

**FAIR EMPLOYMENT AND HOUSING COUNCIL
REGULATIONS REGARDING NATIONAL ORIGIN DISCRIMINATION**

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 4. National Origin

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person. Accordingly, FEHA requires that employers refrain from intentional discrimination and harassment on the basis of national origin and from policies and practices that disparately impact applicants and employees on the basis of national origin that cannot be justified by business necessity and/or for which a less discriminatory alternative could accomplish the business purpose equally well.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in San Francisco on July 17, 2017. The Council further solicited public comment on four modified texts at four subsequent meetings: September 6, 2017, in Los Angeles; October 30, 2017, in Oakland; December 11, 2017, in Sacramento; and April 4, 2018, in Los Angeles.

The following list summarizes the Council's notable amendments to the originally proposed text:

- clarifying the definitions of national origin and national origin groups;
- clarifying permissible and prohibited types of employer policies governing English proficiency, accent, and language spoken in the workplace;
- clarifying permissible and prohibited inquiries regarding immigration status; and
- detailing prohibited forms of harassment in the context of national origin.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

Final Statement of Reasons for Regulations Regarding National Origin Discrimination

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as "authority" or "reference" for the proposed regulations and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11027.1:

Comment: The Council should use the same definitions of national origin as set forth in Title VII of the Civil Rights Act.

Council response: The Council disagrees that the Fair Employment and Housing Act's substantial similarity with a parallel federal law is a reason to rely solely on its provisions, particularly when Title VII does not address much of what these regulations address. Moreover, while the laws

are largely parallel, they are not identical and state law should be interpreted in the California Code of Regulations.

Comment: We seek to clarify the meaning of “physical” and “cultural” characteristics as they apply to national origin. Discriminating against someone because of where they come from is understandably illegal and should be barred. But the concern with expanding the definition of national origin to include characteristics such as physical and cultural characteristics is with how such broad concepts can be used to lodge frivolous lawsuits. When does a physical characteristics become associated with national origin? What constitutes culture? Please consider defining these terms and providing specific examples.

Council response: The Council disagrees that including “physical” and “cultural” characteristics constitutes an expansion of the existing definition of national origin under the law. The federal regulations defining national origin, which FEHA must be at least as protective as, include both physical and cultural characteristics. See 29 C.F.R. § 1606.1. Similar to the federal regulation, the Council believes that the concept that there is a nexus between various national origins and certain physical and cultural characteristics is sufficiently clear for purposes of the general definition and does not require further elaboration.

Comment: Below is our suggestion for revising the subsection. As you will note, it is restructured from a single paragraph to a list format. We believe this format is more easily read and understood by those reviewing the subsection. We also suggest two substantive changes. The first, in our new subsection (a)(3), expands the language used to describe national origin discrimination based on an applicant or employee’s marital state. This language is drawn from Section 11053(a) of the Code of Regulations, defining marital status. The second substantive change is the addition of language “indigenous, or ethnic” throughout the definition. Here is our suggestion with our amendments to the proposed text in underline:

- (a) “National origin” includes but is not limited to, the individual’s or his or her ancestors’ actual or perceived:
 - (1) Place of birth or geographic origin, national origin group, indigenous origin, race, or ethnicity;
 - (2) The physical, cultural, or linguistic characteristics of a national, indigenous, or ethnic origin group;
 - (3) An individual’s state of marriage to, non-marriage, divorce or dissolution, separation, annulment, or other marital state, or association or perceived association with, a person of a national, indigenous, or ethnic origin group;
 - (4) An individual’s parental relationship with a person of a national, indigenous, or ethnic origin group, including an adoptive, step, or foster care parental relationship;
 - (5) Membership in or association with an organization identified with or seeking to promote the interests of a national, indigenous, or ethnic origin group;
 - (6) Attendance or participation in schools, churches, temples, or mosques, or other institutions generally associated with a national, indigenous, or ethnic origin group;
 - (7) Association of an individual’s name with a national, indigenous, or ethnic origin group;
 - (8) Association with a language and/or accent of a national, indigenous, or ethnic origin group;
 - (9) Association with an individual’s tribal affiliation or indigenous group.

Council response: The Council ultimately agrees with and incorporated the substance of this comment, including the suggestion to restructure the definition to a list rather than a narrative

format. “Marriage to or association with persons of a national origin group” is addressed in subsection (a)(2) and “tribal affiliation” is addressed in subsection (a)(3).

Comment: This subsection expands national origin beyond just anyone who is, who is perceived to be, or who is closely associated with anyone who has characteristics of a particular national origin, and includes any person who has a “membership in or association with an organization identified with or seeking to promote the interests of a national origin group; attendance or participation in schools, churches, temples, or mosques, or other institutions generally associated with a national group.” This expansion is simply too broad and unsupported by any legal authority. Nothing within Government Code Section 12940 suggests that the term “national origin” should include an individual who is a member of an association, group, school, temple, or other institution that is “generally associated” with a national group. Although an individual may establish discrimination by “association” with a member of a protected class, the burden of proof required is: (1) the individual is specifically associated with an individual who is a member of a protected classification; and (2) the individual suffered an adverse employment action because of the individual’s association with a member of a protected class. See *Castro Ramirez v. Dependable Highway Express, Inc.* 2 Cal. App 5th 1028 (2016). Under this proposed regulatory definition, an individual would be included and therefore protected under “national origin” simply by attending a group or institution that is “generally associated” with a national group. Presumably, this would allow an individual to utilize general statistics regarding attendance and/or participation in particular groups and institutions to establish the individual’s prima facie case, instead of evidence of the individual’s actual national origin, perceived national origin, or association with an individual of a particular national origin. Additionally, under this proposed definition, simply having a “parental relationship” with an individual of a national origin group would provide protection under FEHA regardless of whether that individual could establish an “association” or not. Nothing within FEHA or Title VII permits the expansion of this definition to such a broad group, or to minimize the burden of proof required to establish a national origin claim. Accordingly, we respectfully request the deletion of the phrase “an individual’s parental relationship with a person of a national origin group, including an adoptive, step, or foster care relationship; membership in or association with an organization identified with or seeking to promote the interests of a national origin group; attendance or participation in schools, churches, temples, or mosques, or other institutions generally associated with a national origin group” as these should not be presumed as within the scope of “national origin.” Any expansion of FEHA to cover such behavior, choices, relationships, should be done through the legislative process.

Council response: The Council disagrees that the clarifying definition constitutes an expansion of the existing definition of national origin under the law. Federal regulations and case law defining national origin, which FEHA must be at least as protective as, include the various types of associations and memberships the comments object to. See 29 C.F.R. § 1606.1.

Comment: Why does § 11027.1 have a subsection (a) without any subsection (b)?

Council response: The Council agrees that the “(a)” was unnecessary when there was not a “(b),” but subsequent revisions that added two subsections mooted this point.

Section 11028(a):

Comment: The Council should follow federal law concerning language restrictions. In particular, the definition of “business necessity” to mean “an overriding legitimate business purpose...that is necessary for the safe and efficient operation of business” and an express indication that business convenience and customer preference are apparently irrelevant.

Council response: The Council disagrees with this comment because state law differs from federal law in this context. Cal. Gov. Code § 12951 explicitly addresses language use restrictions and defines “business necessity” in this context.

Comment: There are many situations in which an English-only policy is a business necessity. For example, communication with superiors and colleagues who only speak English regarding training and day-to-day operation instructions must be conveyed in English. But because English-only rules are presumptively discriminatory, employers carry a heavy burden in justifying their policies. The new regulations put employers at high risk for being sued for their language policies even when their policies are justified. We ask that the Council provide more clarity about what policies are and are not allowed, what circumstances justify language policies, examples of legitimate business necessities and how a business can determine whether their policies meet the definition of business necessity.

Council response: The Council disagrees with this comment to the extent it advocates for a different threshold standard of language restrictions or a different definition of business necessity. Cal. Gov. Code § 12951 explicitly addresses language use restrictions and defines “business necessity” in this context. However, the Council did provide additional clarity to English-only policies in response to this comment and other comments.

Comment: We suggest modifying the language of Subsection (a)(2) as follows:

(2) For purposes of this subsection, “business necessity” means an overriding, fact-specific, credible, and legitimate business purpose, such that...

The less-defined the particular criteria used by an employer to justify the policy or the system relied upon to assess these criteria, the more difficult it may be for a reviewing court to assess the connection between the challenged policy and job performance. In sum, the addition of “fact-specific” and “credible” to the definition of “business necessity” will provide further clarity to employers, and ensure that the business necessity is sufficiently compelling to override any discriminatory impact.

Council response: The Council disagrees that the additional restrictive language proposed by the comment is necessary or will provide clarity. Cal. Gov. Code § 12951 explicitly addresses language use restrictions and defines “business necessity” in this context.

Comment: We suggest the addition of the following two subsections under Section 11028(a):

(5) Language restriction policies, including English-only rules, may create a hostile work environment for non-English speaking and bilingual workers.

(6) Implementation of language restrictions may also constitute an employment practice that adversely affects an employee's enjoyment of an employment benefit by prohibiting bilingual employees whose primary language is

In regard to our proposed new subsection (5), there is substantial authority for the proposition that language policies may, in and of themselves, create a hostile work environment. In regard to our proposed subsection (6), we believe it is essential to explain that even if a language restriction policy is adopted for a nondiscriminatory reason, it may still be unlawful if it is implemented in a manner in which it amounts to an adverse employment action or acts to deprive an employee of an employment benefit. (EEOC Guidance § V.C.2; see also 2 CCR § 11008(h) [defining "Employment Practice"], § 1108(g) [defining "Employment Benefit."].)

Council response: The Council added additional clarity regarding conduct that could contribute to a hostile work environment and/or rise to the level of harassment in a separate section addressing harassment specifically. In the section addressing harassment, the Council provided examples that it believes are more common and thus more clarifying than the specific examples provided in the comment, but also provided the general standards that would encompass the comment's examples in instances when they rise to the level of harassment under the law.

Sections 11028 (a)(1)(A)-(a)(2)(C):

Comment: Section 12951 already explicitly identifies the justification an employer needs to establish for imposing a language restriction in the workplace. There are no cases, legislative authority, or other legal authority to change the statute and impose a new restriction that the policy be "job-related" and "narrowly tailored." The only cases cited in the Initial Statement of Reasons are *El v. Se. Pa. Trans Auth.*, 479 F.3d 232 (3rd Cir. 2007) and *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982), neither of which support the additional requirements of providing the policy is "job-related" and "narrowly tailored." Specifically, *Gerdom* analyzed a weight requirement imposed on flight attendants that worked for an airline. In analyzing the policy, the Court utilized the well-accepted burden shifting of proof for disparate impact cases established by *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 (1971) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) that specifies (1) an employee has the burden to prove that the challenged policy has an adverse impact on a particular group; (2) the burden then shifts to the employer to provide a legitimate, non-discriminatory reason for the challenged practice; and (3) the burden then shifts back to the employee to show the reason offered is pretextual.

Similarly, the court in *El*, which analyzed the use of a homicide conviction in the decision to terminate an employee, further defined "business necessity." The court stated that policies "need not be perfectly tailored to be consistent with business necessity." *Id.* at 241.

Additionally, the EEOC Guidance, does not separate out "narrowly tailored" as an independent factor as the regulations propose. Rather, the EEOC Guidance combines it with the safe and efficient business operations. Specifically, the EEOC Guidance states, "a language-restrictive policy is narrowly tailored when it applies only to those workers, work areas, circumstances, times, and job duties in which it is necessary to effectively promote safe and efficient business

operations.” In the proposed regulations, it requires the employers to essentially prove that the language restriction is “perfectly tailored” or “narrowly tailored” in order to satisfy business necessity. This requirement is inconsistent with *El, supra*. The proposed regulations have the “narrowly tailored” requirement as a separate factor from the safe and efficient business operations, which is inconsistent with any authority cited. Finally, the definition of business necessity in Section 12951 already requires an employer to prove the policy fulfills an overriding, legitimate business purpose. It is unclear or unnecessary as to why the employer would have to separately establish the policy as “job related” too. Accordingly, we respectfully request the deletion of “job-related” from Section 11028(a)(1)(A) and the deletion of Section 11028(a)(1)(B).

Council response: The Council agrees with the comment’s suggestion of more precisely tracking the definition provided in Cal. Gov. Code § 12951 and made amendments in response to this comment and other comments, including removing the reference to “job related.” The Council believes that the reference to “narrowly tailored” provides additional clarity and is consistent with and does not alter the scope of requirements for “business necessity” provided in Cal. Gov. Code § 12951(b). The reference to “narrowly tailored” derives from the federal case law and EEOC’s Guidance on Title VII requirements related to language restrictions, which California employers are also subject to and for which the FEHA must be interpreted at least as protective as. See e.g. EEOC Enforcement Guidance on National Origin Discrimination, Section V3(c)(d); *Silva v. St. Anne Catholic School.*, 595 F. Supp. 2d. 1171, 1183-1185 (D. Kan. 2009) (detailing EEOC position on narrow tailoring).

Sections 11028 (a)(1) and (a)(4):

Comment: *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (1993) and *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 861 F.2d 1187 (1988) are inconsistent with this regulation. We do not believe it is appropriate for the Council to adopt a standard set forth in the EEOC Guidance that has been specifically rejected by the Ninth Circuit and further which the Ninth Circuit has repeatedly opined could harm the workplace. There is no California case or legislative history of FEHA to indicate that English only rules are to be presumed discriminatory or absolutely deemed unlawful as this proposed section requires. Proposed Sections 11028(a)(1) and (a)(4) eliminate any burden on the employee to prove that the “English-only” rule or other language restrictions in the workplace are discriminatory or have a disparate impact on a protected class. Rather, the proposed sections place the entire burden on the employer to justify its policies. Nothing within FEHA or any applicable case law indicates that the Legislature ever intended to eliminate the burden of proof on an employee when challenging any employment practice as discriminatory. Additionally, as the Ninth Circuit has repeatedly indicated, eliminating an employer’s discretion to manage its workplace with language restrictions such as those proposed in these regulations could create further harm. Furthermore, with regard to Section 11028(a)(4) that states “English-only rules are never lawful during an employee’s non-work time, etc.” Even the EEOC Guidance does not go so far. Rather, it simply states that such policies requiring English at all times are “presumptively unlawful.” Accordingly, the proposed regulations go even further than the EEOC Guidance, which has

already been deemed wrong by the Ninth Circuit on this issue. This proposal exceeds the Council's statutory authority and we respectfully request the Council to delete these provisions.

Council response: The Council disagrees with this comment, which appears to rely on the incorrect premise that the FEHA is analogous to Title VII in the context of "English-only" rules. Unlike the disparate impact analysis in Title VII, FEHA contains an explicit statutory provision governing language use restrictions that is not dependent on an initial demonstration of adverse impact. *See* Cal. Gov't. Code § 12951. With respect to the portion of the comment directed to English-only rules never being lawful during nonworking hours, the regulatory language in Section 11028(a)(4) addressing nonworking hours is consistent with FEHA, supported by applicable case law, and will aid clarity and compliance in this area. No comments provided to the Council cited a case in which an English-only policy applied to an employee's nonworking time was deemed lawful, even under the Title VII, which is less protective than the FEHA in this area. In fact, the applicable cases including those identified by this commenter and others lend further support for the regulatory language. *See e.g. Maldonado v. City of Altus* (10th Cir. 2006) 433 F.3d 1294, 1307 *overruled on other grounds in Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F.3d 1164, 1171 n.2 ("Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction."); *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F. 1480, 1483 (policy in question included: "During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish."). Thus, the rationales provided in the federal cases addressing Title VII are even more persuasive in the FEHA context, given the FEHA's stricter scrutiny of English-only policies.

Moreover, any attempted restrictions of language during nonworking hours may well create a wage and hour violation under state law, given California's focus on employer control as the determining factor in the compensability analysis. *See e.g. Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 265 (during breaks, "employers must 'relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time.'") *quoting Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39. The Council frequently fields requests from employers and employer organizations requesting bright line rules that are clear and easy to follow. While there may be a tension between the clarity such rules provide and the flexibility less bright line rules allow for, this is an instance where the clarity provided by a bright line is warranted. The Council is not aware of any circumstances where an "English-only" rule during nonworking hours would be allowable under FEHA, and any extremely remote hypothetical attempting to justify an "English-only" rule during nonworking hours would likely lead an employer to commit state wage and hour violations.

Section 11028(a)(3):

Comment: Consistent with the U.S. Supreme Court and EEOC, this subsection should include co-worker preference.

Council response: The Council agrees and has added "co-worker."

Section 11028(a)(4):

Comment: This subsection should be read as follows: English-only rules are presumed to violate the Act on the basis of national origin, and ancestry, unless the employer can prove business necessity. In order to rebut this presumption, an employer must prove the elements listed in § 11028(a)(1)(A) – (C). English-only rules are never lawful during an employee’s non-work time, e.g. breaks, lunch, unpaid employer- sponsored events, etc.

The suggested rephrasing in this subsection would clarify that (1) under the Act, there is always a presumption that an English-only rule is unlawful by virtue of its intrinsic adverse impact upon national origin minority employees, and (2) an employer can rebut this presumption only by proving up the affirmative defenses listed in § 11028(a)(1) of the proposed regulations. As it currently stands, this proposed provision states that an employer can rebut this assumption by proving business necessity alone, which ignores the remaining factors contained in section 11028(a)(1), including that it effectively notified its employees of the policy and the consequences for violating it, § 11028(a)(1)(C).

Council response: The Council agrees with this comment’s suggestion to incorporate the reference to 11028(a)(1)(A)-(C). With respect to the comment’s suggestions regarding the “presumption,” the Council incorporated more direct language (“English only rules violate the Act”) in response to other comments and to be consistent with Cal. Gov’t. Code § 12951.

Sections 11028(a)(5), 11028(b), and 11028(c):

Comment: Existing case law in the language discrimination context illustrates the possibility that unfounded assumptions will pervade the fact finder’s analysis of the legality of a given action or policy. Accordingly, the Council should provide guidance on burdens of proof in language discrimination cases in the following three places:

[New] Section 11028(a)(5): To meet its burden, it is not sufficient that the employer rely on subjective beliefs or factually unsupported assumptions about the need for a language restrictive policy.

Section 11028(b): Employment discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question. To meet this burden, it is not sufficient to rely on subjective beliefs or factually unsupported assumptions about an accent’s potential to interfere materially with an applicant’s or employee’s job performance.

Section 11028(c): Discrimination based on an applicant’s or employee’s English proficiency is unlawful unless the English proficiency requirement at issue is necessary for the effective performance of the specific position for which it is imposed, and the type and degree of proficiency required is tailored to the requirements of the position in question. To meet this burden, it is not sufficient to rely on subjective beliefs or factually unsupported assumptions about the need for an English-proficiency requirement.

Council response: The Council disagrees that the proposed text additions would add clarity regarding the applicable standards addressed in each of the provisions.

Comment: The Council heard from someone who suggested adding a subsection (5) to 11028(a) which would add that “it is not sufficient for an employer to rely on subjective belief of business necessity” in adopting language restriction policies. As a practical matter, addition of this language would be problematic, especially without setting forth examples or affirmative action items an employer would be expected to take to determine that its language policy is job-related and consistent with business necessity. In particular, especially for smaller employers, it is not reasonable to expect an employer to conduct surveys or commission formal studies to justify that “business necessity” exists. In my practice, employers seek to adopt language policies based on observed trends, including increased frequency of requests by customers to speak with someone in a language other than English, or increased complaints about hard-to-understand telephone representatives. Yet, formally gathering data may be cost-prohibitive, and informally gathering data regarding such trends and complaints is fraught with peril, including reluctance or objections by customers and employees to inquiries or surveys about their experiences, and increased claims of “racial profiling” and civil rights violations by customers. Therefore, I would respectfully object to the proposed addition of such language.

Council response: The Council agrees with the commenter that the proposed additional text identified would not aid the clarity of the standard and may invite confusion.

Section 11028(b):

Comment: We propose a more thorough explanation of the rule prohibiting discrimination based on accent and the manner in which it should be implemented in the workplace as follows:

(b) Employment discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that effective spoken communication in English is required to perform the job in question and the applicant’s or employee’s individual’s accent interferes materially with the spoken communication skills necessary applicant’s or employee’s ability to perform the job in question.

(1) Evidence of an accent materially interfering with the spoken communication skills necessary to perform the job may include documented, non-trivial workplace mistakes attributable to the difficulty in understanding the individual; assessments from fact-based, credible sources who are familiar with the individual and the job; or legitimate substandard job performance that is linked to specific failures in spoken communication.

(2) An employer or a covered entity may not rely on coworker, customer, or client discomfort, biases, or preferences to harass or justify an adverse employment action based on an applicant or employee’s accent.

As the Ninth Circuit explained in the case of *Fragante v. City & Cty. of Honolulu* (9th Cir. 1989) 888 F.2d 591, 596, “[a]n adverse employment decision may be predicated upon an individual’s accent when but only when it interferes materially with job performance.” Our proposed subsection (b)(1) explains that holding in a manner that is easily understandable and remains within the confines of that holding. We believe it is also important to explain that customer or client preferences are not a permissible basis for discrimination based on accent. As noted in the current Code of Regulations, customer preference cannot form the basis of a defense to sex discrimination. (2 CCR § 11031(a)(3).)

Council response: The Council agrees with the comment's statements regarding fleshing out the standard for English proficiency and added clarifying language in response to this comment and other similar comments. The Council does not think that the additional proposed language in the comment related to accent and customer preference would aid the clarity of the provision.

Section 11028(c):

Comment: Particularly in customer contact jobs, the employer must be the judge of what level of English proficiency is necessary to deal with customers. Your provision that the employer must prove "the type and degree of proficiency required" simply invites litigation every time an employer concludes that its customer base requires a particular level of proficiency.

Council response: The Council disagrees with the comment to the extent it disputes that the burden would be on the employer to prove a business necessity defense in a disparate impact analysis involving English proficiency. In any event, the phrase "the type and degree of proficiency required" identified in the comment was removed in response to other comments.

Comment: To provide conformity with federal law and Equal Employment Opportunity Commission regulatory guidelines, we request that "type and degree of proficiency" is changed to "level of fluency." This one change will both conform the language with federal guidelines and provide a clearer standard for car dealers to follow in implementation of the rule.

Council response: The Council removed the reference to "type and degree of proficiency required" and the sentence in which the suggested language of "level of fluency" would have been in.

Comment: Discrimination based on language proficiency and accents is of great concern because of the subjectivity of language comprehension and the need to be able to effectively train employees and provide ongoing instruction. The new rules require employers to prove that an accent materially interferes with an employee's ability to perform their job. It is unclear, however, how an employer goes about proving material interference when language comprehension is highly subjective. For example, an employer may choose not to hire an applicant because the employer simply cannot understand the applicant through the applicant's particular accent. The employer may fear that training will be difficult because of the employer's own inability to understand the applicant. As property managers, concerns could be significant because the potential employee may need to communicate with any number of residents, guests or invitees. To someone else, however, the applicant's accent may be perfectly understandable. We ask that the counsel provide more clarity about the definition of material interference, and provide examples of when and under what circumstances policies on proficiency and accents are permissible. The Council may want to consider EEOC's Enforcement Guidance on National Origin Discrimination.

Council response: The Council agrees with the comment's suggestion of providing additional clarity regarding business necessity in the context of English proficiency and added additional

language. The Council did not believe additional language in the context of accent would aid the clarity of the regulation and disagrees with the comment to the extent it disputes that the burden would be on the employer to prove a business necessity defense in a disparate impact analysis involving English proficiency or accent under existing law.

Comment: This proposed section deems English proficiency requirements unlawful unless the requirement is necessary for the “effective” performance of the specific position and “tailored” to meet the requirements of the position. The Statement of Reasons cites to *Stephen v. PGA Sheraton Resort, Ltd.* 873 F.2d 276, 280-2801 (11th Cir. 1989), and states this language is necessary to conform California law to federal law. The opinion in *Stephen, supra*, however, does not require an employer to show either the English proficiency requirement is “effective” or specifically “tailored.” Rather, in agreeing the employer did not violate Title VII, the court stated: “Clearly, the requirement that Stephen be able to speak and understand English with sufficient facility to adequately perform his assigned tasks had “a manifest relationship to the employment in question.” Accordingly, we respectfully request the Council to amend this section to conform with federal law and provide that an employer must show any English proficiency requirement has a “manifest relationship to the employment in question.”

Council response: The Council’s chosen language relies on Ninth Circuit jurisprudence applicable to California employers and employees. *See e.g. Fragante v. City & Cty. of Honolulu* (9th Cir. 1989) 888 F.2d 591, 596 (“[a]n adverse employment decision may be predicated upon an individual’s accent when - but only when - it interferes materially with job performance.”).

Section 11028(d):

Comment: The proposed regulation states that it is an unlawful employment practice for an employer to prefer individuals who have received a known quality of training in the U.S. to individuals who come from educational institutions in foreign countries of unknown quality. To our knowledge, no court has ever indicated that the employment discrimination laws prohibit a preference for a known quality of education.

Council response: The Council deleted the provision identified in the regulations. While the language was consistent with disparate impact law, the Council was persuaded that the example provided in the provision would not aid in the clarity of the regulations.

Section 11028(e):

Comment: In general, the FEHA considers objections to any form of conduct prohibited by the Act to be “protected activity.” That concept is much more expansive than just “discrimination.” Accordingly, we propose adding language to the body of subsection (e) that clarifies the point that opposing harassment in the workplace is also a form of protected activity. Moreover, in the context of national origin discrimination, the regulation should make clear that voicing opposition to a workplace language restriction constitutes protected activity. We further

believe that the subsections the Council has proposed to place in Section 11028(f)(4) are more properly placed here.

Council response: The Council agrees and added “or harassment” and moved former subsections 11028(f)(4)(A) and (f)(4)(B) to this subsection as 11028(e)(1) and (e)(2).

Section 11028(f)(1):

Comment: The use of the terminology “undocumented worker” in subsection 11028(f)(1) is unnecessarily limiting in scope. We propose changing that language to “regardless of immigration status of authorization to work” to ensure that the provision encompasses all possible permutations. We further propose adding language clarifying that even those who use false documents to secure employment are protected by the Act from being subjected to discrimination or harassment based on their national origin.

(1) All provisions of the Act and these regulations apply ~~to undocumented workers~~ all employees and applicants regardless of immigration status or authorization to work to the same extent that they apply to any other applicant or employee. These protections also exist for individuals who, in violation of federal law, have used false documents to secure employment. An employee’s or applicant’s immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

In light of this suggestion, subsection (5) is unnecessary and should be deleted in its entirety.

Council response: The Council does not agree that the term “undocumented” in this context inaccurately limits the scope of the provision and does not believe the language regarding false documents would aid the clarity of the provision. Issues related to the relevance, or lack thereof, of immigration status are addressed elsewhere in subsection (f). The Council did remove subsection (5) in response to this comment.

Sections 11028(f)(2), 11028(f)(2)(A), and 11028(f)(2)(B):

Comment: As is evidenced by case law, actual or even potential discovery into immigration status can have an extreme chilling effect on individual claimants’ and the broader immigrant worker community’s willingness to exercise their workplace rights. These regulations present the opportunity to provide further clarity on an issue of utmost importance to both the private and public interest in the enforcement of the FEHA. We therefore suggest the Council make it even clearer that 1) discovery into immigration status at the liability phase is not allowed at all and 2) discovery at the remedies stage is allowed under only certain circumstances and for the sole purpose of determining the appropriate remedy. We suggest that, in order to do this, the Council revise Section 11028(f)(2) into a general discovery provision and then create two subsections, one that addresses discovery during the liability phase and one that addresses discovery during the remedies phase:

Section 11028(f)(2): ~~Discovery or other inquiry shall not be permitted into an employee’s or applicant’s immigration status during the liability phase of any proceeding brought to enforce the Act. Such discovery or other inquiry, moreover, may be permitted only where the person~~

~~seeking to make the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law. For example, if an employer is found to be liable for violating the rights of an undocumented employee under the Act, the remedy of reinstatement will not be available.~~

[New] Section 11028(f)(2)(A): Discovery or other inquiry shall not be permitted into an employee's or applicant's immigration status during the liability phase of any proceeding brought to enforce the Act.

[New] Section 11028(f)(2)(B): Discovery or other inquiry into an employee's or applicant's immigration status during the remedies phase of any proceeding brought to enforce the Act, moreover, may be permitted only where the person seeking to make the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law. Such discovery, when allowed, may be used only for purposes of determining the appropriate remedies. For example, if an employer is found to be liable for violating the rights of an undocumented employee under the Act, the remedy of reinstatement will not be available.

Council response: The Council agrees with the comment's overall sentiment of clarifying the language regarding the discoverability of immigration status and made modifications to the language similar to those suggested by the comments.

Section 11028(f)(2) and (3):

Comment: The proposed regulation states that there shall be no inquiry "into an employee's or applicant's immigration status during the liability phase of any proceeding brought to enforce the Act." This makes no sense whatsoever. If an employee is not hired or terminated because he does not have a legal right to work in this country, and sues under the Act alleging national origin discrimination, of course inquiry must be permitted into the plaintiff's immigration status. Furthermore, providing that it is an unlawful employment practice to take action based on an applicant's immigration status "unless the employer is shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law," imposes impossible burdens on employers. Imagine a small employer without ready access to legal advice. This small employer is contacted by immigration agents, and does as they instruct. It is likely that this employer could not show "by clear and convincing evidence" that it was "required" to follow their instructions. Repugnance at the current administration's lack of prosecutorial discretion in terms of deportation policy is understandable, but overreacting with respect to purported interpretations of law which are manufactured out of whole cloth is not the answer. No reasonable interpretation of the prohibition of national origin discrimination in the current Fair Employment and Housing Act could possibly be consistent with what you are proposing. What you are proposing is legislation, pure and simple. Legislation should be left to the legislature. In fact, as you probably know, there is a bill currently before the California Legislature designed to regulate the degree to which California employers can comply with requests from federal immigration officials. This bill is AB 450 (Chiu). This bill recognizes that national origin discrimination has nothing to do with cooperation with federal immigration officials, and directly sets forth what it perceives to be unfair immigration related practices. The

legislative counsel's summary of the bill states, "This bill would impose various requirements on public and private employers with regard to federal immigration agency immigration worksite enforcement actions. Except as otherwise provided by federal law, the bill would prohibit an employer from providing a federal immigration enforcement agent access to a place of labor without a properly executed warrant and would prohibit an employer from providing voluntary access to a federal government immigration enforcement agent to the employer's employee records without a subpoena." In short, there is no basis for your council attempting to usurp the legislative function by a purported definition of national origin discrimination. The matter is before the California Legislature, and should be dealt with there.

Council response: The Council disagrees with the comment, which appears to be asserted without an awareness of the existing state statutory law applicable to this provision. See Cal. Lab. Code § 1171.5(b) ("[N]o inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.")

Section 11028(f)(4):

Comment: Subsection 11028(f)(4) appears to contain a typo. In reference to the prior retaliation language, it should read "as defined in § 11028(e)."

Council response: The Council agrees, but ultimately moved the contents of this section to subsection (e) anyway, rendering the comment moot.

Comment: The proposal says that that it be an unlawful practice for an employer to take adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number or government-issued employment documents. The Department of Fair Employment and Housing has always been able to take an adverse action against any employee for fraud or dishonesty on a job application. This is so broadly written that it appears to be precluding such adverse actions. As such, it appears to violate the merit principle of State government and would allow an applicant to lie about a social security number or rely on false identification to obtain employment without legitimate repercussions.

Council response: The Council removed the language referenced by the comment, so it is moot.

Comment: The proposed text indicates that it is "unlawful...to retaliate against any person as defined in § 11028(f)." However, there is no definition in this section. Is this supposed to be on the basis defined under § 11027.1, the "Definitions" section?

Council response: The Council agrees that the cross-reference was misleading, but this subsection was ultimately rewritten and its former contents moved to subsection (e), rendering the comment moot.

Section 11028(f)(5):

Comment: We believe there should be an additional subsection added to this section to explain the holdings of the California and US Supreme Court regarding the impact of immigration status on national origin discrimination or harassment claims. (*Salas v. Sierra Chem. Co.* (2014) 59 Cal. 4th 407, 428-32; *McKennon v. Nashville Banner Publishing Co.* (2015) 513 U.S. 352.) Our proposed subsection 11028(f)(5) would read as follows:

(5) Equitable defenses of unclean hands or after-acquired evidence based on an individual's immigration status or authorization to work are not a complete defense to a claim under the Act. Such defenses only apply to remedies of wage continuation or reinstatement.

Council response: The Council declines to add this provision and believes the existing language in 11028(f) and 11028(j) thoroughly and sufficiently address immigration status in the context of national origin discrimination and harassment claims.

Section 11028(f)(4)-(5):

Comment: These proposed regulations seek to define what constitutes retaliation with regard to immigration status. There is no authority or cases in the Initial Statement of Reasons that indicate any basis to expansively define retaliation for this specific protected classification under FEHA. Additionally, in 2013 with the enactment of AB 263, followed by AB 2751 in 2014, and thereafter AB 731 and SB 1001 in 2016, the Legislature has indicated that the Labor Commissioner was the appropriate agency to handle retaliation claims with regard to immigration-related practices. Such laws are set forth in Labor Code Sections 1019 and 1091.1. FEHA and these proposed regulations infringe upon the Labor Commissioner's authority on these issues, as expressed by the Legislature. Accordingly, we respectfully request the Council to delete these sections from the proposed regulations, as such claims are under the jurisdiction of the Labor Commissioner.

Council response: The Council disagrees with the premise of the comment that the regulations are usurping the Labor Commissioner's role in enforcement or interpretation of the Labor Code. Retaliation for engaging in protected activity is illegal under the FEHA, and the Council's articulation of examples of adverse actions that amount to retaliation in the national origin context provides needed clarity that is both consistent with EEOC guidance on this topic and in harmony with the state jurisprudence and the Labor Code. *See e.g.* 29 C.F.R. § 1606.5; EEOC Enforcement Guidance Section VII.A; Cal. Lab. Code §§ 1019 – 1019.2.

Section 11028(g):

Comment: Any California resident, regardless of immigration status, is eligible for a driver's license issued under Cal. Vehicle Code § 12801.9. Furthermore, it is a violation of the FEHA for an employer to discriminate "against a person because the person holds or presents a driver's license issued pursuant to [§ 12801.9]", Cal. Vehicle Code § 12801.9(h)(2)(A), and a § 12801.9

license is not to be used for “any purpose other than to establish identity and authorization to drive”, Cal. Vehicle Code § 12801.9(i).

Possession of this driver’s license, therefore, should not itself constitute nor should it be considered at all in an inquiry into whether the employer has presented “clear and convincing evidence” that discovery into an applicant’s or employee’s immigration status during the remedies stage of a proceeding is necessary to comply with federal immigration law. See *Util. Consumers’ Action Network v. Pub. Utilities Comm’n of State of California*, 114 Cal. Rptr. 3d 475, 483 (Cal. Ct. App. 2010) (“[T]he phrase ‘clear and convincing’ is defined as ‘clear, explicit and unequivocal, ‘so clear as to leave no substantial doubt,’ and sufficiently strong to command the unhesitating assent of every reasonable mind.’”) (internal quotation marks omitted).

Accordingly, a new subsection should be added as follows: That an employee or applicant possesses a driver’s license issued under section 12801.9 of the Vehicle Code does not constitute clear and convincing evidence for purposes of § 11028(f)(2)(B)2 of this Article. Possession of a driver’s license issued under section 12801.9 of the Vehicle Code cannot be considered when determining whether an employer has made the required showing for remedies-related discovery into an applicant’s or employee’s immigration status, as described under § 11028(f)(2)(B) of this Article.

Council response: The Council disagrees that the provisions of Cal. Vehicle Code § 12801.9 , which are addressed in the regulations in Section 11028(g), impact the analysis of the circumstances regarding when a particular inquiry may be mandated in order to comply with federal immigration law.

Section 11028(j):

Comment: The potentially harassing nature of English-only rules, especially when applied in an extreme and unreasonable manner, has been repeatedly recognized by the courts. Moreover, Case law strongly suggests the Council should identify employer threats of deportation as a type of conduct that is likely to satisfy the “severity” prong of a hostile work environment analysis. Finally, employers’ tolerance of derogatory comments about immigrant or immigration status and mockery of a language or its speakers, even if thought to be “lighthearted” or not intentionally racial in nature, is no less unlawful than tolerance of other types of actions that are more generally understood to constitute “harassment.” Accordingly, subsection (j) should be elaborated upon as follows:

Section 11028(j): Harassment. ~~It is unlawful for an employer or other covered entity to harass an applicant or employee~~ Harassment on the basis of national origin is unlawful. (See generally ~~Section 11019(b)~~). In addition to the general examples discussed in that section, harassment based on national origin may include, but is not limited to:

[New] Section 11028(j)(1): “English-only rules.” English-only rules may be enforced in an extreme or unreasonable manner and, thus, may give rise to hostile working environments, either in themselves or in conjunction with other behavior.

[New] Section 11028(j)(2): Threats of deportation. By its intrinsically oppressive and intimidating nature, a single threat of deportation is presumed to be sufficiently severe so as to create an unlawful hostile work environment.

[New] Section 11028(j)(3): Derogatory comments about immigrant or immigration status. Pejorative statements or assertions about employees' status as immigrants, whether actual or perceived, presumptively constitute national origin-based harassment inasmuch as immigrants, by definition, are not born in the United States and are of non-United States national origin. Similarly, negative statements or assertions about employees' actual or perceived status under the immigration laws may also create an atmosphere of intimidation for the reasons discussed in subsection (2) above.

[New] Section 11028(j)(4): Mockery of a language or its speakers. Jokes or other comments tending to trivialize or stereotype languages other than English and their speakers can constitute a form of national origin harassment.

Council response: The Council agrees with the comment's sentiment that additional details and examples of harassment in the national origin context would aid the regulations and added language that addressed most of the examples identified in the comments. With respect to "English-only," the Council agrees that such policies could conceptually contribute to a hostile working environment. However, the Council chose to list as nonexclusive examples the more common types of harassment in this context. "English-only" rules are addressed extensively in the section of the regulations addressing discrimination.

Section 11028(k):

Comment: As it relates to height and/or weight requirements, the Council should follow federal law. As you have written the height and weight requirement regulations, they would for example make illegal a maximum height requirement, even though maximum height could not possibly be argued to have any relevance to a national origin group. Moreover, requiring for certain physical activity jobs a reasonable relationship between height and weight would seem to have no national origin implications but would apparently run afoul of your proposed regulation. Once again, we suggest that you do no more than indicate that the well-developed law under Title VII will govern.

Council response: The Council's regulations are consistent with federal law, which similarly references "physical...characteristics of a national origin group" in its definition of national origin. See 29 C.F.R. § 1606.1. Height and weight restrictions may have the effect of disparately impacting certain national origin groups and the Council's regulation correctly provides the disparate impact analysis in this context.

Comment: It is unclear how height and weight are related to national origin. We believe FEHC lacks authority to promulgate regulations concerning characteristics that are not related to protected classes as established under the Fair Employment and Housing Act (Gov. Code 12900 et seq.), Unruh Civil Rights Act (Civ. Code, § 51 et seq.), Ralph Civil Rights Act (Civ. Code, § 51.7), Disabled Persons Act (Civ. Code, § 54 et seq.). Without more, the Council appears to be overstepping its authority in this area. It is up to the legislature to determine whether and to what extent height and weight discrimination should be a protected class. In this regard, we are fully cognizant of the broad range of judicially recognized personal characteristics that are

protected under the statutory framework cited above. And height and weight limitations may well fall within the ambit of those statutes. But it is a far reach to suggest that any of those characteristics not specifically enumerated in the Fair Employment and Housing Act should be the subject of FEHC regulatory authority under the rubric of national origin.

Council response: The Council's regulations are consistent with federal law, which similarly references "physical...characteristics of a national origin group" in its definition of national origin. See 29 C.F.R. § 1606.1. Height and weight restrictions may have the effect of disparately impacting certain national origin groups and the Council's regulation correctly provides the disparate impact analysis in this context. The Council disagrees with the comment to the extent it characterizes the provision addressing disparate impact in the national origin context as a provision incorporating height and weight as separate protected categories.

Comment: We believe this section should be expanded to include other potential preferences that can serve as proxies for national origin discrimination. Our proposal is to delete the current subsection, and instead add the following:

(k) Discriminatory Preferences. It is an unlawful employment practice, unless pursuant to a permissible defense, for an employer or other covered entity to impose preference, trait, look, height, weight or image requirement(s) on applicants or employees that serve as a proxy for national origin discrimination or harassment.

Council response: The Council believes this subject is sufficiently addressed through the existing language provided in Sections 11027.1(a) and 11028(k).

Other:

Comment: One of the main concerns is whether and to what extent the new policies create a duty on the part of employers to provide reasonable accommodations to employees who do not understand or speak English well. Will employers be required to hire interpreters or provide their training manuals and training in other languages? More clarity on the issue is needed.

Council response: The Council's regulations address the circumstances in which English proficiency can be used in employment decisions in Sections 11028(a)-(d) and do not include a requirement that employers provide reasonable accommodations akin to those required in the disability and religion context.

Comment: Proposed section 11028 is silent regarding the inverse of English-language-only policies: inquiries regarding an employee or applicant's ability to speak a language other than English, whether on an application form or "on the fly"; asking an applicant to identify his or her primary language to fulfil statutory notice requirements; or making it an explicit requirement that prospective employees speak a language other than English. First, an employer is statutorily required to provide certain written notices to employees (such as anti-discrimination policies, CFRA notices, and FMLA notices) in any language spoken by more than a certain percentage of its workforce. Collection of this information should be expressly permitted.

Second, employers often have other legitimate reasons for asking employees if they speak. Indeed, many state laws and regulations require that certain information be communicated in a language other than English, and where those statutes relate to an employer's business, the employer may need to have employees who speak, read, write, and/or can translate a foreign language. I would therefore respectfully suggest an addition to the proposed regulation, as follows:

(m) It is not unlawful for an employer to inquire of an applicant or employee regarding his or her primary language, or his or her ability to speak, read, write or understand any languages other than English, if job-related and consistent with business necessity.

Council response: The Council agrees with this comment and added Section 11028(d) in response to it.

COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11027.1:

Comment: We respectfully request the Council to delete "membership in" in Section 11027.1(a)(4) as well as Section 11027.1(a)(5). Nothing within Government Code Section 12940 suggests that the term "national origin" should include an individual who is a member of an association, group, school, temple, or other institution that is "generally associated" with a national group or seeking to promote the interests of a national group. Moreover, nothing within the Fair Employment and Housing Act (FEHA) indicates that mere attendance or participation at a school, church, temple, or mosque should bring that individual under the protected classification of "national origin." FEHA protects an individual's actual or perceived national origin, or the individual's association with a member of a protected classification. National origin does not extend to mere attendance or participation in an organization "generally used" by a person of a national origin group. Expanding the protected classification of "national origin" so far is diluting the very purpose of the protection – i.e., those with the actual or perceived characteristics of a particular national origin. Moreover, religious affiliation is already a protected classification under FEHA and therefore proposed section 11027.1(a)(5) is unnecessary.

Council response: The Council disagrees that the clarifying definition constitutes an expansion of the existing definition of national origin under the law. The federal regulations defining national origin, which FEHA must be at least as protective as, include the various types of associations and memberships the comments object to. See 29 C.F.R. § 1606.1.

Section 11028(a)(4):

Comment: This section "presumes" English-only rules violate FEHA on the basis of national origin and completely bans language restrictions that are applicable during breaks, or unpaid employer-sponsored events. Nothing within FEHA or the Equal Employment Opportunity

Commission (EEOC) Enforcement Guidance on National Origin Discrimination supports such a presumption. Moreover, such a proposal has been explicitly rejected by the Ninth Circuit. While we agree that Government Code Section 12951 already limits the use of language restrictions in the workplace, nothing within that section indicates that a language restriction policy is “presumptively” discriminatory on the basis of national origin. While the EEOC Guidance includes such a provision, the Ninth Circuit specifically rejected the EEOC Guidance on National Origin Discrimination on this very issue in *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (1993). [quotation omitted] In the updated version of the EEOC Guidance on National Origin Discrimination, dated November 11, 2016, it does not change its guidance on this issue, but merely states in a footnote that it disagrees with the Ninth Circuit’s opinion. (See Footnote 120). Next, nothing within the plain language of Government Code Section 12951 indicates that an English-only restriction in the workplace is “presumptively” discriminatory on the specific basis of national origin. We agree Section 12951 requires an employer to justify the restriction with a business necessity. However, creating a presumption of discrimination on the basis of national origin simply goes too far. As previously indicated by some councilmembers at their confirmation hearings, where there is not a specific state statute or applicable California case, the next level of authority is federal law. The Ninth Circuit has explicitly rejected a presumption of discrimination on the basis of national origin for English-only rules. Accordingly, we respectfully request the Council to delete this section.

Furthermore, Section 11028(a)(4) states “English-only rules are never lawful during an employee’s non-work time, etc.” Nothing within Government Code Section 12951 even remotely suggests such a proposal was intended by the statute. In fact, Section 12951 appears to contradict the basis of this proposal as it says any language restriction must be justified by a business necessity. Notably, even the EEOC Guidance does not go so far. Rather, it simply states that such policies requiring English at all times are “presumptively unlawful.” Accordingly, we respectfully request the Council to delete these provisions.

Council response: The Council modified the language in response to this comment to clarify that English-only rules are unlawful, irrespective of whether they are on the basis of national origin, unless justified by business necessity. With respect to such rules that cover an employee’s non-work time, the regulatory language in Section 11028(a)(4) addressing nonworking hours is consistent with FEHA, supported by applicable case law and will aid clarity and compliance in this area. No comments provided to the Council cited a case in which an English-only policy applied to an employee’s nonworking time was deemed lawful, even under Title VII, which is less protective than the FEHA in this area. In fact, the applicable cases including those identified by this commenter and others lend further support for the regulatory language. See *e.g. Maldonado v. City of Altus* (10th Cir. 2006) 433 F.3d 1294, 1307 *overruled on other grounds in Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F.3d 1164, 1171 n.2 (“Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction.”); *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F. 1480, 1483 (policy in question included: “During lunch, breaks, and employees’ own time, they are obviously free to speak Spanish if they wish.”). Thus, the rationales provided in the federal cases addressing Title

VII are even more persuasive in the FEHA context, given the FEHA's stricter scrutiny of English-only policies.

Moreover, any attempted restrictions of language during nonworking hours may well create a wage and hour violation under state law, given California's focus on employer control as the determining factor in the compensability analysis. *See e.g. Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 265 (during breaks, "employers must 'relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time.'") quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

The Council frequently fields requests from employers and employer organizations requesting bright line rules that are clear and easy to follow. While there may be a tension between the clarity such rules provide and the flexibility less bright line rules allow for, this is an instance where the clarity provided by a bright line is warranted. The Council is not aware of any circumstances where an "English-only" rule during nonworking hours would be allowable under FEHA and any extremely remote hypotheticals attempting to justify an "English-only" rule during nonworking hours would likely lead an employer to commit state wage and hour violations.

Sections 11028(a)(5), 11028(b), and 11028(c):

Comment: As noted by the EEOC when discussing language restrictive policies in its Enforcement Guidance, "[t]o meet the burden of establishing business necessity, the employer must present detailed, fact-specific, and credible evidence showing that the language-restrictive policy is 'necessary to safe and efficient job performance' or safe and efficient business operations. This burden cannot be met with conclusory statements or bare assertions about the business need for a language-restrictive policy. It is necessary to analyze the specific circumstances that are presented in each situation." This description of an employer's burden when alleging a business necessity to justify a discriminatory policy is amply supported by both U.S. Supreme Court and federal case law. Given the possibility that unfounded assumptions will pervade the fact finder's analysis in language discrimination cases, we strongly encourage the Council to incorporate language that clarifies an employer's burden when defending a language restrictive policy, English proficiency requirement, or accent discrimination:

[New] Section 11028(a)(5): To meet its burden, an employer must present detailed, fact-specific, and credible evidence. It is not sufficient that the employer rely on conclusory statements or bare assertions about the business need for a language-restrictive policy.

Section 11028(b): Employment discrimination based on an applicant's or employee's accent is unlawful unless the employer proves that the individual's accent interferes materially with the applicant's or employee's ability to perform the job in question. To meet its burden, employers must present detailed, fact-specific, and credible evidence, such as documented workplace mistakes attributable to difficulty understanding the individual; assessments from several credible sources who are familiar with the individual and the job; or specific substandard job performance that is linked to failures in spoken communication. It is not sufficient that the employer rely on conclusory statements or bare assertions about the applicant or employee's accent interfering materially with job performance.

Section 11028(c): Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement at issue is necessary for the effective performance of the specific position for which it is imposed. In particular, the type (e.g. spoken,

written, aural, and/or reading comprehension), level (e.g., grade reading level), and nature (e.g., scientific or technical) of proficiency required must be tailored to the needs of the position in question, and a (i.e. a lower the level of fluency type and degree of proficiency required is tailored to the requirements of would materially interfere with the applicant's or employee's ability to perform the duties of the position in question). To meet its burden, an employer must present detailed, fact-specific, and credible evidence, such as documented workplace mistakes attributable to the individual's lack of English proficiency; assessments from several credible sources who are familiar with the individual and the job; or specific substandard job performance that is linked to a lack in the type, level and/or nature of English proficiency required for the position. It is not sufficient that the employer rely on conclusory statements or bare assertions about the business need for an English proficiency requirement.

Council response: The Council added additional detail and examples in the provision addressing English proficiency in response to this comment. The Council disagrees that the other proposed text additions would add clarity regarding the applicable standards and believes it is the type of language more appropriate for guidance materials similar to the EEOC materials cited by the comment.

Section 11028(c):

Comment: This proposed section deems English proficiency requirements unlawful unless the requirement is necessary for the “effective” performance of the specific position and “tailored” to meet the requirements of the position. The Statement of Reasons cites to *Stephen v. PGA Sheraton Resort, Ltd.* 873 F.2d 276, 280-2801 (11th Cir. 1989), and states this language is necessary to conform California law to federal law. The opinion in *Stephen, supra*, however, does not require an employer to show either the English proficiency requirement is “effective” or specifically “tailored.” Rather, in agreeing the employer did not violate Title VII, the court stated: “Clearly, the requirement that Stephen be able to speak and understand English with sufficient facility to adequately perform his assigned tasks had “a manifest relationship to the employment in question.” Accordingly, we respectfully request the Council to amend this section to conform with federal law and provide that an employer must show any English proficiency requirement has a “manifest relationship to the employment in question.”

Council response: The Council’s chosen language relies on Ninth Circuit jurisprudence applicable to California employers and employees. See e.g. *Fragante v. City & Cty. of Honolulu* (9th Cir. 1989) 888 F.2d 591, 596 (“[a]n adverse employment decision may be predicated upon an individual’s accent when - but only when - it interferes materially with job performance.”). In any event, the language noted in the comment was removed and thus the comment is moot.

Comment: We suggest the Council delete the parenthetical regarding the level of fluency “materially interfer[ing] with the applicant’s or employee’s ability to perform” the position in question given this standard has generally been applied only in accent discrimination cases and is more appropriately suited for that context. While we believe the “materially interfere” and “necessary” standards are equally demanding, they are necessarily different given the different inquiries involved in each type of situation. Where accent discrimination is at issue, the fact finder must analyze whether a person’s manner of speech materially interferes with her ability

to perform her job. The degree of one's accent or lack thereof is non-quantifiable. In contrast, when an employer imposes an English-proficiency requirement, the question is whether the type, level, and nature of proficiency required are actually necessary for the specific position. Unlike with accent discrimination, there exist objective linguistic tools and methodologies, such as language sampling and readability analyses, to measure different aspects of proficiency, and how these relate to specific job duties. Given these differences, the "materially interfere" standard is most suited for the accent discrimination context, whereas the "necessary" standard is more readily applied and more appropriate in the English proficiency context. Case law and the EEOC Enforcement Guidance on these two forms of language discrimination track this division in standards. Deleting the identified parenthetical would therefore avoid confusion and reinforce existing authority on national origin discrimination based on accent and English proficiency. Therefore, this subsection should read as follows:

Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement at issue is necessary for the effective performance of the specific position for which it is imposed. In particular, the type (e.g. spoken, written, aural, and/or reading comprehension), level (e.g., grade reading level), and nature (e.g., scientific or technical) of proficiency required must be tailored to the needs of the position in question, and a (i.e. a lower level of fluency type and degree of proficiency required is tailored to the requirements of the position in question).

Council response: The Council modified the language in accord with this comment and provided a list of relevant factors for the analysis, as suggested by the comment.

Section 11028(e):

Comment: We believe the subsections (e)(1) and (2) are best left under (f) as "Immigration-related Practices," since these appear to be specific to immigration related situations. We suggest these subsections be moved back as (f)(4)(A) and (B). Also, the last sentence of § 11028(e) should be struck and the following language added: "Retaliation under this part also may include § 11028(f)(3)(A) and (B)." This would then include potential immigration-related discrimination practices. The § 11028(f)(3)(A) and (B) numbering reference assumes the further changes under Section 11028(f), as noted below, are implemented.

Council response: The Council disagrees and believes that the language in question is best addressed in the retaliation section since it provides a list of adverse actions that could be retaliatory in this context. The Council did include a cross-reference to the subsections in Section 11028(f)(4), which may address the concerns raised in the comment.

Section 11028(f):

Comment: Currently, the definition of "undocumented applicant or employee" is at the end of the subsection ((f)(4)) to which it is specifically applicable. We suggest moving this definition under § 11027.1, "Definitions," as subsection (c). We suggest rewording this definition as follows: "For purposes of the Act, immigration status of an applicant or employee includes an

undocumented applicant or employee who lacks legal authorization under federal law to work in the United States.”

Council response: The Council agrees with the suggestion of relocating the definition of “undocumented applicant or employee” to Section 11027.1 and relocated it accordingly. While the specific language is largely in accord with the suggested language, it was slightly expanded in response to other comments.

Comment: The order and phraseology of this section are confusing. Further, the same concept is reiterated. We suggest the following order and language, which incorporates our suggested deletion/moving of subsection (f)(4) in an earlier comment:

(f) Section 11028(f) - Immigration-related Practices:

(1) It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee's or applicant's immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law.

(2) The immigration status of an applicant or employee is irrelevant to the issue of liability under the Act. After an employer is found liable under the Act, discovery or other inquiry into an applicant or employee's immigration status shall be permitted, after the employer has shown by clear and convincing evidence such inquiry is necessary to comply with federal immigration law because the remedy of reinstatement will not be available.

(3) It is an unlawful employment practice for any employer or other covered entity to retaliate against any employee or applicant because of their immigration status. Such acts of retaliation may include, but are not limited to:

(A) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (e.g. spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or

(B) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

Council response: The Council relocated the sections addressing retaliation to Subsection 11028(e) and removed the duplicative language raised by the comment. The Council also included a cross reference to Section 11028(e) in Section 11028(f)(4) to add further clarity.

Section 11028(f)(2):

Comment: We respectfully request the Council to delete the new proposed language, as it is inconsistent with Civil Code Section 3339 and reinstate the prior language in the initial proposed regulations.

Civil Code Section 3339(b) states: For purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this

inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law.

In the new proposed language of Section 11028(f)(2), it states “For example, if an employer is found to be liable under the Act but establishes by clear and convincing evidence that the applicant or employee is undocumented, the remedy of reinstatement will not be available.” Nothing within Section 3339 states that an employer has to prove by “clear and convincing evidence” that the employee is undocumented. Rather, Section 3339 requires the person to prove by “clear and convincing evidence” that inquiry into the individual’s immigration status is necessary to comply with federal immigration law. Two very distinct issues and distinct burdens of proof. Under Section 3339, once a person makes the requisite showing of evidence necessary for inquiry into immigration status, nothing requires the employer to thereafter prove by “clear and convincing evidence” that the employee is undocumented. Rather, the normal preponderance of evidence standard applies.

Accordingly, we respectfully request the Council to delete the following language: “For example, if an employer is found to be liable under the Act but establishes by clear and convincing evidence that the applicant or employee is undocumented, the remedy of reinstatement will not be available,” as it is inconsistent with Civil Code Section 3339.

Council response: The Council removed the language identified in response to this comment.

Section 11028(j):

Comment: We encourage the Council to consider adding language in order to clarify the unique forms of conduct that may constitute harassment in the national origin context. Our proposed revision would do this by providing a non-exclusive list of examples of national-origin based harassment while still maintaining this provision’s reference to the general harassment regulation found in § 11019(b). First, case law strongly suggests the Council should identify employer threats of deportation as a type of conduct that is likely to satisfy the “severity” prong of a hostile work environment analysis. Additionally relevant are the Title VII decisions in the discovery context that recognize the fear created by employers’ implied or express threats to determine complaining workers’ immigration status—and, thereby, to render them vulnerable to deportation. Second, the potentially harassing nature of English-Only and Other Language Restrictive Rules, especially when applied in an oppressive and unreasonable manner, has been repeatedly recognized by the courts. As discussed at the September 6, 2017, Council hearing during the exchange between Marisa Díaz and Director Kish and councilmembers, an English-only rule that is enforced in an unreasonable or extreme manner could give rise to a hostile work environment claim regardless of whether the underlying English-only rule is lawful or unlawful. In other words, even if an employer imposes a lawful English-only rule, and would therefore not be subject to liability for creating that rule, it could still enforce that rule in such a manner as to create a hostile work environment on the basis of national origin. Accordingly, this section should be amended as follows:

Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) Harassment on the basis of national origin includes but is not limited to:

- (1) Verbal harassment, e.g., epithets, derogatory comments or slurs based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigrants or immigration status, and mockery of a language or its speakers. A single threat of deportation may be sufficiently severe so as to create an unlawful hostile work environment;
- (2) Enforcement of English-only or other language-restrictive rules in an oppressive or unreasonable manner.

Council response: The Council agrees with the comment's sentiment that additional details and examples of harassment in the national origin context would aid the regulations and added language that addressed most of the examples identified in the comments. With respect to "English-only," while the Council agrees that such policies could conceptually contribute to a hostile working environment, it chose to list as nonexclusive examples the more common types of harassment in this context. "English-only" rules are addressed extensively in the section of the regulations addressing discrimination.

Section 11028(k):

Comment: The sentence "such requirements have the foreseeable effect of creating a disparate impact on the basis of national origin," is confusing. Does this sentence create a presumption of disparate impact discrimination? If so, there is no case law or statutory basis for such a presumption. If it doesn't create a presumption, then it is unclear as to the purpose of this sentence. To avoid confusion, we respectfully request the Council to delete it.

Moreover, the burden to demonstrate that the "purpose of the requirements cannot be achieved as effectively through less discriminatory means," should be on the employee. This is consistent with case law and other recent regulations enacted by the Council. See Title 2, California Code of Regulations, Section 11017.1 (g), regarding use of conviction history and placing the burden on the "employee or applicant" to prove a less discriminatory alternative; *Ricci v. DeStefano*, 557 U.S. 557 (2009).

Finally, in the alternative, we request the Council to delete the entire Section. In Title 2, California Code of Regulations, Section 11017(d), it already sets forth that any height and weight standard that discriminates against any classification protected under FEHA shall not be used unless justified by a permissible defense. There is no need to specify a separate section on height and weight restrictions for national origin discrimination as opposed to any other protected classification under FEHA. Doing so only creates confusion.

Council response: The Council agrees with this comment's suggestions of removing the reference to "foreseeable" effects and that the final step of the disparate impact analysis (less discriminatory alternative) is the employee or applicant's burden to prove. The Council made adjustments to the provision accordingly. The Council disagrees with the suggestion of eliminating the provision altogether because height and weight restrictions may have the effect of disparately impacting certain national origin groups in particular. The regulations are consistent with federal law, which similarly references "physical...characteristics of a national origin group" in addressing national origin. See 29 C.F.R. § 1606.1.

Comment: The proposed language for the first sentence is speculative and unnecessary. We suggests the first sentence be struck. Further, as was implemented with recently promulgated regulations for use of criminal background in employment decisions, the employee should bear the burden for proving an adverse impact related to national origin with extrinsic evidence before the employer has an obligation to refute this decision through business necessity with no less discriminatory alternative.

Council response: The Council modified the first sentence of this regulation to remove the reference to “foreseeable” effect. The modified language of the sentence should avoid any confusion regarding the fact that it is the employee or applicant’s burden to prove an adverse impact in this context.

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11027.1:

Comment: We incorporate herein by reference our prior comments from our letter dated September 27, 2017.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

Section 11027.1(c) & 11028(f)(1):

Comment: Section 11027.1(c) seeks to define the phrase “undocumented worker” as that phrase is used in Section 11028(f)(1). We believe use of this wording is problematic. The Immigration and Nationality Act (“INA”) does not define the word “undocumented” as suggested in this regulation. In fact, it is not generally used in the INA. The INA, instead, uses migrant, non-migrant, and alien to define a person’s right to be present or work in the United States. The closest analogy to an “undocumented worker or applicant” in the INA is “illegal alien” – which translates to an “Alien” (an individual who is not a U.S. citizen or U.S. national) who has entered the US without permission and is deportable if apprehended, or an “Alien” who entered the US legally but who has fallen “out of status” (i.e., overstaying a student visa). Because the phrase “undocumented worker” is neither defined in the INA nor broad enough to encompass the entry/presence in the US, these regulations should not include this language. Part of the difficulty with the Council’s suggested language is that the “undocumented” definition is too narrow. For instance, it leaves out other potential protected categories like: Employees with the right to be here (student visa), but suffer harassment or discrimination as unpaid interns or volunteers (no need for a work permit) under Government Code §§ 12940(c) or 12940(j)(1). Also, the FEHA protects persons providing “services” under a contract against harassment. (Gov. Code § 12940(j)(1).) The “services” and “employee” distinction is important because it extends the FEHA’s protections to circumstances outside the traditional employee-employer relationship.

We believe the alternative language of “immigration status” strikes a better balance. It is broad and tracks the language used in Civil Code § 3339, Government Code § 7285, Health & Safety Code § 24000, and Labor Code § 1171.5 (the statutes prohibiting discovery into a person’s immigration status). For sake of clarity and consistency of application and interpretation of language across statutes, we suggest the Council refrain from using the phrasing “undocumented worker.” Based on the above considerations, we suggest either of the two options to better, more clearly, set forth the intentions of the Council.

Option 1: Strike the “undocumented applicant or employee” definition in Section 11027.1(c) in its entirety and modify 11028(f)(1) to read as follows [new verbiage in bold]:

(1) All provisions of the Act and these regulations apply to **all individuals regardless of immigration status**. An employee’s or applicant’s immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

We believe this modification would be the clearest, easiest to understand, option. However, should the Council insist on adding language to 11027.1(c) to reflect a definition, we suggest the Council approach the issue as follows:

Option 2: Modify Section 11027.1(c) and keep 11028(f) (1) as currently proposed:

(c) “Undocumented applicant or employee” means an applicant or employee who lacks legal authorization under federal law to be present and/or work in the United States.

Council response: The Council incorporated the language suggested in Option 2 of the comment in to the definition as provided in Section 11027.1(c).

Section 11028(a):

Comment: Section 11028(a) is intended to implement the provisions of Government Code § 12951. However, the phrasing used by the Council differs from the language of the statute. Section 12951 consistently refers to “language restriction” when describing the potentially offending issue. However, the proposed regulations consistently replace “language restriction” with the word “policy.” While there may not appear to be meaningful difference between the two phrases – indeed, a “language restriction” will likely most always be technically considered a “policy” – this difference in language does not seem to be motivated by any actual reason other than to use a different descriptive word. Normally, this would not be a major concern. As litigators, however, we have seen plenty of circumstances where cases have been derailed – and justice delayed and/or denied – due to confusion over differences in language such as this. For sake of clarity, we request the Council swap out “policy” in favor of “language restriction” wherever used in Sections 11028(a)(1)(A)&(B), (a)(2)(A)&(B), and (a)(3).

Council response: The Council agrees with this recommendation, and has used “language restriction” instead of “policy” in the suggested provisions.

Section 11028(a)(4):

Comment: The proposed regulations state that English-only rules “are never lawful” during an employee’s non-work time. This ban seems inconsistent with an employer’s ongoing obligation to eliminate harassment in the workplace, even during non-work time. Accordingly, why would

the Council want to absolutely eliminate a potential tool to eradicate harassment in the workplace? If, similar to *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (1993), employees were making derogatory, sexual, or otherwise inappropriate comments in another language to other employees during a meal break, an employer should be allowed to eradicate that behavior, including mandating English-only rules while in the workplace: Government Code Section 12951 already requires an employer to justify an English-only rule by proving it's a business necessity, which is a difficult burden to satisfy. So, it is unnecessary and potentially harmful to absolutely preclude an employer from utilizing an English-only rule while in the workplace, even during non-work time, when justified. Furthermore, Section 11028(a)(4) states "English-only rules are never lawful during an employee's nonwork time, etc." Nothing within Government Code Section 12951 even remotely suggests such a proposal was intended by the statute. In fact, Section 12951 appears to contradict the basis of this proposal as it says any language restriction must be justified by a business necessity. Notably, even the EEOC Guidance does not go so far. Rather, it simply states that such policies requiring English at all times are "presumptively unlawful."

Council response: The Council disagrees with the portion of this comment encouraging the Council to incorporate similar regulations for English-only rules as the EEOC Guidance provides. FEHA specifically addresses the unlawfulness of English-only rules in Cal. Gov't. Code § 12951. The EEOC Guidance addresses this topic through the lens of a disparate impact and/or intent doctrine exclusively, since Title VII does not contain a provision similar to the FEHA. With respect to an "employee's nonwork time," the regulatory language in Section 11028(a)(4) addressing nonworking hours is consistent with FEHA, supported by applicable case law and will aid clarity and compliance in this area. No comments provided to the Council cited a case in which an English-only policy applied to an employee's nonworking time was deemed lawful, even under the Title VII, which is less protective than the FEHA in this area. In fact, the applicable cases including those identified by this commenter and others lend further support for the regulatory language. *See e.g. Maldonado v. City of Altus* (10th Cir. 2006) 433 F.3d 1294, 1307 *overruled on other grounds in Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F.3d 1164, 1171 n.2 ("Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction."); *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F. 1480, 1483 (policy in question included: "During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish."). Thus, the rationales provided in the federal cases addressing Title VII are even more persuasive in the FEHA context, given the FEHA's stricter scrutiny of English-only policies. Moreover, any attempted restrictions of language during nonworking hours may well create a wage and hour violation under state law, given California's focus on employer control as the determining factor in the compensability analysis. *See e.g. Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 265 (during breaks, "employers must 'relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time.'") *quoting Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

The Council frequently fields requests from employers and employer organizations requesting bright line rules that are clear and easy to follow. While there may be a tension

between the clarity such rules provide and the flexibility less bright line rules allow for, this is an instance where the clarity provided by a bright line is warranted. The Council is not aware of any circumstances where an “English-only” rule during nonworking hours would be allowable under FEHA and any extremely remote hypotheticals attempting to justify an “English-only” rule during nonworking hours would likely lead an employer to commit state wage and hour violations.

Sections 11028(e) and (f)(4):

Comment: We believe these two sections are repetitive and, therefore, one is unnecessary. Both address retaliation and section 11028(f) actually refers back to section 11028(e). It seems that section 11028(e) is more comprehensive and sufficient to address retaliation. Accordingly, we respectfully request the deletion of section 11028(f)(4).

Council response: The Council removed the detailed provisions addressing retaliation from Subsection 11028(f) in response to other comments, but believes the (f)(4) provision in Section 11028 and the cross reference contained within it was important to maintain in 11028(f) for clarity in light of the specific immigration-related substance addressed in the provision.

Section 11028(h):

Comment: We request the Council insert the phrase “or retaliation” at the end of the first line, after “discrimination” and “or retaliating” in the middle of the second line after the word “discriminating.” This request is to ensure the clarity of the section and ensure that the reader understands that it is unlawful to retaliate in the circumstances described.

Council response: The Council declines to include the reference to retaliation in this section because it believes it may invite confusion. While it is conceptually true that a citizenship requirement implemented in response to an applicant or employee’s engagement in protected activity would be unlawful, the Council believes such requirements much more often implicate discrimination concerns rather than concerns regarding retaliation. Retaliation is addressed extensively in a separate section.

Section 11028(j):

Comment: We appreciate the effort to expand the explanation of harassment in these regulations and welcome the additional proposed language. We have four suggestions for additional modifications:

1. Incorporate a reference to Section 11034(f)(2) in order to ensure the inclusion of the concept that offending conduct is behavior that “unreasonably interferes with an employee’s work performance” as that concept is not clearly described in the proposed language;
2. Add language to the list of examples to ensure that offending conduct need not be only verbal; nonverbal conduct can also be considered harassing, depending on the circumstances;
3. Add “an accent or” after “mockery of” at the end of the fourth line; and

4. Change “and” to “or” immediately preceding “mockery” on the fourth line.

Council response: The Council ultimately agrees with each of these four recommendations and modified the section accordingly.

Comment: The regulations refer both to actions creating an "abusive working environment" and a "hostile work environment." For consistency and clarity, we believe both references should be to a "hostile work environment." This terminology has a specific definition under the regulatory scheme and legal interpretation, which "abusive work environment" does not have.

Council response: The Council declines to make the requested change because the terms are used together and interchangeably in recitations of the legal standard for harassment. *See e.g. Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th. 264, 277 (defining harassment to include “the creation of a work environment that is hostile or abusive”); *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 66 (same).

Comment: We encourage the Council to add language to proposed Section 11028(j) that expressly alludes to the well-recognized potential of English-only or other language-restrictive rules to constitute unlawful harassment. Aside from the authorities we noted in our previous letter, the U.S. Equal Employment Opportunity Commission just last year reaffirmed its longstanding regulatory acknowledgement that English-only rules may be conducive to hostile working environments. See EEOC Enforcement Guidance on National Origin Discrimination, Nov. 18, 2016, at V.C.3. (referencing 29 C.F.R. § 1606.7(a), and noting that a speak-English-only rule “is likely in itself to ‘create an atmosphere of inferiority, isolation, and intimidation that constitutes a ‘discriminatory working environment.’”). And the judicial authorities we previously cited are not alone in making the connection between such rules and workplace environments hostile to national origin minority employees.

Council response: The Council inserted additional details and examples of harassment in the national origin context to make the regulations clearer and added language that addressed most of the examples identified in prior comments from this commenter. With respect to “English-only,” while the Council agrees that such policies could conceptually contribute to a hostile working environment, it chose to list as nonexclusive examples the more common types of harassment in this context. “English-only” rules are addressed extensively in the section of the regulations addressing discrimination.

COMMENTS RECEIVED DURING THE THIRD 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11028(a)(4):

Comment: During the hearing on December 11, 2017, members of the Council indicated that proposed Section 11028(a)(4) that deems any English-only rule during non-working hours as unlawful is based in part, upon Labor Code section 96(k) and Section 98.6. We believe that the

reliance on these sections as authority for such a broad prohibition is misplaced. Labor Code Section 96(k) provides authority for the Labor Commissioner to file claims on behalf of an employee for demotion, suspension, or discharge from employment for lawful conduct “occurring during nonworking hours **away from the employer’s premises.**” (emphasis added). Labor Code Section 98.6 prohibits discrimination, retaliation, or any adverse employment action because of the applicant’s exercise of rights under the Labor Code, including Section 96(k). Case law interpreting these two sections have provided further clarification regarding the meaning of “lawful conduct” and the “rights” protected. In applying the plain language of Sections 96(k) and 98.6, as well as the limitations of these sections as set forth in the referenced case law above, we do not believe there is sufficient authority for Section 11028 (a)(4) that proposes to deem English-only rules during non-working hours as unlawful, regardless of whether the employee is on or off the employer’s premises.

First, Section 96(k) only protects lawful conduct that occurs “away from the employer’s premises.” Proposed Section 11028(a)(4), does not make such a distinction. Rather, it simply states that an English-only rule is never lawful during non-working hours such as breaks, lunch, or unpaid employer-sponsored events. Notably, any of these examples may occur on the employer’s premises, and therefore, the plain language of Section 96(k) does not provide authority for such a broad prohibition.

Second, based upon the court’s holding in *Barbee v. Household Automotive Finance Corp.*, 113 Cal.App.4th 525 (2003), only constitutionally protected lawful conduct is covered by Section 96(k). Freedom of speech is a constitutionally protected right, however, as set forth in *Grinzi v. San Diego Hospice Corp.*, 120 Cal.App.4th 72 (2004), it is not applicable to private employers. Accordingly, there is no authority for Section 11028(a)(4) to deem any English-only rule during non-working hours in a private employer’s workplace as unlawful.

Third, based upon the court’s holding in *Grinzi, supra*, Section 98.6 only protects any rights set forth in the Labor Code. We are not aware of any right or restriction set forth in the Labor Code that prohibits an employer from establishing language policies within the workplace. Accordingly, Section 98.6 does not provide authority for such a broad ban as proposed in Section 11028(a)(4).

Finally, as set forth in our prior comments, California Government Code Section 12951 does not distinguish between “work hours” vs. “non-work hours.” It simply applies to the “workplace” in general. Accordingly, we do not believe there is any authority to treat an English-only rule during non-working hours in the workplace any different than English-only rules that apply during working hours. Therefore, we respectfully request the Council to strike the sentence in proposed Section 11028(a)(4) that states “English-only rules are never lawful during an employee’s non-work time, e.g. breaks, lunch, unpaid employer-sponsored events, etc.”

Council response: The Council agrees with this comment that Labor Code Sections 96(k) and 98.6 do not provide direct support for the regulation in question, though they are indicative of heightened state scrutiny of employer efforts to control employees’ behavior during nonworking hours. However, the Council believes the regulatory language in Section 11028(a)(4) addressing nonworking hours is consistent with FEHA, supported by applicable case law and will aid clarity and compliance in this area. No comments provided to the Council cited a case in which an English-only policy applied to an employee’s nonworking time was deemed

lawful, even under the Title VII, which is less protective than the FEHA in this area. In fact, the applicable cases including those identified by this commenter and others lend further support for the regulatory language. *See e.g. Maldonado v. City of Altus* (10th Cir. 2006) 433 F.3d 1294, 1307 *overruled on other grounds in Metzler v. Federal Home Loan Bank of Topeka* (10th Cir. 2006) 464 F.3d 1164, 1171 n.2 (“Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction.”); *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F. 1480, 1483 (policy in question included: “During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish.”). Thus, the rationales provided in the federal cases addressing Title VII are even more persuasive in the FEHA context, given the FEHA’s stricter scrutiny of English-only policies. Moreover, any attempted restrictions of language during nonworking hours may well create a wage and hour violation under state law, given California’s focus on employer control as the determining factor in the compensability analysis. *See e.g. Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 265 (during breaks, “employers must ‘relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time.’”) *quoting Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

The Council frequently fields requests from employers and employer organizations requesting bright line rules that are clear and easy to follow. While there may be a tension between the clarity such rules provide and the flexibility less bright line rules allow for, this is an instance where the clarity provided by a bright line is warranted. The Council is not aware of any circumstances where an “English-only” rule during nonworking hours would be allowable under FEHA and any extremely remote hypotheticals attempting to justify an “English-only” rule during nonworking hours would likely lead an employer to commit state wage and hour violations.

PUBLIC HEARING COMMENTS MADE JULY 17, 2017 [Government Code Section 11346.9(a)(3)].

Marisa Diaz of Legal Aid at Work, Noah Lebowitz of the California Employment Lawyers Association, Joan Harrington of the Bay Area Employment Law Office, and Raven Sarnoff of Sarnoff & Sarnoff commented on the text originally noticed to the public. Ms. Diaz and Mr. Lebowitz submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above. Ms. Harrington requested that the Council make clear that these regulations are to be considered retroactive, a recommendation that the Council declines to follow due to a lack of authority and existence of established law on the topic of retroactivity. Ms. Sarnoff commented that the definition of “employer” in section 11008 of the regulations is incomplete, a recommendation that the Council declines to address since it is not part of the rulemaking at issue.

PUBLIC HEARING COMMENTS MADE SEPTEMBER 6, 2017 [Government Code Section 11346.9(a)(3)].

Marisa Diaz of Legal Aid at Work commented on the text noticed for the first 15-day comment period. She submitted written comments that included all of her oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE OCTOBER 30, 2017 [Government Code Section 11346.9(a)(3)].

Noah Lebowitz of the California Employment Lawyers Association commented on the text noticed for the second 15-day comment period. He submitted written comments that included all of his oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE DECEMBER 11, 2017 [Government Code Section 11346.9(a)(3)].

Jennifer Barrera of the California Chamber of Commerce commented on the text noticed for the third 15-day comment period. She submitted written comments that included all of her oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE APRIL 4, 2018 [Government Code Section 11346.9(a)(3)].

No one commented at this meeting. There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council voted 5-1 to submit this draft to the Office of Administrative Law as the final version of the regulations.