

ATTACHMENT E

*Proposed Changes of the Fair Employment and Housing Council
of the Department of Fair Employment and Housing to the
Former Fair Employment and Housing Commission's Regulations*

Proposed deletions are indicated in strike-out; proposed additions are indicated in underlined text.

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

~~Division 4.0.— Fair Employment and Housing Commission~~

~~Chapter 4-5. Administration—Fair Employment and Housing Council~~

Subchapter 1. Administration

Article 1. Administration

§ ~~7285.0-~~11000. Generally.

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

Note: Authority cited: ~~Section 1418(a), Labor Code; Section 35730.5(a), Health and Safety Code; and Section 12935(a), Government Code.~~ Reference: ~~Part 4.5 of Division 2, Labor Code; and Part 2.8 of Division 3 of Title 2, Government Code.~~

§ ~~7285.1.~~ 11001. Construction.

(a) These rules and regulations are to be construed liberally so as to further the policy and purposes of the statutes ~~which~~ 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 ~~which~~ they interpret and implement but, in the spirit of comity, shall be considered to the extent practical and appropriate.

Comment [d1]: Refers to Chapter 5 of Division 4.1., Department of Fair Employment and Housing, where former Commission regulations, as republished by Council, will be moved.

(c) Unless the context dictates otherwise, terms used herein ~~which~~ that are in the singular include the plural, and ~~which~~ 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 ~~to be~~ renamed the Fair Employment and Housing Act and renumbered in Part 2.8 of Division 3 of Title 2 of the Government Code. ~~Authorities and references cited herein to the Labor Code are parenthetically cited to sections of the Government Code which will become applicable when legislation is enacted.~~

Note: Authority cited: ~~Section 1418(a), Labor Code; and~~ Section 12935(a), Government Code.
Reference: ~~Part 4.5 of Division 2, Labor Code; and~~ Part 2.8 of Division 3 of Title 2 of the Government Code.

§ ~~7285.2.~~ 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) "~~Commission Council~~ or FEHC" means the State Fair Employment and Housing ~~Commission Council~~ created by ~~section 1414 of the Labor Code and~~ ~~§~~section 12903 of the Government Code pursuant to ~~the Governor's Reorganization Plan No. 1 (1980) Senate Bill 1038 (2011-2012 Reg. Sess.) (Stats. 2012, ch. 46).~~

(b) "Department or DFEH" means the Department of Fair Employment and Housing created by ~~section 1413.1 of the Labor Code and~~ ~~§~~sections 12901 and ~~12925~~ 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 grievance 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; ~~or against whom an accusation has been issued.~~

(f) "Act" means the California Fair Employment and Housing Act, created by ~~section 1410 seq. of the Labor Code, sections 35700 et seq. of the Health and Safety Code and~~ Government Code section 12900.

Note: Authority cited: ~~Section 1418 (a), Labor Code; and~~ Section 12935(a), Government Code.
Reference: ~~Sections 1413, 1413.1 and 1414, Labor Code; and~~ Sections 12903 and 12925, Government Code.

Subchapter Article 2. Powers and Duties of the Commission Council

§ 7285.3. Staff.

(a) ~~Responsible to the Fair Employment and Housing Commission there shall be an Executive and Legal Affairs Secretary and such legal, professional, administrative and support staff as are necessary to carry out the day to day responsibilities of the Commission.~~

Note: ~~Authority cited: Section 1418(a), Labor Code; Section 35730.5(a), Health and Safety Code; and Section 12935(a), Government Code. Reference: Section 1418(b), (c), (d), (e), and (f), Labor Code; and Section 12935(b), (c), (d), (e), and (f), Government Code.~~

§ 7285.4. 11003. Rules, Regulations and Guidelines.

(a) The Commission 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 ~~4.5~~ 3.5 (commencing with ~~Section 11374~~ 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Note: Authority cited: ~~Section 1418(a), Labor Code; Section 35730.5(a), Health and Safety Code; and~~ Section 12935(a), Government Code. Reference: ~~Part 4.5 of Division 2, Labor Code; and~~ Part 2.8 of Division 3 of Title 2, Government Code.

§ 7285.5. Hearings and Precedential Opinions.

(a) ~~The Commission shall hold hearings and issue findings and orders on accusations of unlawful practices within the Commission's jurisdiction filed by the Department, including charges of discrimination in employment, housing, public accommodation, contract compliance, and licensing and testing.~~

(b) ~~All hearings after accusation shall be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code (known as the California Administrative Procedure Act) and pursuant to Title 2, Division 4, Chapter 4 of the California Administrative Code ("Procedures of the Commission").~~

(c) ~~The Commission shall establish and publish a system of precedential opinions to assist in interpreting the laws under its jurisdiction.~~

~~(d) The Commission shall establish a system and procedure for Declaratory Rulings regarding any rule or statute enforceable by the Commission, and shall make such rulings available to the public. Note: Authority cited: Section 1418(a), Labor Code; Section 35730.5(a), Health and Safety Code; and Section 12935(a), Government Code. Reference: Section 1418(b), (f) and (h), Labor Code; Section 35730.5(b), (f), and (h), Health and Safety Code; and Sections 12935(b), (f) and (h), 12967 and 12981, Government Code.~~

~~§ 7285.6. Investigative Authority.~~

~~Where necessary to carry out its duties relating to any matter under investigation or in question before the Commission, the Commission may hold hearings, subpoena witnesses, compel witnesses' attendance, order production of any books and papers relating to an investigation, administer oaths, and examine any person under oath at times and places set by the Commission, and make other related written and oral inquiries.~~

~~Note: Authority cited: Section 1418(a), Labor Code; Section 35730(a), Health and Safety Code; and Section 12935(a), Government Code. Reference: Section 1418(f) and 1424, Labor Code; Sections 35730.5(f) and 35732, Health and Safety Code; and Sections 12935(f), 12967 and 12981, Government Code.~~

~~§ 7285.7. 11004. Other Powers and Duties.~~

The functions, powers and duties of the Commission 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 Commission Council;

~~(c) Develop standards and policy for application and implementation by the Department of Fair Employment and Housing; and~~

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

Note: Authority cited: ~~Section 1418(a), Labor Code; and~~ Section 12935(a), Government Code. Reference: ~~Sections 1418, 1420.4 and 1431, Labor Code; and~~ Sections 11139.5, 12935, 12946 and 12990, Government Code.

Chapter 2. Discrimination in Employment
Subchapter 1. General Matters

§ 7286-0. 11005. Fair Employment and Housing Commission Council—Conflict of Interest Code.

The Political Reform Act, ~~Government Code Sections 81000, et seq., (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, ~~2 Cal. Code of Regs. section 18730, (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 ~~2 Cal. Code of Regs. 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 ~~Commission Council.~~

Designated employees shall file statements of economic interests with their agency. Upon receipt of the statements of the ~~Commission 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, ~~§ section 81008,~~)

Appendix A

Designated Positions	Disclosure Category
Commission Council Members	1
Executive and Legal Affairs Secretary	4
Administrative Law Judge	4
FEH Counsel	4
Staff Services Manager	2
Consultants	1
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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~~ 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 ~~Commission 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 ~~which 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 ~~which 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 Commission 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.

~~§ 7286.1, 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 agen-

Comment [d2]: Renumber and move to **Chapter 2. Department of Fair Employment and Housing—Administration**, which follows Chapter 1, Procedures of the DFEH. The regulations within the Council's authority are contained within Chapter 5.

cy'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

<i>Designated Position</i>	<i>Disclosure Category</i>
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).

Subchapter 2. Discrimination in Employment.

Article 1. General Matters

§ ~~7286.3.~~ 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, ~~or~~ sex, gender, gender identity, gender expression, ~~and~~ age for individuals over forty years of age, 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) ~~and 12980~~, Government Code. Reference: ~~Part 4.5 of Division 2, Labor Code; Part 5 of Division 24, Health and Safety Code. (Part 2.8 of Division 3 of Title 2, Sections 12920 and 12921(a), Government Code.)~~

§ ~~7286.4.~~ 11007. Authority.

The FEHC issues these regulations under the authority vested in the Commission Council by the Fair Employment and Housing Act, specifically ~~Labor Code Section 1418(a)~~ Government Code ~~§~~section 12935(a).

Note: Authority cited: ~~Section 1418(a), Labor Code; Section 35730(a), Health and Safety Code. (Section 12935(a), Government Code.)~~ Reference: ~~Part 4.5 of Division 2, Labor Code, Part 5 of Division 24, Health and Safety Code. (Part 2.8 of Division 3 of Title 2, Government Code.)~~

§ ~~7286.5.~~ 11008. Definitions.

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

(a) "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.

(2) For purposes of “counting” the (five or more) employees, the individuals employed need not be employees as defined below; nor must any of them be full-time employees.

(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 ~~which~~ 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 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 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 7287.6~~ Section 11019(b).

(g) “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, ~~Sections~~ Sections 3070, et seq.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1413, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12925, 12940, 12941, 12942, Government Code.)

§ 7286.6. 11009. Principles of Employment Discrimination.

(a) Unlawful Practices and Individual Relief. In allegations of employment discrimination, a finding that a 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 a 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 7287.6 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.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, 1421.1, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, 12961, Government Code.)

§ 7286.7. 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 ~~which~~ 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 ~~which~~ 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 ~~that~~ 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 ~~which that~~ would accomplish the business purpose equally well with a lesser discriminatory impact.

(c) Job-Relatedness. See ~~Section 7287.4~~ 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 ~~which 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, ~~such~~ an employment practice is lawful ~~which that~~ conforms to the following is lawful:

(1) A bona fide voluntary affirmative action plan as discussed below in ~~section 7286.8~~ 11011;

(2) A non-discrimination plan, pursuant to ~~Labor Code Section 1431~~ (~~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 ~~where pursuant to an order~~ of a state or federal court of proper jurisdiction.

Note: Authority cited: ~~Section 1418(a), Labor Code;~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, 1421.1, 1431, Labor Code;~~ (Sections 12920, 12921, 12940, 12941, 12942, 12961, 12990, Government Code.)

~~§ 7286.8-11011.~~ 11011. Affirmative Action Programs.

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

Note: Authority cited: ~~Section 1418(a), Labor Code;~~ and Section 12935(a), Government Code.
Reference: ~~Sections 1411, 1412, 1418, 1420, 1420.1 and 1420.15, Labor Code;~~ and Sections 12920, 12921, 12935, 12940, 12941 and 12942, Government Code.

~~§ 7286.9-11012.~~ 11012. Remedies.

Upon proof of unlawful practices under the Act, ~~the Commission~~ a court has broad statutory authority to fashion remedies ~~which that~~ are consistent with the purposes of the Act,

including, but not limited to, those described below.

(a) Retroactive Relief. Where it has been proved that an individual has been unlawfully denied an employment benefit, the most common remedy shall be to “make whole” the individual through relief ~~which~~ that may include, but is not limited to, any or all of the following:

(1) Back Pay. Back pay remedies shall be available to both individual and class complainants.

(A) Mitigation and Other Defenses. Mitigating circumstances, including interim earnings, may be considered in determining the amount of back pay. However, unemployment compensation or other collateral benefits recompensable to the State shall not normally be utilized in considering mitigation of back pay.

(B) Fringe Benefits. Where appropriate, fringe benefits shall normally be included in calculations of back pay. Where such benefits are no longer available or appropriate, then equivalent monetary values may be awarded.

(2) Injunctive and Other Equitable Relief. The Act makes available injunctive relief including, but not limited to, cease and desist orders, hiring, reinstatement or upgrading of employees, or restoration of membership in labor organizations.

(A) Seniority. Where appropriate, “constructive seniority” or other temporal measures of service may be awarded so as to place the individual adversely affected into the position or status he or she would have enjoyed but for the unlawful practice.

(B) Goals and Timetables. Where appropriate, relief may include the setting of goals and timetables for correcting past discriminatory actions. Alternative mandatory injunctive remedies may also be ordered where the past practices of an employer or other covered entity would justify more stringent remedies.

(b) Prospective Relief. In certain circumstances, appropriate relief requires continuing remedies to correct past unlawful practices. Such relief may include, but is not limited to:

(1) “Rightful Place” and “Front Pay.” Where previously closed positions or lines of progression are made available, an employee shall be restored to his or her “rightful place” and shall not be penalized for lacking prior status or position in that line. In such situations, “front pay” may be awarded to offset losses to an employee until such time as the employee takes his or her “rightful place,” or until such time as an offer of the appropriate position is made to the employee.

(2) “Red Circling.” Where an employee transfers to a previously closed line of progression ~~which~~ that starts at a lower rate of compensation, the employee shall not be penalized and may be awarded the higher rate of compensation until such time as the rates of compensation are equal.

Note: Authority cited: ~~Section 1418(a), Labor Code; and~~ Section 12935(a), Government Code.

Reference: ~~Sections 1411, 1412 and 1426, Labor Code; and Sections 12920, and 12921 and 12970, Government Code.~~

§ ~~7287.0.~~ 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 ~~Commission 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 personnel report called the “California Employer Information Report” (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 ~~Equal Employment Opportunity Commission’s~~ 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 ~~Sacramento administrative office of 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 Labor Code Section 1430.3 (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 record-keeping 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 ~~Section 7286.9~~ Section 11012(c) (1) and (2).

(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 deci-

sions. 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 1422.2 of the Labor Code~~ (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 ~~the Commission~~ or 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 ~~which~~ 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1420, 1420.4, Labor Code.~~ (Sections 12940, 12946, Government Code.)

~~Subchapter~~ **Article 2. Particular Employment Practices**

~~§ 7287.1,~~ **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 ~~subchapter article~~ and the provisions are applicable to all discriminatory actions as more specifically discussed in the following ~~subchapters articles~~.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, Government Code.)

§ ~~7287.2.~~ 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12942, Government Code.)

§ ~~7287.3.~~ 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 which:

(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 ~~which that~~ do not discriminate on a basis enumerated in the Act. Inquiries ~~which 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, ~~subdivision (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 7287.0~~ 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 required 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 done 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.

§ ~~7287.4~~ 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity ~~which 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 7287.4~~ Section 11017(e). The ~~Commission~~ Council herein adopts the Uniform Guidelines on Employee Selection Procedures promulgated by various federal agencies, including the EEOC and Department of Labor. [29 CFR 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 7291.2(d)(2)~~ 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 done pursuant to a permissible defense.

(2) Training. Where training ~~which that~~ may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner ~~which 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 § 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 ~~which 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 § 389 and Penal Code §§ 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 § 1203.4; or

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

(2) Height Standards. Height standards ~~which 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 imposed pursuant to a permissible defense.

(3) Weight Standards. Weight standards ~~which 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 imposed pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device or other means of selection ~~which that~~ is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 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 ~~§ 7287.4~~ 11017(a).)

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

§ ~~7287.5-~~ 11018. Compensation. (Reserved.)

§ ~~7287.6-~~ 11019. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. (Reserved.)

(b) Harassment.

(1) 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 7291.1~~ Section 11034(f) (l).]

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

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

(3) Harassment of an applicant or employee by an employee other than those listed in subsection (b)(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) An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the grievement; however, an employee's failure to give such notice is not an affirmative defense.

(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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.) Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, Government Code.)

§ ~~7287.7-11020.~~ 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 ~~Commission~~ or the Department or ~~their~~ its staffs.

(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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, Government Code.)

§ ~~7287.8-11021.~~ 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 which 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 ~~Commission~~ Council or Department or their staffs.

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

(A) Seeking the advice of the Department or ~~Commission~~ 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

~~Commission 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 ~~which that~~ an individual reasonably believes to exist and believes to be a violation of the Act;

(D) Participating in an activity ~~which 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 ~~Commission Council~~ or Department includes, but is not limited to:

(A) Contacting, communicating with or participating in the proceedings of the Department or ~~Commission 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 ~~Commission 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, Government Code.)

~~§ 7287.9.~~ **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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.1, 1420.15, Labor Code.~~ (Sections 12920, 12921, 12940, 12941, 12942, Government Code.)

§ 7288.0. 11023. Sexual Harassment Training and Education.

(a) Definitions. For purposes of this section:

(1) "Contractor" is a person performing services pursuant to a contract to an employer, meeting the criteria specified by Government Code section 12940, subdivision (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.

(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, 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.

(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.

(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.

(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.

(C) 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 fifty or more employees or contractors for each working day in any ~~twenty~~ 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.

(8) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926, ~~subdivision (f)~~ (g). 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; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) how to respond to a harassment complaint; 5) the employer's obligation to conduct a workplace investigation of a harassment complaint; 6) what constitutes retaliation and how to prevent it; 7) essential components of an anti-harassment policy; and 8) 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 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 ~~7288.0, subdivision 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 ~~7288.0, subdivision 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. An employer shall keep documentation of the training it has provided its employees under this section to track compliance, including the name of the supervisory employee trained, the date of training, the type of 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. Busi-

nesses 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 book-marking features, which allow a supervisor to pause ~~their~~ his or her individual training so long as the actual e-learning program is two hours.

(c) Content.

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; and 2) 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.

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

(1) 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, ~~subdivision (j)~~, and discuss how harassment of an employee can cover more than one basis.

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

(4) Remedies available for sexual harassment.

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

(6) "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) The limited confidentiality of the complaint process.

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

(9) The employer's obligation to conduct an effective workplace investigation of a harassment complaint.

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

(11) 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.

(d) Remedies.

~~As part of an order in an adjudicatory proceeding pursuant to California Code of Regulations, Title 2, section 7429, the Commission~~ A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance within 60 days of the effective date of the ~~Commission~~ court's order.

(e) Compliance with section 12950.1 prior to effective date of ~~Commission~~ 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(r), 12940(j)(5), 12950 and 12950.1, Government Code.

~~§ 7288.1. 11024. Labor Organizations. (Reserved.)~~

~~§ 7288.2. 11025. Apprenticeship Programs. (Reserved.)~~

~~§ 7288.3. 11026. Employment Agencies. (Reserved.)~~

~~Subchapter Article 3. Race and Color Discrimination (Reserved)~~

~~Subchapter Article 4. National Origin and Ancestry Discrimination~~

~~§ 7289.4. 11027. Defenses.~~

~~These regulations incorporate the defenses set forth in Section 7286.7 11010.~~

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

~~§ 7289.5. 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 if the employer can show that the rule is justified by business necessity (See Section 7286.7 11010(b)), and if 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)~~

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

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

~~Subchapter Article 5. Ancestry Discrimination (Reserved)~~

~~Subchapter Article 6. Sex Discrimination~~

~~§ 7290.6. 11029. General Prohibition Against Discrimination on the Basis of Sex.~~

~~(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing Commission Council pursuant to Sections 1420, 1420.2 and 1420.35 of the Labor Code. (Sections 12935, 12940, 12943, and 12945 of the Government Code.)~~

~~(b) Statement of Purpose. The purpose of the law against discrimination in employment because of sex is to eliminate the means by which individuals of the female sex have historically been relegated to inferior jobs and to guarantee that in the future both sexes will enjoy equal employment benefits.~~

~~(c) Incorporation of General Regulations. These regulations pertaining to discrimination~~

on the basis of sex incorporate each of the provisions of ~~Subchapters~~ Articles 1 and 2 of ~~Subchapter 2~~, unless a provision is specifically excluded or modified.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.2, 1420.35, Labor Code.~~ (Sections 12920, 12921, 12940, 12945, Government Code.)

§ ~~7290.7.~~ 11030. Definitions.

(a) "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.

(b) "Sex Stereotype." An assumption about an individual's ability or inability to perform certain kinds of work based on a myth or generalization about the individual's gender.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.2, 1420.35, Labor Code.~~ (Sections 12920, 12921, 12926, 12940, 12943, 12945, Government Code.)

§ ~~7290.8.~~ 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 7286.7~~ 11010, including, but not limited to, the defense of Bona Fide Occupational Qualification (BFOQ).

(a) Among situations ~~which~~ 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
- (3) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and
- (4) 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.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420.2, 1420.35, Labor Code.~~ (Sections 12920, 12921, 12940, 12943, 12945, Government Code.)

§ ~~7290.9.~~ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see ~~Section 7287.2~~ 11015(a)) shall recruit individuals of both sexes for all jobs unless ~~pursuant to~~ excused by 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 ~~they~~ the questions are related to specific and relevant working conditions of the job in question.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, 1420., 1420.35, Labor Code.~~ (Sections 12920, 12921, 12940, 12943, 12945, Government Code.)

§ ~~7291.0.~~ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. ~~A~~ Tests 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 ~~which~~ that discriminate against one sex or the other is unlawful unless imposed pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless imposed 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 which 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.

§ ~~7291.1~~ 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 ~~which~~ 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 which:

(A) Prohibits a female from applying for a job ~~labeled~~ 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 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 ~~7294.211035~~.

(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 em-

ployment 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.

(1) Sexual Harassment. Sexual harassment is unlawful as defined in ~~Section 7287.6~~ 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances.

(2) 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

Subchapter Article 6A. Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions

§ ~~7291.2.~~ 11035. Definitions.

The following definitions apply only to this ~~subchapter 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 ~~7297.0~~ 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.

(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.

(h) “Employer,” as used in these regulations, except for section ~~7291.3~~ 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 ~~7286.5, subdivision~~ 11008(a), 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 a 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 a 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 ~~7291.17, subdivisions~~ 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 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 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: Sections 12935(a) and 12945, 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.

§ ~~7291.3.~~ 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.

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

§ ~~7291.4.~~ 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) ~~and 12945~~, Government Code. Reference: Section 12945, Government Code.

§ ~~7291.5.~~ 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.

§ ~~7291.6.~~ 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 ~~7291.3.~~ 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section ~~7291.8.~~ subdivision 11041(c), below. Nothing in this section pre-

vents 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 ~~7291.11~~ 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 ~~7291.11~~, 11044 below, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide a reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section ~~7291.7~~, 11040 below;

(D) refuse to transfer an employee affected by pregnancy as set forth at section ~~7291.8~~, 11041 below;

(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section ~~7291.9~~, 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 ~~7286.7~~ 11010, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.

Note: Authority cited: Sections 12935(a) ~~and 12945~~, 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].

§ ~~7291.7~~, 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.

(C) 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 ~~7291.17, subdivision~~ 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 ~~7291.16, subdivisions~~ 11049(a) and (b), and ~~7291.17, subdivision~~ 11050(b).

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

§ ~~7291.8. 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

(C) 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 ~~7291.16, subdivisions 11049(a) and (b), and 7291.17, subdivision 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 ~~7291.8, subdivision 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 ~~7291.10-11043~~.

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

§ ~~7291.9-11042~~. 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 dis-

abled employees.

(1) 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.

(B) 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 ~~7291.9, subdivision 11042(a)(2)(B)~~.

(5) Employees are eligible for up to four months of leave per pregnancy, not per year.

(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 ~~7291.16, subdivisions 11049(a) and (b), and 7291.17, subdivision 11050(b)~~.

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; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

§ ~~7291.10, 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 ~~7291.10, subdivision 11043(c)(1)~~, to a comparable position, and the employer shall provide the guarantee in writ-

ing 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 Reinstatement

(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, ei-

ther 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 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 ~~7291.10, subdivision 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 ~~7291.10, subdivisions 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: 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; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

§ ~~7291.11~~ 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 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, 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 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.

(3) 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.

(4) 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: Sections 12935(a) ~~and 12945~~, 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.).

§ ~~7291.12~~. 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 subchapter, 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 (29 C.F.R. § 825).

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

§ ~~7291.13~~. 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: Sections 12935(a) and 12945, Government Code. Reference: Sections 12945, 12945.1 and 12945.2, Government Code.

§ ~~7291.14~~ 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 (~~subchapter~~ 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) and 12945, Government Code. Reference: Sections 12926, ~~and~~ 12940 and 12945, Government Code.

§ ~~7291.15~~ 11048. Remedies.

Upon determining that an employer has violated Government Code sections 12940, 12943, or 12945, ~~the Commission~~ a court may order any remedy available under Government Code section ~~12970-12965~~, and section ~~7286.9~~ 11012 of the regulations. The remedy, however, for a violation of section ~~7291.16, subdivision~~ 11049(c)(2), (failure to provide notice) shall be

an order that the employer provide such notice.

Note: Authority cited: Sections 12935(a) and ~~12945~~, Government Code. Reference: Sections ~~12970-12945~~ and 12965, Government Code.

§ ~~7291.16~~ 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 below at section ~~7291.16~~, subdivisions 11049(e) and (f), and as contained in "Notice A" and "Notice B" as set forth below at section ~~7291.18~~, subdivisions ~~11051~~(a) and (b), or their equivalents.

(b) Content of Employer's Reasonable Advance Notice

An employer shall provide its employees with information about:

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

(2) employees' notice obligations, as set forth in section ~~7291.17~~ 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 a reasonable accommodation, transfer, or pregnancy disability leave, as set forth in section ~~7291.17~~, subdivision 11050(b).

(c) Consequences of Employer Notice Requirement

(1) If the employer follows the requirements in section ~~7291.16~~, subdivision ~~7291.49~~(d), below, such compliance shall constitute "reasonable advance notice" to the employee of her notice obligations.

(3) Failure of the employer to provide reasonable advance notice shall preclude the employer from taking any adverse action against the employee, including denying a 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 in a conspicuous place or places where employees congregate. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section.

(3) 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.

(4) 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 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 comprised of ten percent or more persons whose primary language is not English shall translate the notice into the language or languages spoken by this group or these groups of employees. 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 ~~7291.18, subdivision 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 subchapter and section ~~7297.9-11095~~of the regulations. An employer may develop its own notice or it may choose to use the text provided in section ~~7291.18, subdivision 11051~~(b), below, unless it does not accurately reflect its own policy.

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.

§ ~~7291.17~~ 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 a 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 a 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 a 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.

(5) Prohibition Against Denial of Reasonable Accommodation, Transfer, or Leave in Emergency or Unforeseeable Circumstances

An employer shall not deny a 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.

(6) 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 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.

(7) 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.

(8) 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 a 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 ~~7291.17~~, subdivision 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 a 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;

(C) 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 ~~7291.17, subdivision~~ (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 a 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 a 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.

(4) When the need for a 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 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 COMMISSION 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 haz-

ardous 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.

§ ~~7291.18~~ 11051. Employer Notices.

(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 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 level and under the 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.

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 - 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.

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, ~~look at~~ visit the Department of Fair Employment and Housing's ~~Web~~ 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 Commission ~~Web~~ 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 a 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~~ visit the Department of Fair Employment and Housing's ~~w~~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 Commission wWeb_site at www.dfeh.ca.gov.

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.

Subchapter Article 7. Marital Status Discrimination

§ 7292.0. 11052. General Prohibition Against Discrimination on the Basis of Marital Status.

(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing ~~Commission Council~~ pursuant to ~~Section 1420 of the Labor Code~~ (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 ~~Subchapter 2~~ Articles 1 and 2 of Subchapter 2, unless a provision is specifically excluded or modified.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7292.1.~~ 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 ~~Civil Code Section 4100~~ Family Code section 300.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7292.2.~~ 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7292.3.~~ 11055. Defenses.

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

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420(a), 1420(a)(3), Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7292.4.~~ 11056. Pre-Employment Practices.

- (a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her mari-

tal 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7292.5.~~ 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.

§ ~~7292.6.~~ 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

Subchapter Article 8. Religious Creed Discrimination

§ 7293.0. 11059. General Prohibition Against Religious Creed Discrimination.

(a) Statutory Source. These regulations concerning religious discrimination are adopted by the ~~Commission Council~~ pursuant to ~~Section 1420 of the Labor Code.~~ (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 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 ~~Subchapters Articles 1 and 2 of~~ Subchapter 2, unless specifically excluded or modified.

§ 7293.1. 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. 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 ap-

plicant'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.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7293.2.~~ 11061. Defenses.

Any permissible defense set forth in Article 1 of this Subchapter 4 shall be applicable to this ~~Subchapter~~ Article.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ Section 12935(a), Government Code. Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7293.3.~~ 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.

(a) Reasonable accommodation 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.

(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 Standards. Dress standards or requirements for personal appearance shall be flexible enough to take into account religious practices.

(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.

Note: Authority cited: ~~Section 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

§ ~~7293.4.~~ 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 1418(a), Labor Code.~~ (Section 12935(a), Government Code.)
Reference: ~~Sections 1411, 1412, 1420, Labor Code.~~ (Sections 12920, 12921, 12940, Government Code.)

Subchapter Article 9. Disability Discrimination

§ ~~7293.5.~~ 11064. General Prohibitions Against Discrimination on the Basis of Disability.

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

(b) Statement of Purpose. The Fair Employment and Housing ~~Commission 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 by 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.

(c) Incorporation of General Regulations. These regulations governing discrimination on the basis of disability incorporate each of the provisions of ~~Subchapter 2~~ 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.

§ ~~7293.6.~~ 11065. Definitions.

As used in this subchapter, the following definitions apply:

(a) “Assistive animal” means a trained animal, including a trained dog, 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 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 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;

(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.

(b) "Business Necessity," as used in this subchapter 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 subchapter, "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 disease.

(4) A "special education" disability is any other recognized health impairment or mental or psychological disorder not described in section ~~7293.6, subdivisions 11065(d)(1) or (d)(2), of this subchapter 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.

(5) 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 ~~subchapter~~ 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 subchapter, 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,

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 (Pub. L. No. 110-325) and the regulations adopted pursuant thereto, that would result in broader pro-

tection 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 Fair Employment and Housing Act'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 ~~7293.6, subdivision 11065~~(q), of this ~~subchapter article~~; or

(C) 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 nonchronic 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. § 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 ~~7294.0~~ 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 ~~7294.1, 7294.2~~ 11070, 11071 and 7294.3 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 which 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 ~~7293.71~~ 1066, 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 accessi-

ble 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 ~~7293.9, subdivision 11068~~(c);

(N) Providing a reassignment to a vacant position, consistent with section ~~7293.9, subdivision 11068~~(d); and

(O) other similar accommodations.

(q) "Sexual behavior disorders," as used in this subchapter, 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 subchapter, 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.

§ 7293.7. ~~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.

~~(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 7293.8 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; *Mixon v. Fair Empl. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1319.; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

§ 7293.8. ~~11067.~~ Defenses.

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Article 1 of Subchapter 42, at California Code of Regulations, title 2, section ~~7286.711010~~, shall be applicable to this subchapter.

(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 7293.8, subdivisions 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.

~~§ 7293.9-11068. 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 re-

covery, 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 em-

ployer 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 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 ~~7293.6, subdivision 11065~~(p)(2)(A), of this ~~subchapter 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.

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

§ ~~7294.0. 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 ~~7297.4~~, subdivision 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 ~~7294.2~~ below, and second opinions from other health care providers.

(4) If information provided by the applicant or employee needs clarification, then the em-

ployer 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 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 ~~7293.9, subdivision 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 establishes that the individual falls within the definition of "health care provider" under section ~~7293.6, subdivision 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 ~~7293.6, subdivision 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 ~~7293.6, subdivision 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.

§ ~~7294.1~~, 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, ~~subdivision (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.

§ ~~7294.2-11071~~. 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 with-

out 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 that 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 ~~7294.0, subdivision 11069~~(g).

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

§ ~~7294.3~~ 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).

§ ~~7294.4~~ 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.

~~Subchapter 11~~ Article 10. Age Discrimination

§ ~~7295.0~~ 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 forty 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 which are based upon age over the age of forty is unlawful.

(b) Incorporation of General Regulations. These regulations pertaining to discrimination on the basis of age incorporate each of the provisions of ~~Subchapters~~ 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.

§ ~~7295.1~~ 11075. Definitions.

As used in this article the following definitions of terms apply, unless the context in which they are used indicates otherwise:

(a) "Employer" refers to all employers, public and private, as defined in Government Code Section 12926, ~~except employers mandatorily or voluntarily subject to Government Code Sections 20983.5, 20983.6, 21258.1, 31671.03 or 45346, or subject to Education Code Section 23922.~~

(b) "Public employer" refers to public agencies as defined in Government Code Sections 31204 ~~and 20009.~~

(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 which 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 which 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 tenth 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 which 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 seventieth, 70th, birthday.

(g) (Reserved.)

(h) "Basis of Age" or "Ground of Age" refers to age over forty.

(i) "Over Forty" refers to the chronological age of an individual who has reached his or her fortieth 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 7286.5~~(f). It also includes a workplace free of harassment-as defined in ~~Section 7286.7~~(b) of Subchapter 2.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12941(a) and 12942, Government Code.

§ ~~7295.2~~. 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 forty 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 which discriminate against an individual or individuals over forty.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12926(c), (d) and (e), and 12941~~(a)~~, Government Code.

§ ~~7295.3~~ 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 ~~7286.7~~ 11010 of Subchapter 2.

(b) Specific Defenses, Exemptions, Permissible Practices. An employment practice which 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 which 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 subchapter;
- (3) If the practice is declared by one or more sections of this subchapter to be permissible or lawful.

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

§ ~~7295.4~~ 11078. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Recruitment. The provisions of Section ~~7287.3~~ 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 forty 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 forty. 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 forty or to express a limitation against individuals over forty when advertising em-

ployment 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.

§ ~~7295.5.~~ 11079. Pre-Employment Inquiries, Interviews and Applications.

(a) Pre-Employment Inquiries. Pre-employment inquiries which 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 ~~7287.3~~ 11016(b), which is applicable and incorporated by reference herein.)

Pre-employment inquiries which 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 ~~7287.0-11013~~ (and particularly subsection (b)) of ~~Subchapter~~ Article 2.

(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 forty. (See Section ~~7287.3~~ 11016(c), which is applicable and incorporated by reference herein.)

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941, Government Code.

§ ~~7295.6.~~ 11080. Physical or Medical Examination of Applicants and Employees.

(a) It is not a violation of this subchapter for an employer to require an applicant who is over forty 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 subchapter for an employer to require an employee who is over forty 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 forty to meet physical or medical examination standards which are higher ~~then~~ than those standards ap-

plied to applicants or employees who are below the age of forty and are seeking or holding the same job.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941(a), Government Code.

§ ~~7295.7-11081.~~ Employee Selection.

(a) Selection. So long as age is not a factor, this ~~subchapter 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 ~~subchapter 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 forty.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12941, Government Code.

§ ~~7295.8-11082.~~ Promotions.

(a) In selecting a candidate for promotion, it is not, itself, a violation of this ~~subchapter 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 forty because of the age of the candidate.

(b) In selecting a candidate for promotion, it is not, itself, a violation of this ~~subchapter article~~ for an employer to promote a candidate under the age of forty in preference to a candidate over forty 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 forty.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12942(a),

Government Code.

§ ~~7295.9.~~ 11083. Terms, Conditions and Privileges of Employment. (Reserved.)

Note: Authority cited: ~~Section 1418(a), Labor Code;~~ Section 12935(a), Government Code.
Reference: ~~Sections 1420.1 and 1420.15, Labor Code;~~ Sections 12941 and 12942, Government Code.

§ ~~7296.0.~~ 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 forty.

(b) Retirement Plans Generally. Generally, any provision in a private employer's retirement plan, pension plan, collective bargaining agreement or similar plan or agreement which requires mandatory retirement of an employee over forty years of age is unlawful.

(c) Mandatory Retirement Permitted. Mandatory retirement of the following employees is not unlawful:

~~(1) Prior to July 1, 1982, any employee who has attained 65 years of age, and thereafter 70 years of age, and is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure at an institution of higher education as defined by Section 1201(a) of the Federal Higher Education Act of 1965;~~

~~(2) (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 profit sharing, pension, savings, or deferred compensation plans.

~~(3) (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.

§ ~~7296.1.~~ 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 ninety (90) days prior to the NRD and no earlier than one hundred and eighty (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 forty-five (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 sixty (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.

§ ~~7296.2~~ 11086. Termination and Disciplinary Actions.

(a) It is not a violation of this subchapter for an employer to terminate, discharge, dismiss, demote or otherwise discipline an employee over forty 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 forty.

(b) Where an employee is continuing in employment beyond his or her normal retirement date, it is not a violation of this subchapter 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.

~~§ 7296.3. Termination and Disciplinary Action. [Repealed]~~

~~Note: Authority cited: Section 1418(a), Labor Code; Section 12935(a), Government Code. Reference: Sections 1420.1 and 1420.15, Labor Code; Sections 12941 and 12942, Government Code.~~

~~§ 7296.4. Application of Federal Law. [Repealed]~~

~~Note: Authority cited: Section 1418(a), Labor Code; Section 12935(a), Government Code. Reference: Sections 1420.1 and 1420.15, Labor Code; Sections 12941 and 12942, Government Code.~~

Subchapter 12. Article 11. Family Care and Medical Leave

§ 7297.0. 11087. Definitions.

The following definitions apply only to this ~~subchapter~~ article. The definitions in the federal regulations issued January 6, 1995 (29 CFR Part 825), interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. §§ 2601 et seq.) shall also apply to this ~~subchapter~~ 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:

(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” 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. It 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 and 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 step-daughter, 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 (i) and (k).

(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 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.

(1) "Directly employs" means that the employer maintains an aggregate of at least fifty 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.

(2) "Perform services for a wage or salary" excludes independent contractors as defined in Labor Code section 3353 but includes persons who are compensated in whole or in part by commission.

(e) "Eligible employee" means a full or part time employee working in California with more than 12 months (52 weeks) of service with the employer at any time, and who has actually worked (within the meaning of the Fair Labor Standards Act, 29 CFR Part 785) 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) For an employee who takes a pregnancy disability leave which 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, not the first day of the subsequent CFRA leave for reason of the birth of her child.

(3) 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) Once the employee meets this eligibility criterion and takes a leave for a qualifying event, the employer may not 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.

(f) "Employment in the same position" means employment in, or reinstatement to, the original position which the employee held prior to taking a CFRA leave.

(g) "Employment in a comparable position" means employment in a position which 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, 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 termina-

tion 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 CFR Part 825, issued January 6, 1995. “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) “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, subdivision (f). “Medical leave” does not include leave taken for an employee's pregnancy disability, as defined in (m) below, except as specified below in section ~~7297.6, subdivision 11093~~(c)(1).

(l) “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) “Pregnancy disability leave” means a leave taken for disability on account of pregnancy, childbirth, or related medical conditions, pursuant to Government Code section 12945-~~subdivision (b)(2)~~, and defined in section ~~7291.2, subdivision 11035~~(e) (r) of the regulations.

(n) “Reinstatement” means “restoration” within the meaning of FMLA and its implementing regulations.

(o) “Serious health condition” means an illness, injury (including on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent or spouse of the employee which involves either:

(1) inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential health care facility, or

(2) continuing treatment or continuing supervision by a health care provider, as detailed in FMLA and its implementing regulations.

(p) “Spouse” means a partner in marriage as defined in Family Code section 300.

(q) “Twelve workweeks” means the equivalent of twelve of the employee's normally scheduled workweeks. (See also section ~~7297.3~~, subdivision 11090(d).)

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, 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; Code of Federal Regulations, tit. 29, part 825, issued January 6, 1995; Fair Labor Standards Act, 29 U.S.C. § 201 et seq; and 29 CFR part 785.

§ 7297.1. 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 ~~7297.4~~ 11091, and if it is accompanied, where required, by a certification, as that term is defined in section ~~7297.0~~, subdivision 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 12 workweeks in a 12-month period between the two parents. The employer ~~may~~ shall not limit their entitlement to CFRA leave for any other qualifying purpose. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ 7297.2. 11089. Right to Reinstatement: Guarantee of Reinstatement; Refusal to Reinstatement; Permissible Defenses.

(a) Guarantee of Reinstatement.

Upon granting the CFRA leave, the employer shall guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section ~~7297.2, subdivisions~~ 11089(c)(1) and (c)(2), and shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to honor its guarantee of reinstatement to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in ~~§ section 7297.2, subdivisions~~ 11089(c)(1) and (c)(2).

(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, 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) Permissible defenses.

(1) Employment Would Have Ceased

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 reinstatement is requested in order to deny reinstatement.

(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.

(2) "Key Employee."

A refusal to reinstate a "key employee" to his or her same position or to a comparable position is justified if the employer shows, 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

(B) The employee requesting the leave is among the highest paid ten 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

(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

(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.

Note: Authority cited: Sections 12935, ~~subd. (a)~~ and 12945.2, Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ 7297.3. 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 allowed in the FMLA regulations, issued January 6, 1995, 29 CFR Part 825, section 825.200, subdivision (b), for determining the "12-month period" in which the 12 weeks of leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees.

(c) "Twelve workweeks" as that term is defined in section ~~7297.0, subdivision 11087(q)~~, means the equivalent of twelve 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 which constitutes "twelve weeks" is calculated on a pro rata or proportional basis.

(1) For example, for a full time employee who works five eight-hour days per week, "twelve workweeks" means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, "twelve workweeks" may mean 30 eight-hour days or 60 four-hour days, or twelve workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, "twelve 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 twelve weeks of leave to which the

employee is entitled. For example, if an employee needs physical therapy which requires an absence from work of two hours a week, only those two hours can be charged against the employee's CFRA leave entitlement.

(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.

(d) Minimum duration for CFRA leaves taken 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.

(e) Minimum duration for CFRA leaves taken 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. An employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave.

(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, 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 not have to have equivalent duties. 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.

(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.

Note: Authority cited: Sections 12935, ~~subd. (a)~~ and 12945.2, Government Code; and Stats. 1993, ch. 827, (AB 1460), § Section 2. Reference: Section 12945.2, Government Code; and

Stats. 1993, ch. 827 (AB 1460), s 2; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ 7297.4. 11091. Requests for CFRA Leave: Advance Notice; Certification; Employer Response.

(a) Advance Notice.

(1) Verbal Notice.

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 employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.

(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."

(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 oth-

erwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements ~~which that~~ it adopts. The employer may incorporate its notice requirements in the general notice requirements in section ~~7297.9~~ 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 ten 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.

(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 ~~7297.0, subdivision~~ 11087(a)(1). If the certification satisfies the requirements of section ~~7297.0, subdivision~~ 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period which 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 if additional leave is requested.

(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 ~~7297.0, subdivision~~ 11087(a)(2). Upon expiration of the time period which 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 if additional leave is requested.

(A) If the employer has reason to doubt the validity of the certification provided by the employee for his/her own serious health condition, the employer may require, at the employer's own expense, that the employee 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 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 obtain a release to "return-to-work" from his/her health care provider stating that he/she is able to resume work 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.

(3) Providing Certification.

The employer may require that the employee provide any certification within fifteen 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.

Note: Authority cited: Sections 12935, ~~subd. (a)~~ and 12945.2, ~~subd. (a)~~, Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ 7297.5-11092. 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. s 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 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.

(2) Only if the employee asks for 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.

(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 ~~7297.5, subdivision~~ 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) An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off 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 employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period.

(2) This 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 for the duration of the leave(s), up to a maximum of 12 workweeks in a 12-month period.

(3) A “group health plan” is as defined in section 5000, subdivision (b)(1), of the Internal Revenue Code of 1986. If the employer's group health plan includes dental care, eye care, mental health ~~counseling~~ counseling, et cetera, or if it includes coverage for the 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.

(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.

(d) 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.

(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) 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.

(e) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement which 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 employ-

er'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) 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: Sections 12935, ~~subd. (a) and 12945.2~~, 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.

§ 7297.6. 11093. Relationship Between CFRA Leave and Pregnancy 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, ~~subdivision (b)(2)~~, and section ~~7291.2~~ 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or related medical conditions 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 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 related medical conditions 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.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and Government Code section 12945, ~~subdivision (b)(2)~~) and CFRA leave for reason of the birth of the child (under this subchapter) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or 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.

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Sections 12945, ~~subd. (b)(2)~~ and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ 7297.7. 1104. Retaliation.

In addition to the retaliation prohibited by Government Code section 12940, ~~subdivision (f)~~, and section ~~7287.8~~ 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 subchapter, 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 subchapter.

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Sections 12940, ~~subd. (f)~~ and 12945.2, Government Code.

§ 7297.8. 1105. Remedies.

Upon determining that an employer has violated Government Code section 12945.2, ~~the Commission~~ a court may order any remedy available under Government Code section ~~12970~~ 12965, and section ~~7286.9~~ 11012 of the regulations. The remedy, however, for a violation of sec-

tion ~~7297.9~~ 11095 (failure to provide notice) shall be an order that the employer provide such notice.

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Sections 12945.2 and ~~12970~~ 12965, Government Code.

§ ~~7297.9-11096~~. Notice of 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. If the employer publishes an employee handbook which describes other kinds of personal or disability leaves available to its employees, that employer shall include a description of CFRA leave in the next edition of its handbook which 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 ten percent or more of persons who speak a language other than English as their primary language shall translate the notice into the language or languages spoken by this group or these groups of employees.

(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 which is more generous than that required by this act 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 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 you are disabled by pregnancy, childbirth or related medical conditions, 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 to the same or to 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 which 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 or your own serious health condition or 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: Sections 12935, ~~subd. (a)~~ and 12945.2, Government Code. Reference: Sections 12940, ~~subd. (i)~~, 12945, ~~subd. (b)(2)~~ and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ ~~7297.10.~~ 11097. Relationship with FMLA Regulations.

To the extent that they are not inconsistent with this subchapter, other state law or the California Constitution, the ~~Commission~~ Council incorporates by reference the federal regulations interpreting FMLA issued January 6, 1995 (29 CFR Part 825), which govern any FMLA leave which is also a leave under this subchapter.

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq; and Code of Federal Regulations, tit. 29, part 825.

§ ~~7297.11.~~ 11098. 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 the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient.

Comment [BCS3]: "Commission" becomes "Council" on the form.

FAIR EMPLOYMENT & HOUSING COMMISSION
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act of 1993 (CFRA))

1. Employee's Name: _____

2. Patient's Name (If other than employee): _____

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. The attached sheet describes what is meant by 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 under any of the categories described? If so, please check the appropriate category.

(1) (2) (3) (4) (5) (6)

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 needed or during which the employee's presence would be beneficial:

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.

Yes No

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 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. _____

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. Signature of health care provider:

Date: _____

12. Signature of Employee:

Date: _____

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.

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), kidney disease (dialysis).

Note: Authority cited: Sections 12935, ~~subd. (a) and 12945.2~~, Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. §§2601 et seq.; and Code of Federal Regulations, tit. 29, part 825. Appendix B, Form WH-380, as revised December 1994.

Chapter Subchapter 3. Discrimination in Housing (Reserved)

Chapter Subchapter 4. Procedures of the Commission Council (Reserved)

§ 7400. Statement of Purpose.

~~These regulations interpret, implement, and supplement the procedures set forth in Articles 1 (employment, Unruh Act and Ralph Act, discrimination) (Gov. Code, §12960 et seq.) and 2 (housing discrimination) of the Fair Employment and Housing Act (FEHA) (Gov. Code, §12980~~

~~et seq.). These regulations and provisions of the FEHA shall govern the practice and procedure in all matters before the Fair Employment and Housing Commission (Commission). They incorporate the requirements of the Administrative Adjudication Bill of Rights, Government Code sections 11425.10 et seq., and incorporate by reference certain sections of the Administrative Procedure Act, Government Code sections 11370 et seq., as specified.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11370 et seq., 11425.10 et seq., 12948, 12960 et seq. and 12980 et seq., Government Code.~~

§ 7401. Delegation of Powers.

~~Except where otherwise prohibited by law or by these regulations, the Commission may delegate any of the powers and duties of the Commission to the Chairperson, the Hearing Officers, or other members of the staff of the Commission. When a regulation requires something to be delivered or mailed to the "Commission," it may be delivered or mailed, unless otherwise specified, to the Executive and Legal Affairs Secretary (ELAS) or Hearing Officer if there is a Hearing Officer assigned to the case.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 12935(a), Government Code.~~

§ 7402. Definitions.

(a) "Accusation" means the charging document issued by the Department pursuant to Government Code sections 12965 and 12981.

(b) "Administrative adjudication" means any stage of any proceeding, including but not

limited to, the hearing of the Commission following the issuance of an accusation by the Department of Fair Employment and Housing (Department) and enforcement of any judgment entered.

(c) “Amicus brief” means a written submission to the Commission by a non-party who has an interest in the subject matter of a particular adjudicative proceeding.

(d) “Chairperson” means the Chairman or Chairwoman of the Commission.

(e) “Clerk of the Commission” means any individual assigned administrative responsibilities by the ELAS.

(f) “Commission” means the Fair Employment and Housing Commission and includes any Commissioner, officer, employee, or other individual delegated any function, power, or duty of the Commission.

(g) “Commissioner” means any member of the Fair Employment and Housing Commission, including the Chairperson.

(h) “Complainant” means a person claiming to be aggrieved by a practice which is unlawful under the FEHA and who files a complaint with the Department, pursuant to Government Code section 12960 or 12980.

(i) “Complaint” means a complaint filed with the Department, pursuant to Government Code section 12960 or 12980, by a person alleging a practice which is unlawful under the FEHA. It also means a complaint of housing discrimination filed by the California Attorney General, pursuant to Government Code section 12980, subdivision (b).

(j) “Deliver” or “mail” includes, but is not limited to, sending something by facsimile (fax) or other means of electronic transmission, as allowed by the rules set forth in sections 7406 and 7407.

(k) “Department” means the Department of Fair Employment and Housing and includes any officer, employee, or other individual delegated any function, power, or duty of the Department.

(l) “Director” means the Director of the Department who is the executive officer of the Department and includes any officer, employee, or other individual delegated any function, power, or duty of the Director.

(m) “ELAS” means the Executive and Legal Affairs Secretary and chief executive officer of the Commission and includes any officer, employee or other individual delegated any function, power, or duty of the ELAS.

(n) “Hearing” means the evidentiary hearing of the Commission held pursuant to the issuance of an accusation by the Department.

(o) “Hearing Officer” means an administrative law judge of the Commission.

(p) “Motion in limine” means a written request to the Hearing Officer brought prior to the

taking of evidence at hearing to exclude irrelevant or prejudicial matters at hearing.

(q) “Party” includes the Department, the respondent(s), and any person who has been allowed by the Commission to intervene in the proceeding.

(r) “Person” includes one or more individuals, limited liability companies, partnerships, associations, governmental entity, corporations, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.

(s) “Respondent” means any person who is alleged to have committed an unlawful practice in a complaint filed with the Department pursuant to Government Code section 12960 or 12980 and/or a person against whom an accusation is filed pursuant to Government Code section 12965 or 12981.

(t) “Section 12948 discrimination” means allegations of a denial of public accommodation rights or a denial of rights because of hate violence pursuant to Civil Code section 51, 51.7, 54, 54.1, or 54.2, as incorporated in Government Code section 12948.

(u) “Vice chairperson” is a person elected by the Commission as a whole to assume the duties of the chair when the chairperson is absent. Whenever the word “chairperson” appears in these regulations, it shall include “vice chairperson.”

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 51, 51.7, 54, 54.1 and 54.2, Civil Code; and Sections 12965, 12981, 12960, 12980, 12925(d) and 12948, Government Code.

§ 7403. Department to Maintain Current Addresses and Telephone Numbers of Complainants and Respondents.

All complainants and respondents shall keep the Department advised of their current telephone number and mailing address.

(a) Complainants shall file with the Department their telephone numbers, mailing addresses and addresses at which they can be personally served with documents at the time they sign the complaint and shall notify the Department of any changes of addresses and telephone numbers during the investigation and administrative adjudication of the complaint and until payment of any judgment is complete.

(b) When serving the complaint on respondents, the Department shall notify respondents in writing that a complaint has been filed against them, that they are required to file their telephone numbers and mailing addresses and addresses at which they can be personally served documents with the Department, and that they must notify the Department of any changes of addresses or telephone number during the investigation and administrative adjudication of the complaint and until payment of any judgment is complete.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12960, 12962, 12980 and 12986, Government Code.

§ 7403.5. Interpretive Guidelines. [Repealed]

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

§ 7404. Public Hearing Records.

The official record of the Commission in every case which is to proceed to hearing shall be available for public inspection upon making appropriate arrangements with the Clerk of the Commission.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 6253(a) and 12935(a), Government Code.

§ 7405. Representation in Matters Before the Commission.

(a) At all stages of the investigation and administrative adjudication, a respondent may represent himself or herself, may have representation by legal counsel, or may have non-legal representation.

(b) When a party is unrepresented or chooses representation other than by legal counsel, the Commission shall make reasonable efforts to ensure that the rights of the party are protected. Where not otherwise prohibited by law, these efforts may include interpreting papers as motions before hearings or requests for discovery, granting extensions of time to file papers, and waiving procedural requirements when in the interests of justice.

(c) Nothing in this section shall be interpreted to permit a party to engage in dilatory or delaying tactics, such as choosing not to respond to an accusation, or delaying choice of representation.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12935(a), 12967 and 12981(e), Government Code.

§ 7406. Filing of Papers with the Commission.

(a) To file a document with the Commission, a party shall submit two copies of the document to the Clerk of the Commission at its office in San Francisco, California.

(b) Filing of a document is effective if the document is mailed to the Commission by first class, overnight or express mail, registered, or certified mail, postmarked no later than the last day of the time limit. Where mail is metered and bears a later postmark, the date of the postmark shall control for timeliness purposes.

(c) Filing of a document is also effective if it is delivered or sent by facsimile transmission (fax) or other electronic delivery, such as electronic mail (e-mail), when approved by the Commission, on or before the last day of the time limit. If a document is filed by facsimile or other approved electronic means of delivery, the sender shall also place two hard copies of the document in the mail to the Commission, postmarked no later than the last day of the time limit. The copy of any document filed by facsimile or other approved electronic means of delivery shall bear a notation of the date and place of transmission and the facsimile telephone number or e-mail address, where appropriate, to which it is being transmitted.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 1013(f), Code of Civil Procedure; and Sections 12935(a) and 12972(a)(2), Government Code.

§ 7407. Service of Parties and Complainants:

Whenever a party files any papers with the Commission, the party shall serve copies of the same on all other parties and on the complainant, or on their attorneys or representatives of record. Service may be by first class mail, registered or certified mail, overnight or express mail, or any other form of mail delivery. Service may also be by facsimile transmission or other approved electronic means of delivery. If a document is served by facsimile or other approved electronic means of delivery, the person serving the document shall also place a hard copy in the mail within any applicable time limit. Service may also be by personal service.

(a) Proof of Service. Service shall be made simultaneously with filing and proof of such service, by means of a written declaration under penalty of perjury, shall be attached to the papers. Any proof of service which meets the requirements of Code of Civil Procedure section 1013a is acceptable. A sample proof of service, which assumes service by facsimile, followed by placing a hard copy of the document in the mail, is the following:

Declaration of Service by [insert means of service]

I, the undersigned, hereby declare:

I am over eighteen years of age and not a party to the within cause. My address is [insert address]. On [insert date], I served a copy of the [list all documents by title or description] on each of the following, by [insert means of service], facsimile transmission and by placing the same in an envelope (or envelopes) addressed respectively as follows:

[insert names and addresses of all persons served with the documents and, if applicable,

~~which party each person represents]~~

~~Each said envelope was then on said date sealed and deposited in the United States mail at [insert location], the county in which I am employed, with the postage thereon fully prepaid.~~

~~I declare under penalty of perjury that the foregoing is true and correct. Executed on [insert date] at [insert location].~~

~~[Signed by the person executing the service]~~

~~(b) Date of Service. The date of service of papers served on parties and on complainants, and papers served by the Commission, shall be when the paper is deposited in the United States mail, including overnight mail, delivered in person, or sent by facsimile transmission or other approved means of electronic delivery (assuming that a hard copy was also sent by mail, as required by this section). Where mail is metered and bears a later postmark, the date of the postmark shall control for timeliness purposes.~~

~~(c) Computation of Time Periods:~~

~~(1) Beginning and end of time period. In computing time periods prescribed by these rules, the day of the event which starts the time period running is not counted, but the last day of the period is included. If the last day of the period falls on a Saturday, Sunday, or a state legal holiday, the time period expires at the corresponding time on the next business day.~~

~~(2) Extension for service by mail. Whenever a time period is triggered by service of papers on a party or on a complainant and such service is made by regular mail, five days shall be added to the prescribed period for response. When service is made by overnight or other express mail, or by facsimile transmission, two state business days shall be added to the prescribed period for response. No days will be added to any time period when an extension of time has been granted.~~

~~(d) The rules contained in this regulation shall also govern all notices, Commission decisions, and other papers sent out by the Commission pertaining to administrative adjudication.~~

~~(e) Service and orders adverse to respondents. If the respondent has not filed a Notice of Defense or appeared at the hearing, the Commission may issue an order adversely affecting the respondent only if the Department proves that it has served the respondent with the accusation, accusation package, and Notice of Hearing, either personally or by registered or certified mail addressed to the last known mailing address on file with the Department, as required by section 7403(b).~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: See~~

tions 1012.5, 1013 and 1013a, Code of Civil Procedure; Sections 11505(c), 12935(a) and 12972(a)(2), Government Code; and *Evans v. Department of Motor Vehicles* (1994) 21 Cal.App.4th 958.

§ 7408. Accusations.

(a) Only the Director or individual within the Department delegated such authority may, in his or her discretion, issue an accusation.

(b) An accusation shall be deemed issued on the date it is filed with the Commission. An accusation shall be filed with the Commission in the manner set forth in section 7406.

(c) All accusations issued pursuant to Government Code section 12965, subdivision (a), alleging employment or Section 12948 discrimination, shall be issued by the Department and filed with the Commission on or before the one year anniversary date of the filing of the complaint.

(d) All accusations issued pursuant to Government Code section 12981, subdivision (a), alleging unlawful housing practices, shall be issued by the Department and filed with the Commission on or before the 100th day after the date of the filing of the complaint, unless impracticable for the Department to do so. If the Department determines that it is impracticable to meet this deadline, it shall file in the Pleading File a copy of the notification provided to the complainant and respondent explaining the Department's reason(s) for the delay.

(e) Contents of accusation. The form and contents of an accusation may be determined by the Department but, at a minimum, shall meet all of the following:

(1) be written;

(2) be in the name of the Department;

(3) contain the name of each respondent and, if applicable, the capacity in which each respondent is being named;

(4) set forth the nature of the charges in ordinary and concise language with appropriate references to specific sections of the FEHA or other applicable statutes and regulations sufficient to allow the respondent(s) to prepare a defense; and

(5) set forth the relief sought by the Department.

(f) Accusations need not be verified.

(g) The Commission may ignore or correct any error or defect in the accusation which does not substantially affect the rights of any party.

(h) Contents of accusation package. Upon the filing of an accusation, the Department shall serve on the respondent and the complainant, in accordance with the rules in section 7406, an "accusation package." The accusation package shall include, but is not limited to, the following documents:

- (1) a copy of the accusation;
- (2) a copy of the underlying complaint(s) which is the subject of the accusation;
- (3) a copy of the Commission's procedural regulations accompanied by a statement that these regulations are the governing procedure for administrative adjudication before the Commission;
- (4) a copy of a subpoena and a subpoena duces tecum form with instructions for their use;
- (5) a copy of the Statement to Respondents;
- (6) a Notice of Defense form;
- (7) a notice of the right to request, as needed, an interpreter or reasonable accommodation;
- (8) if applicable under Government Code section 12965(e) for allegations of employment or Section 12948 discrimination, a statement regarding respondent's right to elect to transfer the proceedings to court in lieu of administrative adjudication, and a form notice to transfer proceedings to court;
- (10) — for accusations issued pursuant to Government Code section 12981(a), regarding at
 legations of housing discrimination, a statement regarding respondent's, complainant's, or other aggrieved person's right to elect to have the claims adjudicated in a civil action in lieu of administrative adjudication, and a form notice to transfer proceedings to court;
- (11) — if applicable under Government Code section 12981(g), for housing discrimination
 cases, a statement to the complainant that she or he may only be able to recover damages for emotional distress or other intangible injuries through a civil action;
- (12) — a notice asking the respondent to consent to electronic, rather than stenographic, reporting of the proceedings at hearing;
- (13) — a copy of the Department's notice informing respondents and complainants of their
 obligation to keep the Department informed of any change of mailing address or telephone number;
- (13) a Notice of Hearing or Notice of Impending Hearing;
- (14) a proof of service specifying that all of the above documents have been served.
- (i) Service of accusation and accompanying materials. The accusation and accusation package shall be served on each respondent in accordance with the rules in section 7407. The complainant will be provided with a copy of the accusation and related papers pertinent to complainant.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: See

tions 12965, 12948, 12980(f), 12981, 11425.10(a)(2) and 11503, Government Code.

§ 7409. Amended Accusations.

(a) The Department may amend an accusation, issued pursuant to Government Code section 12965 regarding allegations of employment or Section 12948 discrimination, to pray either for damages for emotional injury or for administrative fines, or both, only within the first thirty days after the issuance of the original accusation.

(b) The Department may amend an accusation with new charges (other than those in subdivision (a)) any time up to 30 calendar days prior to the original or continued date the hearing is scheduled to commence. After that time, the Department may amend an accusation which contains new charges only upon such terms as the Hearing Officer approves, including, but not limited to, granting a continuance to the respondent. "New charges" include any amendment which may affect the liability of respondents, such as, but not limited to, the addition of a new respondent or the naming of an existing respondent in a new capacity; the charging of a violation of new sections of the FEHA; the pleading of substantive new facts; and the prayer for new or significantly modified relief.

(c) Any new charges shall be deemed controverted and the respondent does not need to file a new Notice of Defense. Any objections to the amended accusation may be made orally and shall be noted on the record.

(d) At any time before the matter is submitted to the Hearing Officer for decision, the Department may amend an accusation to make nonsubstantive changes.

(e) The first amended accusation shall be clearly labeled "First Amended Accusation," and any subsequent amended accusations shall be labeled consecutively. The Department shall clearly identify the changes made to each amended accusation either by highlighting the changes or identifying them in a separate written statement.

(f) Any amended accusations shall be filed with the Commission and served on all parties and the complainant in accordance with sections 7406 and 7407.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11507, 12965(e)(4), 12935(a) and 12972(a)(2), Government Code.

§ 7410. Election to Transfer Proceedings to Court in Lieu of Administrative Adjudication.

(a) Accusations Issued Pursuant to Government Code Section 12965(a) Regarding Allegations of Employment or Section 12948 Discrimination. If the accusation (or amended accusation if the purpose of the amendment is to add a prayer for damages for emotional injuries and/or administrative fines) includes a prayer for damages for emotional injury or for administrative fines, or both, any respondent may elect to transfer the proceedings to a court instead of having

the matter heard by the Commission. In order to do this, the respondent must serve written notice to this effect. The respondent may use the form provided for this purpose in the Statement to Respondents or available from the Department, or any comparable form. The respondent must serve this notice on the Department, the Commission, and the complainant within 30 days after service of the accusation (or an accusation which has been amended to add a prayer for damages for emotional injuries and/or administrative fines) on the respondent. Where not all of the named respondents exercise election to transfer proceedings to court, the case may be bifurcated and proceed with administrative adjudication as to those non-electing respondents.

(b) ~~Accusations Issued Pursuant to Government Code Section 12981 Regarding Allegations of Housing Discrimination. Any respondent or complainant may elect to have the charges asserted in the accusation adjudicated in a civil action rather than before the Commission. In order to do this, the person seeking election must serve written notice to this effect. The person may use the form provided for this purpose in the Statement to Respondents or available from the Department, or any comparable form. The person must serve the notice on the Department, the Commission, and all other parties, and the complainant, within 20 days after service of the accusation.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12948, 12965, 12965(c)(1) and 12989, Government Code.~~

§ 7411. Statement to Respondent.

The Statement to Respondent shall be substantially in the following form:

You may make a request for a hearing by delivering or mailing the enclosed form, called a Notice of Defense, to the Fair Employment and Housing Commission, [fill in address of the Commission] within 15 days after the accusation is served on you or you receive it by mail. You may also fax the Notice of Defense to the Commission at [fill in facsimile number], as long as you also place two hard copies of the Notice of Defense in the mail within the 15 day time limit. Either you or your representative must sign the Notice of Defense. If you do not file a Notice of Defense, the Department may proceed to hearing without you. You have a right to be represented by a lawyer or other person in these proceedings. The Department will always be represented by a lawyer. Whether or not you hire an attorney to represent you at the hearing, you may want to seek legal advice to better understand your rights and obligations.

The potential monetary damages that may be assessed by the Commission against you in an administrative adjudication may include, among other things, actual damages, compensatory damages for emotional distress, and administrative fines or civil penalties. In an employment case-

~~brought pursuant to Government Code section 12965, the maximum monetary recovery per complainant for the emotional distress and administrative fines combined shall not exceed \$50,000 against each respondent. These damages are in addition to any actual damages, such as back pay, front pay, medical expenses and other out of pocket costs. In a housing case brought pursuant to Government Code section 12981, there is no upper limit on the emotional distress damages that may be awarded against you.~~

~~You are entitled to receive the names and addresses of Department witnesses and to inspect and copy the items mentioned in section 7417 which are held by the Department. You may contact: (here insert name and address of appropriate Department attorney) to obtain these items.~~

~~Once the hearing is set, it may be postponed only for good cause. If you have good cause, you must notify the Commission within 10 working days after you discover the good cause. Failure to give notice within 10 days may mean that the hearing will not be postponed.~~

~~You must at all times keep the Department notified of your current address, telephone number, and, if applicable, fax number.~~

~~[Add appropriate "election to transfer" language from section 7410, subdivision (a) or (b), and state that the appropriate "election to transfer" notice is included in the Statement to Respondent.]~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11505(b), 12935(a) and 12972(a)(2), Government Code.~~

§ 7412. Notice of Defense:

~~(a) Within 15 days after service of the accusation, the respondent may file with the Commission a Notice of Defense, using the form provided by the Department in the accusation package or any substantially equivalent form. In the Notice of Defense, the respondent may request a hearing and state any objections the respondent may have to the form or substance of the accusation.~~

~~(b) The Notice of Defense shall be in writing and signed by, or on behalf of, the respondent and shall state the respondent's mailing address, address at which the respondent can be personally served with documents, and telephone number. If the respondent is represented by an attorney or non-attorney representative, or is a corporation, the Notice of Defense shall state the name, mailing address and telephone number of respondent's representative. It need not be veri-~~

fied, or follow any particular form.

(c) The respondent shall be entitled to a hearing on the merits if the respondent files a Notice of Defense.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11506, 12935(a) and 12972(a)(2), Government Code.

§ 7413. Subpoenas.

(a) Subpoenas and subpoenas duces tecum may be issued for attendance at the hearing and for production of documents at any reasonable time and place in advance of the hearing or at the hearing.

(b) The Department and each party represented by legal counsel shall issue and sign its own subpoenas and subpoenas duces tecum, using the form in the Appendix to these regulations. Parties who are not represented by legal counsel may request the Commission to issue and sign subpoena and subpoena duces tecum forms.

(c) The process extends to all parts of the state and shall be served in accordance with Code of Civil Procedure sections 1987 and 1988. A subpoena or subpoena duces tecum may also be delivered by certified mail, return receipt requested, or by personal service.

(d) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

(e) A person served with a subpoena or subpoena duces tecum may object to its terms by a motion which shall be resolved by the ELAS or a Hearing Officer in an appropriate order.

(f) A witness appearing pursuant to a subpoena or subpoena duces tecum, other than a party, shall receive for the appearance the same mileage and fees allowed by law to a witness in a civil case (see Government Code sections 68092.5-68093), to be paid by the party at whose request the witness is subpoenaed. Fees for witnesses who are officers and employees of the state or political subdivision of the state shall be governed by Government Code sections 68096.1-68097.10).

(g) Subpoenas and subpoenas duces tecum shall be served on the opposing party in the manner provided in section 7407 and shall comply with consumer notice requirements, Code of Civil Procedure sections 1985.3 and 1985.6, where applicable.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 1985.3, 1985.6, 1987, 1988, Code of Civil Procedure; Sections 11450.10, 11450.20(b), 11450.30, 11450.40, 68092.5-68093, 68096.1-68097.10, 12935(a) and 12972(a)(2), Government Code; and *Sehlmeyer v. Department of General Services* (1993) 17 Cal.App.4 1072.

§ 7414. Setting of Hearing.

~~(a) Requests for hearing. Where respondent has not stipulated in writing to waive the 90-day hearing requirement pursuant to regulation section 7429(c), the Department shall request the Commission to set the hearing within 90 days of issuance of the accusation. Where respondent has stipulated in writing to waive the 90-day hearing requirement, the Department shall make an effort to consult with the respondent and the complainant regarding hearing dates, and shall then request the Commission to set the hearing.~~

~~(b) Notice of hearing. The Department shall deliver or mail a Notice of Hearing to all parties and the complainant at least 30 days prior to the date the hearing is scheduled to commence. If the hearing is continued, advance notice as short as 10 days may be given. The Notice of Hearing shall be substantially in the following form but may include other information:~~

~~You are hereby notified that a hearing will be held before the Fair Employment and Housing Commission at [place of hearing] on the [date and time of hearing] upon the charges made in the accusation served upon you. If you do not attend the hearing, the case will be decided without you and an order may be entered which directs you to pay money or take other action.~~

~~You have the right to be represented by a lawyer or other representative at your own expense.~~

~~You are not entitled to the appointment of a lawyer to represent you at public expense. The Department will be represented by a lawyer. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you.~~

~~You are entitled to the issuance of subpoenas to compel the attendance of witnesses at the hearing and the production of books, documents or other things, either before the hearing at a reasonable time and place or at the hearing. If you are represented by a lawyer, your lawyer may use the subpoena forms attached to this Notice. If you are unrepresented or represented by someone other than a lawyer, you may obtain signed subpoena forms from the Fair Employment and Housing Commission at [here, insert the Commission's address and telephone number]. You are responsible for serving the subpoenaed person or entity with the subpoena, as well as serving a copy of the subpoena on the opposing party, in the manner set forth in section 7407. You must also comply with any consumer notice requirements (Code of Civil Procedure sections 1985.3 and 1985.6) where applicable.~~

~~If you or any of your witnesses will need language assistance, including sign language, or other accommodation, you must notify the Commission of this need as soon as possible, but no later~~

than fifteen (15) days before the hearing is to start. The Commission will secure the appropriate interpreter.

Attached is the Commission's regulation on Pre Hearing Statements and a form for you to use. Please make sure that you comply with its requirements.

(c) Requests for continuance of the hearing. A request for a continuance of a hearing date shall be made in writing, filed with the ELAS, and served on all of the parties and the complainant. Before making a request, the moving party shall contact all other parties to determine if there is any opposition and shall state whether there is any opposition in its papers to the ELAS.

(1) Requests for continuance will be granted only for good cause.

(2) A continuance beyond the 90 day time limitation after issuance of an accusation provided by Government Code section 12968 will only be granted by written stipulation of the parties, written waiver of the time limit by all respondents, and upon approval of the ELAS. If approved, the order of the Commission shall specify new hearing dates or shall order the parties to set new dates.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 1985.3 and 1985.6, Code of Civil Procedure; Sections 11509, 11435.60, 12935(a) and 12972(a)(2), Government Code; and *Sehlmeyer v. Department of General Services* (1993) 17 Cal.App.4 1072.

§ 7415. Withdrawal of Accusation.

(a) Accusations issued pursuant to Government Code section 12965 regarding allegations of employment or section 12948 discrimination. The Department may at any time withdraw the accusation. If a complainant's right to sue notice has expired and that complainant objects to the withdrawal, however, the Commission shall decide whether to let the Department withdraw the accusation and whether to allow the administrative adjudication to proceed without the Department, and, if so, on what terms.

(b) Accusations issued pursuant to Government Code section 12981 regarding allegations of housing discrimination. The Department shall not withdraw the accusation unless the complainant withdraws the underlying complaint or the Department determines, after a thorough investigation, that, based on the facts, no reasonable cause exists to believe that an unlawful housing practice, as prohibited by the Act, has occurred or is about to occur or the Department determines that respondent has eliminated the violation which has occurred or is about to occur.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12948, 12965, 12981 and 12981.1, Government Code.

§ 7416. Notification of Settlement or Withdrawal of Accusation.

The Department shall promptly notify the Clerk of the Commission of all settlements and withdrawals of accusations or any other action terminating a matter before the Commission. When properly notified, the Commission will vacate any hearing date and close its file on the matter on receipt of the withdrawal of the accusation.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12935(a) and 12972(a)(2), Government Code.

§ 7417. Discovery.

(a) Once an accusation is issued, a party is entitled to discovery. The party may make a written request to another party prior to the hearing and within 30 days after service by the Department of the initial accusation or within 15 days after service of an amended accusation or additional pleading. Unless otherwise agreed to by the parties, all responses to written requests for discovery are due 30 days after the request has been made. The following discovery is allowable:

- (1) obtain the names and addresses of witnesses who have knowledge of the matters raised in the accusation, to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing; and
- (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party or the complainant:
 - (A) A statement pertinent to the subject matter of the accusation, made by the complainant or any party or any person employed by or related to a party.
 - (B) Statements of witnesses proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (A) above;
 - (C) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party proposes to offer in evidence;
 - (D) Any writing or thing which is relevant and which would be admissible in evidence and which is in the possession or control of a party or the complainant;
 - (E) Investigative or progress reports made by or on behalf of the Department or other party pertaining to the subject matter of the proceeding, to the extent that these reports 1. contain the

~~names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or 2. reflect matters perceived by the Department in the course of its investigation, or 3. contain or include by attachment any statement or writing described in (A) to (E), inclusive, or summary thereof.~~

~~(3) For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of these oral statements.~~

~~(4) Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.~~

~~(5) If the Department alleges conduct which constitutes sexual harassment, sexual assault, or sexual battery, the following rule shall apply: Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at hearing to attack the credibility of the complainant as provided for in section 7429(f)(7).~~

~~(b) In addition to the above, the Department and each respondent or other party may each take a single deposition, which shall continue day to day until completed. If an accusation charges multiple respondents, the Department may take a single deposition per respondent. A notice of deposition may also include a notice for production at the deposition of papers, books, accounts and documents. Unless agreed to otherwise by the parties or upon approval of the ELAS or Hearing Officer assigned to the case, depositions shall be scheduled for a date at least ten days after service of the deposition notice and shall be completed on or before the 30th day before the date initially set for hearing or the date of any continued hearing. However, the 30 day cut off shall not apply where respondent has not stipulated in writing to waive the 90 day hearing requirement pursuant to regulation section 7429(c). In those cases, the deposition shall be completed on or before the 10th day before the hearing date.~~

~~Depositions are to be taken in the manner prescribed by Code of Civil Procedure section 2025, except that any application for a protective order, an order to stay the taking of the deposition and quash the deposition notice, or an order to compel the taking of the deposition shall be made to the Commission rather than to the courts. The rules and time limits for enforcement of discovery set forth below in subdivision (c) shall apply to depositions as well.~~

~~(c) Procedures for enforcement~~

~~(1) Any party claiming that its discovery, including subpoenas and subpoenas duces te~~

~~eum.~~

has not been complied with (the Moving Party) may serve on the Opposing Party and file with the ELAS, or Hearing Officer, if one has been assigned to hear the discovery matter, a motion to compel discovery, against the party refusing or failing to comply with this section (the Opposing Party). The motion shall state facts showing that the Opposing Party failed or refused to comply with this section, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under this section, that a reasonable and good faith attempt to reach an informal resolution of the issue with the Opposing Party has been made, and the ground or grounds of the Opposing Party's refusal so far as known to the Moving Party.

(2) The Moving Party shall serve the motion upon the Opposing Party and file the motion with the Commission within thirty (30) days after the Opposing Party has failed or refused to respond to the written request for discovery or to testify pursuant to a deposition notice. The Opposing Party shall have seven (7) days from the date of service of the motion to file and serve a response. The ELAS or assigned Hearing Officer, in his or her discretion, may allow a greater or lesser time in which to file a motion or response.

(3) A party's "failure or refusal to respond" to discovery includes when that party has stated or indicated that it will not provide any response to the discovery or where, on the Moving Party's notification to the party that the response provided is incomplete or inadequate, that the party will not supplement the response, or where the Moving Party has advised that party in writing that its lack of meaningful, good faith response shall be considered a failure or refusal to respond for the purposes of section 7417(c)(2).

(4) The ELAS or assigned Hearing Officer has the discretion to decide the matter without hearing. If the ELAS or Hearing Officer decides that a hearing is necessary, s/he has the discretion to conduct it by telephone or with the parties present.

(5) Where the matter sought to be discovered is under the custody or control of the Opposing Party and the Opposing Party asserts that the matter is not a discoverable matter under the provisions of this section, or is privileged against disclosure under these provisions, the ELAS or Hearing Officer may order matters provided in subdivision (b) of section 915 of the Evidence Code to be lodged with the Commission and may examine the matters in accordance with its provisions.

(6) Unless otherwise stipulated by the parties, the ELAS or Hearing Officer shall, no later than 15 days after the hearing (or, if no hearing has been held, within 15 days after receipt of the moving papers), make an order denying or granting the motion. The order shall be in writing setting forth the matters which the Moving Party is entitled to discover under this section. The ELAS or Hearing Officer shall serve by mail upon the parties a copy of the order. Where the or

der grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the Moving Party, the order shall be effective on the date it is served.

(7) Unless the ELAS or Hearing Officer rules otherwise, any discovery enforcement proceedings shall stay the 90 day requirement under Government Code section 12968 for the commencement of the hearing.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 2025, Code of Civil Procedure; Sections 11440.40, 12968, 12972, 11507.6 and 11507.7, Government Code; and Section 915, Evidence Code.

§ 7418. Interpreters and Accommodation.

(a) In proceedings where a party, a party's representative, or a party's expected witness requires an interpreter for any language, including sign language, that party shall be responsible for notifying the Commission, following the pre-hearing motion procedure in section 7419. The Commission shall be responsible for securing the interpreter and shall assess the costs of the interpreter as an ordinary cost of the hearing.

(b) In proceedings where a party, a party's representative, or a party's expected witness has a disability requiring accommodation either at the hearing or at any other stage of the administrative adjudication, that party shall be responsible for complying with Judicial Rule 989.3 and/or Evidence Code section 754, set forth in the Appendix to these regulations.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 754, Evidence Code; Judicial Rule 989.3; and Sections 11425.10(a)(9) and 11435.05-11435.65, Government Code.

§ 7419. Pre-Hearing Motions.

Pre-hearing motions before the Commission shall not decide substantive matters. Substantive matters, including jurisdictional or legal challenges, are to be presented at the hearing on the merits and, except as expressly provided below, shall not be the subject of proceedings before hearing.

(a) If all parties stipulate in writing that there is a jurisdictional or other threshold dispositive issue which should, in the interests of judicial economy, be decided before proceeding to the merits of the case, the Hearing Officer assigned to hear the case may take evidence solely on the jurisdictional or other threshold issue and issue a written ruling on this issue alone. If the Hearing Officer rules for the Department, the parties shall set the case for the hearing on the merits. If the Hearing Officer rules against the Department, the procedure in section 7434 shall be followed and the issue will be placed before the Commission for decision in the matter. If the Commission

decides for the Department, the case will then be remanded to the Hearing Officer for a hearing on the merits.

~~(b) Allowable pre-hearing (non-discovery) motions:~~

~~(1) Intervention.~~

~~(2) Amicus briefs.~~

~~(3) Motion compelling deposition of an unavailable witness.~~

~~(4) Consolidation or severance of matters for hearing.~~

~~(5) Request for Interpreter, in compliance with the rules set forth in section 7418 and Government Code sections 11435.05 through 11435.65.~~

~~(6) Motion for disqualification of the hearing officer, in compliance with the rules set forth~~

~~in Government Code section 11425.40, subdivisions (a) through (c).~~

~~(7) Motion to Amend Accusation.~~

~~(8) Motion to Withdraw Accusation.~~

~~(9) Motion to Change Venue.~~

~~(10) Other motions, on prior approval of the ELAS.~~

~~(c) Pre-hearing motions: procedure.~~

~~(1) Pre-hearing motions shall be filed with the ELAS, or assigned Hearing Officer, be in writing, and include a proof of service indicating service on all parties and the complainant.~~

~~(2) No special form of motion is required.~~

~~(3) Unless these regulations set forth a different time for filing a particular motion (see, e.g., section 7409 for Amended Accusation; section 7415 for Withdrawal of Accusation; and section 7429(c), for Motion to Change Venue), pre-hearing motions shall be filed and served at least 15 calendar days before the date set for commencement of the hearing. Such motions may be heard on shorter notice on written application to, and approval of, the ELAS, for good cause, on such terms as determined by the ELAS. The non-moving party shall have seven (7) days from the date of service of the motion to file and serve a response. The ELAS, or Hearing Officer assigned to hear the case, in his or her discretion, may allow a lesser or greater time in which to file a motion or response.~~

~~(4) An order granting or denying a motion shall be made by the ELAS or Hearing Officer assigned to hear the case. The order shall be in writing and served by mail on all parties of record.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. References: Sections 11425.10(a)(5),(9), 11435.05-11435.65 and 11425.40, Government Code; Section 754, Evidence Code; and Judicial Rule 989.3.~~

§ 7420. Ex Parte Communications.

Except as otherwise allowed under the Administrative Procedure Act, Government Code sections 11430.10-11430.80, or as authorized by Judicial Rule 989.3 or under these regulations, there shall be no communication, direct or indirect, regarding any issue in a pending proceeding, to the Hearing Officer, ELAS, or Commission from an employee or representative of the Department or from an interested person outside of the Department, or from the respondent or complainant, without notice and opportunity for all parties to participate in the communication.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11430.10-11430.80, Government Code.

§ 7421. Consolidation and Severance.

(a) A Hearing Officer, on his or her own motion, may order consolidation of two or more cases or severance of any consolidated cases or of issues in a single case. The Hearing Officer shall provide notice to all parties and allow a reasonable time for the parties to file and serve any objections in writing. Failure to assert objections within the time allowed shall constitute a waiver of objection to the order of consolidation or severance.

(b) A party who brings a motion for consolidation or severance shall comply with section 7419.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11507.3, 12935(a) and 12972(a)(2), Government Code.

§ 7422. Pre-Hearing Statements.

(a) Prior to hearing, the parties shall make best efforts to confer in person or by telephone to resolve or define any issues relating to the hearing. Thereafter, each party shall prepare a pre-hearing statement.

(b) No later than five (5) state business days prior to the scheduled date of hearing, each party shall file with the Commission a pre-hearing statement signed by the party or his/her representative of record. This statement shall include, if relevant, but need not be limited to, the following:

(1) A brief summary of any stipulated facts.

(2) Identification of all operative pleadings by their title and date signed.

(3) A current estimate from each party of the time necessary to try its case.

(4) The name of each witness each party may call at hearing, along with a brief statement of the content of each witness's expected testimony.

(5) The name and address of each expert witness each party intends to call at hearing.

~~along with a brief statement of the opinion each expert is expected to give and a copy of the current resume or curriculum vitae of each expert witness.~~

~~(6) A list of documentary exhibits each party intends to present at hearing and a description of any physical or demonstrative evidence.~~

~~(7) The identity of any witness whose testimony will be presented by affidavit pursuant to section 7428 or by deposition pursuant to section 7427.~~

~~(8) A concise statement of any significant evidentiary issues.~~

~~(9) A copy of any pre hearing motion filed by either party, any response filed thereto, and, if applicable, any order from the ELAS or Hearing Officer.~~

~~(10) Any anticipated motions in limine.~~

~~(c) The pre hearing statement may be prepared in the format provided in the Appendix to these regulations.~~

~~(d) Failure to disclose fully all required items in the pre hearing statement without good cause will, at the discretion of the Hearing Officer, result in the exclusion or restriction of evidence at hearing.~~

~~(e) The parties are not required to disclose any witnesses or exhibits which may be presented for rebuttal or impeachment purposes.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11511, 11514, 12935(a) and 12972(a)(2), Government Code.~~

§ 7423. Pre-Hearing Conferences.

~~(a) The Hearing Officer assigned to hear the case may order a pre hearing conference, which ordinarily will be held by telephone, unless the Hearing Officer determines otherwise.~~

~~(b) The pre hearing statements and any pre hearing motions and responsive papers shall provide the basis for discussion of issues and rulings at the pre hearing conference.~~

~~(c) At or after the pre hearing conference, the Hearing Officer may issue a prehearing order, or dictate into the record, the matters determined at the conference.~~

~~(d) Pre hearing conferences need not be open to public observation.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11425.20(e), 11511.5, 12935(a), 12972(a)(2), Government Code.~~

§ 7424. Settlement Conferences.

~~(a) At any time after the Department issues an accusation, any party may file with the ELAS and serve upon all parties and the complainant a request for a settlement conference. Nothing in these regulations precludes the parties from discussing settlement whether or not a settlement conference is convened.~~

~~(b) Upon receipt of a request for a settlement conference, the ELAS shall ascertain if the other party agrees and shall assess whether a settlement conference is feasible, and, if so, shall assign a settlement conference Hearing Officer to convene a settlement conference. The conference may be conducted by telephone or with the parties and complainant present, within the discretion of the settlement conference Hearing Officer.~~

~~(c) The discussions at the settlement conference shall remain confidential and shall not be disclosed to the Hearing Officer assigned to hear the case. All settlement materials received by the settlement conference Hearing Officer shall be maintained in a separate settlement file. If efforts at settlement are unsuccessful or if the matter goes to hearing, a different Hearing Officer, who shall have no access to the settlement file, shall be assigned to hear the case.~~

~~(d) No evidence of an offer of compromise or settlement made in settlement negotiations shall be admissible in any administrative adjudication before the Commission, whether as affirmative evidence, by way of impeachment, or for any other purpose.~~

~~(e) The respondent and his/her representative, the Department's representative, and any other party to the action shall attend the settlement conference, or otherwise be available. Each party shall send, or have available, someone who has the authority to discuss and give tentative approval of a settlement. The complainant may be present, but in all events shall be available by telephone for consultation during the conference.~~

~~(f) If a settlement is reached at, or as a result of, a settlement conference, the terms of the settlement shall be set forth in a written stipulation, settlement agreement or consent order, or orally placed on the record.~~

~~(g) Settlement conferences are not open to public observation.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11425.20(c), 11511.7, 11415.60(a), 12963.7 and 12932(d), Government Code.~~

§ 7425. Intervention.

~~(a) The complainant may intervene as a matter of right in any administrative adjudication before the Commission. In order to intervene, the complainant shall notify the Commission and the parties in writing of his/her intent to intervene.~~

~~(b) Any other person who wishes to intervene in the administrative adjudication of a case which is before the Commission shall file a motion so requesting with the Commission in accordance with section 7419(b).~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12935(a) and 12972(a)(2), Government Code.~~

§ 7426. Amicus Briefs.

~~Before the hearing has commenced, any person wishing to file an amicus curiae brief in a matter which is before the Commission shall file a motion so requesting with the Commission in accordance with section 7419(b). After the hearing has commenced, the Commission may, in its discretion, permit any person to file an amicus brief at any time before the Commission decides the case.~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12935(a) and 12972(a)(2), Government Code.~~

~~§ 7427. Depositions of Unavailable Witnesses.~~

~~Where a witness will be unable to attend or cannot be compelled to attend the hearing, any party may move the Commission for an order that the witness be deposed in the manner prescribed by law for depositions in Code of Civil Procedure section 2025. The motion shall be governed by the procedure set forth for pre-hearing motions in section 7419(b). The motion shall set forth the nature of the pending proceeding; the name and address of the witness whose testimony is desired; a showing of the materiality of the testimony; a showing that the witness will be unable, as defined in Evidence Code section 240, or cannot be compelled to attend, and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. Where the witness resides outside the state and where the Commission has ordered the taking of the testimony by deposition, the Moving Party shall obtain an order of the court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Government Code section 11189. At the hearing, the deposition may be used in accordance with the rules in Code of Civil Procedure section 2025, subdivision (u). This section is in addition to the deposition authorized by section 7417(b).~~

~~Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11511, 11189, 12935(a) and 12972(a)(2), Government Code; Section 2025, Code of Civil Procedure; and Section 740, Evidence Code.~~

~~§ 7428. Evidence by Affidavit.~~

~~(a) At any time 10 or more days prior to a hearing or a continued hearing, any party may serve on the opposing party a copy of any affidavit which he or she proposes to introduce into evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such receipt of the affidavit, serves on the proponent a request to cross-examine the affiant, the opposing party's right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine the affiant is not afforded after a timely request to do so is made as~~

provided herein, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form: The enclosed affidavit of [name of affiant] will be introduced as evidence at the hearing in [title of proceeding]. [Name of affiant] will not be called to testify orally and you will not be entitled to question [him/her] unless you notify [name of person offering the testimony or his/her attorney] at [address] that you wish to cross-examine this person. To be effective, your request must be mailed, sent by facsimile machine (faxed) or delivered to [name of person offering the testimony or his/her attorney] on or before [date which is at least seven days after the date of mailing or delivering the affidavit to the opposing party], together with a proof of service.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11514, 12935(a) and 12972(a)(2), Government Code.

§ 7429. Hearings.

(a) Every hearing in a contested case shall be presided over by a Hearing Officer appointed by the Commission. The Hearing Officer shall hear the case alone, unless a quorum of the Commission decides to hear the case along with the Hearing Officer. If the Commission itself decides to hear the case, the rules in the Administrative Procedure Act, Government Code sections 11512 and 11517(a), shall govern the proceeding.

(b) The hearing shall be open to public observation, unless the Hearing Officer orders closure of a hearing for one of the reasons set forth in Government Code section 11425.20, subdivision (a)(1)-(3):

(1) The Hearing Officer may exclude persons whose conduct impedes the orderly conduct of the hearing; restrict or regulate attendance because of the physical limitations of the hearing room; or take other action to promote due process or the orderly conduct of the hearing.

(2) The Hearing Officer may grant a motion to exclude witnesses under Evidence Code section 777.

(c) Time and place of hearing.

(1) The hearing shall commence within 90 days of the filing of the accusation unless the parties waive the 90 day hearing requirement contained in Government Code section 12968, or a continuance has been granted, subject to the rule in section 7414, subdivision (c).

(2) The Department shall make arrangements for the place of hearing, unless otherwise ordered by the Commission. The hearing shall be held in the county in which the alleged violation of the Fair Employment and Housing Act occurred or where the respondent does business, unless the parties agree, or the Commission orders, that the hearing take place in some other

place. A party may move for a change in the place in hearing by written motion to the Commission in compliance with regulation sections 7406, 7407 and 7419, no later than 10 days after service of the Notice of Hearing, because of economic hardship, convenience of witnesses, or other good cause.

(3) The hearing shall ordinarily be conducted with the parties present before the Hearing Officer, unless the Hearing Officer, with the approval of the parties, permits the hearing to be conducted by telephone, television, or other electronic means.

(4) The Department shall attempt to consult with the respondent or respondent's representative prior to sending out the Notice of Hearing, in order to select mutually agreeable dates of hearing.

(d) Conduct of hearings

(1) The proceedings at the hearing shall be reported by a stenographic reporter. Upon the consent of all the parties, however, the proceedings may be reported electronically.

(2) If the Hearing Officer determines to order a transcript, the Commission shall receive an original and one copy. The Commission retains the original and the copy goes to the Department. Respondents and complainants, if they desire a copy of the transcript, are responsible for ordering their own copy of the transcript.

(e) Motions during hearing

(1) Motions during the hearing, including motions in limine, shall be directed to the Hearing Officer, and may be made orally on the record or in writing with copies served on all parties and the complainant. The Hearing Officer shall rule on all motions, except as provided below in 2., orally on the record, unless s/he reserves ruling until after the close of the hearing, in which case the ruling shall be made a part of the proposed decision.

(2) The Hearing Officer shall not entertain motions in the nature of motions for non-suit, dismissal, or for judgment, but must proceed with the taking of evidence until all of the testimony to be offered by all the parties has been received.

(f) Evidence rules

(1) Oral evidence shall be taken only on oath or affirmation.

(2) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross examine opposing witnesses on any matter relevant to the issues, even though that matter was not covered in the direct examination; to impeach any witness, regardless of which party first called him or her to testify; and to rebut the evidence against him or her. Any party may call any other party during its case in chief, pursuant to Evidence Code section 776.

(3) The hearing need not be conducted according to technical rules relating to evidence

~~and~~
witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

~~(4) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence. If an appropriate objection is made at hearing, hearsay evidence shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.~~

~~(5) The rules of privilege shall apply in administrative adjudications before the Commission to the extent that they are recognized under the Evidence Code.~~

~~(6) The Hearing Officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time because of its collateral or cumulative nature, or create substantial danger of undue prejudice or of confusing the issues.~~

~~(7) In any proceeding under subdivisions (a), (h) or (i) of Government Code section 12940, or section 12955, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is subject to all of the following limitations:~~

~~(A) The evidence is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under (C) below. This paragraph is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed by statute.~~

~~(B) The evidence is not admissible at the hearing unless offered to attack the credibility of the complainant as provided for under (C) below. Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.~~

~~(C) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.~~

~~(8) At the beginning of the hearing, the Department shall introduce into the record, for jurisdictional purposes only, the Pleading File in the case. The Pleading File shall contain, at a minimum, the complaint(s) and accusations(s), any Notice(s) of Defense or other responsive papers filed by the respondent(s) and the proofs of service for each document. If applicable under~~

Government Code section 12980(f), 12981(a), or 12981(c), the pleading file shall also contain a copy of any notifications provided to the complainant and respondent explaining the Department's reason(s) for failing to complete the investigation or issue the accusation within 100 days, or make a final administrative disposition of the complaint within one year.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11440.30, 11440.40, 11512, 11513, 11517(a), 11425.20, 12940, 12955 and 12968, Government Code; and Sections 352, 776 and 777, Evidence Code.

§ 7430. Default Hearings.

(a) At a default hearing, the Hearing Officer may take action based upon the respondent's express admission or upon other evidence introduced at the hearing by the Department. Affidavits or declarations under penalty of perjury may be used as evidence without notice to respondent as allowed by section 7428.

(b) The Hearing Officer and/or Commission may issue an order adversely affecting the respondent in a default hearing if the Department has complied with the rules set forth in section 7407(e).

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11505(e), 11514 and 11520, Government Code.

§ 7431. Official Notice.

In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the Commission's special field, and of any fact which may be judicially noticed by the courts of this state, pursuant to Evidence Code sections 451 and 452. Parties present at the hearing shall be informed by the Hearing Officer or Commission of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. All parties shall be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or, if requested, oral presentation of authority to the Commission.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 11515, Government Code; and Sections 451-52, Evidence Code.

§ 7432. Post-Hearing Matters.

(a) Post hearing briefs. The parties shall be given the opportunity to file post hearing briefs, as directed at the hearing. Copies shall be served on the parties and on the complainants as provided in section 7407.

(b) Date of submission of matter for decision. The matter will be deemed submitted to the

Hearing Officer for decision on the date the Hearing Officer receives the transcripts of the hearing, hears oral argument, or receives the last timely post-hearing brief, whichever event occurs last.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 12935(a) and 12972(a)(2), Government Code.

§ 7433. Proposed Decisions.

(a) Form of decision:

(1) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision.

(2) If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination, to the extent that the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(3) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The Hearing Officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

(b) Preparation of proposed decision. Within 60 days after the case is submitted, the Hearing Officer shall prepare and serve on the Commission, all parties and the complainant, or their representatives of record, a proposed decision in such a form that it may be adopted by the Commission as the Commission's decision in the case. Failure of the Hearing Officer to deliver a proposed decision within the time required does not prejudice the rights of the Commission in the case.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11425.10(a)(6), 11425.50 and 11517, Government Code.

§ 7434. Commission Decisions.

(a) Adoption or modification of proposed decision. Upon receipt of a proposed decision, the Commission may do any of the following:

(1) Adopt the proposed decision in its entirety.

(2) Reduce or otherwise mitigate the proposed remedy and adopt the balance of the proposed decision.

(3) Make technical or other minor changes in the proposed decision and adopt it as the

decision. Action by the Commission under this paragraph is limited to clarifying changes or changes of a similar nature that do not affect the factual or legal basis of the proposed decision.

(b) ~~Non-adoption of proposed decision. If the proposed decision is not adopted as provided in subdivision (a), the Commission may decide the case upon the record, including the transcript, or may refer the case to the same Hearing Officer, if available, to take additional evidence. The parties shall be notified of their ability to order a transcript in the case. If the case is assigned to a Hearing Officer for the taking of additional evidence, he or she shall prepare a proposed decision as provided in section 7433, subdivision (a) upon the receipt of the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be served on the Commission and all parties and complainant, as prescribed below in subdivision (e).~~

~~(1) Before deciding any case on the record, the Commission shall give the parties the opportunity to present further written argument and/or, if the Commission so chooses, to present further oral argument before the Commission.~~

~~(2) If the analysis of the further argument reveals the need for additional evidence, the Commission may order the taking of additional evidence, either by the Commission or by the Hearing Officer. Following receipt of the additional evidence, the Commission may require further written or oral argument before deeming the case submitted to it for decision. If additional oral evidence is taken by the Commission, no Commissioner may vote unless the member heard the additional oral evidence.~~

~~(e) The proposed decision shall be deemed adopted by the Commission 100 days after service to the Commission by the Hearing Officer, unless within that time: (1) the Commission notifies the parties that the proposed decision is not adopted and commences proceedings to decide the case itself upon the record, or (2) the Commission refers the case to the Hearing Officer to take additional evidence.~~

~~(d) The decision of the Commission shall be a public record.~~

~~(e) Copies of the Commission decision shall be served by the Commission by first class, certified or registered mail on all parties and the complainant or their representatives of record. Proof of service shall be as set forth in section 7407.~~

~~(f) Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the Commission for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking judicial review.~~

~~(1) The Commission may refer the application to the Hearing Officer who wrote the proposed decision or may delegate its authority under this section to one or more persons.~~

~~(2) The Commission may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is considered denied if the Commission does not dispose of it within 30 days after it is made.~~

~~(3) Nothing in this section precludes the Commission on its own motion, or on motion of the Hearing Officer, from modifying the decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 30 days after issuance of the decision.~~

~~(4) The Commission shall, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party and complainant on which a copy of the decision was previously served.~~

~~(g) The decision shall become effective 30 days after it is mailed to the parties and the complainant, unless a reconsideration of the decision is ordered within that time, or the Commission orders that the decision shall become effective sooner, or a stay of execution is granted by the Commission.~~

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11517, 11518.5 and 11519, Government Code.

§ 7435. Precedential Decisions.

~~(a) The Commission may designate, as a precedential decision, any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur. Once the Commission designates a decision or part of a decision as precedential, the Commission may rely on it or that part of it as precedent and the parties may cite to such decisions in their argument to the Commission and courts.~~

~~(b) The Commission shall publish, on an annual basis, an index of significant legal and policy determinations made in its precedential decisions and shall publish annually the availability of this index in the California Regulatory Notice Register. The Commission shall also make the index and precedential decisions available for inspection in its office and shall make the index available to the public by subscription or other on-line means.~~

Note: Authority cited: Sections 12935(a) and (h), and 12972(a)(2), Government Code. Reference: Sections 11425.10(a)(7), 11425.60 and 12935(h), Government Code.

§ 7436. Reconsideration.

~~(a) The Commission may order a reconsideration of all or part of a Commission decision on its own motion or by petition of any party. A party may petition the Commission for reconsideration within 20 days of the date a decision is mailed to the party. The power to order reconsideration shall expire 30 days after the delivery or mailing of a Commission decision to all parties and the complainant or upon the termination of a stay of not to exceed 30 days which the~~

Commission may grant for the purpose of filing a petition for reconsideration. If the Commission needs additional time to evaluate a timely petition for reconsideration, the Commission may grant a stay of the expiration for no more than 10 days, for the sole purpose of considering the petition.

(b) The decision may be reconsidered by the Commission on all the pertinent parts of the record and such additional evidence and argument as the Commission permits, or the Commission may assign the case back to the Hearing Officer for the taking of additional evidence, pursuant to the rules set forth in section 7435, subdivision (b). If oral evidence is introduced before the Commission, no Commissioner may vote unless he or she heard the evidence.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Section 11521, Government Code.

§ 7437. Judicial Review.

The Commission incorporates by reference the rules for judicial review which are found in the Administrative Procedure Act, Government Code section 11523, and, for housing discrimination cases, Government Code section 12987.1.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11523 and 12987.1, Government Code; and Section 1094.5, Code of Civil Procedure.

§ 7438. Appendices.

A. Subpoena and subpoena duces tecum form.

B. Judicial Council Rule 989.3 and Evidence Code section 754.

C. Pre hearing statement form.

Note: Authority cited: Sections 12935(a) and 12972(a)(2), Government Code. Reference: Sections 11450.10, 11435.05 and 11511.5(a)(9), Government Code; Section 754, Evidence Code; and Judicial Council Rule 989.3.

Appendix A.

Attorney (Name and Address):

Attorney for (Name):

Telephone Number:

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT _____ Case No. _____

AND HOUSING

v. _____ SUBPOENA

_____ SUBPOENA DUCES TECUM

Respondent(s) _____

Complainant(s) _____

TO (Name):

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time and place shown in the box below UNLESS you make a special agreement with the person named in item 3:

a. Date: Time:

b. Address:

2. AND YOU ARE

a. ordered to appear in person.

b. ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by subdivision

(b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.

c. You are not required to appear in person if you comply with Evidence Code sections 1560 and 1561.

3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name:

b. Telephone Number:

4. Witness Fees: You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them before your scheduled appearance from the person named in item 3.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT.

Date Issued:

(Type or Print Name) _____ (Signature of Person issuing Subpoena) _____

(Title)

THE SUBPOENAING PARTY IS REQUIRED TO SERVE A COPY OF THIS SUBPOENA ON THE OPPOSING PARTY (DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING OR RESPONDENT), AS WELL AS ON THE WITNESS WHO IS BEING SUBPOENAED, AND MUST COMPLY WITH ANY APPLICABLE CONSUMER NOTICE REQUIREMENTS (Code of Civil Procedure §§ 1985.3 and 1985.6).

Appendix B.

RULE 989.3 REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES

(a) ~~[Policy] It shall be the policy of the courts of this state to assure that qualified individuals with disabilities have equal and full access to the judicial system. Nothing in this rule shall be construed to impose limitations or to invalidate the remedies, rights, and procedures accorded to any qualified individuals with disabilities under state or federal law.~~

(b) ~~[Definitions] The following definitions shall apply under this rule:~~

~~(1) "Qualified individuals with disabilities" means persons covered by the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.); Civil Code section 51 et seq.; and other related state and federal laws; and includes individuals who have a physical or mental impairment that substantially limits one or more of the major life activities; have a record of such an impairment; or are regarded as having such an impairment.~~

~~(2) "Applicant" means any lawyer, party, witness, juror, or any other individual with an interest in attending any proceeding before any court of this state.~~

~~(3) "Accommodation(s)" may include, but are not limited to, making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to the qualified individuals with disabilities, auxiliary aids and services, which are not limited to equipment, devices, materials in alternative formats, and qualified interpreters or readers; and making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by qualified individuals with disabilities requesting accommodations. While not requiring that each existing facility be accessible, this standard, known as "program accessibility," must be provided by methods including alteration of existing facilities, acquisition or construction of additional facilities, relocation of a service or program to an accessible facility, or provision of services at alternate sites.~~

~~(4) The "rule" means this rule regarding requests for accommodations in state courts by qualified individuals with disabilities.~~

~~(5) "Confidentiality" applies to the identity of the applicant in all oral or written communications, including all files and documents submitted by an applicant as part of the application process.~~

(c) ~~[Process] The following process for requesting accommodations is established:~~

~~(1) Applications requesting accommodation(s) pursuant to this rule may be presented ex parte in writing, on a form approved by the Judicial Council and provided by the court, or orally as the court may allow. Applications should be made at the designated Office of the Clerk, or to the courtroom clerk or judicial assistant where the proceeding will take place, or to the judicial officer who will preside over the proceeding.~~

~~(2) All applications for accommodations shall include a description of the accommodation sought, along with a statement of the impairment that necessitates such accommodation. The court, in its discretion, may require the applicant to provide additional information about the qualifying impair-~~

ment.

(3) Applications should be made as far in advance of the requested accommodations implementation date as possible, and in any event should be made no less than five court days prior to the requested implementation date. The court may, in its discretion, waive this requirement.

(4) Upon request, the court shall place under seal the identity of the applicant as designated on the application form and all other identifying information provided to the court pursuant to the application.

(d) [Permitted communication] An applicant may make ex parte communications with the court; such communications shall deal only with the accommodation(s) the applicant's disability requires and shall not deal in any manner with the subject matter or merits of the proceedings before the court.

(e) [Grant of accommodation] A court shall grant an accommodation as follows:

(1) In determining whether to grant an accommodation and what accommodation to grant, the court shall consider, but is not limited by, the provisions of the Americans with Disabilities Act of 1990 and related state and federal laws.

(2) The court shall inform the applicant in writing of findings of fact and orders, as may be appropriate, that the request for accommodations is granted or denied, in whole or in part, and the nature of the accommodation(s) to be provided, if any.

(f) [Denial of accommodation] An application may be denied only if the court finds that:

(1) The applicant has failed to satisfy the requirements of this rule; or

(2) The requested accommodation(s) would create an undue financial or administrative burden on the court; or

(3) The requested accommodation(s) would fundamentally alter the nature of the service, program, or activity.

(g) [Review procedure]

(1) An applicant or any participant in the proceeding in which an accommodation has been denied or granted may seek review of a determination made by nonjudicial court personnel within 10 days of the date of the notice of denial or grant by submitting a request for review to the judicial officer who will preside over the proceeding or to the presiding judge if the matter has not been assigned.

(2) An applicant or any participant in the proceeding in which an accommodation has been denied or granted may seek review of a determination made by a presiding judge or any other judicial officer of a court within 10 days of the date of the notice of denial or grant by filing a petition for extraordinary relief in a court of superior jurisdiction.

(h) [Duration of accommodations] The accommodations by the court shall commence on the date indicated in the notice of accommodation and shall remain in effect for the period specified in the notice of accommodation. The court may grant accommodations for indefinite periods of time or for a particular matter or appearance.

Adopted, eff. Jan. 1, 1996.

~~EVIDENCE CODE~~

~~s 754. Deaf or Hearing Impaired Persons; Interpreters; . Qualifications; Guidelines; Compensation; Questioning; Use of Statements~~

~~(a) As used in this section, "individual who is deaf or hearing impaired" means an individual with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone, but does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer aided transcription equipment provided pursuant to Section 54.8 of the Civil Code.~~

~~(b) In any civil or criminal action, including, but not limited to, any action involving a traffic or other infraction, any small claims court proceeding, any juvenile court proceeding, any family court proceeding or service, or any proceeding to determine the mental competency of a person, in any court ordered or court provided alternative dispute resolution, including mediation and arbitration, or any administrative hearing, where a party or witness is an individual who is deaf or hearing impaired and the individual who is deaf or hearing impaired is present and participating, the proceedings shall be interpreted in a language that the individual who is deaf or hearing impaired understands by a qualified interpreter appointed by the court or other appointing authority, or as agreed upon.~~

~~(c) For purposes of this section, "appointing authority" means a court, department, board, commission, agency licensing or legislative body, or other body for proceedings requiring a qualified interpreter.~~

~~(d) For the purposes of this section, "interpreter" includes, but is not limited to, an oral interpreter, a sign language interpreter, or a deaf blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired.~~

~~(e) For purposes of this section, "intermediary interpreter" means an individual who is deaf or hearing impaired, or a hearing individual who is able to assist in providing an accurate interpretation between spoken English and sign language or between variants of sign language or between American Sign Language and other foreign languages by acting as an intermediary between the individual who is deaf or hearing impaired and the qualified interpreter.~~

~~(f) For purposes of this section, "qualified interpreter" means an interpreter who has been certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing impaired.~~

~~(g) In the event that the appointed interpreter is not familiar with the use of particular signs by the individual who is deaf or hearing impaired or his or her particular variant of sign language, the court or other appointing authority shall, in consultation with the individual who is deaf or hearing impaired or his or her representative, appoint an intermediary interpreter.~~

~~(h) Prior to July 1, 1992, the Judicial Council shall conduct a study to establish the guidelines pursuant~~

~~to which it shall determine which testing organizations, agencies, or educational institutions will be approved to administer tests for certification of court interpreters for individuals who are deaf or hearing impaired. It is the intent of the Legislature that the study obtain the widest possible input from the public, including, but not limited to, educational institutions, the judiciary, linguists, members of the State Bar, court interpreters, members of professional interpreting organizations, and members of the deaf and hearing impaired communities. After obtaining public comment and completing its study, the Judicial Council shall publish these guidelines. By January 1, 1997, the Judicial Council shall approve one or more entities to administer testing for court interpreters for individuals who are deaf or hearing impaired. Testing entities may include educational institutions, testing organizations, joint powers agencies, or public agencies.~~

~~Commencing July 1, 1997, court interpreters for individuals who are deaf or hearing impaired shall meet the qualifications specified in subdivision (f).~~

~~(i) Persons appointed to serve as interpreters under this section shall be paid, in addition to actual travel costs, the prevailing rate paid to persons employed by the court to provide other interpreter services unless such service is considered to be a part of the person's regular duties as an employee of the state, county, or other political subdivision of the state. Payment of the interpreter's fee shall be a charge against the county, or other political subdivision of the state, in which that action is pending. Payment of the interpreter's fee in administrative proceedings shall be a charge against the appointing board or authority.~~

~~(j) Whenever a peace officer or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding questions or otherwise interviews an alleged victim or witness who demonstrates or alleges deafness or hearing impairment, a good faith effort to secure the services of an interpreter shall be made, without any unnecessary delay unless either the individual who is deaf or hearing impaired affirmatively indicates that he or she does not need or cannot use an interpreter, or an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder.~~

~~(k) No statement, written or oral, made by an individual who the court finds is deaf or hearing impaired in reply to a question of a peace officer, or any other person having a law enforcement or prosecutorial function in any criminal or quasi-criminal investigation or proceeding, may be used against that individual who is deaf or hearing impaired unless the question was accurately interpreted and the statement was made knowingly, voluntarily, and intelligently and was accurately interpreted, or the court makes special findings that either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (Public Law 101-336) and federal regulations adopted thereunder and that the statement was made knowingly, voluntarily, and intelligently.~~

~~(l) In obtaining services of an interpreter for purposes of subdivision (j) or (k), priority shall be given to~~

~~first obtaining a qualified interpreter.~~

~~(m) Nothing in subdivision (j) or (k) shall be deemed to supersede the requirement of subdivision (b) for use of a qualified interpreter for individuals who are deaf or hearing impaired participating as parties or witnesses in a trial or hearing.~~

~~(n) In any action or proceeding in which an individual who is deaf or hearing impaired is a participant, the appointing authority shall not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the participating individual who is deaf or hearing impaired.~~

~~(o) Each superior court shall maintain a current roster of qualified interpreters certified pursuant to subdivision (f).~~

~~(Amended by Stats. 1995, c. 143 (A.B. 1833), §1, eff. July 18, 1995.)~~

~~Appendix C.~~

~~PRE HEARING STATEMENT~~

~~You may, but do not have to, use this form to prepare your Pre Hearing Statement which must be filed with the Commission no later than five working days before the scheduled date of hearing. Failure to fully disclose all required items in the Pre Hearing Statement may result in the exclusion or restriction of evidence at the hearing. Please see the Commission's procedural regulations, at California Code of Regulations, Title 2, sections 7400 et seq., for more details.~~

In the Matter of the Accusation)	-
of the)	-
)	-
DEPARTMENT OF FAIR)	PRE HEARING STATEMENT
EMPLOYMENT AND)	(Cal. Code Regs. § 7422)
HOUSING)	-
)	-
v.)	Case No.:
-)	Hearing Date:
(RESPONDENT'S NAME),)	-
.....)	-
Respondent(s).)	-

.....) -
(COMPLAINANT'S NAME),) -
Complainant(s):) -
=====) -

1. Brief summary of any stipulated facts:

2. Pleadings in the case: Date of accusation: Date(s) of any amended accusation(s): Date of Notice of Defense: Title and date of any other pleading filed in the case:

3. Estimated time necessary to try your case:

4. List of all witnesses as follows:

~~Name of witnesses/brief statement of anticipated testimony.~~

5. List of all expert witnesses as follows: Name of expert witness/brief statement of anticipated testimony.

6. Exhibits Each exhibit shall be separately listed and shall include a description that is sufficient for identification.

7. Evidence by Affidavit or Deposition (must comply with California Code of Regulations, Title 2, ss 7427 and 7428.)

Name of Witness	Reason that witness is unavailable
=====	=====
=====	=====

8. Major evidentiary issues, if any, in the case:

9. Attach copy of any pre-hearing motion, any response to the motion, and any order.

10. Attach any anticipated motions in limine.

11. ~~Other issues or matters.~~

~~Date: _____~~

~~Signature: _____~~

~~Typed Name: _____~~

~~Attorney for: _____~~

~~§ 7439. Filing of Notice of Defense. [Renumbered]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11506 and 12935(a), Government Code.~~

~~§ 7440. Purpose of Motions Before Hearing. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12935(a), 12965(a), 12967-12969 and 12981, Government Code.~~

~~§ 7441. Form of Motions Before Hearing. [Repealed]~~

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

~~§ 7442. Procedures for Motions Before Hearing. [Repealed]~~

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

~~§ 7443. Decisions and Appeal. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12935(a), 12967, 12968, 12969 and 12981, Government Code.~~

~~§ 7444. Permissible Motions Before Hearing. [Repealed]~~

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

~~§ 7445. Amended or Supplemental Accusations. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11507 and 12935(a), Government Code.~~

~~§ 7446. Withdrawal of Accusation Prior to Hearing or Intervention by a Complainant. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12935(a), 12965 and 12967, Government Code.~~

~~§ 7447. Discovery. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11507.5, 11507.6 and 12935(a), Government Code.~~

~~§ 7448. Intervention and Amicus Briefs. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11500(b) and 12935(a), Government Code.~~

~~§ 7450. Hearings. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11506, 12967, 12972 and 12981(b), Government Code.~~

~~§ 7451. Time and Place of Hearing. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11500(a), 11508, 11509, 12935(a) and 12968, Government Code.~~

~~§ 7452. Continuances. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11524, 12935(a) and 12968, Government Code.~~

~~§ 7453. Depositions of Unavailable Witnesses and Evidence by Affidavit. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11514 and 12935(a), Government Code.~~

~~§ 7454. Depositions of Unavailable Witnesses and Evidence by Affidavit. [Renumbered]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11514 and 12935(a), Government Code.~~

§ 7455. Subpoenas. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11510, 12935(a), 12972, and 12981(b), Government Code.

§ 7456. Pre-Hearing Statement. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12935(a), 12967, 12972 and 12981(b), Government Code.

§ 7457. Conduct of Hearings. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11512, 11517(a) and 12935(a), Government Code; Feist v. Rowe (1970) 83 Cal. Rptr. 465, 3 Cal.App.3d 404; Cooper v. State Board of Medical Examiners of Dept. of Professional and Vocational Standards of California (1950) 217 630, 35 Cal.2d 242, 18 AL.R.2d 593; Leeds v. Gray (1952) 242 P.2d 48, 109 Cal.App.2d 874; Le Strange v. City of Berkeley (1962) 26 Cal.Rptr. 550, 210 Cal.App.2d 313; International Union of Operating Engineers, Local No. 12 v. Fair Employment Practice Commission (1969) 81 Cal. Rptr. 47, 276 C.A. 2d 504, certiorari denied 90 S. Co. 1356, 397 U.S. 1307, 25 L.Ed. 2d 648.

§ 7458. Withdrawal of Accusation After Intervention by a Complainant or After Commencement of Hearing. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11512(b), 12935(a), 12969, 12972 and 12981(b), Government Code.

§ 7459. Motions During Hearing. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11512, 12935(a), 12967, 12972 and 12981(b), Government Code.

§ 7459.1. Motions for Nonsuit, Dismissal or Judgment. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11517(b), 12935(a), Government Code; Frost v. State Personnel Board (1961) 190 Cal. App.2d 1, 3-6; Kramer v. State Board of Accountancy (1962) 200 Cal.App.2d 163, 175; O'Mara v. State Board of Pharmacy (1966) 246 Cal.App.2d 8, 10-11.

§ 7459.2. Evidence Rules. [Repealed]

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11511,

~~11513, 11514, 11515, 12972 and 12981(b), Government Code.~~

~~§ 7459.3. Default Hearings. [Repealed]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11520, 12935(a), 12967, 12972 and 12981(b), Government Code.~~

~~§ 7459.4. Default Hearings. [Renumbered]~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11520, 12935(a), 12967, 12972 and 12981(b), Government Code.~~

~~Article 6. Post-Hearing Matters [Repealed]~~

~~Subchapter 3. Investigative Hearing (Reserved)~~

~~Subchapter Article 4. Advisory Agencies and Councils (Reserved)~~

~~Chapter Subchapter 5. Contractor Nondiscrimination and Compliance~~

~~Subchapter Article 1. General Matters~~

~~§ 8101. 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 ~~Commission Council~~ as set out in this ~~division chapter~~.

~~COMMENT As of the date these regulations were adopted, DFEH headquarters and OCP were located at 1201 I Street, Suite 211, Sacramento, CA 95814, telephone (916) 323-4547.~~

(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.

§ ~~8102.~~ 11100. Definitions.

The words defined in this section shall have the meanings set forth below whenever they appear in this chapter, unless:

- (1) the context in which they are used clearly requires a different meaning; or
- (2) a different definition is prescribed for a particular subchapter or provision.

The definitions set forth previously in this ~~division chapter~~ in ~~Sections 7285.2, 7286.5, 7287.2, 7290.7, 7291.2(b), 7292.1, 7293.6, 11002, 11008, 11015, 11030, 11035, 11053, 11065, and 7295.1~~ 11075 are also applicable to this subchapter.

(a) 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) Business means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

(c) 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) 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-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) 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) 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) Data means recorded information, regardless of form or characteristic.

(h) (Reserved)

(i) Decertification means the decision by 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 8503-11140~~ of this 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) 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) Nondiscrimination Clause means the clause to be included in each state contract or subcontract pursuant to these regulations.

(p) Person means any business, individual, union, committee, club, or other organization or group of individuals.

(q) Prime contractor means any individual or organization who directly contracts with the State of California.

(r) Service and supply contract includes any contract except a construction contract.

(s) Services means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include collective bargaining agreements or arrangements between parties which constitute that of employer and employee.

(t) Shall denotes the imperative.

(u) 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 which constitute that of employer and employee.

(v) 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.

§ ~~8102.5~~ 11101. Nondiscrimination Agreement.

State contracts exempt from the requirements of ~~Section 8107~~ 11105 shall include, as an express or implied term, the term set out in either ~~Section 8107-11105~~ 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 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.

§ ~~8103~~ 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 8104~~ 11103 of this subchapter unless specifically exempted pursuant to ~~Section 8115~~ 11111 of this subchapter.

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

§ ~~8104~~ 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 ~~which~~ that is identified. 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 practices ~~which~~ have resulted in disproportionately inhibiting the employment, promotion or retention of 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 procedures ~~which~~ that have resulted in disproportionately inhibiting the employment, promotion or retention of minorities or women. 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 which cannot be so justified.

(B) Workforce Analysis. The Program will contain a workforce analysis, which shall consist of a listing of each job title which 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. 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 are being underutilized when compared to their availability. A job group for this purpose shall consist of one or more jobs ~~which~~ that have similar content, wage rates and opportunities. Underutilization is defined as having a statistically significant lower utilization of minorities or women 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, 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.

(9) Development and execution of action oriented programs designed to correct problems and attain equal employment opportunities for all applicants and employees.

(10) 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 ~~which that~~ have an adverse impact on one or more groups protected by the Act, and ~~which 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 ~~which 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 which 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 ~~which that~~ contains an effective affirmative action component will create a rebuttable presumption that a contractor is in compliance with the requirements of Government Code, ~~S~~section 12990 and its implementing regulations.

(c) 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), (B), and (C) above for each establishment.

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

§ ~~8106.~~ 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 ~~S~~sections ~~8103~~ 11102 and ~~8104~~ 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 ~~S~~sections ~~8103~~ 11102 and ~~8104~~ 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.

§ ~~8107~~ 11105. Nondiscrimination Clause.

Each state contract shall contain a Nondiscrimination Clause unless specifically exempted pursuant to ~~Section 8115~~ 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 ~~which 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. 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, ~~Section 12900~~ et seq.) and the applicable regulations promulgated thereunder (Cal. ~~Admin. Code Regs., Tit. 2, Section 7285.0-11000~~ et seq.). The applicable regulations of the Fair Employment and Housing ~~Commission Council~~ implementing Government ~~Code~~ Code, ~~Section 12990~~, set forth in Chapter 5 of Division ~~4.1~~ 4 of ~~Title 2~~ of the California ~~Administrative 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, 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. 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, ~~Section §~~12900 et seq.), the regulations promulgated thereunder (Cal. ~~Admin-Code Regs., Tit. 2, Sections 7285.0 §~~ 11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code, ~~Sections §~~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, 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.

§ ~~8108. 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.

§ ~~8109. 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 DFEH.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Sec-

tion 12990, Government Code.

§ ~~8412~~, 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 8413~~, 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.

§ ~~8413~~, 11109. Statement of Compliance.

(a) As a part of its bid, an eligible prospective contractor which 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 8403-11102~~ of this subchapter.

(b) No state contract, unless otherwise exempted pursuant to ~~§section 8415~~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 8403~~ 11102 of this subchapter.

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

§ ~~8414~~, 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 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: Sec-

tion 12990, Government Code.

§ ~~8415~~. 1111. Exemptions.

(a) Licensed rehabilitation workshops which are contractors of state contracting agencies are exempted from the requirements of this chapter.

(b) Contracts of less than \$5,000 are automatically exempt from the requirements of ~~§section 8407~~ 11105; contractors holding only such contracts are automatically exempt from the requirements of ~~§section 8403~~ 11102, but are subject to ~~§section 8402.5~~ 11101.

(c) A contractor with fewer than fifty (50) employees in its entire workforce may receive an automatic exemption from the Program requirements of ~~§section 8404~~ 11103, subdivisions (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a current "California Employer Information Report" 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 8401~~ 11134 or ~~8402~~ 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this chapter.

(d) Contracts and subcontracts ~~which are~~ 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~~, ~~subdivision (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 8407~~ 11105, and contractors holding only such contracts are exempted from the requirements of ~~§section 8403~~ 11102, but remain subject to ~~§section 8402.5~~ 11101.

(e) A construction contractor with fewer than 50 permanent employees may obtain an exemption from the requirements of ~~§section 8404~~ 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 8401~~ 11134 or ~~8402~~ 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this chapter.

(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 contract awarding agencies in making determinations under this section.

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

§ ~~8416.~~ 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.

§ ~~8417.~~ 11113. Recruitment.

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 chapter.

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

§ ~~8417.5.~~ 11114. Notice of Contract.

Contract awarding agencies shall give written notice to the Administrator within 10 working days of an award of 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.

§ ~~8118.~~ 1115. Contract Forms.

The State Department of General Services will have printed copies of the forms referred to in this chapter and shall make them available upon request.

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

§ ~~8119.~~ 1116. 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 chapter.

(b) All information provided to the DFEH in response to a request from OCP ~~which 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 8503~~ 11140 of this Chapter ~~or Section 12967 of the Government Code~~. 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.

§ ~~8120.~~ 1117. 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 non-compliance 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 Ad-

ministrator, 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 ~~8501~~ 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.

~~Subchapter~~ **Article 2. Regulations Applicable to Construction Contracts**

§ ~~8200.~~ 11118. Scope.

This ~~subchapter~~ article applies to all nonexempt businesses ~~which that~~ seek or hold any state construction contract or subcontract. The regulations in this ~~subchapter~~ 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.

§ ~~8201.~~ 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.

§ ~~8202.~~ 11120. Application to Permanent and Temporary Workforce.

A construction contractor's nondiscrimination program established pursuant to ~~§~~sections ~~8103-11102~~ and ~~8104~~ 11103 of this subchapter must ensure nondiscrimination within both its permanent workforce and its temporary on-site workforce. The ~~§~~section ~~8104~~ 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.

§ ~~8202.5.~~ 11121. Transfers Prohibited.

It is a violation of the contract, of Government Code Section 12990 and the regulations in Chapter 5 of Division 4 of Title 2 of the California Administrative Code to transfer women and minority employees or trainees 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.

§ ~~8203.~~ 11122. Standard California Nondiscrimination Construction Contract Specifications. (Gov. Code, Section 12990.)

In addition to the nondiscrimination clause set forth in ~~§~~section ~~8107~~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. "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, Cen-

tral 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 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. ~~d.~~ 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 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.

e**b**. 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.

e**c**. 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**d**. 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 which 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 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 which 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. 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 ~~8104~~ 11103(b) of this ~~C~~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. The Contractor shall not use the nondiscrimination standards to discriminate against any per-

son because of race, color, religion, sex, national origin, ancestry, physical handicap, medical condition, marital status or age over 40.

11. The Contractor shall not enter into any subcontract with any person or firm decertified from state contracts pursuant to Government Code §section 12990.

12. 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. 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.

§ 8204. 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 sex and ethnic group, 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.

§ ~~8205.~~ 11124. Effect on Other Regulations.

The Regulations in this ~~subchapter~~ article are in addition to the regulations contained in this division ~~which~~ apply to contractors and subcontractors generally. See particularly, California ~~Administrative Code of Regulations~~, Title 2, Division 4, ~~Chapter 1 through 5~~, sections ~~7285.0-11000 through 7285.7 11004, 7286.3-11006 through 7296.4 11086, 7400 through 7469.1, 8100-11099 through 8120 11117, and 8400-11133 through 8407 11136.~~

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

Subchapter Article 3. Regulations Applicable to Service and Supply Contracts

Article Subarticle 1. Small Contracts

§ ~~8300.~~ 11125. Scope.

This ~~subchapter~~ subarticle applies to all contractors ~~which~~ 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.

§ ~~8301.~~ 11126. Definition of Small Contract.

All state contracts with a dollar value of twenty-five thousand dollars (\$25,000) or less are for purposes of this subchapter defined as “small” contracts.

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

§ ~~8302.~~ 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 8303 11128~~ upon request.

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

§ ~~8303.~~ 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.

(11) 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.

(12) A copy, if one was required to be prepared of the prime contractor's current California Employer Identification Report (CEIR), or equivalent federal form (See ~~Section 7287.0~~ Section 11013(a) of this division 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.

§ 8304-11129. 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.

Article Subarticle 2. Regulated Contracts

§ ~~8310-11130.~~ 11130. Regulated Contracts, Dollar Value.

All State contracts with a dollar value of more than twenty-five thousand dollars (\$25,000) are for the purposes of this ~~subchapter-subarticle~~ subchapter-subarticle classified as "regulated" contracts.

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

§ ~~8311~~ 11131. Post Award Informational Filing.

(a) The prime contractor of a “regulated” contract shall file with OCP within twenty-eight (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 California Employer Identification Report (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 7287.0~~ 11013(a) of this ~~division~~ 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.

§ ~~8312~~ 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.

~~Subchapter~~ Article 4. OCP Review Procedures

§ ~~8400-~~11133. Scope.

This ~~subchapter article~~ sets forth the review procedures to be followed by OCP in implementing this chapter.

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

§ ~~8401-~~11134. OCP Review Procedures.

In order to monitor the equal employment practices of contractors and their compliance with the requirements of this ~~subchapter~~, 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 chapter.

(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 ~~8303-11128~~ or ~~8344~~ 11131 of these regulations, the compliance with and implementation of the Program required by this Chapter, 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 ~~8402~~ 11135, or follow-up desk or field reviews.

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

§ ~~8402-~~11135. 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 ~~sub~~chapter. 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

~~8420~~ 11117 of this Chapter or Government Code; ~~§~~section 12960; or

(4) The failure of the contractor to provide compliance information required by this chapter or reasonably requested by OCP.

(b) Whenever a contractor ~~which~~ 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.

§ 8403. 11136. 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, 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.

~~Subchapter~~ Article 5. OCP Enforcement Proceedings

§ 8500. 11137. Scope.

This ~~subchapter~~ article sets forth the enforcement procedures to be followed by OCP in implementing this subchapter.

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

§ 8501. 11138. 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 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; about 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 thirtieth 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 thirty (30) day "show cause" period, OCP and the contractor shall make every effort to resolve the deficiencies which 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.

§ ~~8502.~~ 11139. 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.

§ ~~8503.~~ 11140. Hearing.

If the deficiencies listed in the show cause notice are not resolved during the thirty (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 ~~11518-11500 et seq.~~, herein incorporated by reference.

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

§ 8504. 11141. Potential Remedies.

If a violation of this subchapter 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.