

**Draft Proposed Amendments to the Fair Employment and Housing Act Regulations****Article 1. General Matters****§ ~~11005.1.~~ 10500. Department of Fair Employment and Housing - Conflict of Interest Code.**

The Political Reform Act, (Gov. Code, § 81000 et seq.) requires state and local government agencies to adopt and promulgate conflict of interest codes. The Fair Political Practices Commission has adopted a regulation (Cal. Code Regs., tit. 2, § 18730), which contains the terms of a standard conflict of interest code, which can be incorporated by reference in an agency's code. After public notice and hearing, the standard code may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act. Therefore, the terms of California Code of Regulations, title 2, section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission, are hereby incorporated by reference. This regulation, and the attached Appendices designating positions and establishing disclosure requirements, shall constitute the conflict of interest code of the Department of Fair Employment and Housing.

Individuals holding designated positions shall file their statements with the Department of Fair Employment and Housing, which will make the statements available for public inspection and reproduction. (Gov. Code, § 81008). Upon receipt of the statement of the Director, the Department of Fair Employment and Housing will make and retain a copy and forward the original of the statements to the Fair Political Practices Commission.

**Appendix A**

<i>Designated Positions</i>	<i>Disclosure Category</i>
Accountant and Accounting Officer, all levels	2
Administrator, FEH, all levels	1
Associate Information Systems Analyst (Specialist)	3
Associate Programmer Analyst (Specialist)	3
Business Service Assistant (Specialist), all types	2
CEA, all levels	1
Chief Deputy Director, DFEH	1
Consultant	*
Data Processing Manager, all levels	3
Deputy Director	1

Director	1
FEH Consultant, all ranges	1
Legal Counsel, all levels and types	1
Legal Analyst	1
Legal Assistant	1
Senior Legal Analyst	1
Senior Programmer Analyst (Specialist)	3
Staff Information Systems Analyst (Supervisor)	3
Staff Programmer Analyst (Specialist)	3
Staff Services Analyst	2
Staff Services Manager, all levels and types	2

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\* Consultants shall be included in the list of designated positions and shall disclose pursuant to the Disclosure Requirements in this conflict of interest code subject to the following limitation: The Director may determine in writing that a particular consultant, although holding a designated position, is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements described in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Director's determination is a public record and shall be retained for public inspection in the same manner and location as this conflict of interest code.

## **Appendix B**

### *Disclosure Requirements*

#### *Disclosure Category 1*

Individuals holding positions assigned to Disclosure Category 1 must report interests in real property located within the State of California; investment and business positions in business entities, and income, including loans, gifts, and travel payments, from all sources.

#### *Disclosure Category 2*

Individuals holding designated positions in Disclosure Category 2 must report investments and business positions in business entities, and income, including gifts, loans, and travel payments,

from sources, of the type to provide services, supplies, materials, or equipment to the Department. Such services include, but are not limited to, legal recording/reporting services.

### *Disclosure Category 3*

Individuals holding designated positions in Disclosure Category 3 must report investments and business positions in business entities, and income, including gifts, loans, and travel payments, from sources, of the type to provide information technology or telecommunication services, goods, or supplies, including, but not limited to, software, hardware, or data retrieval and security services.

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

### **§ 11006. Statement of Policy and Purpose.**

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

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

### **§ 11009. Principles of Employment Discrimination.**

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

(b) Liability of Employers. In view of the common law theory of *respondeat superior* and its codification in California Civil Code section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in section

11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, the applicant or employee has suffered a loss of or has been denied an employment benefit.

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination alleged under Government Code section 12940, subdivision (a).

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act.

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

## **Article 2. Particular Employment Practices**

### **§ 11019. Terms, Conditions and Privileges of Employment.**

(a) Fringe Benefits. (Reserved.)

(b) Harassment.

(1) Harassment includes but is not limited to:

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

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

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

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

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

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

(3) Harassment of an applicant or employee by an employee other than those listed in subsection (b)(2) above is unlawful if the employer or other covered entity, its agents or supervisors knows of such conduct and fails to take immediate and appropriate corrective action. Proof of such knowledge may be direct or circumstantial. If the employer or other covered entity, its agents or supervisors did not know but should have known of the harassment, knowledge shall be imputed unless the employer or other covered entity can establish that it took reasonable steps to prevent harassment from occurring. Such steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned.

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

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

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

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

(e) Seniority. (Reserved.)

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

### **§11023: Harassment and Discrimination Prevention and Correction**

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

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

(2) A private cause of action under Government Code section 12940(k) is dependent upon a claim of actual discrimination, i.e. an employer should not be held liable for a failure to take steps to prevent discriminatory conduct unless the actions that were not prevented actually took place.

(3) However, in a civil action brought by the Department, the Department may seek non-monetary remedies against an employer for violation of Government Code section 12940(k), i.e. an employer may be held liable for a failure to take steps to prevent discriminatory conduct even if discriminatory actions did not actually take place.

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

(1) Is in writing;

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

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

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

(A) A timely response;

(B) Impartial and timely investigations by qualified personnel;

(C) Documentation and tracking for reasonable progress;

- (D) Appropriate options for remedial actions and resolutions; and
- (E) Timely closures.
- (5) Provides a complaint mechanism free of the obligation to complain directly to the employee's supervisor, including, but not limited to, the following:
  - (A) Direct communication, either orally or in writing, with a designated company representative such as a human resources manager or EEO officer;
  - (B) A complaint hotline;
  - (C) Access to an ombudsperson; and/or
  - (D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.
- (6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training, pursuant to section 11024 of these regulations.
- (7) Indicates that when a valid complaint is lodged, the employer will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
- (8) States that confidentiality will be kept to the extent possible, but not indicate that the investigation will be completely confidential.
- (9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.
- (10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.
  - (c) Dissemination of the policy shall include one or more of the following methods:
    - (1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;
    - (2) Sending the policy via e-mail with an acknowledgment return form;
    - (3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;
    - (4) Discussing policies upon hire and/or during a new hire orientation session; and/or
    - (5) Any other way that ensures employees receive and understand the policies.
  - (d) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their primary language shall translate the notice into every language that is spoken by at least 10 percent of the workforce.

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

**§ ~~11023~~11024. Sexual Harassment Training and Education.**

- (a) Definitions. For purposes of this section:

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

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

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

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

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

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

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

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

(4) "Employer" means any of the following:

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

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

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

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

(7) “New” supervisory employees are employees promoted or hired to a supervisory position after ~~July 1, 2005~~ the date the employer last provided sexual harassment prevention training.

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

(9) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a combination of training and experience have the ability to train supervisors about the following: 1) ~~what are unlawful harassment, discrimination and retaliation under both California and federal law; how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law;~~ 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) supervisors’ obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware ~~45) how to respond to a harassment complaint; 56) the employer's obligation to conduct a workplace investigation of a harassment complaint; 67) what constitutes retaliation and how to prevent it; 78) essential components of an anti-harassment policy; and 89) the effect of harassment on harassed employees, co-workers, harassers and employers.~~

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

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

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

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

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



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

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

(b) Training.

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

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

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

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

(3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.

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

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

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

(c) Objectives and Content.

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

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

(~~4~~A) A definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964. In addition to a definition of sexual harassment, an employer may provide a definition of and train about other forms of harassment covered by the FEHA, as specified at Government Code section 12940(j), and discuss how harassment of an employee can cover more than one basis.

(~~2~~B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

(~~3~~C) The types of conduct that constitutes sexual harassment.

(~~4~~D) Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.

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

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

(~~6~~G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(~~7~~H) The limited confidentiality of the complaint process.

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

(~~9~~J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an~~The~~ employer's obligation to conduct an effective workplace investigation of a harassment complaint.

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

(~~11~~L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer's policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer's policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

(d) Remedies.

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

(e) Compliance with section 12950.1 prior to effective date of Council regulations.

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

(f) The Department of Fair Employment and Housing shall certify sexual harassment prevention training providers who wish to be certified for the purpose of providing training pursuant to Government Code section 12950.1. Any sexual harassment prevention training provider who makes training or training materials available for compensation may apply for certification from the Department. The Department shall issue a certificate to each sexual harassment prevention training provider upon certification. The term of certification shall be for a period of one year from the date of issue unless canceled, suspended, or revoked by the Department. The certificate may be renewed annually.

(1) Any sexual harassment prevention trainer or educator who provides instruction for purposes of Government Code section 12950.1 and seeks certification by the Department must meet the requirements set forth in section 11024(a)(9) of this section.

(2) The Department shall review all sexual harassment prevention training materials before issuing a certification. No sexual harassment prevention training materials may be used by a certified provider without being approved by the Department. In order to be approved and certified by the Department, training materials must include the minimum requirements set forth in 11024(c)(2) this section.

(3) On its Web site, the Department will post application materials and a fee schedule. Additionally, the Department will publish a referral list of all certified sexual harassment training providers on its Web site and transmit that list to each superior court in the state, including each court's alternative dispute resolution administrator, in sufficient quantity to allow the courts to provide a copy to each person referred to sexual harassment prevention training.

(A) The list shall include the name, business address, business telephone number, internet Web site address, e-mail address, and certificate number of each sexual harassment prevention training provider certified by the Department.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926(e), 12940(j)(5), 12950 and 12950.1, Government Code.

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

## **Article 65. Sex Discrimination**

### **§ 11029. General Prohibition against ~~Against~~ Discrimination on the Basis of Sex.**

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

(b) Statement of Purpose. The purpose of the law against discrimination in employment because of sex is to eliminate the means by which individuals of the female sex have historically been relegated to inferior jobs, or subject to conduct of a sexual nature, thus subjecting them to

abusive work environments, and to guarantee that in the future both sexes will enjoy equal employment benefits.

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

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

### **§ 11030. Definitions.**

(a) ~~“Sex:” An applicant's or employee's gender; however, nothing herein shall limit protections due an individual on account of pregnancy, childbirth, or related medical conditions.~~ has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy, childbirth, medical conditions related to pregnancy or childbirth, breast feeding, and gender.

(b) “Gender identity” means a person's identification as male or female, which may or may not correspond to the person's anatomical sex at birth.

(c) “Transgender” is a general term that refers to a person whose gender identity differs from the person’s anatomical sex at birth. A transgender person may or may not express a gender different from the social expectations of the sex assigned at birth.

(d) “Transexual” may refer to a person whose gender identity differs from the person’s anatomical sex at birth and who may have changed physical characteristics, usually by surgery or hormone treatment, to align with a gender different from the person’s anatomical sex at birth.

(~~e~~) “Sex Stereotype-” means aAn assumption about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's gender or sex.

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

### **§ 11031. Defenses.**

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

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

- (1) A correlation between individuals of one sex and physical agility or strength;
- (2) A correlation between individuals of one sex and height;
- (3) Customer preference for employees of one sex;
- (4) The necessity for providing separate facilities for one sex; or
- (5) The fact that members of one sex have traditionally been hired to perform the particular type of job.

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

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

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

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

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

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

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

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

(a) Compensation.

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

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

(b) Fringe Benefits.

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

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

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

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

(c) Lines of Progression.

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Working Conditions.

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

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

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

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

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

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) ~~Interpersonal Conduct and Appearance~~ Sexual Harassment.

~~(4)~~ Sexual harassment is unlawful as defined in section ~~110911019~~(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment.

Sexually harassing conduct may be either "quid pro quo" or "hostile work environment" sexual harassment:

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

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

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

(B) A person may allege harassment even though the offensive conduct has not been directed at him or her, regardless of the gender or sexual orientation of the perpetrator.

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

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

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

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

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

(2g) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921 and 12940, Government Code; *Meritor Savings Bank v Vinson* (1986) 477 US 57, 67-68; *Harris v Forklift Systems* (1993) 510 US 17, 23; *Faragher v. City of Boca Raton* (1998) 524 US 775, 787-788; *Lyle v Warner Bros.* (2006) 38 Cal.4th 264, 273; *Fisher v San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 608; *Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446.

## **Article 6A. ~~Sex Discrimination~~: Pregnancy, Childbirth or Related Medical Conditions**

### **§ 11035. Definitions.**

The following definitions apply only to this article:

(a) “Affected by pregnancy” means that because of pregnancy, childbirth, or a related medical condition, or “a condition related to pregnancy, childbirth, or a related medical

condition,” as set forth in Government Code section 12945, it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.

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

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

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

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

(f) A woman is “disabled by pregnancy” if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons. An employee also may be considered to be disabled by pregnancy if, in the opinion of her health care provider, she is suffering from severe morning sickness or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth, loss or end of pregnancy. The preceding list of conditions is intended to be non-exclusive and illustrative only.

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

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

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

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



(k) "FMLA" means the federal Family and Medical Leave Act of 1993, ~~29 U.S.C. § 2601, et seq., and its implementing regulations, 29 Code of Federal Regulations, part 825.~~ "FMLA leave" means family care or medical leave taken pursuant to FMLA. ~~(29 C.F.R. § 825.)~~

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

(m) "Group health plan" means medical coverage provided by the employer for its employees, as defined, as of ~~the effective date of these regulations (December 30, 2012), in the Internal Revenue Code of 1986 at section 5000(b)(1).~~

(n) "Health care provider" means:

(1) A medical or osteopathic doctor, physician, or surgeon, licensed in California, or in another state or country, who directly treats or supervises the treatment of the applicant's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

(2) A marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations, including nurse practitioners, nurse midwives, licensed midwives, clinical psychologists, clinical social workers, chiropractors, physician assistants, who directly treats or supervises the treatment of the applicant's or employee's pregnancy, childbirth or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in Government Code section 12945, or

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

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

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

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

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

(s) "Reasonable accommodation" of an employee affected by pregnancy is any change in the work environment or in the way a job is customarily done that is effective in enabling an

employee to perform the essential functions of a job. Reasonable accommodation may include, but is not limited to an employer:

- (1) modifying work practices or policies;
- (2) modifying work duties;
- (3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);
- (4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices; or
- (5) providing a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code section 1030 et seq.

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

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

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

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

### **§ 11036. Prohibition ~~Against~~ against Harassment.**

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

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

### **§ 11039. Responsibilities of Employers.**

- (a) Employer Obligations
  - (1) Except as excused by a permissible defense, it is unlawful for any employer to:
    - (A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;
    - (B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;
    - (C) refuse to promote an employee because of pregnancy or perceived pregnancy;
    - (D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

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

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

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

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

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

(J) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any practice that is prohibited on the basis of sex.

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

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

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

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

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

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

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

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

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12945, Government Code; Pregnancy Discrimination Act of 1978 (P.L. 95-555, 42 U.S.C. §2000e, §701(k)), an amendment to Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.); *Cal. Federal Sav. and Loan Ass'n v. Guerra* 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

#### **§ 11040. Reasonable Accommodation.**

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

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

(2) The requested accommodation is reasonable.

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

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

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

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

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

#### **§ 11041. Transfer.**

##### **(a) Transfer - All Employers**

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

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

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

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

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

##### **(b) Burden of Proof**

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

##### **(c) Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule**

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

(d) Right to Reinstatement ~~After~~ after Transfer

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

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

**§ 11042. Pregnancy Disability Leave.**

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

(a) Four-Month Leave Requirement for all Employers

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

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

(2) “Four months” means time off for the number of days or hours the employee would normally work within four calendar months. ~~For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro-rata or proportional basis.~~

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

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

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

~~(C) If a holiday falls within a week taken as pregnancy disability leave, the week is nevertheless counted as a week of pregnancy disability leave. If, however, the employer's~~

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

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

(A) For example, an employee who commences pregnancy disability leave on January 1 would be expected to return to work on May 1. a full-time employee, who normally works a 40-hour work week is entitled to 693 working hours of leave. If that employee takes 180 hours of intermittent leave throughout her pregnancy, she would still be entitled to take 513 hours, or approximately three months leading up to and after her childbirth.

(B) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of pregnancy disability leave) in a four-month period, a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave (including any hours for which the employee took leave of any type) would be used for calculating the employee's pregnancy disability leave entitlement. In contrast, a part-time employee who normally works 20 hours per week, would be entitled to 346.5 hours of leave. If that employee takes intermittent leave of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of leave, approximately two months of leave, leading up to and after her childbirth.

(4) Intermittent leave or a reduced-work-schedule leave

(A) Minimum Duration

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

(B) Although all pregnant employees are eligible for up to four months of disability leave if that leave is taken in one continuous period of time, taking an intermittent leave or a reduced work schedule will affect the amount of time remaining of the four month total allotment.

(C) For the purposes of quantifying the amount of intermittent leave or a reduced-work-schedule leave to which an eligible employee is entitled, "four months" is calculated on a pro rata or proportional basis, based on four months equaling 17 1/3 weeks (one-third of a year). For example, for a full-time employee who works 40 hours per week, "four months" means 693 hours or leave entitlement, based on 40 hours per week times 17 1/3 weeks.

(D) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the four months of leave to which the employee is entitled. For example, if an employee needs to be on bed rest that requires an absence from work of two hours a week, only those two hours may be charged against the

employee's pregnancy disability leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

(5) If a holiday falls within a week taken as pregnancy disability leave, the week is nevertheless counted as a week of pregnancy disability leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks (i.e. a school closing for two weeks for Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's pregnancy disability leave entitlement. Similarly, if an employee uses pregnancy disability leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's pregnancy disability leave entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

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

(b) Employers ~~w~~With More Generous Leave Policies

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

(c) Denial of Leave is an Unlawful Employment Practice

It is an unlawful employment practice for an employer to refuse to grant pregnancy disability leave to an employee disabled by pregnancy, who satisfies the leave request requirements stated in Government Code section 12945.

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

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

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

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

### **§ 11043. Right to Reinstatement from Pregnancy Disability Leave.**

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

(a) Guarantee of Reinstatement

An employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 11043(c)(1), to a comparable position, and the employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the

refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

(b) Refusal to Reinstatement

(1) Definite Date of Reinstatement

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

(2) Change in Date of Reinstatement

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

(c) Permissible Defenses - Employment Would Have Ceased

(1) Right to Reinstatement to the Same Position

An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than those rights she would have had if she had been continuously at work during the pregnancy disability leave or transfer period. This is true even if the employer has given the employee a written guarantee of reinstatement.

A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

(2) Right to Reinstatement to a Comparable Position

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

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

(B) There is no comparable position available.

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

2. An employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or



email, or by links to postings on the company's ~~website~~ Web site if there is a section for job openings.

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

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

(d) Right to Reinstatement to Job if Additional Leave Taken Following End of Pregnancy Disability Leave; Equal Treatment

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

(e) Right to Reinstatement to Job if CFRA Leave is Taken Following Pregnancy Disability Leave

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

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945, Government Code; FMLA, 29 U.S.C. § 2601, et seq. and FMLA regulations, 29 C.F.R. § 825; *Cal. Federal Sav. and Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [107 S.Ct. 683, 93 L.Ed.2d 613].

#### **§ 11044. Terms of Pregnancy Disability Leave.**

(a) Paid Leave

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

(b) Accrued Time Off

(1) Sick Leave

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

(2) Vacation Time and Other Accrued Time Off

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

(c) Continuation of Group Health Coverage

~~(1) An employer shall maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period, beginning on the date the pregnancy disability leave begins. Government Code section 12945 requires employers to maintain and pay for coverage at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the not taken pregnancy disability leave.~~

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

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

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

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

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

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

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

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

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

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

(d) Other Benefits and Seniority Accrual

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

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

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

(e) Employee Status

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

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

**§ 11045. Relationship ~~Between~~between Pregnancy Leave and FMLA Leave.**

(a) A Pregnancy Leave May Also Be a FMLA Leave

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

(b) FMLA Coverage

For more information on rights and obligations under FMLA, consult the FMLA regulations regarding family care and medical leave (~~29 C.F.R. § 825~~).

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

**§ 11046. Relationship ~~Between~~between CFRA and Pregnancy Leaves.**

(a) Separate and Distinct Entitlements

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

(b) Serious Health Condition - Pregnancy

An employee's own disability due to pregnancy, childbirth or related medical conditions is not a serious health condition under CFRA.

(c) CFRA Leave after Pregnancy Disability Leave

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

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

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

(d) Maximum Entitlement

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

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

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

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

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

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

(a) Employers to Provide Reasonable Advance Notice Advising Employees Affected by Pregnancy of Their FEHA Rights and Obligations

An employer shall give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth or related medical conditions as set forth

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

(b) Content of Employer's Reasonable Advance Notice

An employer shall provide its employees with information about:

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

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

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

(c) Consequences of Employer Notice Requirement

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

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

(d) Distribution of Notices

(1) Employers shall post and keep posted the appropriate notice in a conspicuous place or places where employees congregate. Electronic posting is sufficient to meet this posting requirement as long as it ~~otherwise meets the requirements of this section~~ is posted electronically in a conspicuous place or places where employees would tend to view it in the workplace.

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

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

(4) Non-English Speaking Workforce

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

(e) Notice A

Notice A or its equivalent is for employers with less than 50 employees and who are therefore not subject to CFRA or FMLA. An employer may provide a leave policy that is more generous than that required by FEHA if that more generous policy is provided to all similarly situated disabled employees. An employer may develop its own notice or it may choose to use the text provided in section 11051(a), ~~below~~, unless it does not accurately reflect its own policy.

(f) Notice B

Notice B or its equivalent is for employers with 50 or more employees who are subject to CFRA or FMLA. Notice B combines notice of both an employee's rights regarding pregnancy and CFRA leave rights and satisfies the notice obligations of both this article and section 11095 of the regulations. An employer may develop its own notice or it may choose to use the text provided in section 11051(b), ~~below~~, unless it does not accurately reflect its own policy.

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

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

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

(a) Adequate Advance Notice

(1) Verbal or Written Notice

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

(2) 30 Days Advance Notice

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

(3) When 30 Days Is Not Practicable

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

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

An employer shall not deny reasonable accommodation, transfer, or pregnancy disability leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide adequate advance notice of the need for the reasonable accommodation, transfer, or leave.

(5) Employer Response to Reasonable Accommodation, Transfer, or Pregnancy Disability Leave Request

The employer shall respond to the reasonable accommodation, transfer, or pregnancy disability leave request as soon as practicable, and, in any event no later than ~~ten~~ 10 calendar days after receiving the request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(6) Consequences for Employee Who Fails to Give Employer Adequate Advance Notice of Need for Reasonable Accommodation or Transfer

If an employee fails to give timely advance notice when the need for reasonable accommodation or transfer is foreseeable, the employer may delay the reasonable accommodation or transfer until 30 days after the date the employee provides notice to the employer of the need for the reasonable accommodation or transfer. However, under no circumstances may the employer delay the granting of an employee's reasonable accommodation or transfer if to do so would endanger the employee's health, her pregnancy, or the health of her co-workers.

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

(b) Medical Certification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Failure to Provide Medical Certification

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

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



(d) Release to Return to Work

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

(e) Medical Certification Form

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

FAIR EMPLOYMENT & HOUSING ~~COMMISSION~~COUNCIL

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

Employee's Name: \_\_\_\_\_

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

Time off for medical appointments.

Specify when and for what duration:

\_\_\_\_\_  
\_\_\_\_\_

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

Beginning (Estimate): \_\_\_\_\_

Ending (Estimate): \_\_\_\_\_

Intermittent leave. Specify medically advisable intermittent leave schedule:

\_\_\_\_\_  
\_\_\_\_\_

Beginning (Estimate): \_\_\_\_\_

Ending (Estimate): \_\_\_\_\_

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

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Beginning (Estimate): \_\_\_\_\_

Ending (Estimate): \_\_\_\_\_

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

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Beginning (Estimate): \_\_\_\_\_

Ending (Estimate): \_\_\_\_\_

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

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Beginning (Estimate): \_\_\_\_\_

Ending (Estimate): \_\_\_\_\_

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

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Signature of health care provider:

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Date:

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

**§ 11051. Employer Notices.**

(a) "Notice A"

**YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE**

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

- California law protects employees against discrimination or harassment because of an employee's pregnancy, childbirth or any related medical condition (referred to below as "because of pregnancy"). California also law prohibits employers from denying or interfering with an employee's pregnancy-related employment rights.
- Your employer has an obligation to:
  - reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);
  - transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and
  - provide you with pregnancy disability leave (PDL) of up to four months ~~(the working days you normally would work in one third of a year or 17 1/3 weeks)~~ and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.
  - provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in the Labor Code ~~section 1030, et seq.~~

- For pregnancy disability leave:

- PDL is not for an automatic period of time, but for the period of time that you are disabled by pregnancy. Your health care provider determines how much time you will need.

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

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

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

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

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

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

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

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

#### Notice Obligations as an Employee.

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

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

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, ~~look at~~ visit the Department of Fair Employment and Housing's Wweb site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov), or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing Commission's wWeb\_site at [www.fehe.ca.gov](http://www.fehe.ca.gov)~~www.dfeh.ca.gov~~.

(b) "Notice B"

## FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with your employer and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.

Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth or related medical conditions, you are entitled to take pregnancy disability leave (PDL) of up to four months, ~~or the working days in one-third of a year or 17 1/3 weeks~~, depending on your period(s) of actual disability. Time off needed for prenatal or postnatal care; doctor-ordered bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; childbirth; postpartum depression; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy would all be covered by your PDL.

Your employer also has an obligation to reasonably accommodate your medical needs (such as allowing more frequent breaks) and to transfer you to a less strenuous or hazardous position if it is medically advisable because of your pregnancy.

If you are CFRA-eligible, you have certain rights to take BOTH PDL and a separate CFRA leave for reason of the birth of your child. Both leaves guarantee reinstatement — for pregnancy

disability it is to the same position and for CFRA it is to the same or a comparable position — at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or a family member). For events that are unforeseeable, you must to notify your employer, at least verbally, as soon as you learn of the need for the leave.

Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

Your employer may require medical certification from your health care provider before allowing you a leave for:

- your pregnancy;
- your own serious health condition; or
- to care for your child, parent, or spouse who has a serious health condition.

See your employer for a copy of a medical certification form to give to your health care provider to complete.

When medically necessary, leave may be taken on an intermittent or a reduced work schedule.

If you are taking a leave for the birth, adoption or foster care placement of a child, the basic minimum duration of the leave is two weeks and you must conclude the leave within one year of the birth or placement for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. Contact your employer for more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). The FEHA prohibits employers from denying, interfering with, or restraining your exercise of these rights. For more information about your rights and obligations, contact your employer, ~~look at~~ visit the Department of Fair Employment and Housing's Web\_site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov), or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Department of Fair Employment and Housing's ~~Commission's~~ Web\_site at [www.fehedfeh.ca.gov](http://www.fehedfeh.ca.gov).

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

## **Article 8. Religious Creed Discrimination**

### **§ 11059. General Prohibition Against Religious Creed Discrimination.**

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

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

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

### **§ 11060. Establishing Religious Creed Discrimination.**

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

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

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

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

### **§ 11062. Reasonable Accommodation.**

An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless it would result in a violation of the law or the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship.

(a) Reasonable accommodation may include, but is not limited to, job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances. An accommodation is not reasonable if it requires segregation of an employee from customers or the general public.

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

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

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

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

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

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

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

(7) Any available reasonable alternative means of accommodation.

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

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

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

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

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

## **Article 9. Disability Discrimination**

### **§ 11064. General Prohibitions ~~Against~~ against Discrimination on the Basis of Disability.**

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

(b) Statement of Purpose. The Fair Employment and Housing Council is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental disability or medical condition that is disabling, potentially disabling or perceived to be disabling or potentially disabling. The definition of disability in these regulations shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the Fair Employment and Housing Act (FEHA). As with the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendment Act of 2008 (~~Pub. L. No. 110-325~~), the primary focus in cases brought under the FEHA should be whether employers and other covered entities have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their



obligations to engage in the interactive process and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis.

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

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

### **§ 11065. Definitions.**

As used in this article, the following definitions apply:

(a) “Assistive animal” means a trained animal, including a trained dog, necessary as a reasonable accommodation for a person with a disability.

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

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

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

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

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

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

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

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

(C) is trained to provide assistance for the employee's disability.

(3) Nothing in these regulations shall preclude a person with a disability from requesting, or an employer or other covered entity from permitting, the use of a “support” animal in the workplace as a reasonable accommodation. A support animal is one that provides emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.

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

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

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

(1) “~~Mental~~ ~~Disability,~~” has the same definition provided in as defined at Government Code section 12926, and includes, but is not limited to, having any mental or psychological

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

~~(2) “Physical Disability,” has the same definition provided in as defined at Government Code section 12926, and includes, without limitation, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:~~

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

~~(B) limits a major life activity.~~

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

~~(3) A “special education” disability is any other recognized health impairment or mental or psychological disorder not described in section 11065(d)(1) or (d)(2), of this article, that requires or has required in the past special education or related services. A special education disability may include a “specific learning disability,” manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder, such as those for English language acquisition by persons whose first language was not English.~~

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

~~(5) A “Perceived Disability” means being “Regarded as,” “Perceived as” or “Treated as” having a Disability. Perceived disability includes:~~

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

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

~~(6) A “Perceived Potential Disability” includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or~~

special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

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

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

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

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

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

~~(8) A "Disability" is also any definition of "disability" used in the federal Americans with Disabilities Act of 1990 (ADA), and as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110-325) and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the FEHA's definition of disability.~~

(98) "Disability" does not include:

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

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

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

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

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

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

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

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

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

(B) Accurate, current written job descriptions.

- (C) The amount of time spent on the job performing the function.
- (D) The legitimate business consequences of not requiring the incumbent to perform the function.
- (E) Job descriptions or job functions contained in a collective bargaining agreement.
- (F) The work experience of past incumbents in the job.
- (G) The current work experience of incumbents in similar jobs.
- (H) Reference to the importance of the performance of the job function in prior performance reviews.

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

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

(g) "FMLA" means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. Part 825 et seq. For purposes of this section only, "FMLA leave" means medical leave taken pursuant to FMLA.

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

(i) "Health care provider" means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

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

(3) a health care provider from whom an employer, other covered entity, or a group health plan's benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

(j) "Interactive process," as set forth more fully at California Code of Regulations, title 2, section 11069, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) "Job-related," as used in sections 11070, 11071 and 11072 means tailored to assess the employee's ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.

(l) “Major life activities” shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment “limits” a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is “difficult” is an individualized assessment, which may consider what most people in the general population can perform with little or no difficulty, what members of the individual's peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) “Limits” shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.

(m) A “medical or psychological examination” is a procedure or test performed by a health care provider that seeks or obtains information about an individual's physical or mental disabilities or health.

(n) “Mitigating measure” is a treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) “Auxiliary aids and services,” which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) "Qualified individual," for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) "Reasonable accommodation" is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);

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

(O) other similar accommodations.

(q) "Sexual behavior disorders," as used in this article, refers to pedophilia, exhibitionism, and voyeurism.

(r) “Undue hardship” means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the ~~following factors set forth in Government Code section 12926.:~~

~~(1) Consideration of the nature and net cost of the accommodation needed under this article, taking into ~~shall~~ article shall include consideration of the availability of tax credits and deductions, and/or outside funding.;~~

~~(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;~~

~~(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;~~

~~(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and~~

~~(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12940, 12945.1 and 12945.2, Government Code; Americans with Disabilities Act of 1990 (42 U.S.C. §12101, et seq.), as amended by the ADA Amendments Act of 2008 (Pub. L. No. 110-325) and its implementing regulations at 29 C.F.R. § 1630 et seq.; Family and Medical Leave Act of 1993 (29 U.S.C. § 2601 et seq.) and its implementing regulations at 29 C.F.R. § 825 et seq.; and Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) and its implementing regulations at 34 C.F.R. § 300.8 et seq.

### **§ 11066. Establishing Disability Discrimination.**

~~(a) In addition to the requirements of section 11009, a~~An applicant or employee has the burden of proof to establish that the applicant or employee is a qualified individual capable of performing the essential functions of the job with or without reasonable accommodation.

~~(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual's disability and denial of an employment benefit to that individual by the employer or other covered entity. The evidence need not demonstrate that the qualified individual's disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual's disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 7293.8 of this subchapter.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code; *Green v. State of*

*California* (2007) 42 Cal.4th 254, 260; and *Mixon v. Fair Empl. & Hous. Com.*(1987) 192 Cal.App.3d 1306, 1319.

### **§ 11067. Defenses.**

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Article 1 of Subchapter 2, at California Code of Regulations, title 2, section 11010, shall be applicable to this article.

(b) Health or Safety of an Individual ~~W~~with a Disability. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger his or her health or safety because the job imposes an imminent and substantial degree of risk to the applicant or employee.

(c) Health and Safety of Others. It is a permissible defense for an employer or other covered entity to demonstrate that, after engaging in the interactive process, there is no reasonable accommodation that would allow the applicant or employee to perform the essential functions of the position in question in a manner that would not endanger the health or safety of others because the job imposes an imminent and substantial degree of risk to others.

(d) Future Risk. However, it is no defense to assert that an individual with a disability has a condition or a disease with a future risk, so long as the condition or disease does not presently interfere with his or her ability to perform the job in a manner that will not endanger the individual with a disability or others.

(e) Factors to be considered when determining the merits of the defenses enumerated in section 11067(b)-(d) include, but are not limited to:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that potential harm will occur;
- (4) the imminence of the potential harm; and
- (5) consideration of relevant information about an employee's past work history.

The analysis of these factors should be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

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

### **§ 11068. Reasonable Accommodation.**

(a) Affirmative Duty. An employer or other covered entity has an affirmative duty to make reasonable accommodation(s) for the disability of any individual applicant or employee if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.

(b) No elimination of essential job function required. Where a quality or quantity standard is an essential job function, an employer or other covered entity is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity.



(c) Paid or unpaid leaves of absence. When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation.

(d) Reassignment to a vacant position.

(1) As a reasonable accommodation, an employer or other covered entity shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified, under the following circumstances:

(A) if the employee can no longer perform the essential functions of his or her own position even with accommodation; or

(B) if accommodation of the essential functions of an employee's own position creates an undue hardship; or

(C) if both the employer and the employee agree that a reassignment is preferable to being provided an accommodation in the present position; or

(D) if an employee requests reassignment to gain access to medical treatment for his or her disabling condition(s) not easily accessible at the current location.

(2) No comparable positions. If there are no funded, vacant comparable positions for which the individual is qualified with or without reasonable accommodation, an employer or other covered entity may reassign an individual to a lower graded or lower paid position.

(3) Reassignment to a temporary position. Although reassignment to a temporary position is not considered a reasonable accommodation under these regulations, an employer or other covered entity may offer, and an employee may choose to accept or reject, a temporary assignment during the interactive process.

(4) The employer or other covered entity is not required to create a new position to accommodate an employee with a disability to a greater extent than an employer would offer a new position to any employee, regardless of disability.

(5) The employee with a disability is entitled to preferential consideration of reassignment to a vacant position over other applicants and existing employees. However, ordinarily, an employer or other covered entity is not required to accommodate an employee by ignoring its bona fide seniority system, absent a showing that special circumstances warrant a finding that the requested accommodation is reasonable on the particular facts, such as where the employer or other covered entity reserves the right to modify its seniority system or the established employer or other covered entity practice is to allow variations to its seniority system.

(e) Any and all reasonable accommodations. An employer or other covered entity is required to consider any and all reasonable accommodations of which it is aware or ~~which that~~ are brought to its attention by the applicant or employee, except ones that create an undue hardship. The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to select and implement an accommodation that is effective for both the employee and the employer or other covered entity.

(f) An employer shall not require a qualified individual with a disability to accept an accommodation and shall not retaliate against an employee for refusing an accommodation. However, the employer or other covered entity may inform the individual that refusing an accommodation may render the individual unable to perform the essential functions of the current position.

(g) Reasonable Accommodation for the Residual Effects of a Disability. An individual with a record of a disability may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the residual effects of the disability. For example, an employee may need a leave or a schedule change to permit him or her to attend follow-up or monitoring appointments with a health care provider.

(h) Accessibility Standards. To comply with section 11065(p)(2)(A), of this article, the design, construction or alteration of premises shall be in conformance with the standards set forth by the Division of the State Architect in the State Building Code, Title 24, pursuant to Chapter 7, Division 5 of Title 1 of the Government Code (commencing with Government Code section 4450), and Part 5.5 of Division 13 of the Health and Safety Code (commencing with Health and Safety Code section 19955).

(i) An employer or other covered entity shall assess individually an employee's ability to perform the essential functions of the employee's job either with or without reasonable accommodation. In the absence of an individualized assessment, an employer or other covered entity shall not impose a "100 percent healed" or "fully healed" policy before the employee can return to work after an illness or injury.

(j) It is a permissible defense to a claim alleging a failure to provide reasonable accommodation for an employer or other covered entity to prove that providing accommodation to an applicant or employee with a disability would have created an undue hardship.

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

### **§ 11070. Pre-Employment Practices.**

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) "Do you have any particular disabilities?"

(B) "Have you ever been treated for any of the following diseases or conditions?"

(C) "Are you now receiving or have you ever received workers' compensation?"

(D) "What prescription medications are you taking?"

(E) “Have you ever had a job-related injury or medical condition?”(F) Have you ever left a job because of any physical or mental limitations?

(G) “Have you ever been hospitalized?”

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 (~~Pub. L. No. 110-325~~) and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.

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

### **§ 11071. Medical and Psychological Examinations and Inquiries.**

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual's physical or mental conditions or health but does not include testing for current illegal drug use.

(b) Post-Offer. An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee's entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

(c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical and Psychological Examinations and Disability-Related Inquiries ~~D~~during Employment.

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees that are both job-related and consistent with business necessity.

(2) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers (~~49 C.F.R. § 391.41~~), or medical requirements for airline pilots (~~14 C.F.R. § 61.23~~).

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 11069(g).

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

## Subchapter 5. Contractor Nondiscrimination and Compliance

### Article 1. General Matters

#### § 11100. Definitions.

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

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

The definitions set forth previously in this chapter in sections 11002, 11008, 11015, 11030, 11035(b), 11053, 11065, and 11075 are also applicable to this subchapter.

(a) “Act” means the Fair Employment and Housing Act.

~~(ab)~~ “Bid” means any proposal or other request by an employer to a contract awarding agency wherein the employer seeks to be awarded a state contract.

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

~~(ed)~~ “Construction” means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any State of California real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

~~(de)~~ “Contract” or “state contract” means all types of agreements, regardless of what they may be called, for the purchase or disposal of supplies, services, or construction to which a contract awarding agency is a party. It includes awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders. It also includes supplemental agreements or contract modifications with respect to any of the foregoing.

~~(ef)~~ “Contract awarding agency” or “awarding agency” means any department, agency, board, commission, division or other unit of the State of California, which is authorized to enter into state contracts.

~~(fg)~~ “Contractor” means any person having a contract with a contract awarding agency or a subcontract for the performance of a contract with such an agency.

~~(gh)~~ “Data” means recorded information, regardless of form or characteristic.

~~(h)~~ (Reserved)

(i) “Decertification” means the decision by OCP that an employer's nondiscrimination program fails to comply with the requirements of the Fair Employment and Housing Act and/or its implementing regulations either because it is poorly designed or because it has not been properly implemented or because of the person's failure to cooperate with OCP it cannot be determined whether the nondiscrimination program meets the requirements of this subchapter. Decertification of a program shall continue until OCP certifies that the contractor is in compliance with the requirements of this subchapter.

(j) “Decision” means the decision of the hearing officer regarding the allegations of a show cause notice issued pursuant to section 11138 of this subchapter. A decision shall dismiss, modify, or sustain the allegations of the show cause notice; provide the factual basis for the decision; and include any sanctions to be recommended to the awarding agency together with a statement of the reasons in support thereof.

(k) “Employee” means an individual under the direction and control of a contractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

~~(l) (Reserved)~~

~~(m) “May” denotes the permissive.~~

~~(n) “Minority” refers to an individual who is ethnically or racially classifiable in one of four major groups: Black, Hispanic, Asian or Pacific Islander, or American Indian or Alaskan Native.~~

~~(1) “Black” includes persons having their primary origins in any of the black racial groups of Africa, but not of Hispanic origin;~~

~~(2) “Hispanic” includes persons of primary culture or origin in Mexico, Puerto Rico, Cuba, Central or South America, or other Spanish derived culture or origin regardless of race;~~

~~(3) “Asian/Pacific Islander” includes persons having primary origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa; and~~

~~(4) “American Indian/Alaskan Native” includes persons having primary origins in any of the original peoples of North America, and who maintain culture identification through tribal affiliation or community recognition.~~

~~(o) “Nondiscrimination clause” means the clause to be included in each state contract or subcontract pursuant to these regulations.~~

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

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

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

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

~~(t) “Shall” denotes the imperative.~~

~~(u) “Subcontract” means any agreement or arrangement executed by a contractor with a third party in which the latter agrees to provide all or a specified part of the supplies, services or construction required in the original state contract. This does not include arrangements between parties constituting that of employer and employee.~~

~~(v) “Subcontractor” means any individual or organization holding a subcontract for the performance of all or any part of a state contract.~~

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

### **§ 11101. Nondiscrimination Agreement.**

State contracts exempt from the requirements of section 11105 shall include, as an express or implied term, the term set out in either section 11105 clause (a) or clause (b). Breach of this term of contract may constitute a material breach of the contract and may result in the imposition of sanctions by the awarding agency and/or may result in decertification from future opportunities to contract with the state.

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

### § 11103. Nondiscrimination Program.

(a) Definition and Purpose. A nondiscrimination program (hereinafter referred to as “the program”) is a set of specific and result-oriented procedures to which a contractor or subcontractor commits itself for the purpose of insuring equal employment opportunity for all employees or applicants for employment. ~~It may include an affirmative action component, which establishes goals and timetables to remedy any underutilization of minorities and/or women that is identified.~~ The ~~Program~~ program shall contain the following elements:

(1) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(2) Formal internal and external dissemination of the contractor's policy.

(3) Establishment of responsibilities for implementation of the contractor's program.

(4) Annual identification of any existing policies or practices that have resulted in disproportionately inhibiting the employment, promotion or retention of any group ~~those~~ protected by the Act.

(A) Analysis of Employment Selection Procedures. The program shall include an identification and analysis of contractor promotional and entry-level selection procedures and shall identify any such policies or procedures that have resulted in practices disproportionately inhibiting the employment, promotion or retention of ~~minorities or women~~ any group or groups protected by the Act. The retention of such practices so identified can only be justified according to the principles of business necessity upon a demonstration that no reasonable alternatives to such practices exist. The prospective contractor shall eliminate any practices that cannot be so justified.

(B) Workforce Analysis. The ~~Program~~ program will contain a workforce analysis, which shall consist of a listing of each job title that appears in applicable collective bargaining agreements of payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit, including departmental or unit supervisory personnel. For each job title, the total number of incumbents, and the total number of male and female incumbents, and the total number of male and female incumbents ~~in each of the following groups must be given: Blacks, Hispanics, Asian/Pacific Islanders, and American Indian/Native Alaskans~~ broken down by race and/or national origin. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed. If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(C) Utilization Analysis. Employers with 250 or more employees must perform a utilization analysis, which shall consist of an analysis of the major job groups at the facility in order to determine whether ~~women and minorities~~ members of any group protected by the Act are being underutilized when compared to their availability. A job group for this purpose shall consist of one or more jobs that have similar content, wage rates, and opportunities. Underutilization is defined as having a statistically significant lower utilization of ~~minorities or~~

~~women any group protected by the Act in a particular job group than their availability.~~  
Availability is defined as the availability in the labor force. The labor force for this purpose may vary depending upon the type of job in question, and the contractor's past practice, and could encompass the contractor's existing employees, the area immediately surrounding the facility where the vacancy exists for low-skill jobs or it could encompass the entire nation for highly-skilled managerial positions. The employer shall conduct a separate utilization analysis for ~~each minority group and women~~each protected group.

(5) Development and execution of ~~action-oriented programs~~ policies and procedures designed to correct problems and attain equal employment opportunities for all applicants and employees.

(6) Design and implementation of internal audit and reporting systems to measure the effectiveness of the total program.

~~(b) Employers who have identified a practice or practices that have an adverse impact on one or more groups protected by the Act, and that may unlawfully discriminate against members of such groups, may wish to include an affirmative action component in their nondiscrimination programs to minimize liability for discrimination, and correct past injustices; such affirmative action may be required of employers who are found to have discriminated in violation of the Act. Such a voluntary affirmative action component might contain, but need not be limited to, the following:~~

~~(1) Active support of local and national community action programs and community service programs designed to improve the employment opportunities of minorities and women;~~

~~(2) Providing training opportunities to minorities and women within the employer's organization that will qualify them for promotion when openings become available;~~

~~(3) Encouraging qualified women and minorities within the employer's organization to seek and accept transfers and promotions that increase their future opportunities;~~

~~(4) Actively recruit qualified minorities and women, even those not currently seeking such employment;~~

~~(5) Establishing and/or supporting training programs for entry level positions; and~~

~~(6) Establishing goals and objectives by organizational units and job groups, including timetables for completion. Establishment and implementation of a nondiscrimination program that contains an effective affirmative action component will create a rebuttable presumption that a contractor is in compliance with the requirements of Government Code section 12990 and its implementing regulations.~~

~~(e)~~ An employer with multiple facilities may establish a single nondiscrimination program for its organization, but must perform separate analyses pursuant to subsections (a)(4)(A); and (B), ~~and (C)~~ above for each establishment.

Note: Authority cited: Sections 12935(a) and 12990(d), Government Code. Reference: Section 12990, Government Code. Section 31, California Constitution.

#### **§ 11104. Prima Facie Compliance.**

Compliance with a nondiscrimination ~~or affirmative action~~ program subject to review and approval by a federal compliance agency shall constitute prima facie evidence that a contractor has complied with the requirements of sections 11102 and 11103, unless the federal agency has found that the program is not in compliance with federal law, in which case compliance with a current federal commitment letter or conciliation agreement shall constitute prima facie evidence



that a contractor has complied with the requirements of sections 11102 and 11103. Such prima facie evidence can be rebutted by a preponderance of the evidence to the contrary.

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

### **§ 11105. Nondiscrimination Clause.**

Each state contract and subcontract shall contain a nondiscrimination clause unless specifically exempted pursuant to section 11111. The governmental body awarding the contract may use either clause (a) or clause (b) below. Clause (a) will satisfy the requirements of section 12990 of the Government Code only; clause (b) contains language that will satisfy the requirements of both the Fair Employment and Housing Act and Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (adopted pursuant to Government Code sections 11135-11139.5). Standardized state form OCP-1, containing clause (a), and OCP-2, containing clause (b), will be available through the OCP. These forms may be incorporated into a contract by reference and will fulfill the requirement of this section. The contracting parties may, in lieu of incorporating form OCP-1 or OCP-2, include the required clause in the written contract directly.

#### Clause (a)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of ~~race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) and the applicable regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.). The applicable regulations of the Fair Employment and Housing Council implementing Government Code section 12990, set forth in Subchapter 5 of Division 4.1 of Title 2 of the California Code of Regulations are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

2. ~~This~~ Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

#### Clause (b)

1. During the performance of this contract, the recipient, contractor, and its subcontractors shall not deny the contract's benefits to any person on the basis of ~~religion, color, ethnic group identification, sex, age, physical or mental disability~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they discriminate unlawfully against any employee or applicant for employment because of ~~race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age (over 40) or sex~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical

condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Contractor shall insure that the evaluation and treatment of employees and applicants for employment are free of such discrimination.

2. Contractor shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), the regulations promulgated thereunder (Cal. Code Regs., tit. 2, § 11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code, §§ 11135-11139.5), and the regulations or standards adopted by the awarding state agency to implement such article.

3. Contractor or recipient shall permit access by representatives of the Department of Fair Employment and Housing and the awarding state agency upon reasonable notice at any time during the normal business hours, but in no case less than 24 hours' notice, to such of its books, records, accounts, other sources of information and its facilities as said Department or Agency shall require to ascertain compliance with this clause.

4. Recipient, contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

5. The contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

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

### **§ 11111. Exemptions.**

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

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

(c) A contractor with fewer than 50 employees in its entire workforce may receive an automatic exemption from the Program requirements of section 11103, subdivisions (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a current California Employer Information Report (CEIR) annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(d) Contracts and subcontracts awarded pursuant to a declaration of public emergency, a declaration or determination of emergency pursuant to Government Code section 14809 or Government Code section 14272, (a), (b), or (c), or a declared threat to the health, welfare or safety of the public are fully exempted from the requirements of section 11105, and contractors holding only such contracts are exempted from the requirements of section 11102, but remain subject to section 11101.

(e) A construction contractor with fewer than 50 permanent employees may obtain an exemption from the requirements of section 11103, subdivision (a)(4)(B)-(C) pertaining to workforce and utilization analyses by filing a CEIR annually with OCP. The OCP may remove any exemption granted under this subsection, in connection with any detailed review or any

investigation instituted pursuant to section 11134 or 11135, or whenever the contractor is found to be in substantial noncompliance with the requirements of this subchapter.

(f) Exemptions of subsections (a) and (d) of this section shall be granted only upon application to the state contract awarding agency prior to the date the contract is awarded. The contract awarding agency shall, prior to the grant of any exemption under this section, require proof of satisfaction of the exemption conditions of this section. The OCP may issue opinion letters and guidelines from time to time to assist contract awarding agencies in making determinations under this section.

(g) Nothing in this section prohibits hiring or employment practices, which must be enforced in order to maintain or establish eligibility for federal programs, where ineligibility would result in a loss of federal funds to the state.

Note: Authority cited: Sections 12935(a) and 12990(d) Government Code. Reference: Section 12990, Government Code. Section 31, California Constitution.

### **§ 11113. Recruitment.**

Nothing in this article shall serve to deter good faith outreach efforts that are neutral and do not favor, discriminate against, or disparately impact any group on the basis of an improper classification.

~~In the event that any labor organization from which employees are normally recruited and/or with which the contractor has a collective bargaining agreement is unable or unwilling to refer minorities or women, the contractor or subcontractor shall take the following steps and, for a period of two years, keep a record thereof:~~

~~(a) Notify the California Employment Development Department and at least two minority or female referral organizations of the personnel needs and request appropriate referrals, and.~~

~~(a) Nothing in this section shall serve to deter good faith outreach efforts which are neutral and do not favor, discriminate against, or disparately impact any group on the basis of an improper classification.~~

~~(b) Notify any minority or female persons who have personally listed themselves with the contractor or subcontractor as seeking employment of any existing vacancies for which they may qualify;~~

~~(c) Notify minority, women's and community organizations that employment opportunities are available.~~

~~(d) Immediately notify OCP of the existence of the historical and present relationship between the contractor and labor organizations and detail the efforts of the contractor to secure adequate referrals through the labor organizations.~~

~~Neither the provisions of any collective bargaining agreement, nor the failure by a union with which the contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor's obligations under Government Code, section 12990, or the regulations in this subchapter.~~

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

### **§ 11114. Notice of Contract.**

Contract awarding agencies shall give written notice to the Administrator within 10 working days of an award of any and all contracts over \$5,000. The notice shall include the name, address, and telephone number of the contractor; federal employer identification number; state contract identification number; date of contract award; contract amount; project location; name of contractor's agent who signed the contract; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

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

## **Article 2. Regulations Applicable to Construction Contracts**

### **§ 11121. Transfers Prohibited.**

It is a violation of the contract, of Government Code section 12990 and the regulations in Subchapter 5 of Chapter 5 of Division 4.1 of Title 2 of the California Code of Regulations to transfer ~~women and minority~~ employees or trainees who are members of any group protected by the Act from contractor to contractor or from project to project for the sole purpose of meeting the contractor's nondiscrimination obligations.

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

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

In addition to the nondiscrimination clause set forth in section 11105, all non-exempt state construction contracts and subcontracts of \$5,000 or more shall include the specifications set forth in this section.

#### **STANDARD CALIFORNIA NONDISCRIMINATION CONSTRUCTION CONTRACT SPECIFICATIONS (GOV. CODE SECTION 12990)**

These specifications are applicable to all state contractors and subcontractors having a construction contract or subcontract of \$5,000 or more.

1. As used in the specifications:

- a. “Act” means the Fair Employment and Housing Act.
- ~~a~~b. “Administrator” means Administrator, Office of Compliance Programs, California Department of Fair Employment and Housing, or any person to whom the Administrator delegates authority;
- b. “Minority” includes:
  - ~~(i) Black (all persons having primary origins in any of the black racial groups of Africa, but not of Hispanic origin);~~
  - ~~(ii) Hispanic (all persons of primary culture or origin in Mexico, Puerto Rico, Cuba, Central or South America or other Spanish derived culture or origin regardless of race);~~
  - ~~(iii) Asian/Pacific Islander (all persons having primary origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); and~~

~~(iv) American Indian/Alaskan Native (all persons having primary origins in any of the original peoples of North America and who maintain culture identification through tribal affiliation or community recognition).~~

2. Whenever the contractor or any subcontractor subcontracts a portion of the work, it shall physically include in each subcontract of \$5,000 or more the nondiscrimination clause in this contract directly or through incorporation by reference. Any subcontract for work involving a construction trade shall also include the Standard California Construction Contract Specifications, either directly or through incorporation by reference.

3. The contractor shall implement the specific nondiscrimination standards provided in paragraphs 6(a) through (e) of these specifications.

4. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor's obligations under these specifications, Government Code section 12990, or the regulations promulgated pursuant thereto.

5. In order for the nonworking training hours of apprentices and trainees to be counted, such apprentices and trainees must be employed by the contractor during the training period, and the contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor or the California Department of Industrial Relations.

6. The contractor shall take specific actions to implement its nondiscrimination program. The evaluation of the contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The contractor must be able to demonstrate fully its efforts under steps a. through e. below:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and at all facilities at which the contractor's employees are assigned to work. ~~The contractor, where possible, will assign two or more women to each construction project. The contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the contractor's obligations to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.~~

b. Provide written notification within seven days to the director of the DFEH when the referral process of the union or unions with which the contractor has a collective bargaining agreement ~~has not referred to the contractor a minority person or woman sent by the contractor, or when the contractor has other information that the union referral process has impeded the contractor's efforts to meet its obligations.~~

c. Disseminate the contractor's equal employment opportunity policy by providing notice of the policy to unions and training, recruitment and outreach programs and requesting their cooperation in assisting the contractor to meet its obligations; and by posting the company policy on bulletin boards accessible to all employees at each location where construction work is performed.

d. Ensure all personnel making management and employment decisions regarding hiring, assignment, layoff, termination, conditions of work, training, rates of pay or other employment decisions, including all supervisory personnel, superintendents, general foremen, on-site foremen, etc., are aware of the contractor's equal employment opportunity policy and obligations, and discharge their responsibilities accordingly.

e. Ensure that seniority practices, job classifications, work assignments, and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the equal employment opportunity policy and the contractor's obligations under these specifications are being carried out.

7. Contractors are encouraged to participate in voluntary associations that assist in fulfilling their equal employment opportunity obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under these specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on ~~the employment of minorities and women~~ equal employment opportunity in the industry, ensures that the concrete benefits of the program are reflected in the contractor's ~~minority and female~~ workforce participation, and can provide access to documentation that demonstrates the effectiveness of actions taken on behalf of the contractor. The obligation to comply, however, is the contractor's.

8. The contractor is required to provide equal employment opportunity for all ~~minority groups, both male and female, and all women, both minority and non-minority persons~~. Consequently, the contractor may be in violation of the Fair Employment and Housing Act (Government Code section 12990 et seq.) if a particular group is employed in a substantially disparate manner.

~~9. Establishment and implementation of a bona fide affirmative action plan pursuant to section 11103(b) of this subchapter shall create a rebuttable presumption that a contractor is in compliance with the requirements of section 12990 of the Government Code and its implementing regulations.~~

~~109.~~ The contractor shall not use the nondiscrimination standards to discriminate against any person because of ~~race, color, religion, sex, national origin, ancestry, physical handicap, medical condition, marital status or age over 40~~ race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

~~110.~~ The contractor shall not enter into any subcontract with any person or firm decertified from state contracts pursuant to Government Code section 12990.

~~121.~~ The contractor shall carry out such sanctions and penalties for violation of these specifications and the nondiscrimination clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Government Code section 12990 and its implementing regulations by the awarding agency. Any contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Government Code section 12990.

~~1312.~~ The contractor shall designate a responsible official to monitor all employment related activity to ensure that the company equal employment opportunity policy is being carried out, to submit reports relating to the provisions hereof as may be required by OCP and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, ~~social security number, race, sex, status,~~ (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in any easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

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

**§ 11123. Reporting Requirement.**

Contractors holding construction contracts of \$50,000 or more must submit quarterly utilization reports to OCP on forms to be provided by OCP. In such reports the contractor must provide identifying information and report the number and percentage of journey worker, apprentice, and trainee hours worked in each job classification by race, sex, and ethnic group ~~national origin~~, together with the total number of employees and total number of minority employees in each classification by sex. The quarterly utilization reports must cover each calendar quarter and must be received by OCP no later than the 15th day of the month following the end of the quarter (April 15, July 15, October 15, and January 15). Contractors who are required to submit utilization reports to the federal government may submit a copy of the federal report to the OCP at the same time they submit the report to the federal government in lieu of the state quarterly utilization report.

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

**§ 11128. Post Award Compliance.**

(a) Each contractor of a small contract shall compile and shall maintain for inspection for two years after award:

(1) Information regarding the contractor: Federal Employer Identification number; state contract identification number; legal name of the business organization, parent corporation or other outside ownership interest, if applicable, business telephone number, street address, city, state and zip code; mailing address, if different; total number of employees, identified by sex, race and national origin; name, business phone and mailing address of contractor's EEO/AA officer, if there is one; and name of the person responsible for the maintenance of information required pursuant to subsection (b) below.

(2) Information regarding the contract: ~~Dollar~~ dollar value of contract; time for performance of the contract; date of contract award; name of contract awarding agency, and contract awarding officer; brief description of the purpose or subject of the contract.

(3) A copy, if one was required to be prepared of the prime contractor's current CEIR, or equivalent federal form (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

(b) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

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

**§ 11131. Post Award Informational Filing.**

(a) The prime contractor of a regulated contract shall file with OCP within 28 days from the date of execution of a regulated contract or the effective date of these regulations, whichever occurs later:

(1) Information Regarding the Contractor: Federal Employer Identification Number; state contract identification number; legal name of the business organization; business telephone number, street address, city, state and zip code; mailing address, if different; and name, business phone and mailing address of contractor's EEO/AA Officer.

(2) Information Regarding the Contract: ~~Dollar~~-dollar value of contract; date of contract award; name of contract awarding agency and contract awarding officer; and brief description of the purpose or subject of the contract.

(3) (Reserved)

(4) A copy of the prime contractor's current CEIR or equivalent federal form (EEO-1). If the prime contractor is not otherwise required to prepare a CEIR, it must do so in order to comply with the requirements of this section. (See section 11013(a) of this chapter regarding the preparation of CEIR's.)

This information shall be updated annually thereafter, so long as the contractor remains subject to these regulations.

(b) Contractors awarded more than one state contract in one year may file only the information required in subdivision (a)(2) and (a)(4) above for the second and all subsequent contracts awarded during the year.

(c) The OCP and the contract awarding agency shall make forms available for providing the information required under this section.

(d) Failure to comply with the requirements of this section may result in a determination that the contractor has materially breached the state contract and the decertification of the contractor from future state contracts.

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

### **§ 11132. Designating EEO/~~Affirmative Action~~ Officer.**

All contractors of regulated contracts shall designate an individual responsible for the implementation of the contractor's nondiscrimination program.

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



[NOTE: The remaining sections have been renumbered to move to the DFEH procedural regulations. DFEH will amend in a separate rulemaking action.]

#### **Article 4. OCP Review Procedures**

##### **§ ~~11133~~10250. Scope.**

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

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

##### **§ ~~11134~~10251. OCP Review Procedures.**

In order to monitor the equal employment practices of contractors and their compliance with the requirements of this subchapter, contractors shall be subject to review. Contractors may be selected for review on the basis of any specific neutral criteria contained in a general administrative plan for the enforcement of this subchapter.

(a) Desk Review. All contracts shall be subject to desk reviews conducted by and at the discretion of OCP. A desk review will involve a review of the applicable contract(s), the information required of the contractor pursuant to section 11128 or 11131 of these regulations, the compliance with and implementation of the program required by this subchapter, and any additional related information required by OCP. In addition, OCP may review the current and past personnel procedures and practices of a contractor whenever such a review is, within the discretion of OCP, considered appropriate.

(b) Field Review. OCP may conduct a field review of a contractor's workplace. Field reviews will be made during contractor's regular business hours. OCP shall notify the contractor of its intent to conduct a field review under this section and shall arrange a mutually convenient time to conduct it.

(c) A contractor will not be selected for a routine desk or field review if it has been the subject of such a review within the preceding 24 months and was found to be in compliance. Prior review will not exempt a contractor from compliance investigations conducted pursuant to section 11135, or follow-up desk or field reviews.

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

##### **§ ~~11135~~10252. Compliance Investigations.**

(a) OCP may conduct a compliance investigation of a contractor's employment practices for the purpose of determining whether the contractor holding a state contract is acting or has acted in violation of the nondiscrimination and compliance requirements imposed by this subchapter. Investigations under this section shall involve a detailed review of the contractor's entire employment practices and procedures. Investigations under this section may be conducted when the Administrator determines a pattern of unlawful discrimination in employment may have occurred within the past twelve months or be ongoing. Such a determination shall be in writing and shall be based upon:

- (1) A complaint by a contract awarding agency; or
- (2) The results of the regular compliance review activities of the OCP; or
- (3) A notice of any complaint of employment discrimination filed pursuant to section 11117 of this subchapter or Government Code section 12960; or
- (4) The failure of the contractor to provide compliance information required by this subchapter or reasonably requested by OCP.

(b) Whenever a contractor that is the subject of a compliance investigation pursuant to this section is also the subject of a complaint pursuant to Government Code section 12960, if possible, OCP and any other unit of the DFEH investigating the contractor's employment practices shall coordinate their investigations.

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

### **§ 113610253. Letters of Commitment.**

If, in the course of a compliance investigation, OCP concludes that a contractor may be in violation of the provisions of this subchapter, OCP and the contractor may informally agree to resolve the identified deficiencies through the mechanism of a written letter of commitment. The letter of commitment shall set forth the deficiencies identified by OCP, the action the contractor shall take to correct the deficiencies, and the time by which the corrective action shall be taken and the deficiencies resolved.

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

## **Article 5. OCP Enforcement Proceedings**

### **§ 113710254. Scope.**

This article sets forth the enforcement procedures to be followed by OCP in

implementing this subchapter.

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

**§ ~~11138~~10255. Show Cause Notice.**

(a) When the Administrator has reasonable cause to believe that a contractor performing under a state contract is in violation of the nondiscrimination and compliance requirements imposed by this subchapter or is in violation of a letter of commitment or conciliation agreement, he or she may issue a notice requiring the contractor to show cause before a hearing officer, why appropriate action to ensure compliance should not be instituted. The show cause notice shall specifically state the contractor's noncompliance and any recommended sanctions. The show cause notice shall be dated and served on the contractor personally or by registered mail, and such service shall constitute notice to the contractor of the deficiencies. In addition, the show cause notice shall be served by ordinary first class mail on the contract awarding agency. A hearing on the show cause notice shall be held no sooner than the 30th day after the issuance of the show cause notice but shall be at the earliest date OCP can reasonably schedule the hearing.

(b) During the 30 day show cause period, OCP and the contractor shall make every effort to resolve the deficiencies that led to the issuance of the show cause notice through conciliation, mediation, and persuasion.

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

**§ ~~11139~~10256. Conciliation Agreements.**

At the discretion of the Administrator, deficiencies contained in a show cause notice may be resolved through the use of written conciliation agreements. A conciliation agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted. In addition, the Administrator may require periodic compliance reports detailing the actions taken by the contractor to correct the deficiencies, and identifying statistical results of such actions.

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

**§ ~~11140~~10257. Hearing.**

If the deficiencies listed in the show cause notice are not resolved during the 30 day period, a hearing shall be held before a hearing officer appointed by the Director of the Department of Fair Employment and Housing.

A notice of hearing will be dated and served upon the contractor personally or by registered mail. The hearing may be postponed by OCP for good cause. If the contractor has good cause, the contractor shall contact the OCP within 10 days of receiving the notice of hearing.

The procedures of the hearing shall include: testimony under oath, the right to cross-examination and to confront adversary witnesses, the right to representation, and the issuance of a formal decision.

In addition to the above requirements of this section, the hearing shall be conducted in accordance with Government Code sections 11507.6, 11507.7, 11508 (with the exception that the Office of Compliance Programs shall be substituted for the Office of Administrative Hearings), 11510, 11511, 11512(c) and (d), 11513, 11514, 11520, 11523; the sections cited above are incorporated herein by reference.

The hearing officer shall decide whether to dismiss, modify or sustain the allegations of the show cause notice.

The form and content of the decision will be in accordance with the requirements of Government Code section 11518 herein incorporated by reference.

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

#### **§ ~~1114110258~~. Potential Remedies.**

If a violation of this subchapter is found at the hearing, the hearing officer may decertify the contractor's nondiscrimination program and may recommend to the contract awarding agency that the existing contract be terminated. Decertification shall continue until the deficiency is corrected and satisfactory evidence thereof is presented to OCP. Other potential remedies include, but are not limited to, the imposition of periodic reporting requirements and the withdrawal of exemptions.

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