additional or more frequent breaks, time for prenatal or postnatal medical appointments, doctor-ordered bed rest, severe morning sickness, gestational diabetes, pregnancy-induced hypertension, preeclampsia, recovery from childbirth or loss or end of pregnancy, and/or post-partum depression.

° PDL does not need to be taken all at once but can be taken on an as-needed basis as required by your health care provider, including intermittent leave or a reduced work schedule, all of which counts against your four month entitlement to leave.

° Your leave will be paid or unpaid depending on your employer's policy for other medical leaves. You may also be eligible for state disability insurance or Paid Family Leave (PFL), administered by the California Employment Development Department.

° At your discretion, you can use any vacation or other paid time off during your PDL.

° Your employer may require or you may choose to use any available sick leave during your PDL.

° Your employer is required to continue your group health coverage during your PDL at the same level and under the same conditions that coverage would have been provided if you had continued in employment continuously for the duration of your leave.

° Taking PDL may impact certain of your benefits and your seniority date; please contact your employer for details.

° If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Notice Obligations as an Employee.

• Give your employer reasonable notice: To receive reasonable accommodation, obtain a transfer, or take PDL, you must give your employer sufficient notice for your employer to make appropriate plans. Sufficient notice means 30 days advance notice if the need for the reasonable accommodation, transfer, or PDL is foreseeable, otherwise as soon as practicable if the need is an emergency or unforeseeable.

• Provide a Written Medical Certification from Your Health Care Provider. Except in a medical emergency where there is no time to obtain it, your employer may require you to supply a written medical certification from your health care provider of the medical need for your reasonable accommodation, transfer or PDL. If the need is an emergency or unforeseeable, you must provide this certification within the time frame your employer requests, unless it is not practicable for you to do so under the circumstances despite your diligent, good faith efforts. Your employer must provide at least 15 calendar days for you to submit the certification. See your employer for a copy of a medical certification form to give to your health care provider to complete.

• PLEASE NOTE that if you fail to give your employer reasonable advance notice or, if your employer requires it, written medical certification of your medical need, your employer may be justified in delaying your reasonable accommodation, transfer, or PDL.

Additional Rights under California Family Rights Act (CFRA) Leave

• You also may be entitled to additional rights under the California Family Rights Act of 1993 (CFRA) if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave. This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition (not related to pregnancy) or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances. For further information on the availability CFRA leave, please review your

employer's Notice regarding the availability of CFRA leave.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, visit the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq., and FMLA regulations, 29 C.F.R. § 825.

Article 7. Marital Status Discrimination

§ 11052. General Prohibition Against Discrimination on the Basis of Marital Status.

(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing Council pursuant to Section 12940 of the Government Code.

(b) Statement of Purpose. The purpose of the law prohibiting marital status discrimination is to make it unlawful for an employer or other covered entity to deny or grant employment benefits for the reason that an applicant or employee is either married or unmarried.

(c) Incorporation of General Regulations. These regulations pertaining to discrimination on the basis of marital status incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless a provision is specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11053. Definitions.

(a) "Marital Status." An individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state.

(b) "Spouse." A partner in marriage as defined in Family Code section 300.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11054. Establishing Marital Status Discrimination.

Marital status discrimination may be established by showing that an applicant or employee has been denied an employment benefit by reason of:

(a) The fact that the applicant or employee is not married;

(b) An applicant's or employee's single or married status, or

(c) The employment or lack of employment of an applicant's or employee's spouse.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11055. Defenses.

Any defense permissible under Article 1 of Subchapter 2 is applicable to this article, in addition to any other defense provided herein.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government

Code.

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her marital status as part of a pre-employment inquiry unless pursuant to a permissible defense.

(b) Request for Names. For business reasons other than ascertaining marital status, an applicant may be asked whether he or she has ever used another name, e.g., to enable an employer or other covered entity to check the applicant's past work record.

(c) Employment of Spouse. It is lawful to ask an applicant to state whether he or she has a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision except as stated below.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11057. Employee Selection.

(a) Employment of Spouse. An employment decision shall not be based on whether an individual has a spouse presently employed by the employer except in accordance with the following criteria:

(1) For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse.

(2) For business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.

(b) Accommodation for Co-Employees Who Marry. If co-employees marry, an employer shall make reasonable efforts to assign job duties so as to minimize problems of supervision, safety, security, or morale.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11058. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits.

(1) The availability of benefits to any employee shall not be based on the employee's marital status. However:

(A) Bona fide fringe benefit plans or programs may provide benefits to an employee's spouse or dependents;

(B) Such bona fide fringe benefit plans or programs may decline to provide benefits to any individual who is not one of the following: an employee of the employer, a spouse of an employee of the employer, or a dependent of an employee of the employer.

(2) Insofar as an employment practice discriminates against individuals on the basis of marital status, fringe benefits shall not be conditioned upon whether an employee is head of household, principal wage earner, secondary wage earner, or other similar status.

(b) Inter-Personal Conduct.

(1) An employer or other covered entity shall not use job responsibilities such as travel, entertainment, or other non-office hour duties as a justification for discriminating on the basis of marital status.

(2) It is unlawful to require a married female applicant or employee to use her husband's name.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

Article 8. Religious Creed Discrimination

§ 11059. General Prohibition against Religious Creed Discrimination.

(a) Statutory Source. These regulations concerning religious discrimination are adopted by the Council pursuant to section 12940 of the Government Code.

(b) Statement of Purpose. The freedom to worship as one believes is a basic human right. To that end, the accommodation of religious pluralism is an important and necessary part of our society. Questions of religious discrimination and accommodation to the varied religious practices of the people of the State of California often arise in complex and emotionally charged situations; therefore, each case must be reviewed on an individual basis to best balance often contradictory social needs.

(c) Incorporation of General Regulations. These regulations incorporate all of the provisions of Articles 1 and 2 of Subchapter 2, unless specifically excluded or modified.

(d) The Act's prohibition against religious discrimination and duty to provide reasonable accommodations for religious observances and dress and grooming practices applies to individuals serving in apprenticeship programs, unpaid internships, and any other program to provide unpaid experience for a person in the workplace or industry, in addition to employees, applicants, and others covered by section 12940(*l*) of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11060. Establishing Religious Creed Discrimination.

"Religious creed" includes any traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. It encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926. Religious creed discrimination may be established by showing:

(a) Employment benefits have been denied, in whole or in part, because of an applicant's or employee's religious creed or lack of religious creed.

(b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation.

(c) Religious creed is a protected category under the Act, and the examples of unlawful conduct provided in this section are non-exclusive.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11061. Defenses.

Any permissible defense set forth in Article 1 of this Subchapter shall be applicable to this Article.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11062. Reasonable Accommodation.

An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship. Refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination.

(a) A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement and may include, but is not limited to, job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances. Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public.

(b) In determining whether a reasonable accommodation would impose an undue hardship on the operations of an employer or other covered entity, factors to be considered include, but are not limited to:

(1) The size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters;

(2) The overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities, and size of budget;

(3) The type of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

(4) The type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership;

(5) The nature and cost of the accommodation involved;

(6) Reasonable notice to the employer or other covered entity of the need for accommodation; and

(7) Any available reasonable alternative means of accommodation.

(c) Reasonable accommodation includes, but is not limited to, the following specific employment policies or practices:

(1) Interview and examination times. Scheduled times for interviews, examinations, and other functions related to employment opportunities shall reasonably accommodate religious practices.

(2) Dress and Grooming Standards. Dress and grooming standards or requirements for personal appearance shall take into account "religious dress and grooming practices," as defined in Government Code section 12926.

(3) Union Dues. An employer or union shall not require membership from any employee or applicant whose religious creed prohibits such membership. An applicant's or employee's religious creed shall be reasonably accommodated with respect to union dues.

(d) It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on religion, regardless of whether the employer granted the request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926 and 12940, Government Code; Opuku-Boateng v. State of Cal. (9th Cir. 1996) 95 F.3d 1461, 1467 as amended (Nov. 19, 1996); EEOC v. Abercrombie & Fitch Stores, Inc. (2015) 135 S.Ct. 2028.

§ 11063. Pre-Employment Practices.

Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used as a pretext for ascertaining his or her religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

Article 9. Disability Discrimination

§ 11064. General Prohibitions against Discrimination on the Basis of Disability.

(a) Statutory Source. These regulations are adopted by the Council pursuant to sections 12926, 12926.1 and 12940 of the Government Code.

(b) Statement of Purpose. The Fair Employment and Housing Council is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental disability or medical condition that is disabling, potentially disabling or perceived to be disabling or potentially disabling. The definition of disability in these regulations shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the Fair Employment and Housing Act (FEHA). As with the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendment Act of 2008, the primary focus in cases brought under the FEHA should be whether employers and other covered entities have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their obligations to engage in the interactive process and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis. Further, the interactive process requires an individualized assessment of both the job at issue and the specific physical or mental limitations of the individual that are directly related to the need for reasonable accommodation.

(c) Incorporation of General Regulations. These regulations governing discrimination on the basis of disability incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11065. Definitions.

As used in this article, the following definitions apply:

(a) "Assistive animal" means an animal that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) "Guide dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) "Signal dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) "Service dog," as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) "Support dog" or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.

(2) Minimum standards for assistive animals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace:

(A) is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces; and

(B) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace.

(3) A "support animal" may constitute a reasonable accommodation in certain circumstances. A support animal is one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. As in other contexts, what constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

(b) “Business Necessity,” as used in this article regarding medical or psychological examinations, means that the need for the disability inquiry or medical examination is vital to the business.

(c) “CFRA” means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this article “CFRA leave” means medical leave taken pursuant to CFRA.

(d) “Disability” shall be broadly construed to mean and include any of the following definitions:

(1) “Mental disability,” as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. “Mental disability” includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as “mental retardation”), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) “Physical disability,” as defined at Government Code section 12926, includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and

(B) limits a major life activity.

(C) “Disability” includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.

(3) A “special education” disability is any other recognized health impairment or mental or psychological disorder not described in section 11065(d) of this article, that requires or has required in the past special education or related services. A special education disability may include a “specific learning disability,” manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder, such as those for English language acquisition by persons whose first language was not English.

(4) A “record or history of disability” includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.

(5) A “perceived disability” means being “regarded as,” “perceived as” or “treated as” having a disability. Perceived disability includes:

(A) Being regarded or treated by the employer or other entity covered by this article as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or

(B) Being subjected to an action prohibited by this article, including non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

(6) A “perceived potential disability” includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) “Medical condition” is a term specifically defined at Government Code section 12926, to mean either:

(A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or

(B) a "genetic characteristic," as defined at Government Code section 12926. "Genetic characteristics" means:

1. Any scientifically or medically identifiable gene or chromosome, or combination or alteration of a gene or chromosome, or any inherited characteristic that may derive from a person or the person's family member, and

2. That is known to be a cause of a disease or disorder in a person or the person's offspring, or that is associated with a statistically increased risk of development of a disease or disorder, though presently not associated with any disease or disorder symptoms.

(8) A "Disability" is also any definition of "disability" used in the federal Americans with Disabilities Act of 1990 (ADA), and as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the FEHA's definition of disability.

(9) "Disability" does not include:

(A) excluded conditions listed in the Government Code section 12926 definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and "sexual behavior disorders," as defined at section 11065(q), of this article; or

(B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

(e) "Essential job functions" means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's or other covered entity's judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

(3) "Essential functions" do not include the marginal functions of the position. "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.

(f) "Family member," for purposes of discrimination on the basis of a genetic characteristic or genetic information, includes the individual's relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents.

(g) "FMLA" means the federal Family and Medical Leave Act of 1993 and its implementing regulations. For purposes of this section only, "FMLA leave" means medical leave taken pursuant to FMLA.

(h) "Genetic information," as defined at Government Code section 12926, means genetic information derived from an individual's or the individual's family members' genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual's family members.

(i) "Health care provider" means either:

(1) 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; or

(2) 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, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, 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.

(j) "Interactive process," as set forth more fully at California Code of Regulations, title 2, section 11069, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) "Job-related," as used in sections 11070, 11071 and 11072 means tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.

(*l*) "Major life activities" shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment "limits" a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is "difficult" is an individualized assessment, which may consider what most people in the general population can perform with little or no difficulty, what members of the individual's peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) "Limits" shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.

(m) A "medical or psychological examination" is a procedure or test performed by a health care provider that seeks or obtains information about an individual's physical or mental disabilities or health.

(n) "Mitigating measure" is a treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) "Auxiliary aids and services," which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) "Qualified individual," for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) "Reasonable accommodation" is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);

(N) Providing a reassignment to a vacant position, consistent with section 11068(d); and

(O) other similar accommodations.

(q) “Sexual behavior disorders,” as used in this article, refers to pedophilia, exhibitionism, and voyeurism.

(r) “Undue hardship” means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

(1) the nature and net cost of the accommodation needed under this article, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business;

(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the

employer or other covered entity; and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12940, 12945.1 and 12945.2, Government Code; Americans with Disabilities Act of 1990 (42 U.S.C. §12101, et seq.), as amended by the ADA Amendments Act of 2008 and its implementing regulations at 29 C.F.R. § 1630 et seq.; Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and its implementing regulations at 29 C.F.R. § 825 et seq.; and Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) and its implementing regulations at 34 C.F.R. § 300.8 et seq.

§ 11066. Establishing Disability Discrimination.

(a) An applicant or employee has the burden of proof to establish that the applicant or employee is a qualified individual capable of performing the essential functions of the job with or without reasonable accommodation. A description of how discrimination is established is provided in the regulations at section 11009(c).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11067. Defenses.

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Article 1 of Subchapter 2, at California Code of Regulations, title 2, section 11010, shall be applicable to this article.

(b) Health or Safety of an Individual with a Disability. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.

(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger the health or safety of others because the job imposes an imminent and substantial degree of risk to others.

(d) Future Risk. However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

(e) Factors to be considered when determining the merits of the defenses enumerated in section 11067(b)-(d) include, but are not limited to:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that potential harm will occur;

(4) the imminence of the potential harm; and

(5) consideration of relevant information about an employee’s past work history.

The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11068. Reasonable Accommodation.

(a) Affirmative Duty. An employer or other covered entity has an affirmative duty to make reasonable accommodation(s) for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.

(b) No elimination of essential job function required. Where a quality or quantity standard is an essential job function, an employer or other covered entity is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity.

(c) Paid or unpaid leaves of absence. When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation.

(d) Reassignment to a vacant position.

(1) As a reasonable accommodation, an employer or other covered entity shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified, under the following circumstances:

(A) if the employee can no longer perform the essential functions of his or her own position even with accommodation; or

(B) if accommodation of the essential functions of an employee's own position creates an undue hardship; or

(C) if both the employer and the employee agree that a reassignment is preferable to being provided an accommodation in the present position; or

(D) if an employee requests reassignment to gain access to medical treatment for his or her disabling condition(s) not easily accessible at the current location.

(2) No comparable positions. If there are no funded, vacant comparable positions for which the individual is qualified with or without reasonable accommodation, an employer or other covered entity may reassign an individual to a lower graded or lower paid position.

(3) Reassignment to a temporary position. Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, an employer or other covered entity may offer, and an employee may choose to accept or reject, a temporary assignment during the interactive process.

(4) The employer or other covered entity is not required to create a new position to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability.

(5) The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority system.

(e) Any and all reasonable accommodations. An employer or other covered entity is required to consider any and all reasonable accommodations of which it is aware or that are brought to its attention by the applicant or employee, except ones that create an undue hardship. The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to select and implement an accommodation that is effective for both the employee and the employer or other covered entity.

(f) An employer shall not require a qualified individual with a disability to accept an accommodation and shall not retaliate against an employee for refusing an accommodation. However, the employer or other covered entity may inform the individual that refusing an accommodation may render the individual unable to perform the essential functions of the current position.

(g) Reasonable Accommodation for the Residual Effects of a Disability. An individual with a record of a disability may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the residual effects of the disability. For example, an employee may need a leave or a schedule change to permit him or her to attend follow-up or monitoring appointments with a health care provider.

(h) Accessibility Standards. To comply with section 11065(p)(2)(A), of this article, the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, Title 24, pursuant to Chapter 7, Division 5 of Title 1 of the Government Code (commencing with Government Code section 4450), and Part 5.5 of Division 13 of the Health and Safety Code (commencing with Health and Safety Code section 19955).

(i) An employer or other covered entity shall assess individually an employee's ability to perform the essential functions of the employee's job either with or without reasonable accommodation. In the absence of an individualized assessment, an employer or other covered entity shall not impose a "100 percent healed" or "fully healed" policy before the employee can return to work after an illness or injury.

(j) It is a permissible defense to a claim alleging a failure to provide reasonable accommodation for an employer or other covered entity to prove that providing accommodation to an applicant or employee with a disability would have created an undue hardship.

(k) It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on mental or physical disability, regardless of whether the employer granted the request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11069. Interactive Process.

(a) Interactive Process. When needed to identify or implement an effective, reasonable accommodation for an employee or applicant with a disability, the FEHA requires a timely, good faith, interactive process between an employer or other covered entity and an applicant, employee, or the individual's representative, with a known physical or mental disability or medical condition. Both the employer or other covered entity and the applicant, employee or the individual's representative shall exchange essential information identified below without delay or obstruction of the process.

(b) Notice. An employer or other covered entity shall initiate an interactive process when:

(1) an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodations, or

(2) the employer or other covered entity otherwise becomes aware of the need for an accommodation through a third party or by observation, or

(3) the employer or other covered entity becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, for the employee's own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that further accommodation is still necessary for recuperative leave or other accommodation for the employee to perform the essential functions of the job. An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, title 2, section 11091(b)(1) & (b)(2)(A)1., prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."

(c) Obligations of Employer or Other Covered Entity. An employer or other covered entity shall engage in a timely, good faith, interactive process as follows:

(1) The employer or other covered entity shall either grant the applicant's or employee's requested accommodation, or reject it after due consideration, and initiate discussion with the applicant or employee regarding alternative accommodations.

(2) When the disability or need for reasonable accommodation is not obvious, and the applicant or employee has not already provided the employer or other covered entity with reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation, the employer or other covered entity may require the applicant or employee to provide such reasonable medical documentation.

(3) When the employer or other covered entity has received reasonable medical documentation, it shall not ask the applicant or employee about the underlying medical cause of the disability, but may require medical information, as set forth in section 11071 below, and second opinions from other health care providers.

(4) If information provided by the applicant or employee needs clarification, then the employer or other covered entity shall identify the issues that need clarification, specify what further information is needed, and allow the applicant or employee a reasonable time to produce the supplemental information.

(5) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity shall analyze the particular job involved and the essential functions of the job.

(6) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity may consult experts.

(7) In consultation with the applicant or employee to be accommodated, the employer or other covered entity shall identify potential accommodations and assess the effectiveness each would have in enabling the applicant to have an equal opportunity to participate in the application process and to be considered for the job; or for the employee to perform the essential function of the position held or desired or to enjoy equivalent benefits and privileges of employment compared to non-disabled employees.

(8) The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to implement an accommodation that is effective in allowing the applicant or employee to perform the essential functions of the job.

(9) If reassignment to an alternate position is considered as an accommodation, the employer or other covered entity may ask the employee to provide information about his or her educational qualifications and work experience that may help the employer find a suitable alternative position for the employee, and shall comply with section 11068(d).

(d) Obligations of Applicant or Employee. The applicant or employee shall cooperate in good faith with the employer or other covered entity, including providing reasonable medical documentation where the disability or the need for accommodation is not obvious and is requested by the employer or other covered entity, as follows:

(1) Reasonable medical documentation confirms the existence of the disability and the need for reasonable accommodation. Where necessary to advance the interactive process, reasonable medical documentation may include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee. Disclosure of the nature of the disability is not required.

(2) If reassignment to an alternate position is considered as an accommodation, the employee shall provide the employer or other covered entity information about his or her educational qualifications and work experience that may help the employer or other covered entity find a suitable alternative position for which the employee is qualified and for which the employee can perform the essential functions.

(3) An employee's mental or physical inability to engage in the interactive process shall not constitute a breach in either the employee's or the employer's obligation to engage in a good faith interactive process.

(4) Direct communications between the employer or other covered entity and the applicant or employee rather than through third parties are preferred, but are not required.

(5) Required medical information. Where the existence of a disability and/or the need for reasonable accommodation is

not obvious, an employer or other covered entity may require an applicant or employee to obtain and provide reasonable medical documentation from a health care provider that sets forth the following information:

(A) The name and credentials of the health care provider, which establish that the individual falls within the definition of "health care provider" under section 11065(i), of these regulations.

(B) That the employee or applicant has a physical or mental condition that limits a major life activity or a medical condition, and a description of why the employee or applicant needs a reasonable accommodation to have an equal opportunity: to participate in the application process and to be considered for the job, or to perform the employee's job duties, or to enjoy equal benefits and privileges of employment compared to non-disabled employees. The employer or other covered entity shall not ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records, because those records may contain information unrelated to the need for accommodation.

(C) If an applicant or employee provides insufficient documentation in response to the employer's or other covered entity's initial request, the employer or other covered entity shall explain why the documentation is insufficient and allow the applicant or employee an opportunity to provide supplemental information in a timely manner from the employee's health care provider. Thereafter, if there is still insufficient documentation, the employer may require an employee to go to an appropriate health care provider of the employer's or other covered entity's choice.

1. Documentation is insufficient if it does not specify the existence of a FEHA disability and explain the need for reasonable accommodation. Where relevant, such an explanation should include a description of the applicant's or employee's functional limitation(s) to perform the essential job functions.

2. Documentation also might be insufficient where the health care provider does not have the expertise to confirm the applicant's or employee's disability or need for reasonable accommodation, or other objective factors indicate that the information provided is not credible or is fraudulent.

(6) If an applicant or employee provides insufficient documentation, as described above, an employer or other covered entity still must provide reasonable accommodation but only to the extent the reasonable accommodation is supported by the medical documentation provided to date. If the medical documentation provided to date does not support any reasonable accommodation, no reasonable accommodation need be required. If supplemental medical documentation supports a further or additional reasonable accommodation, then such further or additional reasonable accommodation shall be provided.

(7) Any medical examination conducted by the employer's and other covered entity's health care provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation.

(8) If an employer or other covered entity requires an employee to go to a health care provider of the employer's or other covered entity's choice, the employer or other covered entity shall pay all costs and allow the employee time off for the visit(s). An employee may use sick leave for the time off.

(9) If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced-schedule basis for planned medical treatment of the employee's disability, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

(10) If an employee requests leave on an intermittent or reduced-schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

(e) If an employee requests permission to bring an assistive animal into the workplace as a reasonable accommodation, prior to allowing the animal to be in the workplace, the employer may require that the employee supply:

(1) a letter from the employee's health care provider stating that the employee has a disability and explaining why the employee requires the presence of the assistive animal in the workplace (e.g., why the animal is necessary as an accommodation to allow the employee to perform the essential functions of the job); and

(2) confirmation that the animal meets the standards set forth in section 11065(a)(2). Such confirmation may include information provided by the individual with a disability. The employer may challenge that the animal meets that standards set forth in section 11065(a)(2) within the first two weeks the assistive animal is in the work place based on objective evidence of offensive or disruptive behavior. An employer may require an annual recertification from the employee of the continued need for the animal.

(f) For reasonable accommodations extending beyond one year, employers may ask for medical documents substantiating the need for continued reasonable accommodations on a yearly basis.

(g) Maintenance and Confidentiality of Medical Files. Medical information and/or records obtained during the interactive process shall be maintained on separate forms, and in medical files separate from the employee's personnel file, and shall be kept confidential, except that:

(1) supervisors and managers may be informed of restriction(s) on the work or duties of employees with disabilities and necessary reasonable accommodations; and

(2) first aid and safety personnel may be informed, where appropriate, that the condition may require emergency treatment; and

(3) government officials investigating compliance with this subchapter shall be provided relevant information on request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) "Do you have any particular disabilities?"

(B) "Have you ever been treated for any of the following diseases or conditions?"

(C) "Are you now receiving or have you ever received workers' compensation?"

(D) "What prescription medications are you taking?"

(E) "Have you ever had a job-related injury or medical condition?"

(F) Have you ever left a job because of any physical or mental limitations?

(G) "Have you ever been hospitalized?"

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11071. Medical and Psychological Examinations and Inquiries.

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual’s physical or mental conditions or health but does not include testing for current illegal drug use.

(b) Post-Offer. An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee’s entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

(c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical and Psychological Examinations and Disability-Related Inquiries during Employment.

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees so long as the inquiries are both job-related and consistent with business necessity.

(2) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has

participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers or medical requirements for airline pilots.

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 11069(g).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11072. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use qualification standards, employment tests, or other selection criteria based on an applicant's or employee's uncorrected vision or uncorrected hearing unless the standards, tests, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills affected by disability are the criteria that the tests purport to measure. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code; GINA, 42 U.S.C. §2000ff-1(b).

§ 11073. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

Article 10. Age Discrimination

§ 11074. General Prohibition Against Discrimination on the Basis of Age over the Age of Forty.

(a) Statement of Purpose. The purpose of the law prohibiting age discrimination in employment is to guarantee all protected individuals 40 or over employment opportunities commensurate with their abilities. These regulations are promulgated to assure that employment opportunities for those protected persons over the age of 40 are based upon their abilities and are not conditioned upon age-based stereotypes and unsupported generalizations about their qualifications or job performance. In addition, these regulations are promulgated to clarify when the use of mandatory retirement programs that are based upon age over the age of 40 is unlawful.

(b) Incorporation of General Regulations. These regulations pertaining to discrimination on the basis of age incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless a provision is specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940, 12941 and 12942, Government Code.

§ 11075. Definitions.

As used in this article the following definitions of terms apply, unless the context in which they are used indicates otherwise:

(a) "Age-based stereotype" refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty.

(b) "Basis of age" or "ground of age" refers to age over 40.

(c) "Collective bargaining agreement" refers to any collective bargaining agreement between an employer and a labor organization that is in writing.

(d) "Employer" refers to all employers, public and private, as defined in Government Code Section 12926.

(e) "Employment benefit" refers to employment benefit as defined in section 11008(g). It also includes a workplace free of harassment as defined in section 11019(b) of Subchapter 2.

(f) "Normal retirement date or NRD" refers to one of the following dates:

(1) for employees participating in a private employee pension plan regulated under the federal Employee Retirement Income Security Act of 1974, the NRD refers to the time a plan participant reaches normal retirement age under the plan or refers to the later of either the time a plan participant reaches 65 or the 10th anniversary of the time a plan participant commenced participation in the plan;

(2) for employees not described under (1) whose employers have a written retirement policy or whose employers are parties to a collective bargaining agreement that specifies retirement practices, the NRD refers to the normal retirement time or age specified in such a policy or agreement; or

(3) for employees not described under either (1) or (2) the NRD refers to the last calendar day of the month in which an employee reaches his or her 70th birthday.

(g) "Over 40" refers to the chronological age of an individual who has reached his or her 40th birthday.

(h) "Private employer" refers to all employers not defined in subsection (d) above.

(i) "Public employer" refers to public agencies as defined in Government Code Section 31204.

(j) "Retirement or Pension Program" refers to any plan, program or policy of an employer that is in writing and has been communicated to eligible or affected employees, which is intended to provide an employee with income upon retirement (this may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual Retirement Accounts, employee stock ownership plans, matching thrift plans, or stock bonus plans or other forms of defined benefit or defined contribution plans).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12941(a) and 12942, Government Code.

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant's or employee's age over 40 was considered in the denial of an employment benefit.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship

training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual or individuals over 40.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12926(c), (d) and (e), and 12941, Government Code.

§ 11077. Defenses.

(a) Defenses. Generally. In addition to any other defense provided herein, once an inference of employment discrimination on the basis of age has been established, an employer or other covered entity may prove one or more appropriate defenses as generally set forth in section 11010 of subchapter 2.

(b) Specific Defenses, Exemptions, Permissible Practices. An employment practice that discriminates on the basis of age is permissible, exempted, or has a valid defense:

(1) If the practice is otherwise mandated or permitted by federal or state law that preempts, supersedes, or otherwise takes precedence over the Act;

(2) If the practice, at the time it occurred, was deemed lawful by the terms of one or more sections of this article;

(3) If the practice is declared by one or more sections of this article to be permissible or lawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

§ 11078. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Recruitment. The provisions of section 11016(a) are applicable and are incorporated by reference herein.

Generally, during recruitment it is unlawful for employers to refuse to consider applicants because they are over 40 years of age. However, it is lawful for an employer to participate in established recruitment programs with high schools, colleges, universities and trade schools. It is also lawful for employers to utilize temporary hiring programs directed at youth, even though such programs traditionally provide disproportionately few applicants who are over 40. However, exclusive screening and hiring of applicants provided through the above recruitment or temporary programs will constitute discrimination on the basis of age if the programs are used to evade the Act's prohibition against age discrimination.

(2) Advertising. It is unlawful for an employer to either express a preference for individuals under 40 or to express a limitation against individuals over 40 when advertising employment opportunities by any means such as the media, employment agencies, and job announcements.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

§ 11079. Pre-Employment Inquiries, Interviews and Applications.

(a) Pre-Employment Inquiries. Pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age are unlawful. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.)

Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(b) Applications. It is discrimination on the basis of age for an employer or other covered entity to reject or refuse to seriously and fairly consider the application form, pre-employment questionnaire, oral application or the oral or written inquiry of an individual because such individual is over 40. (See section 11016(c), which is applicable and incorporated by reference herein.)

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941, Government Code.

§ 11080. Physical or Medical Examination of Applicants and Employees.

(a) It is not a violation of this article for an employer to require an applicant who is over 40 to undergo physical or medical examinations to determine whether or not the applicant meets the job-related physical or medical standards for the position sought so long as such examinations are uniformly and equally required of all applicants for the position, regardless of their age.

(b) It is not a violation of this article for an employer to require an employee who is over 40 to undergo a physical or medical examination at reasonable times and intervals and at the expense of the employer to determine whether or not the employee continues to meet the job-related physical or medical standards for the position held so long as such examinations are uniformly and equally required of all similarly situated employees in the particular job class regardless of their age.

(c) It is discrimination based on age to require an applicant or employee over 40 to meet physical or medical examination standards which are higher than those standards applied to applicants or employees who are below the age of 40 and are seeking or holding the same job.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941(a), Government Code.

§ 11081. Employee Selection.

(a) Selection. So long as age is not a factor, this article does not preclude an employer from selecting an individual who is in fact better qualified than other applicants, and it does not preclude an employer from hiring an individual on the basis of experience and training superior to other applicants.

(b) Selection Based Upon Seniority or Prior Service. So long as age is not a factor, it is not a violation of this article for an employer, during the process of selection, to give a candidate who has a record of seniority or time in prior service with that employer preference over a candidate who has no such record or who has less seniority or time in prior service with that employer. However, where candidates for hire have the same record of seniority or time in prior service, it is discrimination based on age, in selecting from among them, to refuse to select a candidate because he or she is over 40.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941, Government Code.

§ 11082. Promotions.

(a) In selecting a candidate for promotion, it is not, itself, a violation of this article, for an employer to limit the group of eligible candidates to members of the employer's existing workforce or to give a preference in selection to an incumbent employee over a candidate who is not an incumbent employee. However, in evaluating or selecting candidates for promotion from among its existing workforce, it is discrimination on the basis of age for an employer to evaluate unequally or to fail to select a candidate who is over 40 because of the age of the candidate.

(b) In selecting a candidate for promotion, it is not, itself, a violation of this article for an employer to promote a candidate under the age of 40 in preference to a candidate over 40 on the basis of the superior experience and training of the younger candidate, or on the basis of other legitimate reasons, so long as age is not a factor.

(c) It is discrimination on the basis of age for an employer to deny an employee the opportunity to gain the experience and training necessary to achieve promotion, because such employee is over 40.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12942(a), Government Code.

§ 11083. Terms, Conditions and Privileges of Employment. (Reserved.)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

§ 11084. Retirement Practices.

(a) Mandatory Retirement - Generally. Generally, it is discrimination on the basis of age for a private employer to discharge or force the retirement of an employee because such employee has reached a certain chronological age over 40.

(b) Retirement Plans Generally. Generally, any provision in a private employer's retirement plan, pension plan, collective bargaining agreement or similar plan or agreement that requires mandatory retirement of an employee over 40 years of age is unlawful.

(c) Mandatory Retirement Permitted. Mandatory retirement of the following employees is not unlawful:

(1) Any employee who has attained 65 years of age and who for the two year period immediately prior to retirement, was employed in a bona fide executive or high policymaking position, providing that at the time of mandatory retirement, the employee is entitled to receive an immediate non-forfeitable annual retirement benefit from the current employer, which equals a minimum of $27,000.00, and is either derived from one or a combination of plans such as profitsharing, pension, savings, or deferred compensation plans.

(2) Any employee who has attained 70 years of age and is a physician employed by a professional medical corporation, the articles or bylaws of which provide for compulsory retirement.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

§ 11085. Procedures for Continuing in Employment Past the Normal Retirement Date.

Where a private employer has a private pension or retirement program, the following procedures apply:

(a) Advisory Notice by the Employer. Private employers must advise their employees who are nearing their normal retirement date that if they intend to continue in employment beyond their NRD, they must file a written notice of this intention. The employer's advisory notice should be in writing and should be provided to the employee no later than 90 days prior to the NRD and no earlier than 180 days prior to the NRD. The advisory notice to the employee must clearly indicate when his or her continuation notice, as described in subsection (b), must be submitted.

(b) Continuation Notice by the Employee. An employee of a private employer who wishes to continue working beyond his or her NRD must provide a written notification of this intention to the employer not more than 45 days after the employee receives an advisory notice from the employer as described in subsection (a).

(c) Notice by Employee Following the Normal Retirement Date. An employee continuing in employment past the normal retirement date has an obligation to provide his or her private employer with written notice in advance of the date on which he or she intends to retire from employment. Such notice of retirement should be provided at a reasonable time, no later than 60 days prior to the employee's anticipated date of retirement.

(d) Notice by Private Employer Following the Normal Retirement Date. Where an employee continues in employment beyond his or her NRD, a private employer does not violate this article by periodically sending a written notice to such employee seeking to determine if the employee intends to continue in employment. However, the initial notice of this kind should not be sent to the employee until at least two years following his or her normal retirement date has elapsed. Subsequent thereto, the notice should not be sent more frequently than on an annual basis.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12942, Government Code.

§ 11086. Termination and Disciplinary Actions.

(a) It is not a violation of this article for an employer to terminate, discharge, dismiss, demote or otherwise discipline an employee over 40 who fails to perform the normal functions of his or her position or who fails to conform to the bona fide requirements of his or her position, so long as the performance standards and job requirements do not discriminate against employees over 40.

(b) Where an employee is continuing in employment beyond his or her normal retirement date, it is not a violation of this article for an employer to terminate, force the retirement of, or otherwise discipline such an employee if the employee's job performance no longer satisfies the employer's performance standards. Any such performance standards for quality of work must not be arbitrary and must not be based upon the age of the employee.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12941 and 12942, Government Code.

Article 11. California Family Rights Act

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal regulations that became effective March 8, 2013 interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) shall also apply to this article, to the extent that they are not inconsistent with the following definitions:

(a) "Certification" means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse, or a medical leave for the employee's own serious health condition.

(1) For family care leave for the employee's child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in Government Code section 12945.2.

(A) the date, if known, on which the serious health condition commenced,

(B) the probable duration of the condition,

(C) an estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse, and

(D) a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.

1. "Warrants the participation of the employee," within the meaning of Government Code section 12945.2, includes, but is not limited to, providing psychological comfort and arranging third party care for the child, parent or spouse, as well as directly providing, or participating in, the medical care.

(2) For medical leave for the employee's own serious health condition, this certification need not, but may, at the employee's option, identify the serious health condition involved. Any certification shall contain the information identified in Government Code section 12945.2, as is demonstrated in section 11097 of these regulations. For purposes of the certification "unable to perform the function of his or her position" means that an employee is unable to perform any one or more of the essential functions of his or her position. The certification shall contain:

(A) The date, if known, on which the serious health condition commenced,

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position.

(b) "CFRA" means the Moore-Brown-Roberti California Family Rights Act of 1993. (California Family Rights Act, Gov. Code, §§ 12945.1-12945.2.) "CFRA leave" means family care or medical leave taken pursuant to CFRA.

(c) "Child" means a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, or a child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of Government Code section 12926(j) and (l).

(1) "In loco parentis" means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. It does not require a biological or legal relationship.

(d) "Covered employer" means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs 50 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full-time. "Employer" as used in these regulations means "covered employer."

(1) “Directly employs” means that the employer maintains an aggregate of at least 50 part or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase “current or preceding calendar year” refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(2) “Perform services for a wage or salary” excludes independent contractors as defined in the Labor Code, but includes persons who are compensated in whole or in part by commission.

(3) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(A) Where there is an arrangement between employers to share an employee’s services or to interchange employees;

(B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(C) Where the employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(e) “Eligible employee” means a full- or part-time employee working in California who has been employed for a total of at least 12 months (52 weeks) with the employer at any time prior to the commencement of a CFRA leave, and who has actually worked (within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave is to commence.

(1) Once the employee meets these two eligibility criteria and takes a leave for a qualifying event, the employee does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same qualifying event during the employee’s 12-month leave period.

(2) Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. Nothing in this section prevents an employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly, with respect to all employees with similar breaks in service.

(3) For an employee who takes a pregnancy disability leave, and who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of pregnancy disability leave, not the first day of the subsequent CFRA leave for reason of the birth of her child.

(4) In order to be eligible, the employee must also work for an employer who maintains on the payroll, as of the date the employee gives notice of the need for leave, at least 50 part- or full-time employees within 75 miles, measured in surface miles, using surface transportation, of the worksite where the employee requesting the leave is employed. A worksite can refer to either a single location or a group of contiguous locations.

(A) For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, for the purpose of counting 50 employees, if a salesperson works from home in California, but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.

(B) When an employee is jointly employed by two or more employers, the employee’s worksite is the primary employer’s office from which the employee is assigned or reports, unless the employee has physically worked for at

least one year at a facility of a secondary employer, in which case the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.

(C) Once the employee meets this eligibility criterion and gives notice of the need for a leave, the employer may not deny the leave, cut short the leave, or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period, even if the number of employees within the relevant 75-mile radius falls below 50. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event.

(5) If an employee is not eligible for CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which he/she is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

(f) "Employment in the same position" means employment in, or reinstatement to, the original position the employee held prior to taking a CFRA leave.

(g) "Employment in a comparable position" means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar

duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term "equivalent position" in FMLA and its implementing regulations.

(h) "Family care leave" means either:

(1) Leave of up to a total of 12 workweeks in a 12-month period for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave; or

(2) Leave of up to a total of 12 workweeks in a 12-month period to care for a child, parent, or spouse of the employee who has a serious health condition, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave.

(i) "FMLA" means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. Part 825 that became effective March 8, 2013. "FMLA leave" means family care or medical leave taken pursuant to FMLA.

(j) "Health care provider" means either:

(1) an individual holding either a physician's and surgeon's certificate issued pursuant to Article 4 (commencing with section 2080) of Chapter 5 of Division 2 of the Business and Professions Code or an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the serious health condition, or

(2) any other person who meets the definition of others "capable of providing health care services," as set forth in FMLA and its implementing regulations.

(k) "Key employee" means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer's employees who are employed within 75 miles of the employee's worksite at the time of the leave request, as

described in Government Code section 12945.2.

(*l*) “Medical leave” means leave of up to a total of 12 workweeks in a 12-month period because of an employee’s own serious health condition that makes the employee unable to work at all or unable to perform any one or more of the essential functions of the position of that employee. The term “essential functions” is defined in Government Code section 12926. “Medical leave” does not include leave taken for an employee’s pregnancy disability, as defined in (n) below, except as specified below in section 11093(c)(1).

(m) “Parent” means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child. Parent does not include a parent-in-law.

(n) “Pregnancy disability leave” means a leave taken for disability on account of pregnancy, childbirth, or a related medical condition, pursuant to Government Code section 12945 and defined in section 11035(r) of the regulations.

(o) “Reason of the birth of a child,” within the meaning of Government Code section 12945.2 and these regulations includes, but is not limited to, bonding with a child after birth.

(p) “Reinstatement” means the return of an employee to the position that the employee held prior to CFRA leave, or a comparable position, and is synonymous with “restoration” within the meaning of FMLA and its implementing regulations.

(q) “Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.

(1) “Inpatient care” means a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an “inpatient” when a heath care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

(2) “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.

(3) “Continuing treatment” means ongoing medical treatment or supervision by a health care provider, as detailed in section 11097 of these regulations.

(r) “Spouse” means a partner in marriage as defined in Family Code section 300 or a registered domestic partner, within the meaning of Family Code sections 297 through 297.5. As used in this article and the Family Code, “spouse” includes same-sex partners in marriage.

(s) “Twelve workweeks” means the equivalent of 12 of the employee’s normally scheduled workweeks. (See also section 11090(c).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; *J.E. Robinson v. FEHC* (1992) 2 Cal.4th 226 [5 Cal.Rptr.2d 782]; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11088. Right to CFRA Leave: Denial of Leave; Reasonable Request; Permissible Limitation.

(a) It is an unlawful employment practice for a covered employer to refuse to grant, upon reasonable request, a CFRA leave to an eligible employee, unless such refusal is justified by the permissible limitation specified below in subdivision (c).

(b) Denial of leave.

(1) Burden of proof.

Denial of a request for CFRA leave is established if the Department or the employee shows, by a preponderance of the evidence, that the employer was a covered employer, the employee making the request was an eligible employee, the request

was for a CFRA-qualifying purpose, the request was reasonable, and the employer denied the request for CFRA leave.

(2) Reasonable request.

A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements, as specified in section 11091, and if it is accompanied, where required, by a certification, as that term is defined in section 11087(a).

(c) Limitation on Entitlement.

If both parents are eligible for CFRA leave but are employed by the same employer, that employer may limit leave for the birth, adoption or foster care placement of their child to a combined total of 12 workweeks in a 12-month period between the two parents. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11089. Right to Reinstatement: Guarantee of Reinstatement; Rights upon Return; Refusal to Reinstate; Permissible Defenses.

(a) Guarantee of Reinstatement.

(1) Upon granting the CFRA leave, the employer shall inform the employee of its guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 11089(d), and shall provide the guarantee in writing upon request of the employee.

(2) It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to reinstate the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(d).

(A) An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(B) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

(b) Rights upon Return.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(1) Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee.

(2) CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act (FEHA).

(c) Refusal to Reinstate.

(1) Definite Date of Reinstatement.

Where a definite date of reinstatement has been agreed upon at the beginning of the leave, a refusal to reinstate is established

if the Department or employee proves, by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon.

(2) Change in Date of Reinstatement.

If the reinstatement date differs from the employer's and employee's original agreement, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the employer failed to reinstate the employee to the same or a comparable position within two business days, where feasible, after the employee notifies the employer of his or her readiness to return.

(d) Permissible Defenses.

(1) Employment Would Have Ceased or Hours Would Have Been Reduced.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed on the requested reinstatement date in order to deny reinstatement. As per (a)(1) of this section, this burden shall not be satisfied if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(A) If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(B) If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

(2) "Key Employee."

An employer may refuse to reinstate a "key employee," as defined in section 11087(k) of these regulations, to his or her same position or to a comparable position only if the employer establishes, by a preponderance of the evidence, that all of the following conditions exist:

(A) The employee requesting the CFRA leave is a salaried employee. As used in Government Code section 12945.2 (r), "salaried employee" means an employee paid on a salary basis.

(B) The employee requesting the leave is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request. Whether an employee is "among the highest paid 10 percent," pursuant to Government Code section 12945.2, is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer's employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

(C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer. A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

(D) An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA leave (or when CFRA leave commences, if earlier) that he or she is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable

after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(E) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA leave (or who is on CFRA leave), the employer shall notify the employee in writing that it cannot deny CFRA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

(F) If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

(G) After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

(3) Fraudulently-obtained CFRA Leave.

An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA's job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11090. Computation of Time Periods: Twelve Workweeks; Minimum Duration.

(a) CFRA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period.

(b) If the leave is common to both CFRA and FMLA, this 12-month period will run concurrently with the 12-month period under FMLA. An employer may choose any of the methods (the calendar year, any fixed 12-month "leave year," the 12-month period measured forward from the date any employee's first CFRA leave begins, or a "rolling" 12-month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations that became effective March 8, 2013, 29 C.F.R. Part 825, section 825.200, subdivision (b), for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA leave of its chosen method. If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.

(c) "Twelve workweeks" as that term is defined in section 11087(s), means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of CFRA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the

employee took leave of any type) shall be used for calculating the employee's leave entitlement.

(1) For example, for a full-time employee who works five eight-hour days per week, 12 workweeks means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, 12 workweeks may mean 30 eight-hour days or 60 four-hour days, or 12 workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, 12 workweeks means 72 working and/or paid eight-hour days of leave entitlement.

(2) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee needs physical therapy that requires an absence from work of two hours a week, only those two hours may be charged against the employee's CFRA leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

(3) If a holiday falls within a week taken as CFRA leave, the week is nevertheless counted as a week of CFRA leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's CFRA entitlement. Similarly, if an employee uses CFRA leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's CFRA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

(4) If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

(5) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA, and prior to the employee notice of need for CFRA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the birth, adoption, or foster care placement of a child: CFRA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee. The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks.

(e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health condition of a parent, child, or spouse or for the serious health condition of the employee: Where CFRA leave is taken for a serious health condition of the employee's child, parent, or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, intermittent or reduced work schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if he or she does not receive treatment by a health care provider. An employer must limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour.

(1) If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate

recurring periods of leave than the employee's regular job. It need not have equivalent duties, although an employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or a reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

(2) CFRA leave, including intermittent leave and/or reduced work schedules, is available to instructional employees of educational establishments and institutions under the same conditions as apply to all other eligible employees.

(3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee shall be permitted to return to work if he or she is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule, provided the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; DLSE Opinion Letter 03.12.2002; DLSE Opinion Letter 04.08.2002; Stats. 1993, ch. 827 (AB 1460), § 2; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11091. Requests for CFRA Leave: Advance Notice; Certification; Employer Response.

(a) Advance Notice.

(1) Verbal Notice.

Unless an employer waives its employees' notice obligations described herein, an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, provided the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information). An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.

(A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee or the employee's spokesperson, and to give notice of the designation to the employee.

(B) Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.

(2) 30 Days' Advance Notice.

An employer may require that employees provide at least 30 days' advance notice before CFRA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. The employee shall consult with the employer and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the operations of the employer. Any such scheduling, however, shall be subject to the approval of the

health care provider of the employee or the employee's child, parent or spouse.

(3) When 30 Days Not Practicable.

If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

(4) Prohibition against Denial of Leave in Emergency or Unforeseeable Circumstances.

An employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, so long as the employee provided notice to the employer as soon as practicable.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements that it adopts. The employer may incorporate its notice requirements in the general notice requirements in section 11095 and such incorporation shall constitute reasonable advance notice. Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.

(6) Employer Response to Leave Request.

The employer shall respond to the leave request as soon as practicable and in any event no later than five business days after receiving the employee's request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(b) Medical Certification.

(1) Serious Health Condition of Child, Parent, or Spouse.

As a condition of granting a leave for the serious health condition of the employee's child, parent or spouse, the employer may require certification of the serious health condition, as defined in section 11087(a)(1). If the certification satisfies the requirements of section 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(2) Serious Health Condition of Employee.

As a condition of granting a leave for the serious health condition of the employee, the employer may require certification of the serious health condition, as defined in section 11087(a)(2). Upon expiration of the time period the health care provider originally estimated the employee needed for his/her own serious health condition, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(A) If the employer has a good faith, objective reason to doubt the validity of the certification the employee provides for his/her own serious health condition, the employer may require, at the employer's own expense, the employee to obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information in the certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer.

1. The employer may not ask the employee to provide additional information (e.g. symptoms, diagnosis, etc.) in the medical certification beyond that allowed by these regulations.

2. The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(B) In any case in which the second opinion described in (b)(2)(A) differs from the opinion in the original certification,

the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by both the employer and the employee, concerning any information in the certification.

(C) The opinion of the third health care provider concerning the information in the certification shall be considered to be final and shall be binding on the employer and the employee.

(D) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee.

(E) As a condition of an employee's return from medical leave, the employer may require the employee to obtain a release to return-to-work from his/her health care provider stating that he/she is able to resume work, but only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability and there is no collective bargaining agreement forbidding the practice. An employer is not entitled to a release to return-to-work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return-to-work for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

(F) An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee's return. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity, in accordance with section 11071 of these regulations.

(3) Providing Certification.

The employer may require that the employee provide any certification within no less than 15 calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts. This means that, in some cases, the leave may begin before the employer receives the certification. Absent extenuating circumstances (e.g., unavailability of healthcare provider), if the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. The same rules apply to recertification. If the employee never produces the certification or recertification, the leave is not CFRA leave. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of his or her failure to provide adequate certification.

Note: Authority cited: Section 12935, Government Code. Reference: Section 12945.2, Government Code; *White v. County of Los Angeles* (2014) 225 Cal.App.4th 690; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11092. Terms of CFRA Leave.

(a) The following rules apply to the permissible terms of a CFRA leave, to the extent that they are consistent with the requirements of the Employee Retirement Income Security Act (ERISA). Nothing in these regulations infringes on the employer's obligations, if any, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) or prohibits an employer from granting CFRA leave on terms more favorable to the employee than those listed below.

(b) Paid Leave.

An employer is not required to pay an employee during a CFRA leave except:

(1) An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave. An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

(2) For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy,

during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(3) An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(4) Only if the employee requests leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including PTO) that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave, the leave will not count against the employee's CFRA leave entitlement.

(A) If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.

1. If the employer denies the employee's request and the employee then provides information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may inquire further into the reasons for the absence. If the absence is CFRA-qualifying, then the rules in section 11092(b)(1) and (2), above, apply.

(5) An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off instead of using CFRA leave provided by this section.

(c) Provision of Health Benefits.

If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave, FMLA leave, or both. The following rules apply:

(1) The employer shall maintain and pay for an employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had not taken CFRA leave.

(2) The employer's obligation commences on the date leave first begins under CFRA for the duration of the leave, up to a maximum of 12 workweeks in a 12-month period. As section 11044(c) of the Council's pregnancy disability leave regulations state, "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."

(3) A "group health plan" is as defined in section 5000(b)(1) of the Internal Revenue Code of 1986. If the employer's group health plan includes dental care, eye care, mental health counseling, or other types of coverage, or if it includes coverage for an employee's dependents as well as for the employee, the employer shall also continue this coverage.

(4) Although the employer's obligation to continue group health benefits under either FMLA or CFRA, or both, does not exceed 12 workweeks in a 12-month period, nothing shall preclude the employer from maintaining and paying for health care coverage for longer than 12 workweeks.

(5) An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have failed to return from leave if he/she works less than 30 days after returning from CFRA leave. An employee who retires during CFRA leave or during the first 30 days after returning is deemed to have returned from leave.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a

serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.

(6) Group health plan coverage must be maintained for an employee on CFRA leave until:

(A) The employee's CFRA leave entitlement is exhausted;

(B) The employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the period of the CFRA leave; or

(C) The employee provides unequivocal notice of intent not to return to work.

(d) Employee Payment of Group Health Benefit Premiums.

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

(1) If CFRA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

(2) If CFRA leave is unpaid, the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave is foreseeable).

(3) Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

(A) The employer may recover the employee's share of any premium payments missed by the employee for any CFRA leave period during which the employer maintains health coverage by paying the employee's share.

(B) Regardless of whether an employee pays premiums while on CFRA leave, all other obligations of an employer under CFRA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

(C) If an employer terminates an employee's health benefits coverage in accordance with this section because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(e) Other Benefits and Seniority.

During the period of CFRA leave, the employee is entitled to accrual of seniority and to participate in health plans for any additional period of leave not covered by (c) above; in any employee benefit plans, including life, short-term or long-term disability or accident insurance; pension and retirement plans; and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave.

(1) Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes shall be compared to other unpaid personal leaves offered by the employer. CFRA leave shall not constitute a break in service or cause the employee to lose seniority, even if other paid or unpaid leave constitutes a break in service for purposes of establishing longevity or seniority, or for layoff, recall, promotion, job assignment, or seniority-related benefits.

(2) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on CFRA leave, the employer must give written notice to the employee that he or she is subject to the new or changed plan/benefits to the same extent as if the employee were not on leave.

(f) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement that requires or authorizes any other type of unpaid personal or disability leave or if the employer's other unpaid personal or disability leaves do not allow for the continuation of benefits during these leaves, an employee taking a CFRA leave shall be entitled to continue to participate in the employer's health plans, pension and retirement plans, supplemental unemployment benefit plans or any other health and welfare employee benefit plan, in accordance with the terms of those plans, during the period of the CFRA leave.

(1) As a condition of continued coverage of group medical benefits (beyond the employer's obligation during the 12-week period described above in (c)), life insurance, short- or long-term disability plans or insurance, accident insurance, or other similar health and welfare employee benefit plans during any unpaid portion of the leave, the employer may require the employee to pay premiums at the group rate.

(A) If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.

(2) An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of time accrued under any such plan during any unpaid portion of the CFRA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of these plans, during the unpaid portion of the leave period.

(g) Employee Status.

The employee shall retain employee status during the period of the CFRA leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, et cetera.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; ERISA, 29 U.S.C. § 1001 et seq.; and COBRA, 29 U.S.C. § 1161 et seq.

§ 11093. Relationship between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave.

(a) Separate and Distinct Entitlements.

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a pregnancy disability leave under Government Code section 12945 and section 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or a related medical condition is not included as a serious health condition under CFRA. Any period of incapacity or treatment due to pregnancy, including prenatal care, is included as a serious health condition under FMLA.

(c) CFRA Leave after Pregnancy Disability Leave.

At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date. There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave. There is also no requirement that the employee no longer be disabled by her pregnancy, childbirth or a related medical condition before taking CFRA leave for reason of the birth of her child.

(1) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and Government Code section 12945) and CFRA leave for reason of the birth of the child (under this article) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or a related medical condition for four months and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child. This maximum entitlement does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA.

(e) Disability Leave.

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a disability leave under Government Code section 12945 and section 11064 et seq. of the regulations. If an employee has a serious health condition that also constitutes a disability as defined by Government Code section 12926 and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11094. Retaliation and Protection from Interference with CFRA Rights.

(a) Any violation of CFRA or its implementing regulations constitutes interfering with, restraining, or denying the exercise of rights provided by CFRA. "Interfering with" the exercise of an employee's rights includes, for example, refusing to authorize CFRA leave and discouraging an employee from using such leave. It would also include an action by a covered employer to avoid responsibilities under CFRA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50-employee threshold for employee eligibility under CFRA;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing an employee's hours available to work in order to avoid employee eligibility; and

(4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying leave in the future.

(b) CFRA's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee

or prospective employee for having exercised or attempted to exercise CFRA rights or giving information or testimony regarding his or her CFRA leave, or another person's CFRA leave, in any inquiry or proceeding related to any right guaranteed under this article. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid CFRA leave. By the same token, employers cannot use the taking of CFRA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can CFRA leave be counted against an employee under an employer's attendance policies.

(c) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under CFRA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take CFRA leave against some other benefit offered by the employer. This does not prevent the settlement or release of CFRA claims by employees based on past employer conduct without the approval of a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be reinstated to the same position the employee held at the time the employee's CFRA leave commenced or to a comparable position.

(d) All individuals, and not merely employees who are CFRA-qualified, are protected from retaliation for opposing (e.g., filing a complaint about) any practice that is unlawful under CFRA. They are similarly protected if they oppose any practice that they reasonably believe to be a violation of CFRA or its implementing regulations.

(e) In addition to retaliation prohibited by CFRA, retaliation is also prohibited by Government Code 12940 and section 11021 of the regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11095. Notice of CFRA Rights and Obligations.

(a) Employers to Post Notice.

Every employer covered by the CFRA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. If the employer publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, the employer shall include a description of CFRA leave in the next edition of its handbook it publishes following adoption of these regulations. The employer may include both pregnancy disability leave and CFRA leave requirements in a single notice.

(b) Employers to Give Notice.

Employers are also encouraged to give a copy of the notice to each current and new employee, ensure that copies are otherwise available to each current and new employee, and disseminate the notice in any other way.

(c) Non-English Speaking Workforce.

Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the notice into every language that is spoken by at least 10 percent of the workforce.

(d) Text of Notice.

The text below contains only the minimum requirements of the California Family Rights Act of 1993 and of the employer's obligation to provide pregnancy disability leave. Nothing in this notice requirement prohibits an employer from providing a leave policy that is more generous than that required by CFRA and providing its own notice of its own policy. Covered employers may develop their own notice or they may choose to use the text provided below, unless it does not accurately reflect their own policy.

FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE) AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to a family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances.

Even if you are not eligible for CFRA leave, if you are disabled by pregnancy, childbirth or a related medical condition, you are entitled to take a pregnancy disability leave of up to four months, depending on your period(s) of actual disability. If you are CFRA-eligible, you have certain rights to take BOTH a pregnancy disability leave and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement -for pregnancy disability it is to the same position and for CFRA it is to the same or a comparable position -at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

We may require certification from your health care provider before allowing you a leave for pregnancy disability or for your own serious health condition. We also may require certification from the health care provider of your child, parent or spouse, who has a serious health condition, before allowing you a leave to take care of that family member. When medically necessary, leave may be taken on an intermittent or reduced work schedule.

If you are taking a leave for the birth, adoption, or foster care placement of a child, the basic minimum duration of the leave is two weeks, and you must conclude the leave within one year of the birth or placement for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact _____ .

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940, 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11096. Relationship with FMLA Regulations.

To the extent that they are within the scope of Government Code section 12945.2 and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA that became effective March 8, 2013 (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11097. Certification Form.

For leaves involving serious health conditions, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form so long as the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient.

FAIR EMPLOYMENT & HOUSING COUNCIL
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act (CFRA))

IMPORTANT NOTE: The California Genetic Information Nondiscrimination Act of 2011 (CalGINA) prohibits employers and other covered entities from requesting, or requiring, genetic information of an individual or family member of the individual except as specifically allowed by law. To comply with the Act, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information," as defined by CalGINA, includes information about the individual's or the individual's family member's genetic tests, information regarding the manifestation of a disease or disorder in a family member of the individual, and includes information from genetic services or participation in clinical research that includes genetic services by an individual or any family member of the individual. "Genetic Information" does not include information about an individual's sex or age.

1. Employee's Name: _____

2. Patient's Name (If other than employee): _____

   Patient's relationship to employee: _____
   If patient is employee's child, is patient either under 18 or an adult dependent child:

Yes	No
☐	☐

3. Date medical condition or need for treatment commenced
   [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:
   _____

4. Probable duration of medical condition or need for treatment: _____

5. Below is a description of what constitutes a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify as a serious health condition?

Yes	No
☐	☐

6. If the certification is for the serious health condition of the employee, please answer the following:

Yes	No	
☐	☐	Is employee able to perform work of any kind? (If "No," skip next question.)
☐	☐	Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)

7. If the certification is for the care of the employee's family member, please answer the following:

Yes	No	
☐	☐	Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation?
☐	☐	After review of the employee's signed statement (See Item 10 below), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)

8. Estimate the period of time care is needed or during which the employee's presence would be beneficial:

_____

9. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule.

Yes	No	
☐	☐	Intermittent Leave: Is it medically necessary for the employee to be off work on an intermittent basis due to the serious health condition of the employee or family member?

If yes, please indicate the estimated frequency of the employee's need for intermittent leave due to the serious health condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1–2 days):
Frequency: ____ times per _____week(s) _____month(s)
Duration: _____hours or ____ day(s) per episode

Yes	No	
☐	☐	Reduced Schedule Leave: Is it medically necessary for the employee to work less than the employee's normal work schedule due to the serious health condition of the employee or family member?

If yes, please indicate the part-time or reduced work schedule the employee needs:
___ hour(s) per day: ___days per week. from _____ through _____

Yes	No	
☐	☐	Time Off for Medical Appointments or Treatment: Is it medically necessary for the employee to take time off work for doctor's visits or medical treatment, either by the health care practitioner or another provider of health services?

If yes, please indicate the estimated frequency of the employee's need for leave for doctor's visits or medical treatment, and the time required for each appointment, including any recovery period:
Frequency: ____ times per _____week(s) _____month(s)
Duration: _____hours or ____ day(s) per appointment/treatment

ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.
****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

_____

_____

_____

11. Printed name of health care provider:

_____

Signature of health care provider:

_____

Date:_____

12. Signature of Employee:

_____

Date: _____

***

— Serious Health Condition —

"Serious health condition" means an illness, injury (including, but not limited to, on–the–job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse. A serious health condition may involve one or more of the following:

1. Hospital Care
Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. A person is considered an "inpatient" when a heath care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

2. Absence Plus Treatment

(a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy [NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA]

Any period of incapacity due to pregnancy or for prenatal care.

4. Chronic Conditions Requiring Treatment
A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long–term Conditions Requiring Supervision
A period of incapacity which is permanent or long–term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non–Chronic Conditions)
Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; California Genetic Information Nondiscrimination Act, Stats. 2011, ch. 261; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11098. Certification Form. [Renumbered]

Subchapter 3. Discrimination in Housing (Reserved)

Subchapter 4. Procedures of the Council (Reserved)

Subchapter 5. Contractor Nondiscrimination and Compliance

Article 1. General Matters

§ 11099. Office of Compliance Programs.

(a) Creation and Authority. The Department of Fair Employment and Housing (DFEH) is responsible for the administration of policies, the implementation of standards, and the enforcement of the rules and regulations set forth in this subchapter. The DFEH has created the Office of Compliance Programs (OCP) to carry out these responsibilities. The OCP will operate under the procedures established in this subchapter as well as under other procedures of the Council as set out in this chapter.

(b) Administrator. The OCP will operate under the direction of an Administrator of Compliance Programs, who shall be appointed by and be responsible to the Director of the Department. The Administrator will have direct responsibility for the

appointment of staff and the organization and operation of the OCP consistent with the terms of the Act and the provisions of this subchapter.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11100. Definitions.

The words defined in this section shall have the meanings set forth below whenever they appear in this subchapter, unless: (1) the context in which they are used clearly requires a different meaning; or (2) a different definition is prescribed for a particular article or provision.

The definitions set forth previously in this chapter in sections 11002, 11008, 11015, 11030, 11035(b), 11053, 11065, and 11075 are also applicable to this subchapter.

(a) "Act" means the Fair Employment and Housing Act.

(b) "Bid" means any proposal or other request by an employer to a contract awarding agency wherein the employer seeks to be awarded a state contract.

(c) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

(d) "Construction" means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any State of California real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

(e) "Contract" or "state contract" means all types of agreements, regardless of what they may be called, for the purchase or disposal of supplies, services, or construction to which a contract awarding agency is a party. It includes awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders. It also includes supplemental agreements or contract modifications with respect to any of the foregoing.

(f) "Contract awarding agency" or "awarding agency" means any department, agency, board, commission, division or other unit of the State of California, which is authorized to enter into state contracts.

(g) "Contractor" means any person having a contract with a contract awarding agency or a subcontract for the performance of a contract with such an agency.

(h) "Data" means recorded information, regardless of form or characteristic.

(i) "Decertification" means the decision by the Office of Compliance Programs (OCP) that an employer's nondiscrimination program fails to comply with the requirements of the Fair Employment and Housing Act and/or its implementing regulations either because it is poorly designed or because it has not been properly implemented or because of the person's failure to cooperate with OCP it cannot be determined whether the nondiscrimination program meets the requirements of this subchapter. Decertification of a program shall continue until OCP certifies that the contractor is in compliance with the requirements of this subchapter.

(j) "Decision" means the decision of the hearing officer regarding the allegations of a show cause notice issued pursuant to section 10255 of this division. A decision shall dismiss, modify, or sustain the allegations of the show cause notice; provide the factual basis for the decision; and include any sanctions to be recommended to the awarding agency together with a statement of the reasons in support thereof.

(k) "Employee" means an individual under the direction and control of a contractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(*l*) "May" denotes the permissive.

(m) "Nondiscrimination clause" means the clause to be included in each state contract or subcontract pursuant to these regulations.

(n) “Person” means any business, individual, union, committee, club, or other organization or group of individuals.

(o) “Prime contractor” means any individual or organization who directly contracts with the State of California.

(p) “Service” and “supply contract” includes any contract except a construction contract.

(q) “Services” means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. This term shall not include collective bargaining agreements or arrangements between parties constituting that of employer and employee.

(r) “Shall” denotes the imperative.

(s) “Subcontract” means any agreement or arrangement executed by a contractor with a third party in which the latter agrees to provide all or a specified part of the supplies, services or construction required in the original state contract. This does not include arrangements between parties constituting that of employer and employee.

(t) “Subcontractor” means any individual or organization holding a subcontract for the performance of all or any part of a state contract.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11101. Nondiscrimination Agreement.

State contracts exempt from the requirements of section 11105 shall include, as an express or implied term, the term set out in either section 11105 clause (a) or clause (b). Breach of this term of contract may constitute a material breach of the contract and may result in the imposition of sanctions by the awarding agency and/or decertification from future opportunities to contract with the state.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11102. Requirement of Nondiscrimination Program.

All employers who are, or wish to become, contractors with the state must develop and implement a nondiscrimination program as defined in section 11103 of this subchapter unless specifically exempted pursuant to section 11111 of this subchapter.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11103. Nondiscrimination Program.

(a) Definition and Purpose. A nondiscrimination program (hereinafter referred to as “the program”) is a set of specific and result-oriented procedures to which a contractor or subcontractor commits itself for the purpose of insuring equal employment opportunity for all employees or applicants for employment. The program shall contain the following elements:

(1) Development or reaffirmation of the contractor’s equal employment opportunity policy in all personnel actions.

(2) Formal internal and external dissemination of the contractor’s policy.

(3) Establishment of responsibilities for implementation of the contractor’s program.

(4) Annual identification of any existing policies or practices that have resulted in disproportionately inhibiting the employment, promotion or retention of any group protected by the Act.

(A) Analysis of Employment Selection Procedures. The program shall include an identification and analysis of contractor promotional and entry-level selection procedures and shall identify any such policies or procedures that have resulted in practices disproportionately inhibiting the employment, promotion or retention of any group or groups protected by the Act. The retention of such practices so identified can only be justified according to the principles of business necessity upon a demonstration that no reasonable alternatives to such practices exist. The prospective contractor shall eliminate any practices that cannot be so justified.

(B) Workforce Analysis. The program will contain a workforce analysis, which shall consist of a listing of each job title that appears in applicable collective bargaining agreements of payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit, including departmental or unit supervisory personnel. For each job title, the total number of incumbents, and the total number of male and female incumbents, and the total number of male and female incumbents broken down by race and/or national origin. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(C) Utilization Analysis. Employers with 250 or more employees must perform a utilization analysis, which shall consist of an analysis of the major job groups at the facility in order to determine whether members of any group protected by the Act are being underutilized when compared to their availability. A job group for this purpose shall consist of one or more jobs that have similar content, wage rates, and opportunities. Underutilization is defined as having a statistically significant lower utilization of any group protected by the Act in a particular job group than their availability. Availability is defined as the availability in the labor force. The labor force for this purpose may vary depending upon the type of job in question, and the contractor's past practice, and could encompass the contractor's existing employees, and, for example, the area immediately surrounding the facility where the vacancy exists for low-skill jobs or it could encompass the entire nation for highly-skilled managerial positions. The employer shall conduct a separate utilization analysis for each protected group.

(5) Development and execution of policies and procedures designed to correct problems and attain equal employment opportunities for all applicants and employees.

(6) Design and implementation of internal audit and reporting systems to measure the effectiveness of the total program.

(b) An employer with multiple facilities may establish a single nondiscrimination program for its organization, but must perform separate analyses pursuant to subsections (a)(4)(A) and (B) above for each establishment.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code; California Constitution, article I, § 31.

§ 11104. Prima Facie Compliance.

Compliance with a nondiscrimination program subject to review and approval by a federal compliance agency shall constitute prima facie evidence that a contractor has complied with the requirements of sections 11102 and 11103, unless the federal agency has found that the program is not in compliance with federal law, in which case compliance with a current federal commitment letter or conciliation agreement shall constitute prima facie evidence that a contractor has complied with the requirements of sections 11102 and 11103. Such prima facie evidence can be rebutted by a preponderance of the evidence to the contrary.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11105. Nondiscrimination Clause.

Each state contract and subcontract shall contain a nondiscrimination clause unless specifically exempted pursuant to section 11111. The governmental body awarding the contract may use either clause (a) or clause (b) below. Clause (a) will satisfy the requirements of section 12990 of the Government Code only; clause (b) contains language that will satisfy the requirements of both the Fair Employment and Housing Act and Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (adopted pursuant to Government Code sections 11135-11139.5). Standardized state form OCP-1, containing clause (a), and OCP-2, containing clause (b), will be available through the OCP. These forms may be incorporated into a contract by reference and will fulfill the requirement of this section. The contracting parties may, in lieu of incorporating form OCP-1 or OCP-2, include the required clause in the written contract directly.

Clause (a)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any

employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and the applicable regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.). The applicable regulations of the Fair Employment and Housing Council implementing Government Code section 12990, set forth in Subchapter 5 of Division 4.1 of Title 2 of the California Code of Regulations are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

2. Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

Clause (b)

1. During the performance of this contract, the recipient, contractor, and its subcontractors shall not deny the contract's benefits to any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractor shall insure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

2. Contractor shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), the regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code, §§ 11135-11139.5), and the regulations or standards adopted by the awarding state agency to implement such article.

3. Contractor or recipient shall permit access by representatives of the Department of Fair Employment and Housing and the awarding state agency upon reasonable notice at any time during the normal business hours, but in no case less than 24 hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or Agency shall require to ascertain compliance with this clause.

4. Recipient, contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

5. The contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11106. Subcontracts.

The contractor shall include the nondiscrimination clause in its contract in all subcontracts to perform work under the contract, either directly or by incorporation by reference. Any such incorporation by reference shall be specific and prominent.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11107. Enforcement of Clause.

The nondiscrimination clause in state contracts and subcontracts shall be fully and effectively enforced. Any breach of its terms may constitute a material breach of the contract and may result in the imposition of sanctions against the contractor, including but not limited to cancellation, termination, or suspension of the contract in whole or in part, by the contract awarding agency or decertification from future opportunities to contract with the State of California by the DFEH.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11108. Contract Awarding Agency, Unresponsive Bids.

(a) A contract awarding agency shall refuse to accept a bid or proposal on a state contract subject to this chapter when the bid is unaccompanied by a statement of compliance pursuant to section 11109 and shall declare any such bid or proposal unresponsive.

(b) A contract awarding agency shall declare unresponsive any bid or proposal on a state contract that is submitted by a contractor on OCP's list of decertified contractors.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11109. Statement of Compliance.

(a) As a part of its bid, an eligible prospective contractor that bids on a state contract must submit a statement under penalty of perjury to the awarding agency that it has complied with the requirement of section 11102 of this subchapter.

(b) No state contract, unless otherwise exempted pursuant to section 11111, shall be awarded by any contract awarding agency unless the prospective contractor has filed with the agency as a part of its bid a statement, made under penalty of perjury, that the prospective contractor has complied with the requirements of section 11102 of this subchapter.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11110. Subcontracting Prohibited with Ineligible Entities.

(a) OCP shall establish and maintain a list of decertified contractors, which shall be updated monthly and published in the first California Notice Register published each month.

(b) No contractor with the State of California shall, during the performance of any contract with the State, enter into any subcontract with any person listed on OCP's list of decertified contractors during the month in which the bid is submitted.

(c) Subcontracting with a decertified contractor in violation of the provisions of this section may constitute a material breach of the contract and may result in the imposition of sanctions against the contractor, including but not limited to cancellation, termination, or suspension of the contract, in whole or in part by the awarding agency, or decertification by the DFEH. Specific knowledge of the unlawfulness of the subcontract is not required to establish a breach, but will be considered by OCP and the contract awarding agency in their determination of the appropriate sanctions.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11111. Exemptions.

(a) Licensed rehabilitation workshops that are contractors of state contracting agencies are exempted from the requirements of this subchapter.

(b) Contracts of less than $5,000 are automatically exempt from the requirements of section 11105; contractors holding only such contracts are automatically exempt from the requirements of section 11102, but are subject to section 11101.

(c) A contractor with fewer than 50 employees in its entire workforce may receive an automatic exemption from the Program requirements of section 11103, subdivisions (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a current California Employer Information Report (CEIR) annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(d) Contracts and subcontracts awarded pursuant to a declaration of public emergency, a declaration or determination of emergency pursuant to Government Code section 14809 or Government Code section 14272(a), (b), or (c), or a declared threat to the health, welfare or safety of the public are fully exempted from the requirements of section 11105, and contractors holding only such contracts are exempted from the requirements of section 11102, but remain subject to section 11101.

(e) A construction contractor with fewer than 50 permanent employees may obtain an exemption from the requirements of section 11103, subdivision (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a CEIR annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(f) Exemptions of subsections (a) and (d) of this section shall be granted only upon application to the state contract awarding agency prior to the date the contract is awarded. The contract awarding agency shall, prior to the grant of any exemption under this section, require proof of satisfaction of the exemption conditions of this section. The OCP may issue opinion letters and guidelines from time to time to assist contact awarding agencies in making determinations under this section.

(g) Nothing in this section prohibits hiring or employment practices, which must be enforced in order to maintain or establish eligibility for federal programs, where ineligibility would result in a loss of federal funds to the state.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code; California Constitution, article I, § 31.

§ 11112. Advertisements for New Employees.

In all written advertisements or recruitment efforts for new employees during the performance of a regulated contract, a contractor is required to prominently identify itself with the phrase “State Equal Opportunity Employer” or similar wording.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11113. Recruitment.

Nothing in this article shall serve to deter good faith outreach efforts that are neutral and do not favor, discriminate against, or disparately impact any group protected by the Act on the basis of an improper classification.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11114. Notice of Contract.

Contract awarding agencies shall give written notice to the Administrator within 10 working days of an award of any and all contracts over $5,000. The notice shall include the name, address, and telephone number of the contractor; federal employer identification number; state contract identification number; date of contract award; contract amount; project location; name of contractor’s agent who signed the contract; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code.

§ 11115. Contract Forms.

The State Department of General Services will have printed copies of the forms referred to in this subchapter and shall make them available upon request.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11116. Access to Records and Employment Site.

(a) Each contractor shall provide OCP with any relevant information requested and shall permit OCP access to its premises, upon reasonable notice, during normal business hours for the purpose of conducting on-site compliance reviews, employee interviews, and inspecting and copying such books, records, accounts and other material as may be relevant to a matter under investigation for the purpose of determining and enforcing compliance with this subchapter.

(b) All information provided to the DFEH in response to a request from OCP that contains or might reveal a trade secret referred to in section 1905 of Title 18 of the United States Code, or other information that is confidential pursuant to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, shall be considered confidential, except that such information may be disclosed to other officers or employees of the DFEH and may be introduced as

evidence in any hearing conducted pursuant to section 11140 of this Chapter. The hearing officer or the director shall issue such orders as may be appropriate to protect the confidentiality of such information.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11117. Complaints of Discrimination or Noncompliance.

(a) Any interested person may lodge a written complaint of noncompliance with either the DFEH or the contract awarding agency. The complaint shall state the name and address of the contractor and shall set forth a description of the alleged noncompliance. Complaints lodged with the awarding agency shall be immediately referred to the Administrator of OCP. No complaint may be lodged after the expiration of one year from the date upon which the alleged noncompliance occurred.

OCP shall cause any written complaint lodged under the provisions of this section on which it intends to take action to be served, either personally or by ordinary first class mail, upon the respondent contractor and the awarding agency within 45 days. At the discretion of the Administrator, the complaint may not contain the name of the complaining party.

(b) OCP shall notify the contract awarding agency of any action pursuant to section 11138 instituted against a contractor of the agency, and permit the agency to become a party to the action, except that the agency shall be fully responsive to any request for information made by OCP in connection with the action.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Article 2. Regulations Applicable to Construction Contracts

§ 11118. Scope.

This article applies to all nonexempt businesses that seek or hold any state construction contract or subcontract. The regulations in this article are applicable to all of a construction contractor's employees who are engaged in on-site construction including those employees who work on a construction site where no state work is being performed.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11119. Notice of Requirements.

The following notice shall be included in, and shall be a part of, all solicitations for offers and bids on all nonexempt state construction contracts and subcontracts, except that newspaper or trade publication advertisements need only state that the contract is subject to state contractor nondiscrimination and compliance requirements pursuant to Government Code section 12990:

NOTICE OF REQUIREMENT FOR NONDISCRIMINATION PROGRAM (GOV. CODE SECTION 12990)

Your attention is called to the Nondiscrimination Clause set forth or referred to herein, which is applicable to all nonexempt state construction contracts and subcontracts and to the Standard California Nondiscrimination Construction Contract Specifications set forth herein. The specifications are applicable to all nonexempt state construction contracts and subcontracts of $5,000 or more.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11120. Application to Permanent and Temporary Workforce.

A construction contractor's nondiscrimination program established pursuant to sections 11102 and 11103 of this subchapter must ensure nondiscrimination within both its permanent workforce and its temporary on-site workforce. The section 11103 requirements of workforce and utilization analyses, however, must be prepared only for permanent employees.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11121. Transfers Prohibited.

It is a violation of the contract, of Government Code section 12990 and the regulations in Subchapter 5 of Chapter 5 of

Division 4.1 of Title 2 of the California Code of Regulations to transfer employees or trainees who are members of any group protected by the Act from contractor to contractor or from project to project for the sole purpose of meeting the contractor's nondiscrimination obligations.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code.

§ 11122. Standard California Nondiscrimination Construction Contract Specifications. (Gov. Code, Section 12990.)

In addition to the nondiscrimination clause set forth in section 11105, all non-exempt state construction contracts and subcontracts of $5,000 or more shall include the specifications set forth in this section.

STANDARD CALIFORNIA NONDISCRIMINATION CONSTRUCTION CONTRACT SPECIFICATIONS (GOV. CODE SECTION 12990)

These specifications are applicable to all state contractors and subcontractors having a construction contract or subcontract of $5,000 or more.

1. As used in the specifications:

a. "Act" means the Fair Employment and Housing Act.

b. "Administrator" means Administrator, Office of Compliance Programs, California Department of Fair Employment and Housing, or any person to whom the Administrator delegates authority;

2. Whenever the contractor or any subcontractor subcontracts a portion of the work, it shall include in each subcontract of $5,000 or more the nondiscrimination clause in this contract directly or through incorporation by reference. Any subcontract for work involving a construction trade shall also include the Standard California Construction Contract Specifications, either directly or through incorporation by reference.

3. The contractor shall implement the specific nondiscrimination standards provided in paragraphs 6(a) through (e) of these specifications.

4. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer members of any group protected by the Act shall excuse the contractor's obligations under these specifications, Government Code section 12990, or the regulations promulgated pursuant thereto.5. In order for the nonworking training hours of apprentices and trainees to be counted, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor or the California Department of Industrial Relations.

5. In order for the nonworking training hours of apprentices and trainees to be counted, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor or the California Department of Industrial Relations.

6. The contractor shall take specific actions to implement its nondiscrimination program. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor must be able to demonstrate fully its efforts under steps a. through e. below:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and at all facilities at which the contractor's employees are assigned to work. The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligations to maintain such a working environment.

b. Provide written notification within seven days to the director of the DFEH when the referral process of the union or unions with which the contractor has a collective bargaining agreement has impeded the contractor's efforts to meet its

obligations.

c. Disseminate the contractor's equal employment opportunity policy by providing notice of the policy to unions and training, recruitment and outreach programs and requesting their cooperation in assisting the contractor to meet its obligations; and by posting the company policy on bulletin boards accessible to all employees at each location where construction work is performed.

d. Ensure all personnel making management and employment decisions regarding hiring, assignment, layoff, termination, conditions of work, training, rates of pay or other employment decisions, including all supervisory personnel, superintendents, general foremen, on-site foremen, etc., are aware of the contractor's equal employment opportunity policy and obligations, and discharge their responsibilities accordingly.

e. Ensure that seniority practices, job classifications, work assignments, and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the equal employment opportunity policy and the contractor's obligations under these specifications are being carried out.

7. Contractors are encouraged to participate in voluntary associations that assist in fulfilling their equal employment opportunity obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under these specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on equal employment opportunity in the industry, ensures that the concrete benefits of the program are reflected in the contractor's workforce participation, and can provide access to documentation that demonstrates the effectiveness of actions taken on behalf of the contractor. The obligation to comply, however, is the contractor's.

8. The contractor is required to provide equal employment opportunity for all persons. Consequently, the contractor may be in violation of the Fair Employment and Housing Act (Government Code section 12990 et seq.) if a particular group is employed in a substantially disparate manner.

9. The contractor shall not use the nondiscrimination standards to discriminate against any person because race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

10. The contractor shall not enter into any subcontract with any person or firm decertified from state contracts pursuant to Government Code section 12990.

11. The contractor shall carry out such sanctions and penalties for violation of these specifications and the nondiscrimination clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Government Code section 12990 and its implementing regulations by the awarding agency. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Government Code section 12990.

12. The contractor shall designate a responsible official to monitor all employment related activity to ensure that the company equal employment opportunity policy is being carried out, to submit reports relating to the provisions hereof as may be required by OCP and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, status, (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in any easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11123. Reporting Requirement.

Contractors holding construction contracts of $50,000 or more must submit quarterly utilization reports to OCP on forms to be provided by OCP. In such reports the contractor must provide identifying information and report the number and percentage of journey worker, apprentice, and trainee hours worked in each job classification by race, sex, and national origin, together with the total number of employees and total number of minority employees in each classification by sex. The quarterly utilization reports must cover each calendar quarter and must be received by OCP no later than the 15th day of the month following the end of the quarter (April 15, July 15, October 15, and January 15). Contractors who are required to

submit utilization reports to the federal government may submit a copy of the federal report to the OCP at the same time they submit the report to the federal government in lieu of the state quarterly utilization report.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11124. Effect on Other Regulations.

The regulations in this article are in addition to the regulations contained in this chapter, which apply to contractors and subcontractors generally. See particularly, California Code of Regulations, Title 2, Division 4.1, subchapters 1 through 5, sections 11000 through 11004, 11006 through 11086, 11099 through 11117, and 11133 through 11136.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Article 3. Regulations Applicable to Service and Supply Contracts

Subarticle 1. Small Contracts

§ 11125. Scope.

This article applies to all contractors who seek or hold any nonexempt state service and supply contract or subcontract.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11126. Definition of Small Contract.

All state contracts with a dollar value of $25,000 or less are for purposes of this article defined as small contracts.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code.

§ 11127. Post Award Filing.

Contractors awarded small contracts need not file any information with OCP after execution of the contract, but must provide OCP access to records required under section 11128 upon request.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11128. Post Award Compliance.

(a) Each contractor of a small contract shall compile and shall maintain for inspection for two years after award:

(1) Information regarding the contractor: Federal Employer Identification number; state contract identification number; legal name of the business organization, parent corporation or other outside ownership interest, if applicable, business telephone number, street address, city, state and zip code; mailing address, if different; total number of employees, identified by sex, race and national origin; name, business phone and mailing address of contractor's EEO/AA officer, if there is one; and name of the person responsible for the maintenance of information required pursuant to subsection (b) below.

(2) Information regarding the contract: dollar value of contract; time for performance of the contract; date of contract award; name of contract awarding agency, and contract awarding officer; brief description of the purpose or subject of the contract.

(3) A copy, if one was required to be prepared of the prime contractor's current CEIR, or equivalent federal form (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

(b) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Sections 12990, Government Code.

§ 11129. Verification.

A contract awarding agency shall, upon request by OCP, verify information provided to OCP by an agency contractor performing a small contract. Such requests for verification shall be limited to that information required by OCP on any standardized state forms or other form where such information is specifically required by these regulations, and such information is also contained in the awarding agency's files.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Subarticle 2. Regulated Contracts

§ 11130. Regulated Contracts, Dollar Value.

All state contracts with a dollar value of more than $25,000 are for the purposes of this article classified as regulated contracts.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11131. Post Award Informational Filing.

(a) The prime contractor of a regulated contract shall file with OCP within 28 days from the date of execution of a regulated contract or the effective date of these regulations, whichever occurs later:

(1) Information Regarding the Contractor: Federal Employer Identification Number; state contract identification number; legal name of the business organization; business telephone number, street address, city, state and zip code; mailing address, if different; and name, business phone and mailing address of contractor's EEO/AA Officer.

(2) Information Regarding the Contract: dollar value of contract; date of contract award; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

(3) (Reserved)

(4) A copy of the prime contractor's current CEIR or equivalent federal form (EEO-1). If the prime contractor is not otherwise required to prepare a CEIR, it must do so in order to comply with the requirements of this section. (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

This information shall be updated annually thereafter, so long as the contractor remains subject to these regulations.

(b) Contractors awarded more than one state contract in one year may file only the information required in subdivision (a)(2) and (a)(4) above for the second and all subsequent contracts awarded during the year.

(c) The OCP and the contract awarding agency shall make forms available for providing the information required under this section.

(d) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

Note: Authority cited: Sections 12935(a), and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11132. Designating EEO Officer.

All contractors of regulated contracts shall designate an individual responsible for the implementation of the contractor's nondiscrimination program.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Article 4. OCP Review Procedures [Renumbered]

Article 5. OCP Enforcement Proceedings [Renumbered]

§ 11133-11141 [Renumbered to § 10250-10258]

Fair Employment & Housing Council
Amendments to the California Family Rights Act Regulations

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 11. Family Care and Medical Leave Act

TEXT

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Article 11. ~~Family Care and Medical Leave~~ California Family Rights Act

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal regulations ~~issued~~ that became effective ~~January~~ March ~~6~~ 8, ~~1995 (29 C.F.R. Part 825),~~ 2013 interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) shall also apply to this article, to the extent that they are not inconsistent with the following definitions:

(a) "Certification" means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse, or a medical leave for the employee's own serious health condition.

(1) For family care leave for the employee's child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in Government Code section 12945.2.~~:~~

(A) the date, if known, on which the serious health condition commenced,

(B) the probable duration of the condition,

(C) an estimate of the amount of time which the health care provider believes the employee

needs to care for the child, parent or spouse, and

(D) a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.

1. "Warrants the participation of the employee," within the meaning of Government Code section 12945.2, includes, but is not limited to, providing psychological comfort, and arranging third party care for the child, parent or spouse, as well as directly providing, or participating in, the medical care.

(2) For medical leave for the employee's own serious health condition, this certification need not, but may, at the employee's option, identify the serious health condition involved. Any certification shall contain the information identified in Government Code section 12945.2, as is demonstrated in section 11097 of these regulations. For purposes of the certification "unable to perform the function of his or her position" means that an employee is unable to perform any one or more of the essential functions of his or her position. It The certification shall contain:

(A) The date, if known, on which the serious health condition commenced,

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position.

(b) "CFRA" means the Moore-Brown-Roberti California Family Rights Act of 1993. (California Family Rights Act, Gov. Code, §§ 12945.1- and12945.2.) "CFRA leave" means family care or medical leave taken pursuant to CFRA.

(c) "Child" means a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, or a child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of Government Code section 12926(j) and (l).

(1) "In loco parentis" means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. It does not require a biological or legal relationship.

(d) “Covered employer” means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs 50 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full-time. “Employer” as used in these regulations means “covered employer.”

(1) “Directly employs” means that the employer maintains an aggregate of at least 50 part or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase “current or preceding calendar year” refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(2) “Perform services for a wage or salary” excludes independent contractors as defined in the Labor Code, ~~section 3353~~ but includes persons who are compensated in whole or in part by commission.

(3) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(A) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(C) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(e) “Eligible employee” means a full- or part-time employee working in California ~~with~~ who has been employed for a total of at least ~~more than~~ 12 months (52 weeks) ~~of service~~ with the

employer at any time prior to the commencement of a CFRA leave, and who has actually worked (within the meaning of the ~~Fair Labor Standards Act, 29 C.F.R. Part 785~~California Labor Code and Industrial Welfare Commission Wage Orders) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave ~~or FMLA leave~~ is to commence.

(1) Once the employee meets these two eligibility criteria and takes a leave for a qualifying event, the employee does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same qualifying event during the employee's 12-month leave period.

(2) Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. Nothing in this section prevents an employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly, with respect to all employees with similar breaks in service.

(~~2~~3) For an employee who takes a pregnancy disability leave ~~that is also a FMLA leave~~, and who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of ~~FMLA leave based on her~~ pregnancy disability leave, not the first day of the subsequent CFRA leave for reason of the birth of her child.

(~~3~~4) In order to be eligible, the employee must also work for an employer who maintains on the payroll, as of the date the employee gives notice of the need for leave, at least 50 part- or full-time employees within 75 miles, measured in surface miles, using surface transportation, of the worksite where the employee requesting the leave is employed. A worksite can refer to either a single location or a group of contiguous locations.

(A) For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, for the purpose of counting 50 employees, if a salesperson works from home in California, but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.

(B) When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports,

unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.

(~~A~~C) Once the employee meets this eligibility criterion and gives notice of the need for a leave~~takes a leave for a qualifying event~~, the employer may not deny the leave, cut short the leave, or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period, even if the number of employees within the relevant 75-mile radius falls below 50. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event.

(5) If an employee is not eligible for CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which he/she is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

(f) "Employment in the same position" means employment in, or reinstatement to, the original position the employee held prior to taking a CFRA leave.

(g) "Employment in a comparable position" means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term "equivalent position" in FMLA and its implementing regulations.

(h) "Family care leave" means either:

(1) Leave of up to a total of 12 workweeks in a 12-month period for reason of the birth of a child of the employee~~,~~ or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the

leave; or

(2) Leave of up to a total of 12 workweeks in a 12-month period to care for a child, parent, or spouse of the employee who has a serious health condition, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave.

(i) "FMLA" means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. Part 825, ~~issued~~ that became effective ~~January 6, 1995~~ March 8, 2013. "FMLA leave" means family care or medical leave taken pursuant to FMLA.

(j) "Health care provider" means either:

(1) an individual holding either a physician's and surgeon's certificate issued pursuant to Article 4 (commencing with section 2080) of Chapter 5 of Division 2 of the Business and Professions Code or an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the serious health condition, or

(2) any other person who meets the definition of others "capable of providing health care services," as set forth in FMLA and its implementing regulations.

(k) "Key employee" means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer's employees who are employed within 75 miles of the employee's worksite at the time of the leave request, as described in Government Code section 12945.2.

(~~k~~l) "Medical leave" means leave of up to a total of 12 workweeks in a 12-month period because of an employee's own serious health condition that makes the employee unable to work at all or unable to perform any one or more of the essential functions of the position of that employee. The term "essential functions" is defined in Government Code section 12926~~(f)~~. "Medical leave" does not include leave taken for an employee's pregnancy disability, as defined in (~~m~~n) below, except as specified below in section 11093(c)(1).

(~~l~~m) "Parent" means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the

employee as a child. Parent does not include a parent-in-law.

(~~m~~n) “Pregnancy disability leave” means a leave taken for disability on account of pregnancy, childbirth, or a related medical condition~~s~~, pursuant to Government Code section 12945 and defined in section 11035(r) of the regulations.

(o) “Reason of the birth of a child,” within the meaning of Government Code section 12945.2 and these regulations includes, but is not limited to, bonding with a child after birth.

(~~n~~p) “Reinstatement” means the return of an employee to the position that the employee held prior to CFRA leave, or a comparable position, and is synonymous with “restoration” within the meaning of FMLA and its implementing regulations.

(~~o~~q) “Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee ~~which~~ that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.~~:~~

(1) ~~i~~“Inpatient care” means ~~(i.e., an overnight~~ a stay~~)~~ in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an “inpatient” when a heath care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

(2) “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.

(~~2~~3) ~~c~~“Continuing treatment” means ~~or continuing~~ ongoing medical treatment or supervision by a health care provider, as detailed in section 11097 of these ~~FMLA and its implementing~~ regulations.

(~~p~~r) “Spouse” means a partner in marriage as defined in Family Code section 300 or a registered domestic partner, within the meaning of Family Code sections 297 through 297.5. As used in this article and the Family Code, “spouse” includes same-sex partners in marriage.

(~~q~~s) “Twelve workweeks” means the equivalent of 12 of the employee's normally scheduled workweeks. (See also section 11090(~~d~~c).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; ~~and~~ *J.E. Robinson v. FEHC* (1992) 2 Cal.4th 226 [5 Cal.Rptr.2d 782]; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825~~, issued January 6, 1995 ; Fair Labor Standards Act, 29 U.S.C. section 201 et seq.; and 29 C.F.R. § 785~~.

§ 11088. Right to CFRA Leave: Denial of Leave; Reasonable Request; Permissible Limitation.

(a) It is an unlawful employment practice for a covered employer to refuse to grant, upon reasonable request, a CFRA leave to an eligible employee, unless such refusal is justified by the permissible limitation specified below in subdivision (c).

(b) Denial of leave.

(1) Burden of proof.

Denial of a request for CFRA leave is established if the Department or the employee shows, by a preponderance of the evidence, that the employer was a covered employer, the employee making the request was an eligible employee, the request was for a CFRA-qualifying purpose, the request was reasonable, and the employer denied the request for CFRA leave.

(2) Reasonable request.

A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements, as specified in section 11091, and if it is accompanied, where required, by a certification, as that term is defined in section 11087(a).

(c) Limitation on Entitlement.

If both parents are eligible for CFRA leave but are employed by the same employer, that employer may limit leave for the birth, adoption or foster care placement of their child to a combined total of 12 workweeks in a 12-month period between the two parents. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11089. Right to Reinstatement: Guarantee of Reinstatement; Rights upon Return; Refusal to Reinstate; Permissible Defenses.

(a) Guarantee of Reinstatement.

(1) Upon granting the CFRA leave, the employer shall inform the employee of its guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 11089(~~c~~d)~~(1) and (c)(2)~~, and shall provide the guarantee in writing upon request of the employee.

(2) It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to ~~honor its guarantee of~~ reinstate~~ment~~ the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(~~c~~d)~~(1) and (c)(2)~~.

(A) An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(B) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

(b) Rights upon Return.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(1) Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee.

(2) CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act (FEHA).

(~~b~~c) Refusal to ~~reinstate~~ Reinstate.

(1) Definite Date of Reinstatement.

Where a definite date of reinstatement has been agreed upon at the beginning of the leave, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon.

(2) Change in Date of Reinstatement.

If the reinstatement date differs from the employer's and employee's original agreement, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the employer failed to reinstate the employee to the same or a comparable position within two business days, where feasible, after the employee notifies the employer of his or her readiness to return~~, as required by the FMLA regulations~~.

(~~c~~d) Permissible ~~defenses~~ Defenses.

(1) Employment Would Have Ceased or Hours Would Have Been Reduced.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed ~~at the time~~ on the requested reinstatement date ~~is requested~~ in order to deny reinstatement. As per (a)(1) of this section, this burden shall not be satisfied if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(A) If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(B) If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

(2) "Key Employee."

~~A refusal~~ An employer may refuse to reinstate a "key employee," as defined in section 11087(k) of these regulations, to his or her same position or to a comparable position ~~is justified~~ only if the employer ~~shows~~ establishes, by a preponderance of the evidence, that all of the following conditions exist:

(A) The employee requesting the CFRA leave is a salaried employee.~~, and~~ As used in Government Code section 12945.2 (r), "salaried employee" means an employee paid on a salary basis.

(B) The employee requesting the leave is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request.~~, and~~ Whether an employee is "among the highest paid 10 percent," pursuant to Government Code section 12945.2, is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer's employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

(C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer.~~, and~~A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

~~(D) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines that the refusal is necessary under (C) above, and~~

~~(E) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed in (D) above.~~

(D) An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA leave (or when CFRA leave commences, if earlier) that he or she is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the

employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(E) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA leave (or who is on CFRA leave), the employer shall notify the employee in writing that it cannot deny CFRA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

(F) If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

(G) After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

(3) Fraudulently-obtained CFRA Leave.

An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA's job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11090. Computation of Time Periods: Twelve Workweeks; Minimum Duration.

(a) CFRA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period.

(b) If the leave is common to both CFRA and FMLA, this 12-month period will run concurrently with the 12-month period under FMLA. An employer may choose any of the methods (the calendar year, any fixed 12–month "leave year," the 12–month period measured forward from the date any employee's first CFRA leave begins, or a "rolling" 12–month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations~~, issued~~ that became effective ~~January 6, 1995~~ March 8, 2013, 29 C.F.R. Part 825, section 825.200, subdivision (b), for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA leave of its chosen method. If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.

(c) "Twelve workweeks" as that term is defined in section 11087(~~q~~s), means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of CFRA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) shall be used for calculating the employee's leave entitlement.

(1) For example, for a full-time employee who works five eight-hour days per week, 12 workweeks means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, 12 workweeks may mean 30 eight-hour days or 60 four-hour days, or 12 workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, 12 workweeks means 72 working and/or

paid eight-hour days of leave entitlement.

(2) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee needs physical therapy that requires an absence from work of two hours a week, only those two hours ~~can~~ may be charged against the employee's CFRA leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

(3) If a holiday falls within a week taken as CFRA leave, the week is nevertheless counted as a week of CFRA leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's CFRA entitlement. Similarly, if an employee uses CFRA leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's CFRA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

(4) If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

(5) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA, and prior to the employee notice of need for CFRA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the birth, adoption, or foster care placement of a child~~.~~: CFRA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee. The basic minimum duration of the leave shall be two weeks. However,

an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks.

(e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health condition of a parent, child, or spouse or for the serious health condition of the employee.: Where CFRA leave is taken for a serious health condition of the employee's child, parent, or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, intermittent or reduced work schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if he or she does not receive treatment by a health care provider. An employer maymust limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour.

(1) If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular job. It does need not have to have equivalent duties, although an employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or a reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

(2) CFRA leave, including intermittent leave and/or reduced work schedules, is available to instructional employees of educational establishments and institutions under the same conditions as apply to all other eligible employees.

(3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed “clean room” during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee shall be permitted to return to work if he or she is able to perform other aspects of the work that are

not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule, provided the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Note: Authority cited: Section 12935(a), Government Code~~; and Stats. 1993, ch. 827, (AB 1460), Section 2~~. Reference: Section 12945.2, Government Code; DLSE Opinion Letter 03.12.2002; DLSE Opinion Letter 04.08.2002;~~and~~ Stats. 1993, ch. 827 (AB 1460), § 2; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11091. Requests for CFRA Leave: Advance Notice; Certification; Employer Response.

(a) Advance Notice.

(1) Verbal Notice.

Unless an employer waives its employees' notice obligations described herein, ~~An~~an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA~~-qualifying~~ leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, provided the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if ~~it is~~ necessary to determine whether the employee is requesting ~~have more information about whether~~ CFRA leave ~~is being sought by the employee~~ and to obtain ~~the~~ necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).~~details of the leave to be taken.~~ An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.

(A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the

employee or the employee's spokesperson, and to give notice of the designation to the employee.

(B) ~~Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except under those same circumstances provided for in FMLA and its implementing regulations for retroactively counting leave as FMLA leave.~~ Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.

(2) 30 Days' Advance Notice.

An employer may require that employees provide at least 30 days' advance notice before CFRA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. The employee shall consult with the employer and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the operations of the employer. Any such scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent or spouse.

(3) When 30 Days Not Practicable.

If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

(4) Prohibition ~~Against~~ against Denial of Leave in Emergency or Unforeseeable Circumstances.

An employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, so long as the employee provided notice to the employer as soon as practicable.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements that it adopts. The employer may incorporate its notice requirements in the general notice

requirements in section ~~11096~~11095 and such incorporation shall constitute reasonable advance notice. Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.

(6) Employer Response to Leave Request.

The employer shall respond to the leave request as soon as practicable and in any event no later than ~~10 calendar~~ five business days after receiving the employee's request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(b) Medical Certification.

(1) Serious Health Condition of Child, Parent, or Spouse.

As a condition of granting a leave for the serious health condition of the employee's child, parent or spouse, the employer may require certification of the serious health condition, as defined in section 11087(a)(1). If the certification satisfies the requirements of section 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated ~~that~~ the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(2) Serious Health Condition of Employee.

As a condition of granting a leave for the serious health condition of the employee, the employer may require certification of the serious health condition, as defined in section 11087(a)(2). Upon expiration of the time period the health care provider originally estimated ~~that~~ the employee needed for his/her own serious health condition, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(A) If the employer has a good faith, objective reason to doubt the validity of the certification ~~provided by~~ the employee provides for his/her own serious health condition, the employer may require, at the employer's own expense, ~~that~~ the employee to obtain the

opinion of a second health care provider, designated or approved by the employer, concerning any information in the certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer.

1. The employer may not ask the employee to provide additional information (e.g. symptoms, diagnosis, etc.) in the medical certification beyond that allowed by these regulations.

2. The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(B) In any case in which the second opinion described in (b)(2)(A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by both the employer and the employee, concerning any information in the certification.

(C) The opinion of the third health care provider concerning the information in the certification shall be considered to be final and shall be binding on the employer and the employee.

(D) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee.

(E) As a condition of an employee's return from medical leave, the employer may require ~~that~~ the employee to obtain a release to return-to-work from his/her health care provider stating that he/she is able to resume work, but only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability and there is no collective bargaining agreement forbidding the practice. An employer is not entitled to a release to return-to-work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return-to-work for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

(F) An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee’s return. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity, in accordance with section 11071 of these regulations.

(3) Providing Certification.

The employer may require that the employee provide any certification within no less than 15 calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts. This means that, in some cases, the leave may begin before the employer receives the certification. Absent extenuating circumstances (e.g., unavailability of healthcare provider), if the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. The same rules apply to recertification. If the employee never produces the certification or recertification, the leave is not CFRA leave. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of his or her failure to provide adequate certification.

Note: Authority cited: Section 12935, Government Code. Reference: Section 12945.2, Government Code; *White v. County of Los Angeles* (2014) 225 Cal.App.4th 690; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11092. Terms of CFRA Leave.

(a) The following rules apply to the permissible terms of a CFRA leave, to the extent that they are consistent with the requirements of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. Nothing in these regulations infringes on the employer's obligations, if any, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (29 U.S.C. § 1161 et seq.) or prohibits an employer from granting CFRA leave on terms more favorable to the employee than those listed below.

(b) Paid Leave.

An employer is not required to pay an employee during a CFRA leave except:

(1) An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), other than accrued sick leave, that the employee is otherwise eligible to take during the otherwise unpaid portion of the CFRA leave. An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-

provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

(2) For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy, during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(3) An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(~~2~~4) Only if the employee ~~asks for~~ requests leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including PTO ~~time), other than accrued sick leave,~~ that the employee is ~~otherwise~~ eligible to take during the otherwise unpaid portion of the CFRA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave, the leave will not count against the employee's CFRA leave entitlement.

(A) If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.

1. If the employer denies the employee's request and the employee then provides information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may inquire further into the reasons for the absence. If the absence is CFRA-qualifying, then the rules in section 11092(b)(1) and (2), above, apply.

~~(3) An employer may require the employee to use, or an employee may elect to use, any accrued sick leave that the employee is otherwise eligible to take during the otherwise unpaid portion of a CFRA leave for:~~

~~(A) the employee's own serious health condition, or~~

~~(B) any other reason if mutually agreed to between the employer and the employee.~~

(~~4~~5) An employer and employee may negotiate for the employee's use of any additional paid

or unpaid time off instead of using ~~to substitute for the~~ CFRA leave provided by this section.

(c) Provision of Health Benefits.

If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave, FMLA leave, or both. The following rules apply:

(1) The employer shall maintain and pay for ~~the~~ an employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had not taken CFRA leave ~~been continuously employed during the entire leave period~~.

(2) ~~This~~The employer's obligation commences on the date leave first begins under ~~FMLA (i.e., for pregnancy disability leaves) or under FMLA/CFRA (i.e., for all other family care and medical leaves). The obligation continues~~ CFRA for the duration of the leave~~(s)~~, up to a maximum of 12 workweeks in a 12-month period. As section 11044 (c) of the Council's pregnancy disability leave regulations state, "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."

(3) A "group health plan" is as defined in section 5000(b)(1) of the Internal Revenue Code of 1986. If the employer's group health plan includes dental care, eye care, mental health counseling, ~~et cetera,~~ or other types of coverage, or if it includes coverage for ~~the~~ an employee's dependents as well as for the employee, the employer shall also continue this coverage.

(4) Although the employer's obligation to continue group health benefits under either FMLA or CFRA, or both, does not exceed 12 workweeks in a 12-month period, nothing shall preclude the employer from maintaining and paying for health care coverage for longer than 12 workweeks.

(5) An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have failed to return from leave if he/she works less than 30 days after returning from CFRA leave. An employee who retires during CFRA leave or during the first 30 days after returning is deemed to have returned from leave.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.

(6) Group health plan coverage must be maintained for an employee on CFRA leave until:

(A) The employee's CFRA leave entitlement is exhausted;

(B) The employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the period of the CFRA leave; or

(C) The employee provides unequivocal notice of intent not to return to work.

(d) Employee Payment of Group Health Benefit Premiums.

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

(1) If CFRA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

(2) If CFRA leave is unpaid, the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave is foreseeable).

(3) Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

(A) The employer may recover the employee's share of any premium payments missed by the employee for any CFRA leave period during which the employer maintains health coverage by paying the employee's share.

(B) Regardless of whether an employee pays premiums while on CFRA leave, all other obligations of an employer under CFRA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

(C) If an employer terminates an employee's health benefits coverage in accordance with this section because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(~~d~~e) Other Benefits and Seniority ~~Accrual~~

During the period of CFRA leave, the employee is entitled to accrual of seniority and to participate in health plans for any additional period of leave not covered by (c) above~~,~~; ~~and also~~ in any employee benefit plans, including life, short-term or long-term disability or accident insurance~~,~~; pension and retirement plans~~,~~; and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave.

(1) Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes shall be compared to other unpaid personal leaves offered by the employer. CFRA leave shall not constitute a break in service or cause the employee to lose seniority, even if other paid or unpaid leave constitutes a break in service for purposes of establishing longevity or seniority, or for layoff, recall, promotion, job assignment, or seniority-related benefits.

~~(2) If the employer's policy allows seniority to accrue when employees are out on paid leave, such as paid sick or vacation leave, then seniority will accrue during any part of a paid CFRA leave.~~

(~~3~~2) ~~The employee returning from CFRA leave shall return with no less seniority than the employee had when the leave commenced for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation.~~ If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on CFRA leave, the employer must give written notice to the employee that he or she is subject to the new or changed plan/benefits to the same extent as if the employee were not on leave.

(~~e~~f) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement that requires or authorizes any other type of unpaid personal or disability leave or if the employer's other unpaid personal or disability leaves do not allow for the continuation of benefits during these leaves, an employee taking a CFRA leave shall be entitled to continue to participate in the employer's health plans, pension and retirement plans, supplemental unemployment benefit plans or any other health and welfare employee benefit plan, in accordance with the terms of those plans, during the period of the CFRA leave.

(1) As a condition of continued coverage of group medical benefits (beyond the employer's obligation during the 12-week period described above in (c)), life insurance, short- or long-term disability plans or insurance, accident insurance, or other similar health and welfare employee benefit plans during any unpaid portion of the leave, the employer may require the employee to pay premiums at the group rate.

(A) If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.

(2) An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of time accrued under any such plan during any unpaid portion of the CFRA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of these plans, during the unpaid portion of the leave period.

(~~f~~g) Employee Status.

The employee shall retain employee status during the period of the CFRA leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, et cetera.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; ERISA, 29 U.S.C. § 1001 et seq.; and COBRA, 29 U.S.C. § 1161 et seq.

§ 11093. Relationship ~~Between~~ between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave.

(a) Separate and Distinct Entitlements.

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a pregnancy disability leave under Government Code section 12945 and section 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or a related medical condition~~s~~ is not included as a serious health condition under CFRA. Any period of incapacity or treatment due to pregnancy, including prenatal care, is included as a serious health condition under FMLA.

(c) CFRA Leave after Pregnancy Disability Leave.

At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date. There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave. There is also no requirement that the employee no longer be disabled by her pregnancy, childbirth or a related medical condition~~s~~ before taking CFRA leave for reason of the birth of her child.

(1) Where an employee has utilized four months of pregnancy disability leave prior to the

birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and Government Code section 12945) and CFRA leave for reason of the birth of the child (under this article) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or a related medical conditions for four months and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child. This maximum entitlement does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA.

(e) Disability Leave

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a disability leave under Government Code section 12945 and section 11064 et seq. of the regulations. If an employee has a serious health condition that also constitutes a disability as defined by Government Code section 12926 and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11094. Retaliation and Protection from Interference with CFRA Rights.

In addition to the retaliation prohibited by Government Code section 12940 and section 11021 of the regulations, it shall be an unlawful employment practice for any person to discharge, fine, suspend, expel, punish, refuse to hire, or otherwise discriminate against any individual, except as otherwise permitted in this article, because that individual has:

(a) exercised his or her right to CFRA leave, and/or

~~(b) given information or testimony regarding his or her CFRA leave, or another person's CFRA leave, in any inquiry or proceeding related to any right guaranteed under this article.~~

(a) Any violation of CFRA or its implementing regulations constitutes interfering with, restraining, or denying the exercise of rights provided by CFRA. "Interfering with" the exercise of an employee's rights includes, for example, refusing to authorize CFRA leave and discouraging an employee from using such leave. It would also include an action by a covered employer to avoid responsibilities under CFRA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50-employee threshold for employee eligibility under CFRA;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing an employee's hours available to work in order to avoid employee eligibility; and

(4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying leave in the future.

(b) CFRA's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise CFRA rights or giving information or testimony regarding his or her CFRA leave, or another person's CFRA leave, in any inquiry or proceeding related to any right guaranteed under this article. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid CFRA leave. By the same token, employers cannot use the taking of CFRA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can CFRA leave be counted against an employee under an employer's attendance policies.

(c) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under CFRA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take CFRA leave against some other benefit offered by the employer. This does not prevent the settlement or release of CFRA claims by employees based on past employer conduct without the approval of a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be reinstated to the same position the employee held at the time the employee's CFRA leave commenced or to a comparable position.

(d) All individuals, and not merely employees who are CFRA-qualified, are protected from retaliation for opposing (e.g., filing a complaint about) any practice that is unlawful under CFRA. They are similarly protected if they oppose any practice that they reasonably believe to

be a violation of CFRA or its implementing regulations.

(e) In addition to retaliation prohibited by CFRA, retaliation is also prohibited by Government Code 12940 and section 11021 of the regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ ~~11096~~11095. Notice of CFRA Rights and Obligations~~Right to Request CFRA Leave~~.

(a) Employers to Post Notice.

~~Covered employers shall provide notice to their employees of the right to request CFRA leave under the California Family Rights Act. Employers shall post the notice in a conspicuous place or places where employees tend to congregate.~~ Every employer covered by the CFRA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. If the employer publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, ~~that~~ the employer shall include a description of CFRA leave in the next edition of its handbook it publishes following adoption of these regulations. The employer may include both pregnancy disability leave and CFRA leave requirements in a single notice.

(b) Employers to Give Notice.

Employers are also encouraged to give a copy of the notice to each current and new employee, ensure that copies are otherwise available to each current and new employee, and disseminate the notice in any other way.

(c) Non-English Speaking Workforce.

Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their ~~primary~~spoken language shall translate

the notice into ~~the language or languages spoken by this group or these groups of employees~~ every language that is spoken by at least 10 percent of the workforce.

(d) Text of Notice.

The text below contains only the minimum requirements of the California Family Rights Act of 1993 and of the employer's obligation to provide pregnancy disability leave. Nothing in this notice requirement prohibits an employer from providing a leave policy that is more generous than that required by ~~this act~~ CFRA and providing its own notice of its own policy. Covered employers may develop their own notice or they may choose to use the text provided below, unless it does not accurately reflect their own policy.

FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE) AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to a~~n unpaid~~ family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances.

Even if you are not eligible for CFRA leave, if you are disabled by pregnancy, childbirth or a related medical condition~~s~~, you are entitled to take a pregnancy disability leave of up to four months, depending on your period(s) of actual disability. If you are CFRA-eligible, you have certain rights to take BOTH a pregnancy disability leave and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement~~—~~for pregnancy disability it is to the same position ~~or~~ and for CFRA it is to the same or a comparable position~~—~~at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

We may require certification from your health care provider before allowing you a leave for pregnancy disability or for your own serious health condition. ~~or~~We also may require

certification from the health care provider of your child, parent or spouse, who has a serious health condition, before allowing you a leave to take care of that family member. When medically necessary, leave may be taken on an intermittent or reduced work schedule.

If you are taking a leave for the birth, adoption, or foster care placement of a child, the basic minimum duration of the leave is two weeks, and you must conclude the leave within one year of the birth or placement for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact _____ .

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940, 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825

§ ~~11097~~11096. Relationship with FMLA Regulations.

To the extent that they are within the scope of Government Code section 12945.2 and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA ~~issued~~ that became effective ~~January 6, 1995~~ March 8, 2013 (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ ~~11098~~11097. Certification Form.

For leaves involving serious health conditions, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form~~, such as the United States Department of Labor Form WH-380, revised December 1994 (Certification of Health Care Provider/Family and Medical Leave Act of 1993), provided that~~ so long as the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient.

FAIR EMPLOYMENT & HOUSING ~~COMMISSION~~COUNCIL
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act ~~of 1993~~ (CFRA))

IMPORTANT NOTE: The California Genetic Information Nondiscrimination Act of 2011 (CalGINA) prohibits employers and other covered entities from requesting, or requiring, genetic information of an individual or family member of the individual except as specifically allowed by law. To comply with the Act, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information," as defined by CalGINA, includes information about the individual's or the individual's family member's genetic tests, information regarding the manifestation of a disease or disorder in a family member of the individual, and includes information from genetic services or participation in clinical research that includes genetic services by an individual or any family member of the individual. "Genetic Information" does not include information about an individual's sex or age.

1. Employee's Name:_____

2. Patient's Name (If other than employee):_____

   Patient's relationship to employee:_____

   If patient is employee's child, is patient either under 18 or an adult dependent child:

   Yes No

   ☐ ☐

3. Date medical condition or need for treatment commenced
   [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT CONSENT OF THE PATIENT:]

   _____

4. Probable duration of medical condition or need for treatment:_____

5. ~~The attached sheet describes what is meant by a~~Below is a description of what constitutes a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify as a serious health condition:~~under any of the categories described~~? ~~If so, please check the appropriate category.~~

   ~~(1) (2) (3) (4) (5) (6)~~

   Yes No

☐ ☐

6. If the certification is for the serious health condition of the employee, please answer the following:

Yes	No	
☐	☐	Is the employee able to perform work of any kind? (If "No," skip next question.)
☐	☐	Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)

7. If the certification is for the care of the employee's family member, please answer the following:

Yes	No	
☐	☐	Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation?
☐	☐	After review of the employee's signed statement (See Item 10 below), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)

8. Estimate the period of time care is needed or during which the employee's presence would be beneficial:

_____

9. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule.

Yes	No	
☐	☐	Intermittent Leave: Is it medically necessary for the employee to be off work on an intermittent basis ~~or to work less than the employee's normal work schedule in order to deal with~~due to the serious health condition of the employee or family member?
~~☐~~	~~☐~~	~~If the answer to 9 is yes, please indicate the estimated number of doctor's visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services, upon referral from the health care provider.~~ _____

_____
_____
_____
_____

If yes, please indicate the estimated frequency of the employee's need for intermittent leave due to the serious health condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: ____ times per _____week(s) _____month(s)

Duration: _____hours or ____ day(s) per episode

Yes No

☐ ☐ Reduced Schedule Leave: Is it medically necessary for the employee to work less than the employee's normal work schedule due to the serious health condition of the employee or family member?

If yes, please indicate the part-time or reduced work schedule the employee needs:

___ hour(s) per day; ___ days per week, from _____ through _____

Yes No

☐ ☐ Time Off for Medical Appointments or Treatment: Is it medically necessary for the employee to take time off work for doctor's visits or medical treatment, either by the health care practitioner or another provider of health services?

If yes, please indicate the estimated frequency of the employee's need for leave for doctor's visits or medical treatment, and the time required for each appointment, including any recovery period:

Frequency: ____ times per _____week(s) _____month(s)

Duration: _____hours or ____ day(s) per appointment/treatment

ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE. ****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

_____
_____
_____

11. Printed name of health care provider:_____Signature of health care provider: _____

Date:_____

12. Signature of Employee:

_____

Date:_____

***

--- Serious Health Condition ---

"Serious health condition" means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse. A serious health condition may involve one or more of the following:~~A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:~~

1. Hospital Care
   Inpatient care ~~(i.e., an overnight stay)~~ in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. A person is considered an "inpatient" when a heath care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

2. Absence Plus Treatment

   (a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

      (1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

      (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy [NOTE: An employee's own incapacity due to pregnancy is covered as a serious

health condition under FMLA but not under CFRA]

Any period of incapacity due to pregnancy~~,~~ or for prenatal care.

4. Chronic Conditions Requiring Treatment
A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse of physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision
A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)
Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.)~~,~~ severe arthritis (physical therapy), or kidney disease (dialysis).

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; California Genetic Information Nondiscrimination Act, Stats. 2011, ch. 261; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825. ~~Appendix B, Form WH-380, as revised December 1994.~~

Fair Employment & Housing Council
Amendments to the Fair Employment and Housing Act Regulations

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Subchapter 5. Contractor Nondiscrimination and Compliance

TEXT

Text proposed to be added is displayed in underline type.
Text proposed to be deleted is displayed in ~~strikethrough~~ type.

Subchapter 2. Discrimination in Employment

Article 1. General Matters [Note to publisher: What is currently the second section (§ 11005.1) in Article 1 of Subchapter 2 of Chapter 5 is being renumbered and placed into new Chapter 2 ("Conflict of Interest Code").]

Chapter 2. Conflict of Interest Code

§ ~~11005.1~~ 10500. Department of Fair Employment and Housing - Conflict of Interest Code.

The Political Reform Act, (Gov. Code, § 81000 et seq.) requires state and local government agencies to adopt and promulgate conflict of interest codes. The Fair Political Practices Commission has adopted a regulation (Cal. Code Regs., tit. 2, § 18730), which contains the terms of a standard conflict of interest code, which can be incorporated by reference in an agency's code. After public notice and hearing, the standard code may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act. Therefore, the terms of California Code of Regulations, title 2, section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, are hereby incorporated by reference. This regulation, and the attached Appendices designating positions and establishing disclosure requirements, shall constitute the conflict of interest code of the Department of Fair Employment and Housing.

Individuals holding designated positions shall file their statements with the Department of Fair Employment and Housing, which will make the statements available for public inspection and reproduction. (Gov. Code, § 81008). Upon receipt of the statement of the Director, the Department of Fair Employment and Housing will make and retain a copy and forward the original of the statements to the Fair Political Practices Commission.

Appendix A

Designated Positions	*Disclosure Category*
Accountant and Accounting Officer, all levels	2
Administrator, FEH, all levels	1
Associate Information Systems Analyst (Specialist)	3
Associate Programmer Analyst (Specialist)	3
Business Service Assistant (Specialist), all types	2
CEA, all levels	1
Chief Deputy Director, DFEH	1
Consultant	*
Data Processing Manager, all levels	3
Deputy Director	1
Director	1
FEH Consultant, all ranges	1
Legal Counsel, all levels and types	1
Legal Analyst	1
Legal Assistant	1
Senior Legal Analyst	1
Senior Programmer Analyst (Specialist)	3
Staff Information Systems Analyst (Supervisor)	3
Staff Programmer Analyst (Specialist)	3
Staff Services Analyst	2
Staff Services Manager, all levels and types	2

* Consultants shall be included in the list of designated positions and shall disclose pursuant to the Disclosure Requirements in this conflict of interest code subject to the following limitation: The Director may determine in writing that a particular consultant, although holding a designated position, is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Director's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.

Appendix B

Disclosure Requirements

Disclosure Category 1

Individuals holding positions assigned to Disclosure Category 1 must report interests in real property located within the State of California; investment and business positions in business entities, and income, including loans, gifts, and travel payments, from all sources.

Disclosure Category 2

Individuals holding designated positions in Disclosure Category 2 must report investments and business positions in business entities, and income, including gifts, loans, and travel payments, from sources, of the type to provide services, supplies, materials, or equipment to the Department. Such services include, but are not limited to, legal recording/reporting services.

Disclosure Category 3

Individuals holding designated positions in Disclosure Category 3 must report investments and business positions in business entities, and income, including gifts, loans, and travel payments, from sources, of the type to provide information technology or telecommunication services, goods, or supplies, including, but not limited to, software, hardware, or data retrieval and security services.

Note: Authority and reference cited: Section 81000 et seq., Government Code. (Section filed 6-6-83, operative 7-6-83; approved by Fair Political Practices Commission 4-18-83; Register 83, No. 24).

§ 11006. Statement of Policy and Purpose. [Note to publisher: The next three enumerated sections – §§ 11006, 11008, 11009 – still remain in Article 1 of Subchapter 2 of Chapter 5.]

The public policy of the State of California is to protect and safeguard the civil rights of all individuals to seek, have access to, obtain, and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age for individuals over forty years of age, <u>military and veteran status,</u> and sexual

orientation. Employment practices should treat all individuals equally, evaluating each on the basis of individual skills, knowledge and abilities and not on the basis of characteristics generally attributed to a group enumerated in the Act. The objectives of the California Fair Employment and Housing Act and these regulations are to promote equal employment opportunity and to assist all persons in understanding their rights, duties and obligations, so as to facilitate achievement of voluntary compliance with the law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920 and 12921(a), Government Code.

§ 11008. Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) "Applicant." Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, "Applicant" is also an individual who can prove that he or she has been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice. "Applicant" does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(b) "Apprenticeship Training Program." Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(c) "Employee." Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) "Employee" does not include an independent contractor as defined in Labor Code section 3353.

(2) "Employee" does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) "Employee" does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of

that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(~~a~~d) "Employer." Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) "Regularly employing" means employing five or more individuals for each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year regardless of whether the employee's worksite is located within or outside of California. While employees located outside of California are counted in determining whether employers employ five or more individuals for coverage purposes, the employees located outside of California are not themselves covered by the protections of the Act if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California.

(2) For purposes of "counting" the (five or more) employees, the individuals employed need not be employees as defined ~~below~~above; nor must any of them be full-time employees. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) "Employer" includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

~~(b) "Employee." Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.~~

~~(1) Employee does not include an independent contractor as defined in Labor Code section 3353.~~

~~(2) Employee does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.~~

~~(3) Employee does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.~~

~~(4) An employment agency is not an employee of the person or individual for whom it procures employees.~~

~~(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.~~

~~(c) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.~~

~~(d) "Labor Organization." Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.~~

(e) "Employer or Other Covered Entity." Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(~~f~~g) "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, "employment benefit" includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) "Employment benefit" also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) “Provision of a discrimination-free workplace” is a provision of a workplace free of harassment, as defined in section 11019(b).

(~~g~~h) “Employment Practice.” Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual's employment benefits or consideration for an employment benefit.

~~(h) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.~~

~~(i) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.~~

(i) “Labor Organization.” Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j) “Person performing services pursuant to a contract.” A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

(k) “Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12925, 12926, 12940, 12941 and 12942, Government Code; *Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850; *Sims v. Worldpac Inc.* (N.D. Cal. Feb. 22, 2013) 2013 WL 663277.

§ 11009. Principles of Employment Discrimination.

(a) Unlawful Practices and Individual Relief. In allegations of employment discrimination, a finding that an employer or other covered entity ~~respondent~~ has engaged in an unlawful employment practice is not dependent upon a showing of individual back pay or other compensable liability. Upon a finding that an employer or other covered entity ~~respondent~~ has engaged in an unlawful employment practice and on order of appropriate relief, a severable and

separate showing may be made that the complainant, complainants or class of complainants is entitled to individual or personal relief including, but not limited to, hiring, reinstatement or upgrading, back pay, restoration to membership in a ~~respondent~~ labor organization, or other relief in furtherance of the purpose of the Act.

(b) Liability of Employers. In view of the common law theory of *respondeat superior* and its codification in California Civil Code section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in section 11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, the applicant or employee has suffered a loss of or has been denied an employment benefit.

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.

(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941, 12942 and 12961, Government Code; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Article 2. Particular Employment Practices

§ 11019. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. (Reserved.)

(b) Harassment.

(1) For all purposes related to the Act's protections of individuals from unlawful harassment, the term "employee" shall include unpaid interns, volunteers, and persons providing services pursuant to a contract.

(~~1~~2) Harassment includes but is not limited to:

(A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;

(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;

(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or

(D) Sexual favors, e.g., unwanted sexual advances, which condition an employment benefit upon an exchange of sexual favors. [See also section 11034(f)(1).]

(E) In applying this subsection, the rights of free speech and association shall be accommodated consistently with the intent of this subsection.

(~~2~~3) Harassment of an applicant or employee by an employer or other covered entity, its agents or supervisors is unlawful.

(~~3~~4) Harassment of an applicant or employee by an employee other than those listed in subsection (b)(~~3~~2) above is unlawful if the employer or other covered entity, its agents or supervisors knows of such conduct and fails to take immediate and appropriate corrective action. Proof of such knowledge may be direct or circumstantial. If the employer or other covered entity, its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer or other covered entity can establish that it took reasonable steps to prevent harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

(~~4~~5) An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the aggrievement; however, an employee's failure to give such notice is not an affirmative defense.

(6) An employee who engages in unlawful harassment of a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(c) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an employee physical appearance, grooming, or dress standards. However, if such a standard discriminates on a basis enumerated in the Act and if it also significantly burdens the individual in his or her employment, it is unlawful.

(d) Reasonable Discipline. Nothing in these regulations may be construed as limiting an employer's or other covered entity's right to take reasonable disciplinary measures, which do not discriminate on a basis enumerated in the Act.

(e) Seniority. (Reserved.)

Note: Authority: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941 and 12942, Government Code.

§ 11023. Harassment and Discrimination Prevention and Correction

(a) Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct. (Gov. Code, § 12940(k).)

(1) A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.

(2) There is no stand-alone, private cause of action under Government Code section 12940(k). In order for a private claimant to establish an actionable claim under Government Code section 12940(k), the private claimant must also plead and prevail on the underlying claim of discrimination, harassment, or retaliation.

(3) However, in an exercise of its police powers, the Department may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation.

(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department’s DFEH-185 brochure on sexual harassment, or an alternative writing that complies with Government Code section 12950, an employer shall develop a harassment, discrimination, and retaliation prevention policy that:

(1) Is in writing;

(2) Lists all current protected categories covered under the Act;

(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;

(4) Creates a complaint process to ensure that complaints receive:

(A) An employer's designation of confidentiality, to the extent possible;

(B) A timely response;

(C) Impartial and timely investigations by qualified personnel;

(D) Documentation and tracking for reasonable progress;

(E) Appropriate options for remedial actions and resolutions; and

(F) Timely closures.

(5) Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor, including, but not limited to, the following:

(A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or

(B) A complaint hotline; and/or

(C) Access to an ombudsperson; and/or

(D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

(6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training, pursuant to section 11024 of these regulations.

(7) Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.

(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.

(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

(c) Dissemination of the policy shall include one or more of the following methods:

(1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;

(2) Sending the policy via e-mail with an acknowledgment return form;

(3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;

(4) Discussing policies upon hire and/or during a new hire orientation session; and/or

(5) Any other way that ensures employees receive and understand the policies.

(d) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the policy into every language that is spoken by at least 10 percent of the workforce.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, and 12950, Government Code; *Scotch v. Art Institute of California–Orange County, Inc.* (2009) 173 Cal.App.4th 986; *Trujillo v. No. County Transit Dist.* (1998) 63 Cal.App.4th 280, 289; *Dept. Fair Empl. & Hous. v. Lyddan Law Group, LLP*. (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C)].

§ ~~11023~~ 11024. Sexual Harassment Training and Education.

(a) Definitions. For purposes of this section:

(1) “Contractor” is a person performing services pursuant to a contract ~~to~~with an employer, meeting the criteria specified by Government Code section 12940(j)(5), for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(2) “Effective interactive training” includes any of the following:

(A) “Classroom” training is in-person, trainer-instruction, whose content is created by a trainer and provided to a supervisor by a trainer, in a setting removed from the supervisor's daily duties.

(B) “E-learning” training is individualized, interactive, computer-based training created

by a trainer and an instructional designer. An e-learning training shall provide a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.

(C) "Webinar" training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training's interactive content, discussion questions, hypothetical scenarios, polls, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. For a period of two years after the date of the webinar, the employer shall maintain a copy of the webinar, all written materials used by the trainer and all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar.

(D) Other "effective interactive training" and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training. These, however, are supplemental tools that cannot, by themselves, fulfill the requirements of this subdivision.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor's application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training. Examples include pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor's work environment.

(3) "Employee" includes full time, part time, and temporary workers.

(4) "Employer" means any of the following:

(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section,

governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered "political subdivisions of the state."

(5) "Having 50 or more employees" means employing or engaging 50 or more employees or contractors for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(6) "Instructional Designer" under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.

(7) "New" supervisory employees are employees promoted or hired to a supervisory position after ~~July 1, 2005~~ the date the employer last provided sexual harassment prevention training.

(8) "Supervisory employees" or "supervisors" under this section are supervisors located in California, defined under Government Code section 12926~~(s)~~. Attending training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

(9) "Trainers" or "Trainers or educators" qualified to provide training under this section are individuals who, through a combination of training and experience have the ability to train supervisors about the following: 1) ~~what are unlawful harassment, discrimination and retaliation under both California and federal law;~~ how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors' obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; ~~4~~ 5) how to respond to a harassment complaint; ~~5~~ 6) the employer's obligation to conduct a workplace investigation of a harassment complaint; ~~6~~ 7) what constitutes retaliation and how to prevent it; ~~7~~ 8) essential components of an anti-harassment policy; and ~~8~~ 9) the effect of harassment on harassed employees, co-workers, harassers and employers.

(A) A trainer shall be one or more of the following:

1. "Attorneys" admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

2. "Human resource professionals" or "harassment prevention consultants" working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a. designing or conducting discrimination, retaliation and sexual harassment prevention training; b. responding to sexual harassment complaints or other discrimination complaints; c. conducting investigations of sexual

harassment complaints; or d. advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or

3. “Professors or instructors” in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

(B) Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, professor or instructor because they lack the requisite years of experience may team teach with a trainer, in accordance with 1. through 3. immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

(10) “Training,” as used in this section, is effective interactive training as defined at section 11023(a)(2).

(11) “Two hours” of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

(b) Training.

(1) Frequency of Training. An employer shall provide two hours of training, in the content specified in section 11023(c), once every two years, and may use either of the following methods or a combination of the two methods to track compliance.

(A) “Individual” Tracking. An employer may track its training requirement for each supervisory employee, measured two years from the date of completion of the last training of the individual supervisor.

(B) “Training year” tracking. An employer may designate a “training year” in which it trains some or all of its supervisory employees and thereafter must again retrain these supervisors by the end of the next “training year,” two years later. Thus, supervisors trained in training year 2005 shall be retrained in 2007. For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer's other supervisors.

(2) Documentation of Training. To track compliance, ~~An~~ an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years ~~to track compliance~~, including but not limited to the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider ~~and shall retain the records for a minimum of two years~~.

(3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.

(4) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(5) Duplicate Training. A supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the supervisor's new supervisory position or within six months of the employer's eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor's last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

(6) Duration of Training. The training required by this section does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features, which allow a supervisor to pause his or her individual training so long as the actual e-learning program is two hours.

(c) Objectives and Content.

(1) The learning objectives of the training mandated by ~~California~~ Government Code section 12950.1 shall be: 1) to assist California employers in changing or modifying workplace behaviors that create or contribute to "sexual harassment," as that term is defined in California and federal law; 2) to provide trainees with information related to the negative effects of abusive conduct (as defined in Government Code section 12950.1(g)(2)) in the workplace; and ~~2~~3) to develop, foster, and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing, ~~and~~ effectively responding to incidents of sexual harassment, and implementing mechanisms to promptly address and correct wrongful behavior.

(2) Towards that end, the training mandated by ~~California~~ Government Code section 12950.1~~,~~ shall include, but is not limited to:

(~~1~~A) A definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.

(~~2~~ B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

(~~3~~ C) The types of conduct that constitutes sexual harassment.

(~~4~~ D) Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.

(~~5~~ E) Strategies to prevent sexual harassment in the workplace.

(F) Supervisors' obligation to report sexual harassment, discrimination, and retaliation of which they become aware.

(~~6~~ G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(~~7~~ H) The limited confidentiality of the complaint process.

(~~8~~ I) Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.

(~~9~~ J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an ~~The~~ employer's obligation to conduct an effective workplace investigation of a harassment complaint.

(~~10~~ K) Training on what to do if the supervisor is personally accused of harassment.

(~~11~~ L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part

of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

(M) A review of the definition of "abusive conduct" as used in this context (and as defined by Government Code section 12950.1(g)(2)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers – including a reduction in productivity and morale. The training should specifically discuss the elements of "abusive conduct," including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer's legitimate business interests (including performance standards). Examples of abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

(d) Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.

(e) Compliance with section 12950.1 prior to effective date of Council regulations. An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its supervisors prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding training as though it had been done under these regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926~~(q)~~, 12940~~(j)(5)~~, 12950 and 12950.1, Government Code.

§ ~~11024~~. ~~Labor Organizations. (Reserved.)~~

Article 4. National Origin and Ancestry Discrimination

§ 11028. Specific Employment Practices.

(a)-(c) (Reserved)

(d) An employer may have a rule requiring that employees speak only in English at certain times, so long as the employer can show that the rule is justified by business necessity (See section 11010(b)) and the employer has effectively notified its employees of the circumstances and time when speaking only in English is required and of the consequences of violating the rule.

(e) ~~(Reserved)~~It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under section

12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver's license is required by state or federal law; or

(B) Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law. An employer's or other covered entity's policy requiring applicants or employees to present or hold a driver's license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver's license is not needed in order to perform an essential function of the job).

(2) Nothing in this subsection shall limit or expand an employer's authority to require an applicant or employee to possess a driver's license.

(3) Nothing in this subsection shall alter an employer's or other covered entity's rights or obligations under federal immigration law.

(f) Citizenship requirements. Citizenship requirements that have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12926 and 12940, Government Code.

~~Article 5. Ancestry Discrimination (Reserved)~~

Article ~~6~~ 5. Sex Discrimination

§ 11029. General Prohibition ~~A~~against Discrimination on the Basis of Sex.

(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing Council pursuant to sections 12935, 12940, 12943, and 12945 of the Government Code.

(b) Statement of Purpose. The purpose of the laws against discrimination and harassment in employment because of sex is to eliminate the means by which individuals, by virtue of their sex, gender identity, or gender expression,~~of the female sex have historically been relegated to inferior jobs~~ are treated differently, paid less, treated adversely based on stereotyping, subjected to conduct of a sexual nature, subjected to hostile work environments, or made to suffer other forms of adverse action, and to guarantee that in the future ~~both sexes will enjoy~~ equal employment benefits will be afforded regardless of the individual's sex.

(c) Incorporation of General Regulations. These regulations pertaining to discrimination on the basis of sex incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless a

provision is specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943, and 12945, Government Code.

§ 11030. Definitions.

(a) "Gender expression" means a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.

(b) "Gender identity" means a person's identification as male, female, a gender different from the person's sex at birth, or transgender.

(~~a~~c) "Sex~~.~~" ~~An applicant's or employee's gender; however, nothing herein shall limit protections due an individual on account of pregnancy, childbirth, or related medical conditions.~~ has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender identity; and gender expression.

(~~b~~d) "Sex Stereotype~~.~~" means ~~A~~an assumption about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's ~~gender~~ sex.

(e) "Transgender" is a general term that refers to a person whose gender identity differs from the person's sex at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as "transsexual."

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12940, 12943 and 12945, Government Code.

§ 11031. Defenses.

Once employment discrimination on the basis of sex has been established, an employer or other covered entity may prove one or more appropriate affirmative defenses as generally set forth in section 11010, including, but not limited to, the defense of Bona Fide Occupational Qualification (BFOQ).

(a) Among situations that will not justify the application of the BFOQ defense are the following:

(1) A correlation between individuals of one sex and physical agility or strength;

(2) A correlation between individuals of one sex and height;

(3) Customer preference for employees of one sex;

(4) The necessity for providing separate facilities for one sex; or

(5) The fact that members of one sex have traditionally been hired to perform the particular type of job.

(b) Personal privacy considerations may justify a BFOQ only where:

(1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and

(2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and

(3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(c) Employers or other covered entities shall assign job duties and make other reasonable accommodations so as to minimize the number of jobs for which sex is a BFOQ.

(d) It is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and 12945, Government Code.

§ 11034. Terms, Conditions, and Privileges of Employment.

(a) Compensation.

(1) Except as otherwise required or permitted by regulation, an employer or other covered entity shall not base the amount of compensation paid to an employee, in whole or in part, on the employee's sex.

(2) Equal Compensation for Comparable Work. (Reserved.)

(b) Fringe Benefits.

(1) It is unlawful for an employer to condition the availability of fringe benefits upon an employee's sex.

(2) Insofar as an employment practice discriminates against one sex, an employer or other covered entity shall not condition the availability of fringe benefits upon whether an employee is a head of household, principal wage earner, secondary wage earner, or of other similar status.

(3) Except where otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated male and female

employees to fringe benefit plans, nor shall different amounts of basic benefits be established under fringe benefit plans for similarly situated male and female employees.

(4) It shall be unlawful for an employer or other covered entity to have a pension or retirement plan that establishes different optional or compulsory retirement ages based on the sex of the employee.

(c) Lines of Progression.

(1) It is unlawful for an employer or other covered entity to classify a job as male or female or to maintain separate lines of progression or separate seniority lists based on sex unless it is justified by a permissible defense. For example, a line of progression or seniority system is unlawful that:

(A) Prohibits a female from applying for a job labeled “male” or for a job in a “male” line of progression, and vice versa; or

(B) Prohibits a male scheduled for layoff from displacing a less senior female on a “female” seniority list, and vice versa.

(2) An employer or other covered entity shall provide equal opportunities to all employees for upward mobility, promotion, and entrance into all jobs for which they are qualified. However, nothing herein shall prevent an employer or other covered entity from implementing mobility programs to accelerate the ~~promotability~~ promotion of underrepresented groups.

(d) Dangers to Health, Safety, or Reproductive Functions.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of the other sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer; or

(B) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education.

(2) An employer or other covered entity may require an applicant or employee to provide a physician's certification that he or she is endangered by the working conditions.

(3) The existence of a greater risk for employees of one sex than the other shall not justify a BFOQ defense.

(4) An employer may not discriminate against members of one sex because of the prospective application of this subsection.

(5) With regard to protections due on account of pregnancy, childbirth, or related medical conditions, see ~~Section~~ section 11035.

(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in Labor Code ~~Section~~ section 6300 et seq.

(e) Working Conditions.

(1) Where rest periods are provided, equal rest periods must be provided to employees of both sexes.

(2) Equal access to comparable and adequate toilet facilities shall be provided to employees of both sexes. This requirement shall not be used to justify any discriminatory employment decision.

(3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee's sex.

(4) Job duties shall not be assigned according to sex stereotypes.

(5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual of one sex and not the other on the grounds that the individual is not sterilized or refuses to undergo sterilization.

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) ~~Interpersonal Conduct and Appearance~~ Sexual Harassment. ~~(1) Sexual Harassment.~~Sexual harassment is unlawful as defined in section ~~11091~~ 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment. Sexually harassing conduct may be either “quid pro quo” or “hostile work environment” sexual harassment:

(1) “Quid pro quo” (Latin for “this for that”) sexual harassment is characterized by

explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.

(2) Hostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment.

(A) The harassment must be severe or pervasive such that it alters the conditions of the victim's employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.

(B) An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

(C) An employer or other covered entity may be liable for sexual harassment committed by a supervisor, coworker, or third party.

1. An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.

2. An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.

3. An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

4. An employee who harasses a co-employee is personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(~~2~~ g) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code; *Meritor Savings Bank v Vinson* (1986) 477 US 57,

67-68; *Harris v Forklift Systems* (1993) 510 US 17, 23; *Lyle v Warner Bros*. (2006) 38 Cal.4th 264, 273; *Fisher v San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446.

Article 6~~A~~. ~~Sex Discrimination:~~ Pregnancy, Childbirth, or Related Medical Conditions

§ 11035. Definitions.

The following definitions apply only to this article:

(a) "Affected by pregnancy" means that because of pregnancy, childbirth, or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.

(b) "Because of pregnancy" means due to an employee's actual pregnancy, childbirth or a related medical condition.

(c) "CFRA" means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) "CFRA leave" means family care or medical leave as those leaves are defined at section 11087.

(d) A "condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, means a physical or mental condition intrinsic to pregnancy or childbirth that includes, but is not limited to, lactation. Generally lactation without medical complications is not a disabling related medical condition requiring pregnancy disability leave, although it may require transfer to a less strenuous or hazardous position or other reasonable accommodation.

(e) A "covered entity" is any person (as defined in Government Code section 12925), labor organization, apprenticeship training program, training program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of Government Code sections 12940, 12943, 12944 or 12945 apply.

(f) A woman is "disabled by pregnancy" if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons. An employee also may be considered to be disabled by pregnancy if, in the opinion of her health care provider, she is suffering from severe morning sickness or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth, loss or end of pregnancy. The preceding list of conditions is intended to be non-exclusive and illustrative only. Nothing in this Article shall exclude a transgender individual who is disabled by pregnancy.

(g) An "eligible female employee" is an employee who qualifies for coverage under her employer's group health plan. An employee's pregnancy, childbirth, or related medical conditions

are not lawful bases to make an employee ineligible for coverage. "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

(h) "Employer," as used in these regulations, except for section 11036, is any employer with five or more full or part time employees, who is an employer within the meaning of Government Code section 12926, and section 11008(~~a~~d), of these regulations. "Employer" includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees.

(i) "Employment in the same position" means employment in, or reinstatement to, the position that the employee held prior to reasonable accommodation, transfer, or disability leave because of pregnancy.

(j) "Employment in a comparable position" means employment in a position that is virtually identical to the employee's position held prior to reasonable accommodation, transfer, or disability leave in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from the employee's prior position and ordinarily has the same shift or the same or an equivalent work schedule.

(k) "FMLA" means the federal Family and Medical Leave Act of 1993~~, 29 U.S.C. § 2601, et seq.,~~ and its implementing regulations~~, 29 Code of Federal Regulations, part 825~~. "FMLA leave" means family care or medical leave taken pursuant to FMLA. ~~(29 C.F.R. § 825.)~~

(*l*) "Four months" means the number of days the employee would normally work within four calendar months (one-third of a year equaling 17 1/3 weeks), if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee's normal work month.

(m) "Group health plan" means medical coverage provided by the employer for its employees, as defined, as of ~~the effective date of these regulations (~~December 30, 2012~~)~~, in the Internal Revenue Code ~~of 1986 at section 5000(b)(1)~~.

(n) "Health care provider" means:

(1) 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's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

(2) 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 nurse practitioners, nurse midwives, licensed midwives, clinical psychologists, clinical social workers, chiropractors, physician assistants, who directly treats or supervises the treatment of the applicant's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

(3) 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.

(o) "Intermittent leave" means leave taken in separate periods of time because of pregnancy, rather than for one continuous period of time. Examples of intermittent leave include leave taken on an occasional basis for medical appointments, or leave taken several days at a time over a period of several months for purposes related to pregnancy, childbirth or a related medical condition.

(p) "Medical certification" means a written communication, as specified in section 11050(b)(6) and (b)(7), from the employee's health care provider to the employer stating that the employee is disabled because of pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous or hazardous position or duties or otherwise to be reasonably accommodated.

(q) "Perceived pregnancy" ~~is~~means being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition.

(r) "Pregnancy disability leave" is any leave, whether paid or unpaid, taken by an employee for any period(s) up to a total of four months during which she is disabled by pregnancy.

(s) "Reasonable accommodation" of an employee affected by pregnancy is any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. Reasonable accommodation may include, but is not limited to an employer:

(1) modifying work practices or policies;

(2) modifying work duties;

(3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);

(4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices; or

(5) providing a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code ~~section 1030 et seq~~.

(t) “Reduced work schedule” means permitting an employee to work less than the usual number of hours per work week, or hours per work day.

(u) A “related medical condition” is any medically recognized physical or mental condition related to pregnancy, childbirth or recovery from pregnancy or childbirth. This term includes, but is not limited to, lactation-related medical conditions such as mastitis; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy; or recovery from loss or end of pregnancy.

(v) “Transfer” means reassigning temporarily an employee affected by pregnancy to a less strenuous or hazardous position or to less strenuous or hazardous duties.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944, 12945, 12945.1 and 12945.2, Government Code; Family and Medical Leave Act, (FMLA) 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. § 825; Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. §2000e; and *J.E. Robinson v. Fair Employment & Housing Com*. (1992) 2 Cal. 4th 226.

§ 11036. Prohibition ~~A~~against Harassment.

As set forth in Government Code sections 12926 and 12940, it is an unlawful employment practice for any employer with one or more employees or other covered entities to harass an employee or applicant because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical conditions.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code.

§ 11039. Responsibilities of Employers.

(a) Employer Obligations

(1) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;

(B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(C) refuse to promote an employee because of pregnancy or perceived pregnancy;

(D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;

(F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c)~~, below~~. Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;

(H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;

(I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or because she has filed a complaint, testified, or assisted in any proceeding under the FEHA; or

(J) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any practice that is prohibited on the basis of sex.

(2) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to provide employee benefits for pregnancy as set forth at section 11044 ~~below~~, if the employer provides such benefits for other temporary disabilities;

(B) refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave, as set forth at section 11044~~ below~~, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 11040~~ below~~;

(D) refuse to transfer an employee affected by pregnancy as set forth at section 11041 ~~below~~;

(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section 11042~~ below~~; or

(F) deny, interfere with, or restrain an employee's rights to reasonable accommodation, to transfer or to take pregnancy disability leave under Government Code section 12945, including retaliating against the employee because she has exercised her right to reasonable accommodation, to transfer or to take pregnancy disability leave.

(b) Permissible defenses, as defined at section 11010, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. §2000e, §701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.); *Cal. Federal Sav. and Loan Ass'n v. Guerra* 479 U.S. 272 ~~[107 S.Ct. 683, 93 L.Ed.2d 613]~~.

§ 11040. Reasonable Accommodation.

(a) It is unlawful for an employer to deny a request for reasonable accommodation made by an employee affected by pregnancy if:

(1) The employee's request is based on the advice of her health care provider that reasonable accommodation is medically advisable; and

(2) The requested accommodation is reasonable.

(A) Whether an accommodation is reasonable is a factual determination to be made on a case-by-case basis, taking into consideration such factors, including but not limited to, the employee's medical needs, the duration of the needed accommodation, the employer's legally permissible past and current practices, and other such factors, under the totality of the circumstances.

(B) The employee and employer shall engage in a good faith interactive process to identify and implement the employee's request for reasonable accommodation as set forth in section 11050(a) ~~, below~~.

(b) When a reasonable accommodation, such as a change of work duties or job restructuring, is granted, it shall not affect the employee's independent right to take up to four months for pregnancy disability leave. If the requested reasonable accommodation, however, involves a reduction in hours worked such as a reduced work schedule, or intermittent leave, the employer may consider this as a form of pregnancy disability leave and deduct the hours from the employee's four month leave entitlement.

(c) An employer may, but need not, require a medical certification substantiating the employee's need for reasonable accommodation, as set forth in sections 11049(a) and (b), and 11050(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926 and 12945, Government Code.

§ 11041. Transfer.

(a) Transfer - All Employers

(1) It is unlawful for an employer who has a policy, practice, or collective bargaining

agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions or duties for the duration of the disability, including disabilities or conditions resulting from on-the-job injuries, to fail to apply the policy, practice or collective bargaining agreement to transfer an employee who is disabled by pregnancy and who so requests.

(2) It is unlawful for an employer to deny the request of an employee affected by pregnancy to transfer provided that:

(A) The employee's request is based on the advice of her health care provider that a transfer is medically advisable; and

(B) Such transfer can be reasonably accommodated by the employer. To provide a transfer, an employer need not create additional employment that the employer would not otherwise have created, discharge another employee, violate the terms of a collective bargaining agreement, transfer another employee with more seniority, or promote or transfer any employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no obligation to do so.

(C) An employer may, but need not, require a medical certification substantiating the employee's need for transfer, as set forth in sections 11049(a) and (b), and 11050(b).

(b) Burden of Proof. The burden shall be on the employer to prove, by a preponderance of the evidence, that such transfer cannot be reasonably accommodated for one or more of the enumerated reasons listed in section 11041(a)(2).

(c) Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule. If an employee's health care provider provides medical certification that an employee has a medical need to take intermittent leave or leave on a reduced work schedule because of pregnancy, the employer may require the employee to transfer temporarily to an available alternative position that meets the needs of the employee. The employee must meet the qualifications of the alternative position. The alternative position must have the equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than her regular job, but does not have to have equivalent duties.

(d) Right to Reinstatement ~~After~~after Transfer. When the employee's health care provider certifies that there is no further medical advisability for the transfer, intermittent leave, or leave on a reduced work schedule, the employer must reinstate the employee to her same or comparable position in accordance with the requirements of section 11043.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945, Government Code; FMLA, 29 U.S.C. §2601, et seq. and FMLA regulations, 29 C.F.R. §825.

§ 11042. Pregnancy Disability Leave.

The following provisions apply to leave taken for disability because of pregnancy:

(a) Four-Month Leave Requirement for all Employers. All employers must provide a leave of up to four months, as needed, for the period(s) of time an employee is actually disabled because of pregnancy, even if an employer has a policy or practice that provides less than four months of leave for other similarly situated, temporarily disabled employees. Pregnancy disability leave does not need to be taken in one continuous period of time.

(1) Employees are eligible for up to four months of leave per pregnancy, not per year. A "four month leave" means time off for the number of days or hours the employee would normally work within four calendar months (one-third of a year or 17 1/3 weeks). For a full time employee who works 40 hours per week, "four months" means 693 hours of leave entitlement, based on 40 hours per week times 17 1/3 weeks.

(2) For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis.

(A) For example, for an employee who works 20 hours per week, "four months" means 346.5 hours of leave entitlement. For an employee who normally works 48 hours per week, "four months" means 832 hours of leave entitlement.

(B) Leave on an intermittent leave or a reduced work schedule.
An employer may account for increments of intermittent leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than one hour. For example, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, the employer must account for pregnancy disability leave in increments of 30 minutes or less. If an employer accounts for other forms of leave in two-hour increments, the employer must account for pregnancy disability leave in increments no greater than one hour.

(C) If a holiday falls within a week taken as pregnancy disability leave, the week is nevertheless counted as a week of pregnancy disability leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's pregnancy disability leave entitlement.

(3) Although all pregnant employees are eligible for up to four months of leave, if that leave is taken in one period of time, taking intermittent or reduced work schedule throughout an employee's pregnancy will differentially affect the number of hours remaining that an employee is entitled to take pregnancy disability leave leading up to and after childbirth, depending on the employee's regular work schedule.

(A) For example, a full-time employee, who normally works a 40-hour work week is

entitled to 693 working hours of leave. If that employee takes 180 hours of intermittent leave throughout her pregnancy, she would still be entitled to take 513 hours, or approximately three months leading up to and after her childbirth.

(B) In contrast, a part-time employee who normally works 20 hours per week, would be entitled to 346.5 hours of leave. If that employee takes intermittent leave of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of leave, approximately two months of leave, leading up to and after her childbirth.

(4) Minimum Duration. Leave may be taken intermittently or on a reduced work schedule when an employee is disabled because of pregnancy, as determined by the health care provider of the employee. An employer may account for increments of intermittent leave using the shortest period of time that the employer's payroll system uses to account for other forms of leave, provided it is not greater than one hour, as set forth in section 11042(a)(2)(B).

(b) Employers w~~W~~ith More Generous Leave Policies. If an employer has a more generous leave policy for similarly situated employees with other temporary disabilities than is required for pregnancy purposes under these regulations, the employer must provide the more generous leave to employees temporarily disabled by pregnancy. If the employer's more generous leave policy exceeds four months, the employer's return policy after taking the leave would govern, not the return rights specified in these regulations.

(c) Denial of Leave is an Unlawful Employment Practice. It is an unlawful employment practice for an employer to refuse to grant pregnancy disability leave to an employee disabled by pregnancy.

(1) who has provided the employer with reasonable advance notice of the medical need for the leave, and

(2) whose health care provider has advised that the employee is disabled by pregnancy.

The employer may require medical certification of the medical advisability of the leave, as set forth in sections 11049(a) and (b), and 11050(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272~~[107 S.Ct. 683, 93 L.Ed.2d 613]~~.

§ 11043. Right to Reinstatement from Pregnancy Disability Leave.

The following rules apply to reinstatement from any leave or transfer taken for disability because of pregnancy.

(a) Guarantee of Reinstatement. An employee who exercises her right to take pregnancy

disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 11043(c)(1), to a comparable position, and the employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

(b) Refusal to Reinstate

(1) Definite Date of Reinstatement. Where a definite date of reinstatement has been agreed upon at the beginning of the leave or transfer, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave or transfer was granted by the employer and that the employer failed to reinstate the employee to the same position or, where applicable, to a comparable position, by the date agreed upon, as specified below in subdivisions (c)(1) and (c)(2).

(2) Change in Date of Reinstatement. If the reinstatement date differs from the employer's and the employee's original agreement or if no agreement was made, the employer shall reinstate the employee within two business days, or, when two business days is not feasible, reinstatement shall be made as soon as it is possible for the employer to expedite the employee's return, after the employee notifies the employer of her readiness to return to the same, or, where applicable, a comparable position, as specified below in subdivisions (c)(1) and (c)(2).

(c) Permissible Defenses - Employment Would Have Ceased

(1) Right to Reinstatement to the Same Position. An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than those rights she would have had if she had been continuously at work during the pregnancy disability leave or transfer period. This is true even if the employer has given the employee a written guarantee of reinstatement. A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

(2) Right to Reinstatement to a Comparable Position. An employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the employer is excused from reinstating the employee to her same position, or with the same duties, a refusal to reinstate the employee to a comparable position is justified if the employer proves, by a preponderance of the evidence, either of the following:

(A) The employer would not have offered a comparable position to the employee if she would have been continuously at work during the pregnancy disability leave or transfer period.

(B) There is no comparable position available.

1. A position is available if there is a position open on the employee's scheduled date of reinstatement or within 60 calendar days for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement.

2. An employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or email, or by links to postings on the company's ~~website~~ Web site if there is a section for job openings.

3. If a comparable position is not available on the employee's scheduled date of reinstatement, but the employee is later reinstated under the 60 calendar day period set forth in section 11043(c)(2)(B)1.~~, above~~, the period between the employee's scheduled date of reinstatement and the date of her actual reinstatement shall not be counted for purposes of any employee pay or benefit.

(3) If an employee is laid off during pregnancy disability leave or transfer for legitimate business reasons unrelated to her leave or transfer, the employer's responsibility to continue the pregnancy disability leave or transfer, maintain benefits, and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement, or otherwise.

(d) Right to Reinstatement to Job if Additional Leave Taken Following End of Pregnancy Disability Leave; Equal Treatment. If an employee disabled by pregnancy remains on some form of leave following the end of her pregnancy disability leave (e.g., employer's disability leave plan, etc.), an employer shall grant the employee reinstatement rights that are the same as any other similarly situated employee who has taken a similar length disability leave under the employer's policy, practice or collective bargaining agreement. For example, if the employer has a policy that grants reinstatement to other employees who are temporarily disabled for up to six months, the employer must also grant reinstatement to an employee disabled by pregnancy for six months. An employer and employee also may agree to a later date of reinstatement.

(e) Right to Reinstatement to Job if CFRA Leave is Taken Following Pregnancy Disability Leave. At the expiration of pregnancy disability leave, if an employee takes a CFRA leave for reason of the birth of her child, the employee's right to reinstatement to her job is governed by CFRA and not section 11043(c)(1) and (c)(2)~~, above~~. Under CFRA, an employer may reinstate an employee either to her same or a comparable position.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations,

29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 ~~[107 S.Ct. 683, 93 L.Ed.2d 613]~~.

§ 11044. Terms of Pregnancy Disability Leave.

(a) Paid Leave. An employer is not required to pay an employee during pregnancy disability leave unless the employer pays for other temporary disability leaves for similarly situated employees. An employee may be entitled to receive state disability insurance for a period of disability because of pregnancy and may contact the California Employment Development Department for more information.

(b) Accrued Time Off

(1) Sick Leave. An employer may require an employee to use, or an employee may elect to use, any accrued sick leave during the otherwise unpaid portion of her pregnancy disability leave.

(2) Vacation Time and Other Accrued Time Off. An employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off (PTO)) for which the employee is eligible.

(c) Continuation of Group Health Coverage

(1) An employer shall maintain and pay for group health coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period per pregnancy, beginning on the date the pregnancy disability leave begins, at the same level and under the same conditions that coverage would have been provided if the employee had ~~continued in employment continuously for the duration of the~~ not taken pregnancy disability leave.

(A) An employer may maintain and pay for coverage for a group health plan for longer than four months.

(B) If the employer is a state agency, the collective bargaining agreement shall govern the continued receipt by an eligible female employee of health care coverage under the employer's group health plan.

(2) The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.

(3) An employer may recover from the employee the premium paid while the employee was on pregnancy disability leave if both of the following conditions occur:

(A) The employee fails to return at the end of her pregnancy disability leave.

(B) The employee's failure to return from leave is for a reason other than one of the following:

1. Taking CFRA leave, unless the employee chooses not to return to work following the CFRA leave.

2. The continuation, recurrence or onset of a health condition that entitles the employee to pregnancy disability leave, unless the employee chooses not to return to work following the leave.

3. Non-pregnancy related medical conditions requiring further leave, unless the employee chooses not to return to work following the leave.

4. Any other circumstance beyond the control of the employee, including, but not limited to, circumstances where the employer is responsible for the employee's failure to return (e.g., the employer does not return the employee to her same position or reinstate the employee to a comparable position), or circumstances where the employee must care for herself or a family member (e.g., the employee gives birth to a child with a serious health condition).

(d) Other Benefits and Seniority Accrual. During her pregnancy disability leave, the employee shall accrue seniority and participate in employee benefit plans, including, but not limited to, life, short-term and long-term disability or accident insurance, pension and retirement plans, stock options and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability.

(1) If the employer's policy allows seniority to accrue when employees are on paid leave, such as paid sick or vacation leave, and/or unpaid leave, then seniority will accrue during any part of a paid and/or unpaid pregnancy disability leave.

(2) The employee returning from pregnancy disability leave shall return with no less seniority than the employee had when the leave commenced.

(e) Employee Status. The employee shall retain employee status during the period of the pregnancy disability leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, or other qualifying provisions.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA

regulations, 29 C.F.R. § 825; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. § 2000e, § 701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).

§ 11045. Relationship ~~B~~b<u>e</u>tween Pregnancy Leave and FMLA Leave.

(a) A Pregnancy Leave May Also Be a FMLA Leave<u>.</u> If the employer is a covered employer and the employee is eligible for leave under the federal Family Care and Medical Leave Act (FMLA), the employer may be able to count the employee's pregnancy disability leave under this article, up to a maximum of 12 weeks, against her FMLA leave entitlement.

(b) FMLA Coverage<u>.</u> For more information on rights and obligations under FMLA, consult the FMLA regulations regarding family care and medical leave ~~(29 C.F.R. § 825)~~.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq.; and FMLA regulations, 29 C.F.R. § 825.

§ 11046. Relationship ~~B~~b<u>e</u>tween CFRA and Pregnancy Leaves.

(a) Separate and Distinct Entitlements<u>.</u> The right to take a pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take leave under the California Family Rights Act (CFRA), Government Code sections 12945.1 and 12945.2.

(b) Serious Health Condition – Pregnancy<u>.</u> An employee's own disability due to pregnancy, childbirth<u>,</u> or related medical conditions is not a serious health condition under CFRA.

(c) CFRA Leave after Pregnancy Disability Leave<u>.</u> At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.

(1) There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave for the birth of her child. There is also no requirement that the employee no longer be disabled by her pregnancy before taking CFRA leave for the birth of her child.

(2) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, as a reasonable accommodation, allow the employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled under CFRA.

(d) Maximum Entitlement<u>.</u> The maximum statutory leave entitlement for California employees, provided they qualify for CFRA leave, for both pregnancy disability leave and CFRA leave for reason of the birth of the child and/or the employee's own serious health condition is the working

days in 29 1/3 workweeks. This assumes that the employee is disabled by pregnancy for four months (the working days in 17 1/3 weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945, 12945.1 and 12945.2, Government Code.

§ 11047. Relationship ~~B~~between Pregnancy Disability Leave and Leave of Absence as Reasonable Accommodation for Physical or Mental Disability - Separate and Distinct Rights.

The right to take pregnancy disability leave under Government Code section 12945 and these regulations is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation under Government Code section 12940. At the end or depletion of an employee's pregnancy disability leave, an employee who has a physical or mental disability (which may or may not be due to pregnancy, childbirth, or related medical conditions) may be entitled to reasonable accommodation under Government Code section 12940. Entitlement to leave under section 12940 must be determined on a case-by case basis, using the standards provided in the disability discrimination provisions article 9) of these regulations, and is not diminished by the employee's exercise of her right to pregnancy disability leave.

Note: Authority cited: Sections 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code.

§ 11049. Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, ~~To~~ to Transfer and ~~To~~to Take Pregnancy Disability Leave.

(a) Employers to Provide Reasonable Advance Notice Advising Employees Affected by Pregnancy of Their FEHA Rights and Obligations. An employer shall give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth, or related medical conditions as set forth ~~below~~ at section 11049(e)~~ and (f),~~ and as contained in the Notice ~~A and Notice B~~ as set forth ~~below~~ at section 11051(a)~~ and (b)~~, or ~~their~~its equivalent~~s~~.

(b) Content of Employer's Reasonable Advance Notice. An employer shall provide its employees with information about:

(1) an employee's right to request reasonable accommodation, transfer, or pregnancy disability leave;

(2) employees' notice obligations, as set forth in section 11050, to provide adequate advance notice to the employer of the need for reasonable accommodation, transfer or pregnancy disability leave; and

(3) the employer's requirement, if any, for the employee to provide medical certification to establish the medical advisability for reasonable accommodation, transfer, or pregnancy disability leave, as set forth in section 11050(b).

(c) Consequences of Employer Notice Requirement

(1) If the employer follows the requirements in section 11049(d) ~~below~~, such compliance shall constitute reasonable advance notice to the employee of the employer's notice obligations.

(2) Failure of the employer to provide reasonable advance notice shall preclude the employer from taking any adverse action against the employee, including denying reasonable accommodation, transfer or pregnancy disability leave, for failing to furnish the employer with adequate advance notice of a need for reasonable accommodation, transfer, or pregnancy disability leave.

(d) Distribution of Notices

(1) Employers shall post and keep posted the appropriate notice on its premises, in conspicuous places where employees are employed. The notice shall explain the Act's provisions and provide information about how to contact the Department of Fair Employment and Housing to file a complaint and learn more about rights and obligations under the Act ~~in a conspicuous place or places where employees congregate~~. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it ~~otherwise meets the requirements of this section.~~is posted electronically in a conspicuous place or places where employees would tend to view it in the workplace.

(2) An employer is also required to give an employee a copy of the appropriate notice as soon as practicable after the employee tells the employer of her pregnancy or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves.

(3) If the employer publishes an employee handbook that describes other kinds of reasonable accommodation, transfers or temporary disability leaves available to its employees, that employer ~~is encouraged to~~shall include a description of reasonable accommodation, transfer, and pregnancy disability leave in the next edition of its handbook that it publishes following adoption of these regulations. In the alternative, the employer may distribute to its employees a copy of its Notice at least annually. ~~(d~~Distribution may be by electronic mail~~)~~.

(4) Non-English Speaking Workforce. Any FEHA-covered employer whose work force at any facility or establishment is comprised of ~~ten~~ 10 percent or more persons whose ~~primary~~spoken language is not English shall translate the notice into ~~the language or languages spoken by this group or these groups of employees~~ every language that is spoken by at least 10 percent of the workforce. In addition, any FEHA-covered employer shall make a reasonable effort to give either verbal or written notice in the appropriate language to any employee who the employer knows is not proficient in English, and for whom written notice previously has not been given in her primary language, of her rights

to pregnancy disability leave, reasonable accommodation, and transfer, once the employer knows the employee is pregnant.

(e) Notice ~~A.~~ ~~Notice A or its equivalent is for employers with less than 50 employees and who are therefore not subject to CFRA or FMLA.~~ An employer may provide a leave policy that is more generous than that required by FEHA if that more generous policy is provided to all similarly-situated, disabled employees. An employer may develop its own notice or it may choose to use the text provided in section 11051~~(a)~~, ~~below,~~ unless it does not accurately reflect its own policy.

~~(f) Notice B Notice B or its equivalent is for employers with 50 or more employees who are subject to CFRA or FMLA. Notice B combines notice of both an employee's rights regarding pregnancy and CFRA leave rights and satisfies the notice obligations of both this article and section 11095 of the regulations. An employer may develop its own notice or it may choose to use the text provided in section 11051(b), below, unless it does not accurately reflect its own policy.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825.

§ 11050. Employee Requests for Reasonable Accommodation, Transfer or Pregnancy Disability Leave: Advance Notice; Medical Certification; Employer Response.

The following rules apply to any request for reasonable accommodation, transfer, or disability leave because of pregnancy.

(a) Adequate Advance Notice

(1) Verbal or Written Notice. An employee shall provide timely oral or written notice sufficient to make the employer aware that the employee needs reasonable accommodation, transfer, or pregnancy disability leave, and, where practicable, the anticipated timing and duration of the reasonable accommodation, transfer or pregnancy disability leave.

(2) 30 Days Advance Notice. An employee must provide the employer at least 30 days advance notice before the start of reasonable accommodation, transfer, or pregnancy disability leave if the need for the reasonable accommodation, transfer, or leave is foreseeable. The employee shall consult with the employer and make a reasonable effort to schedule any planned appointment or medical treatment to minimize disruption to the employer's operations, subject to the health care provider's approval.

(3) When 30 Days Is Not Practicable. If 30 days advance notice is not practicable, because it is not known when reasonable accommodation, transfer, or leave will be required to begin, or because of a change in circumstances, a medical emergency, or other good cause, notice must be given as soon as practicable.

(4) Prohibition ~~A~~against Denial of Reasonable Accommodation, Transfer, or Leave in Emergency or Unforeseeable Circumstances. An employer shall not deny reasonable accommodation, transfer, or pregnancy disability leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide adequate advance notice of the need for the reasonable accommodation, transfer, or leave.

(5) Employer Response to Reasonable Accommodation, Transfer, or Pregnancy Disability Leave Request. The employer shall respond to the reasonable accommodation, transfer, or pregnancy disability leave request as soon as practicable, and, in any event no later than ~~ten~~ 10 calendar days after receiving the request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(6) Consequences for Employee Who Fails to Give Employer Adequate Advance Notice of Need for Reasonable Accommodation or Transfer. If an employee fails to give timely advance notice when the need for reasonable accommodation or transfer is foreseeable, the employer may delay the reasonable accommodation or transfer until 30 days after the date the employee provides notice to the employer of the need for the reasonable accommodation or transfer. However, under no circumstances may the employer delay the granting of an employee's reasonable accommodation or transfer if to do so would endanger the employee's health, her pregnancy, or the health of her co-workers.

(7) Direct notice to the employer from the employee rather than from a third party regarding the employee's need for reasonable accommodation, transfer, or pregnancy disability leave is preferred, but not required. The content of any notice must meet the requirements of this section and the employer may require medical certification.

(b) Medical Certification. As a condition of granting reasonable accommodation, transfer, or pregnancy disability leave, the employer may require written medical certification. The employer must notify the employee of the need to provide medical certification; the deadline for providing certification; what constitutes sufficient medical certification; and the consequences for failing to provide medical certification.

(1) An employer must notify the employee of the medical certification requirement each time a certification is required and provide the employee with any employer-required medical certification form for the employee's health care provider to complete. An employer may use the form provided at section 11050(e), or may develop its own form. Notice to the employee of the need for medical certification may be oral if the employee is already out on pregnancy disability leave because the need for the leave was unforeseeable. The employer shall thereafter mail or send via electronic mail or by facsimile a copy of the medical certification form to the employee or to her health care provider, whomever the employee designates.

(2) When the leave is foreseeable and at least 30 days' notice has been provided, the

employee shall provide the medical certification before the leave begins. When this is not practicable, the employee shall provide the requested certification to the employer within the time frame requested by the employer (which must be at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(3) When the employer requires medical certification, the employer shall request that an employee furnish medical certification from a health care provider at the time the employee gives notice of the need for reasonable accommodation, transfer or leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the reasonable accommodation, transfer, or leave or its duration.

(4) At the time the employer requests medical certification, the employer shall also advise the employee of the anticipated consequences of an employee's failure to provide adequate medical certification. The employer shall also advise the employee whenever the employer finds a medical certification inadequate or incomplete, and provide the employee a reasonable opportunity to cure any deficiency.

(5) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the medical certification requirements of these regulations, and the employee or employer elects to substitute sick, vacation, personal or family leave for unpaid pregnancy disability leave, only the employer's less stringent leave certification requirements may be imposed.

(6) The medical certification indicating the medical advisability of reasonable accommodation or a transfer is sufficient if it contains:

(A) A description of the requested reasonable accommodation or transfer;

(B) A statement describing the medical advisability of the reasonable accommodation or transfer because of pregnancy; and

(C) The date on which the need for reasonable accommodation or transfer became or will become medically advisable and the estimated duration of the reasonable accommodation or transfer.

(7) The medical certification indicating disability necessitating a leave is sufficient if it contains:

(A) A statement that the employee needs to take pregnancy disability leave because she is disabled by pregnancy, childbirth or a related medical condition;

(B) The date on which the employee became disabled because of pregnancy and the estimated duration of the leave.

(8) If the certification satisfies the requirements of section 11050(b), the employer must accept it as sufficient. The employer may not ask the employee to provide additional information beyond that allowed by these regulations. Upon expiration of the time period that the health care provider originally estimated the employee would need reasonable accommodation, transfer, or leave, the employer may require the employee to obtain recertification if additional time is requested.

(9) The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(c) Failure to Provide Medical Certification

(1) In the case of a foreseeable need for reasonable accommodation, transfer, or pregnancy disability leave, an employer may delay granting the reasonable accommodation, transfer or leave to an employee who fails to provide timely certification after the employer has requested the employee to furnish such certification (i.e., within 15 calendar days, if practicable), until the required certification is provided.

(2) When the need for reasonable accommodation, transfer or leave is not foreseeable, or in the case of recertification, an employee shall provide certification (or recertification) within the time frame requested by the employer (which must be at least 15 days after the employer's request) or as soon as reasonably possible under the circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of the reasonable accommodation, transfer or pregnancy disability leave.

(d) Release to Return to Work. As a condition of an employee's return from pregnancy disability leave or transfer, the employer may require the employee to obtain a release to return-to-work from her health care provider stating that she is able to resume her original job or duties only if the employer has a uniformly applied practice or policy of requiring such releases from other similarly situated employees returning to work after a non-pregnancy related disability leave or transfer.

(e) Medical Certification Form. Employers requiring written medical certification from their employees who request a reasonable accommodation, transfer or disability leave because of pregnancy may develop their own form, utilize one provided by the employee's health care provider or use the form provided below.

FAIR EMPLOYMENT & HOUSING COUNCIL

CERTIFICATION OF HEALTH CARE PROVIDER FOR PREGNANCY DISABILITY LEAVE, TRANSFER AND/OR REASONABLE ACCOMMODATION

Employee's Name: _____

Please certify that, because of this patient's pregnancy, childbirth, or a related medical condition (including, but not limited to, recovery from pregnancy, childbirth, loss or end of pregnancy, or post-partum depression), this patient needs (check all appropriate category boxes):

[ ] Time off for medical appointments.

Specify when and for what duration:

_____

_____

[ ] A disability leave. [Because of a patient's pregnancy, childbirth or a related medical condition, she cannot perform one or more of the essential functions of her job or cannot perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons.]

Beginning (Estimate): _____

Ending (Estimate): _____

[ ] Intermittent leave. Specify medically advisable intermittent leave schedule:

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

[ ] Reduced work schedule. [Specify medically advisable reduced work schedule.]

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

[ ] Transfer to a less strenuous or hazardous position or to be assigned to less strenuous or hazardous duties [specify what would be a medically advisable position/duties].

_____

_____

Beginning (Estimate): _____

Ending (Estimate): _____

[ ] Reasonable accommodation(s). [Specify medically advisable needed accommodation(s). These could include, but are not limited to, modifying lifting requirements, or providing more frequent breaks, or providing a stool or chair.]

_____
_____

Beginning (Estimate): _____

Ending (Estimate): _____

Name, license number and medical/health care specialty [printed] of health care provider.

_____

_____

_____

_____

Signature of health care provider:

_____

Date:
_____

Note: Authority cited: Sections 12935(a) and 12945, Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq., and FMLA regulations, 29 C.F.R. § 825.

§ 11051. Employer Notice~~s~~.

~~(a) Notice A~~

YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE

If you are pregnant, have a related medical condition, or are recovering from childbirth, PLEASE READ THIS NOTICE.

• California law protects employees against discrimination or harassment because of an employee's pregnancy, childbirth or any related medical condition (referred to below as "because of pregnancy"). California also law prohibits employers from denying or interfering with an employee's pregnancy-related employment rights.

• Your employer has an obligation to:

° reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);

° transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and

° provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17 1/3 weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.

° provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code ~~section 1030, et seq~~.

• For pregnancy disability leave:

° PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care provider determines how much time you will need.

° Once your employer has been informed that you need to take PDL, your employer must guarantee in writing that you can return to work in your same position if you request a written guarantee. Your employer may require you to submit written medical certification from your health care provider substantiating the need for your leave.

° PDL may include, but is not limited to, additional or more frequent breaks, time for prenatal or postnatal medical appointments, doctor-ordered bed rest, severe "morning

sickness," gestational diabetes, pregnancy-induced hypertension, preeclampsia, recovery from childbirth or loss or end of pregnancy, and/or post-partum depression.

° PDL does not need to be taken all at once but can be taken on an as-needed basis as required by your health care provider, including intermittent leave or a reduced work schedule, all of which counts against your four month entitlement to leave.

° Your leave will be paid or unpaid depending on your employer's policy for other medical leaves. You may also be eligible for state disability insurance or Paid Family Leave (PFL), administered by the California Employment Development Department.

° At your discretion, you can use any vacation or other paid time off during your PDL.

° Your employer may require or you may choose to use any available sick leave during your PDL.

° Your employer is required to continue your group health coverage during your PDL at the same level and under the same conditions that coverage would have been provided if you had continued in employment continuously for the duration of your leave.

° Taking PDL may impact certain of your benefits and your seniority date; please contact your employer for details.

° If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Notice Obligations as an Employee.

• Give your employer reasonable notice: To receive reasonable accommodation, obtain a transfer, or take PDL, you must give your employer sufficient notice for your employer to make appropriate plans. – Sufficient notice means 30 days advance notice if the need for the reasonable accommodation, transfer, or PDL is foreseeable, otherwise as soon as practicable if the need is an emergency or unforeseeable.

• Provide a Written Medical Certification from Your Health Care Provider. Except in a medical emergency where there is no time to obtain it, your employer may require you to supply a written medical certification from your health care provider of the medical need for your reasonable accommodation, transfer or PDL. If the need is an emergency or unforeseeable, you must provide this certification within the time frame your employer requests, unless it is not practicable for you to do so under the circumstances despite your diligent, good faith efforts. Your employer must provide at least 15 calendar days for you to submit the certification. See

your employer for a copy of a medical certification form to give to your health care provider to complete.

• PLEASE NOTE that if you fail to give your employer reasonable advance notice or, if your employer requires it, written medical certification of your medical need, your employer may be justified in delaying your reasonable accommodation, transfer, or PDL.

Additional Rights under California Family Rights Act (CFRA) Leave

• You also may be entitled to additional rights under the California Family Rights Act of 1993 (CFRA) if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave. This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition (not related to pregnancy) or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances. For further information on the availability CFRA leave, please review your employer's Notice regarding the availability of CFRA leave.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, visit the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov.

~~(b) Notice B~~

~~FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE~~

~~Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with your employer and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.~~

~~Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth, or related medical conditions, you are entitled to take pregnancy disability leave (PDL) of up to four months , or the working days in one-third of a year or 17 1/3 weeks, depending on your period(s) of actual disability. Time off needed for prenatal or postnatal care; doctor-ordered bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; childbirth; postpartum depression; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy would all be covered by your PDL.~~

~~Your employer also has an obligation to reasonably accommodate your medical needs (such as allowing more frequent breaks) and to transfer you to a less strenuous or hazardous position if it is medically advisable because of your pregnancy.~~

~~If you are CFRA-eligible, you have certain rights to take BOTH PDL and a separate CFRA leave for reason of the birth of your child. Both leaves guarantee reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under the law.~~

~~If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or a family member). For events that are unforeseeable, you must to notify your employer, at least verbally, as soon as you learn of the need for the leave.~~

~~Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.~~

~~Your employer may require medical certification from your health care provider before allowing you a leave for:~~

~~• your pregnancy;~~

~~• your own serious health condition; or~~

~~• to care for your child, parent, or spouse who has a serious health condition.~~

~~See your employer for a copy of a medical certification form to give to your health care provider to complete.~~

~~When medically necessary, leave may be taken on an intermittent or a reduced work schedule.~~

~~If you are taking a leave for the birth, adoption or foster care placement of a child, the basic minimum duration of the leave is two weeks and you must conclude the leave within one year of the birth or placement for adoption or foster care.~~

~~Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. Contact your employer for more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits.~~

~~This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). The FEHA prohibits employers from denying, interfering with, or restraining your exercise of these rights. For more information about your rights and obligations, contact your employer, look at the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing's Web site at www.dfeh.ca.gov.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq., and FMLA regulations, 29 C.F.R. § 825.

Article 8. Religious Creed Discrimination

§ 11059. General Prohibition ~~A~~against Religious Creed Discrimination.

(a) Statutory Source. These regulations concerning religious discrimination are adopted by the Council pursuant to section 12940 of the Government Code.

(b) Statement of Purpose. The freedom to worship as one believes is a basic human right. To that end, the accommodation ~~to~~ of religious pluralism is an important and necessary part of our society. Questions of religious discrimination and accommodation to the varied religious practices of the people of the State of California often arise in complex and emotionally charged situations; therefore, each case must be reviewed on an individual basis to best balance often contradictory social needs.

(c) Incorporation of General Regulations. These regulations incorporate all of the provisions of Articles 1 and 2 of Subchapter 2, unless specifically excluded or modified.

(d) The Act's prohibition against religious discrimination and duty to provide reasonable accommodations for religious observances and dress and grooming practices applies to individuals serving in apprenticeship programs, unpaid internships, and any other program to provide unpaid experience for a person in the workplace or industry, in addition to employees, applicants, and others covered by section 12940(l) of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11060. Establishing Religious Creed Discrimination.

"Religious creed" includes any traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. It encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926. Religious creed discrimination may be established by showing:

(a) Employment benefits have been denied, in whole or in part, because of an applicant's or employee's religious creed or lack of religious creed.

(b) The employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation.

(c) Religious creed is a protected category under the Act, and the examples of unlawful conduct provided in this section are non-exclusive.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code.

§ 11062. Reasonable Accommodation.

An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship. Refusing to hire an applicant or terminating an employee in order to avoid the need to accommodate a religious practice constitutes religious creed discrimination.

(a) A ~~R~~reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement and may include, but is not limited to, job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances. Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public.

(b) In determining whether a reasonable accommodation would impose an undue hardship on the operations of an employer or other covered entity, factors to be considered include, but are not limited to:

(1) The size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters;

(2) The overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities, and size of budget;

(3) The type of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

(4) The type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership;

(5) The nature and cost of the accommodation involved;

(6) Reasonable notice to the employer or other covered entity of the need for accommodation; and

(7) Any available reasonable alternative means of accommodation.

(c) Reasonable accommodation includes, but is not limited to, the following specific employment policies or practices:

(1) Interview and examination times. Scheduled times for interviews, examinations, and other functions related to employment opportunities shall reasonably accommodate religious practices.

(2) Dress and Grooming Standards. Dress and grooming standards or requirements for personal appearance shall ~~be flexible enough to~~ take into account "religious dress ~~practices~~ and grooming practices," as defined in Government Code section 12926.

(3) Union Dues. An employer or union shall not require membership from any employee or applicant whose religious creed prohibits such membership. An applicant's or employee's religious creed shall be reasonably accommodated with respect to union dues.

(d) It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on religion, regardless of whether the employer granted the request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926 and 12940, Government Code; *Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467 as amended (Nov. 19, 1996); *EEOC v. Abercrombie & Fitch Stores, Inc.* (2015) 135 S.Ct. 2028.

Article 9. Disability Discrimination

§ 11064. General Prohibitions ~~A~~against Discrimination on the Basis of Disability.

(a) Statutory Source. These regulations are adopted by the Council pursuant to sections 12926, 12926.1 and 12940 of the Government Code.

(b) Statement of Purpose. The Fair Employment and Housing Council is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental disability or medical condition that is disabling, potentially disabling or perceived to be disabling or potentially disabling. The definition of disability in these regulations shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the Fair Employment and Housing Act (FEHA). As with the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendment Act of 2008 ~~(Pub. L. No. 110-325)~~, the primary focus in cases brought under the FEHA should be whether employers and other covered entities have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their obligations to engage in the interactive process and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis. Further, the interactive process requires an individualized assessment of both the job at

issue and the specific physical or mental limitations of the individual that are directly related to the need for reasonable accommodation.

(c) Incorporation of General Regulations. These regulations governing discrimination on the basis of disability incorporate each of the provisions of Articles 1 and 2 of Subchapter 2, unless specifically excluded or modified.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11065. Definitions.

As used in this article, the following definitions apply:

(a) "Assistive animal" means an trained animal, including a trained dog, that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) "Guide" dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) "Signal" dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) "Service" dog," as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) "Support" dog" or other animal that provides emotional, cognitive, or other similar support or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.

(2) Minimum Sstandards for Aassistive Aanimals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace:

(A) is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces; and

(B) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace; and

(C) is trained to provide assistance for the employee's disability.

(3) A "support animal" may constitute a reasonable accommodation in certain circumstances. A support animal is one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. As in other contexts, what

constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

(b) "Business Necessity," as used in this article regarding medical or psychological examinations, means that the need for the disability inquiry or medical examination is vital to the business.

(c) "CFRA" means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this article "CFRA leave" means medical leave taken pursuant to CFRA.

(d) "Disability" shall be broadly construed to mean and include any of the following definitions:

(1) "Mental ~~D~~disability," as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. "Mental ~~D~~disability" includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) "Physical ~~D~~disability," as defined at Government Code section 12926, includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and

(B) limits a major life activity.

(C) "Disability" includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.

(3) A "special education" disability is any other recognized health impairment or mental or psychological disorder not described in section 11065(d)~~(1) or (d)(2),~~ of this article, that requires or has required in the past special education or related services. A special education disability may include a "specific learning disability," manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder,

such as those for English language acquisition by persons whose first language was not English.

(4) A "~~R~~rrecord or ~~H~~hhistory of ~~D~~ddisability" includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.

(5) A "~~P~~pperceived ~~D~~ddisability" means being "r~~R~~regarded as," "p~~P~~erceived as" or "t~~T~~reated as" ~~H~~hhaving a ~~D~~ddisability. Perceived disability includes:

(A) Being regarded or treated by the employer or other entity covered by this article as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or

(B) Being subjected to an action prohibited by this article, including non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

(6) A "~~P~~pperceived ~~P~~ppotential ~~D~~ddisability" includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) "Medical condition" is a term specifically defined at Government Code section 12926, to mean either:

(A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or

(B) a "genetic characteristic," as defined at Government Code section 12926. "Genetic characteristics" means:

1. Any scientifically or medically identifiable gene or chromosome, or combination or alteration of a gene or chromosome, or any inherited characteristic that may derive from a person or the person's family member, and

2. ~~t~~That is known to be a cause of a disease or disorder in a person or the person's offspring, or that is associated with a statistically increased risk of development of a disease or disorder, though presently not associated with any disease or disorder symptoms.

(8) A “Disability” is also any definition of “disability” used in the federal Americans with Disabilities Act of 1990 (ADA), and as amended by the ADA Amendments Act of 2008 ~~(Pub. L. No. 110-325)~~ and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the FEHA's definition of disability.

(9) “Disability” does not include:

(A) excluded conditions listed in the Government Code section 12926 definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and “sexual behavior disorders,” as defined at section 11065(q), of this article; or

(B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

(e) “Essential job functions” means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's or other covered entity's judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

(3) “Essential functions” do not include the marginal functions of the position. “Marginal functions” of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.

(f) “Family member,” for purposes of discrimination on the basis of a genetic characteristic or genetic information, includes the individual's relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents.

(g) “FMLA” means the federal Family and Medical Leave Act of 1993~~, 29 U.S.C. § 2601 et seq.,~~ and its implementing regulations~~, 29 C.F.R. Part 825 et seq~~. For purposes of this section only, “FMLA leave” means medical leave taken pursuant to FMLA.

(h) “Genetic information,” as defined at Government Code section 12926, means genetic information derived from an individual's or the individual's family members' genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual's family members.

(i) “Health care provider” means either:

(1) 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; or

(2) 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, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, 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.

(j) “Interactive process,” as set forth more fully at California Code of Regulations, title 2, section 11069, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) “Job-related,” as used in sections 11070, 11071 and 11072 means tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.

(*l*) “Major life activities” shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment “limits” a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is “difficult” is an individualized assessment, which may consider what most people in the general population can perform with little or no difficulty, what members of the individual's peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) “Limits” shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.

(m) A “medical or psychological examination” is a procedure or test performed by a health care provider that seeks or obtains information about an individual's physical or mental disabilities or health.

(n) “Mitigating measure” is a treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) “Auxiliary aids and services,” which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) “Qualified individual,” for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) “Reasonable accommodation” is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);

(N) Providing a reassignment to a vacant position, consistent with section 11068(d); and

(O) other similar accommodations.

(q) “Sexual behavior disorders,” as used in this article, refers to pedophilia, exhibitionism, and voyeurism.

(r) “Undue hardship” means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

(1) the nature and net cost of the accommodation needed under this article, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12940, 12945.1 and 12945.2, Government Code; Americans with Disabilities Act of 1990 (42 U.S.C. §12101, et seq.), as amended by the ADA Amendments Act of 2008 ~~(Pub. L. No. 110-325)~~ and its implementing regulations at 29 C.F.R. § 1630 et seq.;

Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and its implementing regulations at 29 C.F.R. § 825 et seq.; and Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) and its implementing regulations at 34 C.F.R. § 300.8 et seq.

§ 11066. Establishing Disability Discrimination.

(a) An applicant or employee has the burden of proof to establish that the applicant or employee is a qualified individual capable of performing the essential functions of the job with or without reasonable accommodation. A description of how discrimination is established is provided in the regulations at section 11009(c).

~~(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual's disability and denial of an employment benefit to that individual by the employer or other covered entity. The evidence need not demonstrate that the qualified individual's disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual's disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 11067 of this subchapter.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code~~; *Green v. State of California* (2007) 42 Cal.4th 254, 260; and *Mixon v. Fair Empl. & Hous. Com.*(1987) 192 Cal.App.3d 1306, 1319~~.

§ 11067. Defenses.

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Article 1 of Subchapter 2, at California Code of Regulations, title 2, section 11010, shall be applicable to this article.

(b) Health or Safety of an Individual ~~W~~with a Disability. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.

(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger the health or safety of others because the job imposes an imminent and substantial degree of risk to others.

(d) Future Risk. However, it is no defense to assert that an individual with a disability has a

condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

(e) Factors to be considered when determining the merits of the defenses enumerated in section 11067(b)-(d) include, but are not limited to:

(1) the duration of the risk;

(2) the nature and severity of the potential harm;

(3) the likelihood that potential harm will occur;

(4) the imminence of the potential harm; and

(5) consideration of relevant information about an employee's past work history.

The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11068. Reasonable Accommodation.

(a) Affirmative Duty. An employer or other covered entity has an affirmative duty to make reasonable accommodation(s) for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.

(b) No elimination of essential job function required. Where a quality or quantity standard is an essential job function, an employer or other covered entity is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity.

(c) Paid or unpaid leaves of absence. When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation.

(d) Reassignment to a vacant position.

(1) As a reasonable accommodation, an employer or other covered entity shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified, under the following circumstances:

(A) if the employee can no longer perform the essential functions of his or her own position even with accommodation; or

(B) if accommodation of the essential functions of an employee's own position creates an undue hardship; or

(C) if both the employer and the employee agree that a reassignment is preferable to being provided an accommodation in the present position; or

(D) if an employee requests reassignment to gain access to medical treatment for his or her disabling condition(s) not easily accessible at the current location.

(2) No comparable positions. If there are no funded, vacant comparable positions for which the individual is qualified with or without reasonable accommodation, an employer or other covered entity may reassign an individual to a lower graded or lower paid position.

(3) Reassignment to a temporary position. Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, an employer or other covered entity may offer, and an employee may choose to accept or reject, a temporary assignment during the interactive process.

(4) The employer or other covered entity is not required to create a new position to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability.

(5) The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority system.

(e) Any and all reasonable accommodations. An employer or other covered entity is required to consider any and all reasonable accommodations of which it is aware or ~~which~~ that are brought to its attention by the applicant or employee, except ones that create an undue hardship. The employer or other covered entity shall consider the preference of the applicant or employee to be

accommodated, but has the right to select and implement an accommodation that is effective for both the employee and the employer or other covered entity.

(f) An employer shall not require a qualified individual with a disability to accept an accommodation and shall not retaliate against an employee for refusing an accommodation. However, the employer or other covered entity may inform the individual that refusing an accommodation may render the individual unable to perform the essential functions of the current position.

(g) Reasonable Accommodation for the Residual Effects of a Disability. An individual with a record of a disability may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the residual effects of the disability. For example, an employee may need a leave or a schedule change to permit him or her to attend follow-up or monitoring appointments with a health care provider.

(h) Accessibility Standards. To comply with section 11065(p)(2)(A), of this article, the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, Title 24, pursuant to Chapter 7, Division 5 of Title 1 of the Government Code (commencing with Government Code section 4450), and Part 5.5 of Division 13 of the Health and Safety Code (commencing with Health and Safety Code section 19955).

(i) An employer or other covered entity shall assess individually an employee's ability to perform the essential functions of the employee's job either with or without reasonable accommodation. In the absence of an individualized assessment, an employer or other covered entity shall not impose a “100 percent healed” or “fully healed” policy before the employee can return to work after an illness or injury.

(j) It is a permissible defense to a claim alleging a failure to provide reasonable accommodation for an employer or other covered entity to prove that providing accommodation to an applicant or employee with a disability would have created an undue hardship.

(k) It is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on mental or physical disability, regardless of whether the employer granted the request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) “Do you have any particular disabilities?”

(B) “Have you ever been treated for any of the following diseases or conditions?”

(C) “Are you now receiving or have you ever received workers' compensation?”

(D) “What prescription medications are you taking?”

(E) “Have you ever had a job-related injury or medical condition?”

(F) Have you ever left a job because of any physical or mental limitations?

(G) “Have you ever been hospitalized?”

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 ~~(Pub. L. No. 110-325)~~ and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

§ 11071. Medical and Psychological Examinations and Inquiries.

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual's physical or mental conditions or health but does not include testing for current illegal drug use.

(b) Post-Offer. An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee's entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

(c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical and Psychological Examinations and Disability-Related Inquiries ~~D~~during Employment.

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees ~~that~~so long as the inquiries are both job-related and consistent with business necessity.

(2) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently engages in the use of

illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers ~~(49 C.F.R. § 391.41),~~ or medical requirements for airline pilots ~~(14 C.F.R. § 61.23)~~.

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 11069(g).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code.

Article 10. Age Discrimination

§ 11075. Definitions.

As used in this article the following definitions of terms apply, unless the context in which they are used indicates otherwise:

(a) "Age-based stereotype" refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty.

(b) "Basis of age" or "ground of age" refers to age over 40.

(c) "Collective bargaining agreement" refers to any collective bargaining agreement between an employer and a labor organization that is in writing.

(d) "Employer" refers to all employers, public and private, as defined in Government Code Section 12926.

(e) "Employment benefit" refers to employment benefit as defined in section 11008(g). It also includes a workplace free of harassment as defined in section 11019(b) of Subchapter 2.

(f) "Normal retirement date or NRD" refers to one of the following dates:

(1) for employees participating in a private employee pension plan regulated under the federal Employee Retirement Income Security Act of 1974, the NRD refers to the time a plan participant reaches normal retirement age under the plan or refers to the later of either the time a plan participant reaches 65 or the 10th anniversary of the time a plan participant commenced participation in the plan;

(2) for employees not described under (1) whose employers have a written retirement policy or whose employers are parties to a collective bargaining agreement that specifies retirement practices, the NRD refers to the normal retirement time or age specified in such a policy or agreement; or

(3) for employees not described under either (1) or (2) the NRD refers to the last calendar day of the month in which an employee reaches his or her 70th birthday.

(g) "Over 40" refers to the chronological age of an individual who has reached his or her 40th birthday.

(h) "Private employer" refers to all employers not defined in subsection (d) above.

(i) "Public employer" refers to public agencies as defined in Government Code Section 31204.

(j) "Retirement or Pension Program" refers to any plan, program or policy of an employer that is in writing and has been communicated to eligible or affected employees, which is intended to provide an employee with income upon retirement (this may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual

Retirement Accounts, employee stock ownership plans, matching thrift plans, or stock bonus plans or other forms of defined benefit or defined contribution plans).

~~(a) "Employer" refers to all employers, public and private, as defined in Government Code Section 12926.~~

~~(b) "Public employer" refers to public agencies as defined in Government Code Section 31204.~~

~~(c) "Private employer" refers to all employers not defined in subsection (b) above.~~

~~(d) "Retirement or Pension Program" refers to any plan, program or policy of an employer that is in writing and has been communicated to eligible or affected employees, which is intended to provide an employee with income upon retirement (this may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual Retirement Accounts, employee stock ownership plans, matching thrift plans, or stock bonus plans or other forms of defined benefit or defined contribution plans).~~

~~(e) "Collective Bargaining Agreement" refers to any collective bargaining agreement between an employer and a labor organization that is in writing.~~

~~(f) "Normal retirement date or NRD" refers to one of the following dates:~~

> ~~(1) for employees participating in a private employee pension plan regulated under the federal Employee Retirement Income Security Act of 1974, the NRD refers to the time a plan participant reaches normal retirement age under the plan or refers to the later of either the time a plan participant reaches 65 or the 10th anniversary of the time a plan participant commenced participation in the plan;~~
>
> ~~(2) for employees not described under (1) whose employers have a written retirement policy or whose employers are parties to a collective bargaining agreement that specifies retirement practices, the NRD refers to the normal retirement time or age specified in such a policy or agreement; or~~
>
> ~~(3) for employees not described under either (1) or (2) the NRD refers to the last calendar day of the month in which an employee reaches his or her 70th birthday.~~

~~(g) (Reserved.)~~

~~(h) "Basis of age" or "ground of age" refers to age over 40.~~

~~(i) "Over 40" refers to the chronological age of an individual who has reached his or her 40th birthday.~~

~~(j) "Age based stereotype" refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty.~~

~~(k) "Employment benefit" refers to employment benefit as defined in section 11008(f). It also includes a workplace free of harassment as defined in section 11019(b) of Subchapter 2.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12941(a) and 12942, Government Code.

Subchapter 5. Contractor Nondiscrimination and Compliance

Article 1. General Matters

§ 11100. Definitions.

The words defined in this section shall have the meanings set forth below whenever they appear in this subchapter, unless: (1) the context in which they are used clearly requires a different meaning; or (2) a different definition is prescribed for a particular article or provision.

The definitions set forth previously in this chapter in sections 11002, 11008, 11015, 11030, 11035(b), 11053, 11065, and 11075 are also applicable to this subchapter.

(a) "Act" means the Fair Employment and Housing Act.

(~~a~~b) "Bid" means any proposal or other request by an employer to a contract awarding agency wherein the employer seeks to be awarded a state contract.

(~~b~~c) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

(~~c~~d) "Construction" means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any State of California real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

(~~d~~e) "Contract" or "state contract" means all types of agreements, regardless of what they may be called, for the purchase or disposal of supplies, services, or construction to which a contract awarding agency is a party. It includes awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders. It also includes supplemental agreements or contract modifications with respect to any of the foregoing.

(~~e~~f) "Contract awarding agency" or "awarding agency" means any department, agency, board, commission, division or other unit of the State of California, which is authorized to enter into state contracts.

(~~f~~g) "Contractor" means any person having a contract with a contract awarding agency or a subcontract for the performance of a contract with such an agency.

(~~g~~h) “Data” means recorded information, regardless of form or characteristic.

~~(h) (Reserved)~~

(i) “Decertification” means the decision by the Office of Compliance Programs (OCP) that an employer's nondiscrimination program fails to comply with the requirements of the Fair Employment and Housing Act and/or its implementing regulations either because it is poorly designed or because it has not been properly implemented or because of the person's failure to cooperate with OCP it cannot be determined whether the nondiscrimination program meets the requirements of this subchapter. Decertification of a program shall continue until OCP certifies that the contractor is in compliance with the requirements of this subchapter.

(j) “Decision” means the decision of the hearing officer regarding the allegations of a show cause notice issued pursuant to section ~~11138~~ 10255 of this division~~subchapter~~. A decision shall dismiss, modify, or sustain the allegations of the show cause notice; provide the factual basis for the decision; and include any sanctions to be recommended to the awarding agency together with a statement of the reasons in support thereof.

(k) “Employee” means an individual under the direction and control of a contractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

~~(*l*) (Reserved)~~

(~~m~~*l*) “May” denotes the permissive.

~~(n) “Minority” refers to an individual who is ethnically or racially classifiable in one of four major groups: Black, Hispanic. Asian or Pacific Islander; or American Indian or Alaskan Native.~~

~~(1) “Black” includes persons having their primary origins in any of the black racial groups of Africa, but not of Hispanic origin;~~

~~(2) “Hispanic” includes persons of primary culture or origin in Mexico, Puerto Rico, Cuba, Central or South America, or other Spanish derived culture or origin regardless of race;~~

~~(3) “Asian/Pacific Islander” includes persons having primary origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa; and~~

~~(4) “American Indian/Alaskan Native” includes persons having primary origins in any of the original peoples of North America, and who maintain culture identification through tribal affiliation or community recognition.~~

(~~o~~ m) “Nondiscrimination clause” means the clause to be included in each state contract or subcontract pursuant to these regulations.

(~~p~~ n) “Person” means any business, individual, union, committee, club, or other organization or group of individuals.

(~~q~~ o) “Prime contractor” means any individual or organization who directly contracts with the State of California.

(~~r~~ p) “Service” and “supply contract” includes any contract except a construction contract.

(~~s~~ q) “Services” means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. This term shall not include collective bargaining agreements or arrangements between parties constituting that of employer and employee.

(~~t~~ r) “Shall” denotes the imperative.

(~~u~~ s) “Subcontract” means any agreement or arrangement executed by a contractor with a third party in which the latter agrees to provide all or a specified part of the supplies, services or construction required in the original state contract. This does not include arrangements between parties constituting that of employer and employee.

(~~v~~ t) “Subcontractor” means any individual or organization holding a subcontract for the performance of all or any part of a state contract.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11101. Nondiscrimination Agreement.

State contracts exempt from the requirements of section 11105 shall include, as an express or implied term, the term set out in either section 11105 clause (a) or clause (b). Breach of this term of contract may constitute a material breach of the contract and may result in the imposition of sanctions by the awarding agency and/or ~~may result in~~ decertification from future opportunities to contract with the state.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11103. Nondiscrimination Program.

(a) Definition and Purpose. A nondiscrimination program (hereinafter referred to as “the program”) is a set of specific and result-oriented procedures to which a contractor or subcontractor commits itself for the purpose of insuring equal employment opportunity for all employees or applicants for employment. ~~It may include an affirmative action component, which establishes goals and timetables to remedy any underutilization of minorities and/or women that is identified.~~ The ~~P~~program shall contain the following elements:

(1) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(2) Formal internal and external dissemination of the contractor's policy.

(3) Establishment of responsibilities for implementation of the contractor's program.

(4) Annual identification of any existing policies or practices that have resulted in disproportionately inhibiting the employment, promotion or retention of any group ~~those~~ protected by the Act.

(A) Analysis of Employment Selection Procedures. The program shall include an identification and analysis of contractor promotional and entry-level selection procedures and shall identify any such policies or procedures that have resulted in practices disproportionately inhibiting the employment, promotion or retention of ~~minorities or women~~any group or groups protected by the Act. The retention of such practices so identified can only be justified according to the principles of business necessity upon a demonstration that no reasonable alternatives to such practices exist. The prospective contractor shall eliminate any practices that cannot be so justified.

(B) Workforce Analysis. The ~~P~~program will contain a workforce analysis, which shall consist of a listing of each job title that appears in applicable collective bargaining agreements of payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit, including departmental or unit supervisory personnel. For each job title, the total number of incumbents, and the total number of male and female incumbents, and the total number of male and female incumbents ~~in each of the following groups must be given: Blacks, Hispanics, Asian/Pacific Islanders, and American Indian/Native Alaskans~~ broken down by race and/or national origin. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(C) Utilization Analysis. Employers with 250 or more employees must perform a utilization analysis, which shall consist of an analysis of the major job groups at the facility in order to determine whether ~~women and minorities~~ members of any group protected by the Act are being underutilized when compared to their availability. A job group for this purpose shall consist of one or more jobs that have similar content, wage rates, and opportunities. Underutilization is defined as having a statistically significant lower utilization of ~~minorities or women~~ any group protected by the Act in a particular job group than their availability. Availability is defined as the availability in the labor

force. The labor force for this purpose may vary depending upon the type of job in question, and the contractor's past practice, and could encompass the contractor's existing employees, and, for example, the area immediately surrounding the facility where the vacancy exists for low-skill jobs or it could encompass the entire nation for highly-skilled managerial positions. The employer shall conduct a separate utilization analysis for ~~each minority group and women~~ each protected group.

(5) Development and execution of ~~action oriented programs~~ policies and procedures designed to correct problems and attain equal employment opportunities for all applicants and employees.

(6) Design and implementation of internal audit and reporting systems to measure the effectiveness of the total program.

~~(b) Employers who have identified a practice or practices that have an adverse impact on one or more groups protected by the Act, and that may unlawfully discriminate against members of such groups, may wish to include an affirmative action component in their nondiscrimination programs to minimize liability for discrimination, and correct past injustices; such affirmative action may be required of employers who are found to have discriminated in violation of the Act. Such a voluntary affirmative action component might contain, but need not be limited to, the following:~~

~~(1) Active support of local and national community action programs and community service programs designed to improve the employment opportunities of minorities and women;~~

~~(2) Providing training opportunities to minorities and women within the employer's organization that will qualify them for promotion when openings become available;~~

~~(3) Encouraging qualified women and minorities within the employer's organization to seek and accept transfers and promotions that increase their future opportunities;~~

~~(4) Actively recruit qualified minorities and women, even those not currently seeking such employment;~~

~~(5) Establishing and/or supporting training programs for entry level positions; and~~

~~(6) Establishing goals and objectives by organizational units and job groups, including timetables for completion. Establishment and implementation of a nondiscrimination program that contains an effective affirmative action component will create a rebuttable presumption that a contractor is in compliance with the requirements of Government Code section 12990 and its implementing regulations.~~

(~~c~~b) An employer with multiple facilities may establish a single nondiscrimination program for its organization, but must perform separate analyses pursuant to subsections (a)(4)(A)~~,~~ and (B)~~, and (C)~~ above for each establishment.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code~~.~~; California Constitution, article I, § 31.

§ 11104. Prima Facie Compliance.

Compliance with a nondiscrimination ~~or affirmative action~~ program subject to review and approval by a federal compliance agency shall constitute prima facie evidence that a contractor has complied with the requirements of sections 11102 and 11103, unless the federal agency has found that the program is not in compliance with federal law, in which case compliance with a current federal commitment letter or conciliation agreement shall constitute prima facie evidence that a contractor has complied with the requirements of sections 11102 and 11103. Such prima facie evidence can be rebutted by a preponderance of the evidence to the contrary.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11105. Nondiscrimination Clause.

Each state contract and subcontract shall contain a nondiscrimination clause unless specifically exempted pursuant to section 11111. The governmental body awarding the contract may use either clause (a) or clause (b) below. Clause (a) will satisfy the requirements of section 12990 of the Government Code only; clause (b) contains language that will satisfy the requirements of both the Fair Employment and Housing Act and Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (adopted pursuant to Government Code sections 11135-11139.5). Standardized state form OCP-1, containing clause (a), and OCP-2, containing clause (b), will be available through the OCP. These forms may be incorporated into a contract by reference and will fulfill the requirement of this section. The contracting parties may, in lieu of incorporating form OCP-1 or OCP-2, include the required clause in the written contract directly.

Clause (a)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of ~~race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and the applicable regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.). The applicable regulations of the Fair Employment and Housing Council implementing Government Code section 12990, set forth in Subchapter 5 of Division 4.1 of Title 2 of the California Code of Regulations are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors

shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

2. ~~This~~ Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

Clause (b)

1. During the performance of this contract, the recipient, contractor, and its subcontractors shall not deny the contract's benefits to any person on the basis of ~~religion, color, ethnic group identification, sex, age, physical or mental disability~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they discriminate unlawfully against any employee or applicant for employment because of ~~race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age (over 40) or sex~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractor shall insure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

2. Contractor shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), the regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code, §§ 11135-11139.5), and the regulations or standards adopted by the awarding state agency to implement such article.

3. Contractor or recipient shall permit access by representatives of the Department of Fair Employment and Housing and the awarding state agency upon reasonable notice at any time during the normal business hours, but in no case less than 24 hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or Agency shall require to ascertain compliance with this clause.

4. Recipient, contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

5. The contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11111. Exemptions.

(a) Licensed rehabilitation workshops that are contractors of state contracting agencies are exempted from the requirements of this subchapter.

(b) Contracts of less than $5,000 are automatically exempt from the requirements of section 11105; contractors holding only such contracts are automatically exempt from the requirements of section 11102, but are subject to section 11101.

(c) A contractor with fewer than 50 employees in its entire workforce may receive an automatic exemption from the Program requirements of section 11103, subdivisions (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a current California Employer Information Report (CEIR) annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(d) Contracts and subcontracts awarded pursuant to a declaration of public emergency, a declaration or determination of emergency pursuant to Government Code section 14809 or Government Code section 14272~~,~~ (a), (b), or (c), or a declared threat to the health, welfare or safety of the public are fully exempted from the requirements of section 11105, and contractors holding only such contracts are exempted from the requirements of section 11102, but remain subject to section 11101.

(e) A construction contractor with fewer than 50 permanent employees may obtain an exemption from the requirements of section 11103, subdivision (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a CEIR annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(f) Exemptions of subsections (a) and (d) of this section shall be granted only upon application to the state contract awarding agency prior to the date the contract is awarded. The contract awarding agency shall, prior to the grant of any exemption under this section, require proof of satisfaction of the exemption conditions of this section. The OCP may issue opinion letters and guidelines from time to time to assist contact awarding agencies in making determinations under this section.

(g) Nothing in this section prohibits hiring or employment practices, which must be enforced in order to maintain or establish eligibility for federal programs, where ineligibility would result in a loss of federal funds to the state.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code~~.~~; California Constitution, article I, § 31.

§ 11113. Recruitment.

Nothing in this article shall serve to deter good faith outreach efforts that are neutral and do not favor, discriminate against, or disparately impact any group protected by the Act on the basis of an improper classification.

~~In the event that any labor organization from which employees are normally recruited and/or with which the contractor has a collective bargaining agreement is unable or unwilling to refer minorities or women, the contractor or subcontractor shall take the following steps and, for a period of two years, keep a record thereof:~~

~~(a) Notify the California Employment Development Department and at least two minority or female referral organizations of the personnel needs and request appropriate referrals, and.~~
~~(b) Notify any minority or female persons who have personally listed themselves with the contractor or subcontractor as seeking employment of any existing vacancies for which they may qualify;~~

~~(c) Notify minority, women's and community organizations that employment opportunities are available.~~

~~(d) Immediately notify OCP of the existence of the historical and present relationship between the contractor and labor organizations and detail the efforts of the contractor to secure adequate referrals through the labor organizations.~~

~~Neither the provisions of any collective bargaining agreement, nor the failure by a union with which the contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor's obligations under Government Code, section 12990, or the regulations in this subchapter.~~

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11114. Notice of Contract.

Contract awarding agencies shall give written notice to the Administrator within 10 working days of an award of any and all contracts over $5,000. The notice shall include the name, address, and telephone number of the contractor; federal employer identification number; state contract identification number; date of contract award; contract amount; project location; name of contractor's agent who signed the contract; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code.

Article 2. Regulations Applicable to Construction Contracts

§ 11121. Transfers Prohibited.

It is a violation of the contract, of Government Code section 12990 and the regulations in Subchapter 5 of Chapter 5 of Division 4.1 of Title 2 of the California Code of Regulations to transfer ~~women and minority~~ employees or trainees who are members of any group protected by the Act from contractor to contractor or from project to project for the sole purpose of meeting the contractor's nondiscrimination obligations.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code.

§ 11122. Standard California Nondiscrimination Construction Contract Specifications. (Gov. Code, Section 12990.)

In addition to the nondiscrimination clause set forth in section 11105, all non-exempt state construction contracts and subcontracts of $5,000 or more shall include the specifications set forth in this section.

STANDARD CALIFORNIA NONDISCRIMINATION CONSTRUCTION CONTRACT SPECIFICATIONS (GOV. CODE SECTION 12990)

These specifications are applicable to all state contractors and subcontractors having a construction contract or subcontract of $5,000 or more.

1. As used in the specifications:

a. "Act" means the Fair Employment and Housing Act.

~~a~~b. "Administrator" means Administrator, Office of Compliance Programs, California Department of Fair Employment and Housing, or any person to whom the Administrator delegates authority;

~~b. "Minority" includes:~~

~~(i) Black (all persons having primary origins in any of the black racial groups of Africa, but not of Hispanic origin);~~

~~(ii) Hispanic (all persons of primary culture or origin in Mexico, Puerto Rico, Cuba, Central or South America or other Spanish derived culture or origin regardless of race);~~

~~(iii) Asian/Pacific Islander (all persons having primary origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); and~~

~~(iv) American Indian/Alaskan Native (all persons having primary origins in any of the original peoples of North America and who maintain culture identification through tribal affiliation or community recognition).~~

2. Whenever the contractor or any subcontractor subcontracts a portion of the work, it shall ~~physically~~ include in each subcontract of $5,000 or more the nondiscrimination clause in this contract directly or through incorporation by reference. Any subcontract for work involving a construction trade shall also include the Standard California Construction Contract Specifications, either directly or through incorporation by reference.

3. The contractor shall implement the specific nondiscrimination standards provided in paragraphs 6(a) through (e) of these specifications.

~~4~~. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer ~~either minorities or women~~ members of any group protected by the Act shall excuse the contractor's obligations under these specifications, Government Code section 12990, or the regulations promulgated pursuant thereto.

5. In order for the nonworking training hours of apprentices and trainees to be counted, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor or the California Department of Industrial Relations.

6. The contractor shall take specific actions to implement its nondiscrimination program. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor must be able to demonstrate fully its efforts under steps a. through e. below:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and at all facilities at which the contractor's employees are assigned to work. ~~The contractor, where possible, will assign two or more women to each construction project.~~ The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligations to maintain such a working environment~~, with specific attention to minority or female individuals working at such sites or in such facilities~~.

b. Provide written notification within seven days to the director of the DFEH when the referral process of the union or unions with which the contractor has a collective bargaining agreement ~~has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process~~ has impeded the contractor's efforts to meet its obligations.

c. Disseminate the contractor's equal employment opportunity policy by providing notice of the policy to unions and training, recruitment, and outreach programs and requesting their cooperation in assisting the contractor to meet its obligations; and by posting the company policy on bulletin boards accessible to all employees at each location where construction work is performed.

d. Ensure all personnel making management and employment decisions regarding hiring, assignment, layoff, termination, conditions of work, training, rates of pay or other employment decisions, including all supervisory personnel, superintendents, general foremen, on-site foremen, etc., are aware of the contractor's equal employment opportunity policy and obligations, and discharge their responsibilities accordingly.

e. Ensure that seniority practices, job classifications, work assignments, and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the equal employment opportunity policy and the contractor's obligations under these specifications are being carried out.

7. Contractors are encouraged to participate in voluntary associations that assist in fulfilling their equal employment opportunity obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under these specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on ~~the employment of minorities and women~~ equal employment opportunity in the industry, ensures that the concrete benefits of the program are reflected in the contractor's ~~minority and female~~ workforce participation, and can provide access to documentation that demonstrates the effectiveness of actions taken on behalf of the contractor. The obligation to comply, however, is the contractor's.

8. The contractor is required to provide equal employment opportunity for all ~~minority groups, both male and female, and all women, both minority and non-minority~~ persons. Consequently, the contractor may be in violation of the Fair Employment and Housing Act (Government Code section 12990 et seq.) if a particular group is employed in a substantially disparate manner.

~~9. Establishment and implementation of a bona fide affirmative action plan pursuant to section 11103(b) of this subchapter shall create a rebuttable presumption that a contractor is in compliance with the requirements of section 12990 of the Government Code and its implementing regulations.~~

~~10~~9. The contractor shall not use the nondiscrimination standards to discriminate against any person because ~~of race, color, religion, sex, national origin, ancestry, physical handicap, medical condition, marital status or age over 40~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

~~11~~10. The contractor shall not enter into any subcontract with any person or firm decertified from state contracts pursuant to Government Code section 12990.

~~12~~11. The contractor shall carry out such sanctions and penalties for violation of these specifications and the nondiscrimination clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Government

Code section 12990 and its implementing regulations by the awarding agency. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Government Code section 12990.

~~13~~12. The contractor shall designate a responsible official to monitor all employment related activity to ensure that the company equal employment opportunity policy is being carried out, to submit reports relating to the provisions hereof as may be required by OCP and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, ~~social security number, race, sex,~~ status, (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in any easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11123. Reporting Requirement.

Contractors holding construction contracts of $50,000 or more must submit quarterly utilization reports to OCP on forms to be provided by OCP. In such reports the contractor must provide identifying information and report the number and percentage of journey worker, apprentice, and trainee hours worked in each job classification by race, sex, and ~~ethnic group~~ national origin, together with the total number of employees and total number of minority employees in each classification by sex. The quarterly utilization reports must cover each calendar quarter and must be received by OCP no later than the 15th day of the month following the end of the quarter (April 15, July 15, October 15, and January 15). Contractors who are required to submit utilization reports to the federal government may submit a copy of the federal report to the OCP at the same time they submit the report to the federal government in lieu of the state quarterly utilization report.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Article 3. Regulations Applicable to Service and Supply Contracts

Subarticle 1. Small Contracts

§ 11128. Post Award Compliance.

(a) Each contractor of a small contract shall compile and shall maintain for inspection for two years after award:

(1) Information regarding the contractor: Federal Employer Identification number; state contract identification number; legal name of the business organization, parent

corporation or other outside ownership interest, if applicable, business telephone number, street address, city, state and zip code; mailing address, if different; total number of employees, identified by sex, race and national origin; name, business phone and mailing address of contractor's EEO/AA officer, if there is one; and name of the person responsible for the maintenance of information required pursuant to subsection (b) below.

(2) Information regarding the contract: ~~Dollar~~ dollar value of contract; time for performance of the contract; date of contract award; name of contract awarding agency, and contract awarding officer; brief description of the purpose or subject of the contract.

(3) A copy, if one was required to be prepared of the prime contractor's current CEIR, or equivalent federal form (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

(b) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section~~s~~ 12990, Government Code.

Subarticle 2. Regulated Contracts

§ 11131. Post Award Informational Filing.

(a) The prime contractor of a regulated contract shall file with OCP within 28 days from the date of execution of a regulated contract or the effective date of these regulations, whichever occurs later:

(1) Information Regarding the Contractor: Federal Employer Identification Number; state contract identification number; legal name of the business organization; business telephone number, street address, city, state and zip code; mailing address, if different; and name, business phone and mailing address of contractor's EEO/AA Officer.

(2) Information Regarding the Contract: ~~Dollar~~ dollar value of contract; date of contract award; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

(3) (Reserved)

(4) A copy of the prime contractor's current CEIR or equivalent federal form (EEO-1). If the prime contractor is not otherwise required to prepare a CEIR, it must do so in order to comply with the requirements of this section. (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

This information shall be updated annually thereafter, so long as the contractor remains subject to these regulations.

(b) Contractors awarded more than one state contract in one year may file only the information required in subdivision (a)(2) and (a)(4) above for the second and all subsequent contracts awarded during the year.

(c) The OCP and the contract awarding agency shall make forms available for providing the information required under this section.

(d) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

Note: Authority cited: Sections 12935(a), and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ 11132. Designating EEO~~/Affirmative Action~~ Officer.

All contractors of regulated contracts shall designate an individual responsible for the implementation of the contractor's nondiscrimination program.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

[Note to publisher: The remaining sections have been renumbered to move to the DFEH procedural regulations as new Articles 1 and 2 of new Subchapter 3 of Chapter 1.]

Subchapter 3. Office of Compliance Programs

Article 1~~4~~. OCP Review Procedures

§ ~~11133~~ 10250. Scope.

This article sets forth the review procedures to be followed by OCP in implementing ~~this~~ subchapter 5 of chapter 5.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11134~~ 10251. OCP Review Procedures.

In order to monitor the equal employment practices of contractors and their compliance with the requirements of ~~this~~ subchapter 5 of chapter 5, contractors shall be subject to review. Contractors may be selected for review on the basis of any specific neutral criteria contained in a general administrative plan for the enforcement of ~~this~~ subchapter 5 of chapter 5.

(a) Desk Review. All contracts shall be subject to desk reviews conducted by and at the discretion of OCP. A desk review will involve a review of the applicable contract(s), the information required of the contractor pursuant to section 11128 or 11131 of these regulations, the compliance with and implementation of the program required by ~~this~~ subchapter 5 of chapter 5, and any additional related information required by OCP. In addition, OCP may review the current and past personnel procedures and practices of a contractor whenever such a review is, within the discretion of OCP, considered appropriate.

(b) Field Review. OCP may conduct a field review of a contractor's workplace. Field reviews will be made during contractor's regular business hours. OCP shall notify the contractor of its intent to conduct a field review under this section and shall arrange a mutually convenient time to conduct it.

(c) A contractor will not be selected for a routine desk or field review if it has been the subject of such a review within the preceding 24 months and was found to be in compliance. Prior review will not exempt a contractor from compliance investigations conducted pursuant to section ~~11135~~10252, or follow-up desk or field reviews.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11135~~ 10252. Compliance Investigations.

(a) OCP may conduct a compliance investigation of a contractor's employment practices for the purpose of determining whether the contractor holding a state contract is acting or has acted in violation of the nondiscrimination and compliance requirements imposed by ~~this~~ subchapter 5 of chapter 5. Investigations under this section shall involve a detailed review of the contractor's entire employment practices and procedures. Investigations under this section may be conducted when the Administrator determines a pattern of unlawful discrimination in employment may have occurred within the past twelve months or be ongoing. Such a determination shall be in writing and shall be based upon:

(1) A complaint by a contract awarding agency; or

(2) The results of the regular compliance review activities of the OCP; or

(3) A notice of any complaint of employment discrimination filed pursuant to section 11117 of ~~this~~ subchapter 5 of chapter 5 or Government Code section 12960; or

(4) The failure of the contractor to provide compliance information required by ~~this~~ subchapter 5 of chapter 5 or reasonably requested by OCP.

(b) Whenever a contractor that is the subject of a compliance investigation pursuant to this section is also the subject of a complaint pursuant to Government Code section 12960, if possible, OCP and any other unit of the DFEH investigating the contractor's employment

practices shall coordinate their investigations.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11136~~ 10253. Letters of Commitment.

If, in the course of a compliance investigation, OCP concludes that a contractor may be in violation of the provisions of ~~this~~ subchapter 5 of chapter 5, OCP and the contractor may informally agree to resolve the identified deficiencies through the mechanism of a written letter of commitment. The letter of commitment shall set forth the deficiencies identified by OCP, the action the contractor shall take to correct the deficiencies, and the time by which the corrective action shall be taken and the deficiencies resolved.

Note: Authority cited: Sections 12935 (a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

Article 2~~5~~. OCP Enforcement Proceedings

§ ~~11137~~ 10254. Scope.

This article sets forth the enforcement procedures to be followed by OCP in implementing ~~this~~ subchapter 5 of chapter 5.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11138~~ 10255. Show Cause Notice.

(a) When the Administrator has reasonable cause to believe that a contractor performing under a state contract is in violation of the nondiscrimination and compliance requirements imposed by ~~this~~ subchapter 5 of chapter 5 or is in violation of a letter of commitment or conciliation agreement, he or she may issue a notice requiring the contractor to show cause before a hearing officer, why appropriate action to ensure compliance should not be instituted. The show cause notice shall specifically state the contractor's noncompliance and any recommended sanctions. The show cause notice shall be dated and served on the contractor personally or by registered mail, and such service shall constitute notice to the contractor of the deficiencies. In addition, the show cause notice shall be served by ordinary first class mail on the contract awarding agency. A hearing on the show cause notice shall be held no sooner than the 30th day after the issuance of the show cause notice but shall be at the earliest date OCP can reasonably schedule the hearing.

(b) During the 30 day show cause period, OCP and the contractor shall make every effort to resolve the deficiencies that led to the issuance of the show cause notice through conciliation, mediation, and persuasion.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section

12990, Government Code.

§ ~~11139~~ 10256. Conciliation Agreements.

At the discretion of the Administrator, deficiencies contained in a show cause notice may be resolved through the use of written conciliation agreements. A conciliation agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted. In addition, the Administrator may require periodic compliance reports detailing the actions taken by the contractor to correct the deficiencies, and identifying statistical results of such actions.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11140~~ 10257. Hearing.

If the deficiencies listed in the show cause notice are not resolved during the 30 day period, a hearing shall be held before a hearing officer appointed by the Director of the Department of Fair Employment and Housing.

A notice of hearing will be dated and served upon the contractor personally or by registered mail. The hearing may be postponed by OCP for good cause. If the contractor has good cause, the contractor shall contact the OCP within 10 days of receiving the notice of hearing.

The procedures of the hearing shall include: testimony under oath, the right to cross-examination and to confront adversary witnesses, the right to representation, and the issuance of a formal decision.

In addition to the above requirements of this section, the hearing shall be conducted in accordance with Government Code sections 11507.6, 11507.7, 11508 (with the exception that the Office of Compliance Programs shall be substituted for the Office of Administrative Hearings), 11510, 11511, 11512(c) and (d), 11513, 11514, 11520, 11523; the sections cited above are incorporated herein by reference.

The hearing officer shall decide whether to dismiss, modify or sustain the allegations of the show cause notice.

The form and content of the decision will be in accordance with the requirements of Government Code section 11518 herein incorporated by reference.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.

§ ~~11141~~10258. Potential Remedies.

If a violation of ~~this~~ subchapter 5 of chapter 5 is found at the hearing, the hearing officer may

decertify the contractor's nondiscrimination program and may recommend to the contract awarding agency that the existing contract be terminated. Decertification shall continue until the deficiency is corrected and satisfactory evidence thereof is presented to OCP. Other potential remedies include, but are not limited to, the imposition of periodic reporting requirements and the withdrawal of exemptions.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code.