

**FAIR EMPLOYMENT AND HOUSING COUNCIL
PROPOSED AMENDMENTS TO CALIFORNIA FAMILY RIGHTS ACT REGULATIONS**

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 11. Family Care and Medical Leave Act

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

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

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

The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, would be more effective in carrying out the purpose for which the action is proposed, or would be more cost-effective to affected private persons and equally effective in implementing the California Family Rights Act (CFRA).

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

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

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

This rulemaking action clarifies, makes specific, and where appropriate conforms to relevant federal regulations, existing state regulations interpreting the California Family Rights Act

(CFRA) set forth in Government Code section 12945.2. In compliance with the Administrative Procedure Act (APA), the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The only change from the original informative digest is the method by which the Council incorporates by reference the federal Family and Medical Leave Act regulations, which was done in response to several comments from members of the public. Publication of the entire text of the FMLA regulations within the CFRA regulations would be impractical as it is available, free of charge, from commonly known online sources, such as the United States Department of Labor's website. Finally, the Council has concluded that the proposed amendments are not inconsistent or incompatible with existing regulations.

WRITTEN COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD AND ORAL COMMENTS MADE AT PUBLIC HEARINGS [Government Code Section 11346.9(a)(3)].

Section 11087(a) – Definition: "Adult dependent child."

Comment: The regulations define a child 18 and over as one who is incapable of self-care due to a mental or physical disability within the meaning of CA Govt. Code 12926. This definition is not in the CFRA statute. We propose changing the definition to align with the FMLA regulations, which state that the child must have a disability as defined by the Americans with Disabilities Act ("ADA"). The proposed CFRA definition is overly broad since it does not require a showing that the child is substantially limited in a major life activity.

Council Response: In response to other comments, the Council has decided to strike this definition.

Comment: This section will become unnecessary if subsection (c) is reinstated.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(b)(1) – Criteria to be Included in Certification for Leaves Other than for One's Own Serious Health Condition.

Comment: The proposed stricken language should be reinstated to enhance clarity and avoid confusion.

Council Response: The Council agrees and changes to the language have been made accordingly.

Sections 11087(b)(1) and (2).

Comment: The current version of these subsections sets forth in a manner clear to the person "directly affected" by the requirement what information the referenced certification must contain. The certification of serious health condition is one of the most important aspects of showing CFRA eligibility. It is extremely important that employees seeking to exercise their right to covered leave know what specific information is – and is not – required to satisfy their obligation. It is equally important for employers to understand what it may – or may not – ask for in terms of the elements of the certification. Having these specific elements directly before the reader in the regulations makes it clear to all those "directly affected" by the regulations

what the obligations and limits are for certifications. Thus, the proposed amendment should be rescinded and the existing language restored.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The proposed new language explaining in more detail the meaning of “unable to perform the function of his or her position” should be added to the end of subsection (C) if that subsection is restored, either by adding it to the end of the current language or as a subsection (C)(1).

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(b)(1)(A) – Definition: “Warrants the participation of the employee.”

Comment: The definition should be amended as follows: “‘Warrants the participation of the employee,’ within the meaning of Government Code section 12945.2, includes, but is not limited to, providing psychological comfort and care, traveling to and from the care recipient, assisting the recipient with tasks that are made difficult or impossible by the serious health condition (e.g., moving to a new home) and/or arranging third party care for the care recipient, as well as directly providing, or participating in, care. ‘Psychological comfort and care’ includes, but is not limited to, spending time with a seriously ill or dying child, parent, spouse, or domestic partner.”

Council Response: The Council disagrees that the proposed changes are necessary – the statutory expression is clear on its face and appropriately flexible. Moreover, public comment did not in the aggregate indicate that it is a source of confusion.

Comment: The definition of “arranging third party care” needs to be included in this section.

Council Response: The Council disagrees that a definition of “arranging third party care” is necessary. The use of this term in the regulations does not require a definition separate from the plain meaning of the term, and hence no addition has been made.

Comment: Language in the regulations illustrating when a family member’s health condition “warrants the participation of the employee” has resulted in employees using excessive amounts of CFRA leave time to engage in personal activities that should be dedicated to care of the individual. Such a result is inconsistent with the intent of the statute. Cal. Gov’t Code section 12945.2(j)(1) authorizes employers to require that an employee’s request for leave to care for a family member be supported by a certification from a health care provider of the individual requiring care. The statute then sets forth minimally sufficient contents for such a certification, including: “A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.” Cal. Gov’t Code 12945.2(j)(1)(D). The language of the statute closely tethers time off to providing “care during treatment” or “supervision of the individual requiring care.” However, examples offered in current regulations have been used to

depart significantly from the requirements of the statute to authorize time off for reasons that have little to do with the direct supervision of the individual requiring care, or providing care during treatment of the employee. CFRA regulations should clarify that “participation” means being directly involved with the family member, and cannot include time off to engage in personal or other activities. With no guidance on the issue, health care providers are likely to authorize whatever time off the employee asks for regardless of the limitations imposed by statute.

Council Response: The Council disagrees with this comment. While recognizing that employers may feel frustrated when they believe an employee is taking CFRA leave under false pretenses in order to use the time for personal enjoyment, it is nevertheless the professional opinion of the health care provider that must be respected in these circumstances. It should not be assumed that health care providers are willing to lie because a patient or patient’s family member, in bad faith, asked for them to do so. Thus, it should remain up to the health care provider’s professional judgment to determine whether CFRA leave is justified. Moreover, section 11090(d)(3) now explicitly enumerates the “Fraudulently-obtained CFRA Leave” defense: “An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA’s job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.” As a result, no changes have been made.

Section 11087(b)(2) – Criteria to be Included in Certification for Leaves for One’s Own Serious Health Condition.

Comment: The definition should be amended as follows: “For purposes of the certification ‘unable to perform the function of his or her position’ means that an employee is unable to perform any one or more of the essential functions of his or her position in his or her current employment environment. The fact that an employee continues to engage in similar employment with another employer does not conclusively establish that he or she does not have the requisite serious health condition rendering her unable to perform the essential functions of the job from which she is taking leave.”

Council Response: The Council disagrees with this comment as the suggested text goes beyond what is necessary in this section. Additionally, the suggested addition would only serve to muddle the issue and make the text less clear and comprehensible. As a result, no changes have been made.

Section 11087(c) – Definition: “CFRA.”

Comment: The Council should retain this definition in the text of the regulations to avoid any confusion or need to reference the statute for this important definition.

Council Response: The Council agrees and changes to the language have been made accordingly.

Former Section 11087(c) – Definition “Child.”

Comment: Reinstate the definition of “Child” rather than relying on the definition in the statute.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The Council should reinstate and clarify within the definition of “in loco parentis” the rights of LGBT individuals to bond with and care for their children and the children of their partners.

Council Response: The Council disagrees with the necessity of instituting the recommended change within the section. As written, the reinstated text has the desired effect of preserving rights for LGBT individuals over their children and the children of their partners. As a result, no changes have been made.

Section 11087(d) – Definition: “Covered Employer.”

Comment: The wording “including successors in interest...” should be amended to read: “including successors in interest of a covered employer...”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The term “successors in interest” is not defined in the proposed regulations and should be removed because it is overly broad and results in an assumption that a “successor in interest” is also a “covered employer.”

Council Response: The Council has modified the language to read “successors in interest of a covered employer.” This modification clarifies the intended result and avoids ambiguity without requiring the removal of the language.

Comment: Reinstate all of the stricken language to clarify that the requisite number of employees may in some cases be outside of California, and clarify that the state of California is a covered employer.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: While the 75-mile requirement has always been a requirement for an “eligible employee,” it has never been a part of the requirement for a “covered employer” under CFRA or FMLA. Although this proposed amendment may be more limiting as to employers that are covered, it will create an administrative burden for California employers due to lack of conformity with FMLA as to the definition of “covered employer.” Accordingly, the phrase “within 75 miles of the worksite where the employee requesting the leave is employed” should be deleted.

Council Response: The Council has decided to remove this requirement and reinstate the original language.

Section 11087(d)(1) – Definition: “Directly Employs.”

Comment: The following language of the proposed amendment should be stricken: “so long as the employer has a reasonable expectation that the employee will later return to active employment.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Clarity is needed as to the requirement of “each working day.”

Council Response: The Council disagrees that additional clarity is needed for the definition of “each working day” as the plain meaning is clear, and hence no additional changes have been made.

Comment: Words like “full-time” and “part-time” should not be hyphenated.

Council Response: The Council disagrees with this grammatical preference, which is also reflected in other regulations like those for the FMLA (29 C.F.R. § 825.100 et seq.), and no resulting changes have been made.

Section 11087(d)(3) – Joint Employers and Integrated Employers.

Comment: This proposed section conflates and oversimplifies complex concepts. This subsection should be stricken completely, or either reference or restate in its entirety the 1995 FMLA regulation regarding these concepts (29 C.F.R. § 825.106).

Council Response: Changes made by the Council in response to other comments regarding this subdivision should alleviate the concerns expressed by this commenter.

Comment: The current proposal of adopting, by cross-reference, the definition of Joint Employer and Integrated Employer from the current version of the FMLA regulations should be deleted. The FMLA regulations related to this topic have been the subject of substantial dispute and litigation. It is suggested that this controversy can be avoided by detailing a specific test for Joint Employer and Integrated Employer. In crafting this regulation, we point to the FEHA’s general definition of “employer.” Gov. Code § 12926(d). Though the CFRA contains a definition of “employer”, the CFRA is merely one part of the FEHA’s overall statutory structure and must be harmonized with the more general definition of “employer.” Reading Sections 12926(d) and 12945.2(b), (c)(2) together, then, the CFRA’s definition of “employer” merely modifies the threshold number of employees required for coverage by the statute. The remainder of Section 12926(d) should be read as applying to CFRA. Importantly, the language “any person acting as agent of an employer, directly or indirectly. . .” provides an avenue for crafting a comprehensive regulation encompassing the reality of joint and integrated employer arrangements, such as Professional Employer Organizations (PEO’s), and remote working locations.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(e): “Eligible Employee.”

Comment: This section should include the word “worked” to qualify the term “1,250 hours.” The term “hours worked” is defined by statute at both the state and federal levels and is a recognized phrase in employment law. Adding this word is consistent with how this requirement has been interpreted under CFRA and FLMA, and would provide clarity to this section as well as other areas.

Council Response: The Council disagrees with the necessity of this proposed change. The proposed text already uses the word "worked" to qualify the mention of "1,250 hours," and while it may not do so in the exact manner suggested, the Council is confident that the current version of the text is sufficiently clear and accurate. As a result, no changes have been made.

Comment: The detailed name of the Labor Code is awkward because it should be named in full the first time (see § 11087(d)(2)), or every time.

Council Response: The Council disagrees that any feeling of awkwardness resulting from the use of the full, detailed name of the Labor Code outweighs the clarity that the full, detailed name provides to the text. Moreover, this is the first instance of mentioning the California Labor Code and IWC Wage Orders. Thus, no changes have been made.

Comment: With respect to FMLA, CA employers or their attorneys will now need to refer to two different laws with respect to the meaning of "actual hours worked." The result may likely be the same number, yet it could also be more cumbersome for some situations.

Council Response: For consistency with California law, the Council relies upon California law and the California definition for the California Family Rights Act regulations.

Comment: Is there a different eligibility requirement or should there be a different eligibility requirement for teachers since they often may be schedule for only 9 to 10 months out of the year?

Council Response: Under current law, teachers and other workers, who work fewer than 12 months per year, must meet the same threshold of 1,250 work hours over 12 months to be eligible for CFRA leave. To reach this threshold, the FMLA regulations expressly allow teachers to count non-classroom time toward the 1,250 hours. Ultimately, this suggestion would best be addressed by the legislature, not a regulatory body regulating the current state of the law.

Sections 11087(e) and 11087(e)(4)

Comment: The proposed definition of "eligible employee" omits reference to the Fair Labor Standards Act, 29 C.F.R. Part 785, regarding the definition of the concept of "work," and instead points to the California Labor Code and Industrial Welfare Commission Wage Orders to define this term. The Labor Code, however, does not define the concept of what constitutes "hours worked." On the other hand, the Industrial Welfare Commission defines "hours worked" in most of its Wage Orders as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Given that the Labor Code does not define the term "hours worked," at a minimum, the definition should be reworded to state: " ... who has actually worked (within the meaning of the Industrial Welfare Commission Orders) . . . " Also, revisions to proposed section 11087(e)(4) add language to assist with defining a "worksite," referencing either a single location or a "group of contiguous locations." The term "contiguous locations" is used in the FMLA regulations (see 29 C.F.R. § 825.111) and at least provides examples of circumstances

that would result in counting multiple locations as a single worksite. To provide further clarification on this issue, examples should be provided in the CFRA regulations, or reference be made more specifically to 29 C.F.R. § 825.111 in order to provide additional guidance.

Council Response: The Council disagrees with the proposed changes. California regulations should work in conjunction with and should cite relevant state law, not federal law, if it exists. Because the IWC Wage Orders are on point, California law sufficiently addresses what “actually worked” means. Moreover, the regulation now tracks the federal law and by giving examples, the Council would not want to have to list all possible qualifying circumstances or deviate from the meaning of the federal regulation. Therefore, no changes have been made.

Sections 11087(e)(1) and 11087(e)(4)(A)

Comment: The CFRA regulations should identify that an employee whose employer uses a ‘rolling 12-month period backwards’ for its FMLA/CFRA year does not possess this right of not having to requalify, as described in the sections above. A rolling 12-month period going backwards does not provide any actual conceptual framework for this particular CFRA right. It is recommended that the omission of this CFRA right be noted within the regulation.

Council Response: The Council disagrees with the necessity of this recommendation, which would likely add confusion by incorporating the new concept of “rolling 12-month period backwards,” and as a result, no changes have been made.

Section 11087(e)(2) – Employment Periods Prior to a Break in Service of Seven Years.

Comment: The term “employers” should be deleted and replaced with “an employer,” the words “they do” in the last sentence should be deleted and replaced with “the employer does.”

Council Response: The Council disagrees with this grammatical proposal since preexisting language is reflected in several FMLA sections and throughout case law.

Comment: The proposed adoption of 29 C.F.R. § 825.110(b)(1) limits employee eligibility for leave by providing that employers need not count work prior to a break in service of more than seven years in calculating whether the employee has met the one-year-in-service eligibility requirement. The adoption of this FMLA regulation will result in the unnecessary disqualification of individuals from CFRA coverage who are eligible under the current statute and regulations. Thus, it should be rejected.

Council Response: The Council disagrees with this comment. The proposed changes are necessary for both clarity and to make the application of CFRA consistent with other law on the issue, which is now being explicitly stated rather than incorporated by reference. As a result, no changes have been made.

Comment: This subsection changes the substantive rights of employees, to their detriment by limiting the timeframe from which the employee may draw their service time for purposes of eligibility for CFRA leave. This limitation should not be included because it is not contained

within the statute, is contrary to current regulations, and represents an unjustified limitation on employee rights. The Council's Initial Statement of Reasons (ISR) relies on the FMLA regulations for authority for this change, and "convenience (of the employer)" for this proposed change. Neither represents a justification for limiting the substantive rights of California workers.

Council Response: The Council disagrees with this comment. This proposed section is intended to make the CFRA regulations consistent with the FMLA, which already imposes an identical limitation on employee's substantive rights. Consistency between the CFRA and FMLA provide a level of convenience – rather than maintaining draconian record-keeping requirements – to employers in their need to comply with both federal and state law, which contain the same underlying eligibility requirements. As a result, no changes have been made.

Comment: The final sentence has the effect of confusing employers regarding setting policies under this section. The first sentence, by its terms, confers discretion upon employers as to whether or not they will count employment periods prior to a seven year break in service. Current case law already confers upon employers the obligation to apply these policies in a nondiscriminatory manner. The proposed final sentence here renders the employer's otherwise clear obligation unclear. Indeed, this sentence's requirement that the policy be applied "uniformly" to all employees with "similar" breaks in service facially conflicts with the first sentence's provision that the employer and employee may contract around the general requirement.

Council Response: The Council disagrees with this comment. The purpose of the last sentence is to make it clear to employers that they may be more generous in their calculation of the 12-month period, to the benefit of employees, so long as they do so for all their employees. The first sentence is consistent with the last sentence, and is necessary to make explicit that both employees and employers have the power to negotiate another arrangement as they see fit. As a result, no changes have been made.

Section 11087(e)(3) – Relationship with Pregnancy Disability Leave.

Comment: The language, "that is also an FMLA leave," should be stricken from the first sentence to account for circumstances where a woman may begin PDL leave before she becomes eligible for FMLA leave, but then may become FMLA/CFRA eligible during her PDL leave.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The phrase "who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave" should be changed to "who then wants to take CFRA leave for reason of the birth of her child within the first year of the child's life, or to bond with a newly adopted or fostered child within the child's first year in the home" to ensure that new mothers eligible for CFRA bonding leave are able to enjoy it within the first year of their child's life.

Council Response: The Council disagrees with the necessity of this recommendation as the current text reaches the same result in a manner no less clear than the suggested text. As a result, no changes have been made.

Comment: The first day of FMLA in a pregnancy situation should be the marker for an employee's eligibility when taking subsequent CFRA bonding leave, not the first day of PDL.

Council Response: The Council disagrees with the necessity of the proposed change since the law as stated is based on statute and, as a result, no changes have been made.

Section 11087(e)(4) – 50 Employees within 75 Miles of a Worksite; Worksite Definition.

Comment: Language should be added specifying that only employees who perform work in California at least half of the time are eligible for CFRA leave in order to clarify that only employees who have a certain minimum level of contact working within California are eligible for the benefits provided by the CFRA.

Council Response: The Council disagrees that such a minimum contact requirement is necessary here, which would be more appropriate for the legislature to add to the statute, and as a result, no changes have been made.

Comment: An example should be added to this subsection for clarity.

Council Response: The Council agrees, and a clarifying example has been added to the text and appears as a new subdivision under 11087(e)(4).

Comment: Clarity is needed as to what constitutes a "worksite" for employees with fixed worksites as opposed to employees with no fixed worksites.

Council Response: The Council agrees, and clarifying text has been added and appears as a new Section 11087(e)(4).

Comment: The current language conflicts with other CFRA and FMLA regulations in suggesting that if the number of employees working within the 75-mile radius falls below 50 after the employee has given notice of the need for leave but before the employee's leave begins, the employee no longer would be eligible for CFRA leave, and thus the subsection should be revised to state: "Once the employee meets the eligibility criterion of working at a facility where 50 employees are employed within 75 miles at the time the employee gives notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite for that specific notice of the need of leave. The employer may not deny the leave, cut short the leave or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period based on the reduced number of employees. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event."

Council Response: The Council's addition of a new subdivision under 11087(e)(4) addresses the concerns of this comment.

Comment: The meaning of "jointly employed" needs clarification and definitions of "primary" and "secondary" employer should be provided.

Council Response: The Council disagrees that changes are needed in response to this comment because clarifying language was already included, making this proposed addition superfluous. Additionally, the Council does not believe definitions of “primary” and “secondary” employer are required in the text as they are common, accepted terms.

Comment: It is odd that the 75-miles criterion is described in greater detail the second time it is referenced in the regulations, and not the first time (in § 11087(d)).

Council Response: As a result of changes made in response to other comments, this comment is now addressed and moot.

Section 11087(e)(5) – Earning CFRA Eligibility during another Leave.

Comment: The following language should be added for clarity: “However, because leave taken due to pregnancy-related disability does not qualify under the CFRA, if an employee earns CFRA eligibility while on pregnancy disability leave, the portion of pregnancy disability leave taken after the employee has met the one-year requirement should be designated as FMLA leave. Any leave taken to bond with a child after recovery from childbirth should be designated as CFRA leave.”

Council Response: The Council believes the text already captures this sentiment and no resulting changes have been made.

Comment: The following language should be added to provide more clarity in defining weeks that should be counted toward the 12-month length of service requirement: “If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.” If this addition is made, then the phrase “leave to which they are otherwise entitled” would become unnecessary and should be revised accordingly.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: “One-year” should be replaced with the term “12-month.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: “...the employee may nonetheless meet this requirement while on leave,” should be amended to read, “the employee may nonetheless meet this requirement while on a leave approved by the employer,” because this entitlement, by definition, can only apply to an employee on an approved leave.

Council Response: Modifications made by the Council in response to other comments have the effect of satisfying the concerns of this comment. As a result, no changes have been made.

Comment: The word “should” is not sufficiently strenuous for this sentence and should be replaced with “shall.”

Council Response: The Council disagrees with the proposed word preference as it is purposefully fashioned as a suggestion, not a mandate, and has not made any changes in response.

Section 11087(e)(6).

Comment: A new section should be added that states: “Where an employer disputes that an employee has worked the requisite 1250 hours required for CFRA eligibility, the employer has the burden to prove both that it maintained accurate records of hours worked by the employee, and that those records reflect less than 1250 hours worked in the year immediately preceding the beginning of the requested leave. Where an employer cannot meet this burden, it is presumed that the employee has worked the requisite 1250 hours. In the event that an employer intends to deny CFRA leave on the basis that an employee has insufficient hours, the employer must provide the employee with an accurate accounting of her hours worked in the year prior to the request for leave. This accounting must be in writing and must be provided within three days of the employee’s request for leave.”

Council Response: The Council disagrees that the proposed new section is necessary, and as a result no changes have been made. Eligibility is part of an employee’s underlying claim, not an affirmative defense of the employer. Thus, the burden shifting requested is not appropriate in this instance.

Section 11087(e)(7).

Comment: A new section should be added that states: “Where an employer disputes that it employs the requisite 50 or more employees within a 75 mile radius of the requesting employee’s worksite, the employer has the burden to prove both that it maintained accurate records of the number of employees it employed during the relevant time period, and that those records reflect that it did not employ 50 or more employees for 20 or more working weeks during the year of the leave request or the preceding year. Where an employer cannot meet this burden, it is presumed that the employer has the requisite number of employees to render the requesting employee CFRA-eligible.”

Council Response: The Council disagrees that the proposed new section is necessary, and as a result no changes have been made. Eligibility is part of an employee’s underlying claim, not an affirmative defense of the employer. Thus, the burden shifting requested is not appropriate in this instance.

Section 11087(e)(8).

Comment: A new section should be added that states: “If an ineligible employee holds a reasonable belief, based on communication from her employer or an agent thereof, that she is eligible for FMLA or CFRA leave, and if she subsequently takes such leave, the employee will be entitled to all protections of the Act. Such communication may include, but is not limited to, verbal or written information provided by an employer to an employee granting her request for FMLA- or CFRA-qualifying leave.”

Council Response: The Council disagrees that the proposed new section is necessary since that is outside the scope of these regulations and as a result, no changes have been made.

Section 11087(f) – Definition: “Employment in the same position.”

Comment: The term “original” should be deleted.

Council Response: This comment is unnecessary and non-responsive to any changes proposed by the Council. As a result, no changes have been made.

Section 11087(g) – Definition: “Employment in a comparable position.”

Comment: The phrase “the employee's original position” should be replaced with “the position that the employee held prior to CFRA leave.”

Council Response: This comment is unnecessary and non-responsive to any changes proposed by the Council. As a result, no changes have been made.

Section 11087(h) - Definition: “ Family Care Leave.”

Comment: The phrase “guarantee of employment” should be replaced with the phrase “guarantee of reinstatement.”

Council Response: The Council disagrees with the necessity of the proposed change, especially considering the phrase “guarantee of employment” comes directly from the statute, and as a result no changes have been made to the text.

Comment: The use of the word “termination” in the phrase “termination of leave” has bad connotations and should be replaced by a synonym.

Council Response: The Council does not agree that any bad connotations associated with the word “termination” necessitate the proposed change. Moreover, this comment is nonresponsive, as the Council did not attempt to regulate this part of the subdivision. Therefore, no changes have been made to the text.

Section 11087(j)(1) – “Health care provider.”

Comment: The proposed stricken language should be reinstated to enhance clarity.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(k) – Definition: “In loco parentis.”

Comment: The proposed stricken language should be reinstated to enhance clarity.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This definition should be clarified to address the rights of LGBT individuals to bond with and care for their children.

Council Response: The Council disagrees with the necessity of instituting the recommended change within the section. As written, the reinstated text has the desired effect of preserving rights for LGBT individuals over their children and the children of their partners. As a result, no changes have been made.

Section 11087(l) – Definition: “Key employee.”

Comment: The term “key employee” is not included in Government Code section 12945.2. Further, the definition conflicts with the Government Code in its use of the term “working” rather than “employed, and as a result the subsection should be revised to state: “‘Key employee’ means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer’s employees who are employed within 75 miles of the employee’s worksite at the time of the leave request, as described in Government Code section 12945.2.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The wording of this definition is confusing when read in conjunction with the substantive right section (§ 11089(d)(2)) and should be restructured accordingly.

Council Response: As a result of changes made in response to other comments, this comment is now moot.

Section 11087(n) – Definition: “Parent.”

Comment: The proposed stricken language should be reinstated to enhance clarity and avoid confusion.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(q) – Definition: “Reinstatement.”

Comment: To avoid confusion over the meaning of the word “original,” the definition should be changed to state: “the return of an employee to his or her same or a comparable position.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11087(r)(1) – Definition: “Inpatient Care.”

Comment: Omitting “an overnight stay” in a hospital, hospice, or residential health care facility to instead reference “a stay” may significantly expand the circumstances under which CFRA leave may be invoked and create an increased administrative burden on California employers who would need to determine whether the illness or injury qualified as a “serious health condition,” as well as track the limited amount of leave allowed/required. For consistency with FMLA, and given the amorphous meaning that could apply to the term “stay,” the original regulation’s wording of “an overnight stay” should remain.

Council Response: Modifications made by the Council in response to other comments properly address the concerns of this comment by limiting the circumstances under which CFRA leave may be invoked. The Council’s modified definition more accurately reflects the meaning of the term as defined by state law in other contexts, such as Workers’ Compensation.

Comment: Use of the phrase “or any period of incapacity” suggests that it stands alone from the topical term “inpatient care,” and so would be better to add the word “subsequent,” as in “or any subsequent period of incapacity.”

Council Response: The Council disagrees with the necessity of the proposed change since “or any period of incapacity” is within the definition of “inpatient care,” and as a result, no changes have been made to the text.

Section 11087(r)(2) – Definition: “Continuing Treatment.”

Comment: The term “meaning” should be changed to “means” so that the statement reads more clearly.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: “Incapacity” should be identified as a vital prong of “continuing treatment.”

Council Response: The Council disagrees that “incapacity” is a required, vital element of the definition of “continuing treatment,” especially considering “incapacity” is not used to define “continuing treatment.” As a result, no changes have been made to the text.

Comment: The wholesale incorporation of the 2013 FMLA regulations as described at the beginning of Proposed Section 11087 restricts one of the ways in which an employee may establish a serious health condition. Under the new FMLA regulations, for purposes of the “incapacity and treatment” prong of the serious health condition definition, an employee must now see a health care provider for the first time within seven days of the onset of the incapacity, and in some circumstances must make a second visit within 30 days. Further, for chronic conditions, a worker now must make at least two visits per year to a health care provider. 29 C.F.R. § 825.115(a), (c). Therefore, it is recommended that the 2013 FMLA regulations not be adopted, or in the alternative, clarifying language should be added that states that this restriction in the 2013 regulations does not apply to the CFRA.

Council Response: The Council disagrees with the necessity of this comment. The Council finds alignment between the CFRA and FMLA on the definition of “continuing treatment” to be preferable to burdening employers and employees with having to interpret two different definitions. As a result, no changes have been made.

Section 11087(s) – Definition: “Spouse.”

Comment: “Registered Domestic Partner” should be given its own definition to avoid potential ambiguity and confusion surrounding the differing definitions of “spouse” under applicable state and federal law.

Council Response: The Council disagrees that the term “registered domestic partners” needs its own definition, especially because the Family Code sections where it is defined is listed, but has made changes to the text to clarify what is meant by this term for purposes of these regulations.

Comment: Any reference to the Family Code regarding a “registered domestic partner” should refer to California Family Code § 297 or to sections 297 through 297.5.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The “and” in the phrase “a partner in marriage as defined in Family Code section 300 and a registered domestic partner” should instead be “or” for purposes of clarity.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The U.S. Supreme Court’s Prop 8 decision in *Hollingsworth* may impact the CFRA definition of “spouse.”

Council Response: The Council had appropriately considered the ramifications of the *Hollingsworth* case in modifying the definition of “spouse.”

Section 11087(t) – Definition: “Twelve workweeks.”

Comment: The accurate subsection to cross reference for the definition of “twelve workweeks” is § 11090(c), and not § 11090(b).

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11088(a) – Right to CFRA Leave.

Comment: This reference to § 11088(c) is unnecessary and not an accurate description of the subdivision’s purpose, and thus should be eliminated.

Council Response: This comment would diminish the regulations’ clarity and is non-responsive to any proposed changes by the Council. As a result, no changes have been made.

Section 11088(b) – Denial of CFRA Leave.

Comment: For consistency, all use of the words “CFRA-qualifying” should use a hyphen.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Denial of leave can and should encompass not only denying the employee’s request, but also denying the employee entitled protections during the leave, and denying various rights of return. The regulatory term should broaden its concept to enlarge the perception of what denial of leave can include.

Council Response: This comment is unnecessary, unjustified, and non-responsive to any proposed changes by the Council. As a result, no changes have been made.

Section 11088(c) – Limitation on Entitlement.

Comment: The proposed change of the term “parents” to “spouses” in the first sentence of this regulation is a problem in California because marital status is a protected category under the FEHA. The current CFRA regulations utilize the term “parents” to avoid different treatment of married and unmarried parents for purposes of CFRA bonding leave entitlement. Retaining the old language or using the proposed edit above would help avoid this issue.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: For clarity purposes, the following should be added after the first sentence of this subsection: "If two unmarried parents work for the same employer, they are not subject to this limitation."

Council Response: The Council disagrees that further clarity is needed within this subdivision and as a result, no changes have been made.

Comment: CFRA regulations allow for the limitation on spouses working for the same employer only for bonding, adoption, and foster care, but not for the care of a parent. This is different from FMLA and prevents an employer from following the same rule. This is not addressed in the statute and should be amended to mirror the FMLA.

Council Response: The Council disagrees with this comment. The Council cannot regulate in a manner that expands current California law, even if that results in some inconsistency between state and federal law. As a result, no changes have been made.

Comment: The proposed changes to this section are confusing. The existing regulation provided that parents had to share bonding time if they worked for the same employer. The proposed regulations change the word parent to spouse, which brings the rule in line with the FMLA. However, the regulations continue to note that unmarried parents may have different rights under the FMLA, which is inconsistent with the proposed change.

Council Response: Subsequent modifications made by the Council address the concerns of this comment.

Comment: Both the CFRA and the FMLA have a limitation against parent-employees, married (CFRA and FMLA) or not married (CFRA only), who request bonding. There are several conundrums with these limitations, one of which is created by the Council's proposed change to align CFRA with FMLA. The reverse course should be taken on this proposed regulation, and employers should be informally guided away from the antiquated current CFRA rule. Guidance should also be provided to CA employers that to follow this particular CFRA rule can result in a potential violation of federal law regarding non-married parents.

Council Response: Changes made by the Council in response to other comments properly and adequately address the concerns of this comment.

Section 11089 (a)(1)-(b)(2).

Comment: To eliminate any confusion regarding conformity between FMLA and CFRA, these sections should be deleted and instead simply reference the federal law on this issue.

Council Response: The Council disagrees that a simple reference to federal law will eliminate any confusion between the FMLA and CFRA, and as a result no changes have been made. These subdivisions are either preexisting or contextually insert vital guidance on rights upon return.

Section 11089(a) – Guarantee of Reinstatement.

Comment: A new paragraph should be added to this section in order to give the critical phrase, "it is an unlawful employment practice," more prominence.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(a)(1) – Reinstatement in Case of Replacement or Restructuring.

Comment: This section should be either reworded or appropriate commas should be added to the language to clarify what is intended is to provide reinstatement to an employee, when the employee's absence, has necessitated his/her replacement or restructuring his/her position.

Council Response: The Council disagrees that more clarification is required and believes the language clearly accomplishes what was intended. As a result, no changes have been made.

Section 11089(a)(2) – Reasonable Opportunity to Re-Qualify on Return.

Comment: The proposed section's wording leaves question as to whether the employer must allow the employee to return to work and then fulfill the qualifying conditions or whether the employee must first meet qualifying conditions to be restored to work. Given that it would be unfair to require an employer to return an employee to working in a position for which the employee is not currently qualified, we presume the intention allows the employer to put the employee's restoration to any work on hold until the employee reasonably can qualify for the position again, and thus the language should be changed to reflect that intention.

Council Response: The Council disagrees that such an ambiguity exists in the language. The text clearly states what is intended – that an employer must place an employee who has been out on an approved CFRA leave in the same or a comparable position, unless some defense justifies otherwise. It is clear that if an employee's inability to meet the qualifications to return to the same or a comparable position is justified by a valid defense, only then may the employer refuse reinstatement. Thus, no changes have been made.

Section 11089(b) – Rights upon Return.

Comment: The phrase “shift and geographic location” should be added so the statute reads “pay, benefits, working conditions, shift and geographic location.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This section is ambiguous and conflicts with current proposed §11087(g), so the first sentence should be changed to read, “The employee is entitled to reinstatement to the same position or to a comparable position, at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(d).”

Council Response: The Council disagrees that any ambiguity exists in the text of this section. The text is clearly identified as “Rights Upon Return,” and does not use any language that invokes, or causes conflict with, the term of art defined in § 11087(g). As a result, no changes have been made.

Comment: The use of the term “virtually identical” should be reconsidered because the term is quite restrictive upon the rights of returning employees.

Council Response: The Council disagrees that the term “virtually identical” will have a restrictive result upon the rights of returning employees, but instead believe the term serves to reinforce an employee’s right to return to work in a capacity close to that which the employee help prior to taking leave. Moreover, “virtually identical” is used in the FMLA regulations – 29 C.F.R. § 825.215(a). As a result, no changes have been made.

Section 11089(b)(1) – Scope of Equivalent Benefits.

Comment: The subject of the sentence is plural and therefore the verb should be in agreement by using the verb form ‘include’.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(b)(2) – No Prohibition on Accommodating Request for Schedule or Shift Change.

Comment: The phrase “or geographic location” should be added so the statute reads “different shift, schedule, position, or geographic location.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Sections 11089(c) – Refusal to Reinstate.

Comment: Clarity is needed as to the decision-making authority and the process for the escape and break for employers because almost any employer could effectively attempt to claim this exception.

Council Response: The Council disagrees with this comment and the need for further modifications, as the text is sufficiently clear. Moreover, this comment is unresponsive since the Council did not propose any changes to or regarding this subdivision. As a result, no changes have been made.

Section 11089(c)(2) – Change in Date of Reinstatement.

Comment: Use of the term “reinstatement date” should be reconsidered because it is not the most accurate description of the situation since the employee has changed the reinstatement date, and is now requesting a new date for reinstatement.

Council Response: The Council disagrees with this comment and believes “reinstatement date” is the most accurate and appropriate term for purposes of these regulations. Moreover, this comment is unresponsive since the Council did not propose any changes to or regarding this subdivision. As a result, no changes have been made.

Sections 11089(d) and (d)(1)(B).

Comment: The text of these sections should be broadened to align with the introductory title of “hours would have been reduced.”

Council Response: The Council disagrees with this comment and believes the text is accurate and clear as written. As a result, no changes have been made.

Section 11089(d)(1) – Employment Would Have Ceased or Hours Would Have Been Reduced.

Comment: Proposed subsection § 11089(d)(1)(B) should be consolidated with (d)(1), in order to clarify that the elimination of a shift or overtime would be subject to the same qualifiers as the cessation of work or reduction of hours – namely, that to meet its burden of proof that the employee would not otherwise be entitled to his or her prior shift or overtime hours, the employer cannot point to changes made “to accommodate the employee’s absence.”

Council Response: The Council disagrees with this comment and believes this sentiment has already been captured by the proposed text. Section 11089(d)(1)(B) is, after all, a subset of section 11089(d)(1). As a result, no changes have been made.

Comment: The text, “that an employee would not otherwise have been employed on the requested reinstatement date in order to deny reinstatement,” is awkward and should be edited accordingly.

Council Response: The Council disagrees with this comment. The text is sufficiently clear, and as a result, no changes have been made.

Section 11089(d)(1)(A) – Employee Laid Off.

Comment: Language should be added to this subsection to indicate that it is the employer’s obligation to provide written notice to the employee at the time the layoff decision is made of the impact the decision will have upon his/her employment status and eligibility for continuation of benefits, etc.

Council Response: The Council disagrees that any such affirmative obligation is required of, and must be explicitly placed upon, employers. As a result, no changes have been made.

Comment: This section should identify that the employer’s responsibility continues after a lay off in terms of no-CFRA-discrimination.

Council Response: The Council disagrees with this comment and does not believe the recommended clarification is necessary as it is already clear from surrounding text. As a result, no changes have been made.

Comment: Use of the word “otherwise” all by itself appears to be a poor fit.

Council Response: The Council disagrees with this comment. The language is preexisting and the Council did not alter it. As a result, no changes have been made.

Section 11089(d)(2) – Provisions Applicable to “Key employee.”

Comment: As currently constructed, the wording of the definition section, § 11087(l), is confusing when read in conjunction with the substantive right section, §11089(d)(2), and thus these sections should be restructured.

Council Response: Changes made in response to other comments on the definition of “key employee,” § 11087(l), address this concern, and hence make the comment moot.

Comment: This section needs to be changed to reflect that the definition of “Key employee” is found under § 11087(k)(1).

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(d)(2)(B) – Requirement that Employee be among Highest Paid Ten Percent of Employees.

Comment: The phrase “actually paid” should be added after “year-to-date wages” resulting in “year-to-date wages actually paid” to remedy the ambiguity the total of “wages” within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders.

Council Response: The Council disagrees with the suggested change. Wages are those actually earned, and thus the suggested change would result in an unnecessary redundancy. As a result, no changes have been made.

Section 11089(d)(2)(C) – “Substantial and Grievous Economic Injury.”

Comment: A significant section of the FMLA definition of “substantial and grievous economic injury” is missing and thus the following should be added for consistency: “A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(d)(2)(F) – Employee Remains Entitled To Benefits if They Do Not Return to Work After Notified of Employer’s Intent To Deny Reinstatement.

Comment: This section should be changed to read, “If an employee on leave does not return to work in response to the..., the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c)...”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(d)(3) – Fraudulently-obtained CFRA Leave.

Comment: This section should be changed to make it clear that an employee who commits fraud to obtain CFRA leave is not entitled to any CFRA protection, and this is not limited only to CFRA's "job protections."

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This section should include the following limiting language: “An employer’s honest belief that an employee has obtained CFRA leave fraudulently, without more, does not meet this burden, nor does it protect the employer from liability for failure to reinstate that employee.”

Council Response: The Council disagrees with this comment. The suggested language is not necessary, nor does it provide any clarity to the intended results of this text. Moreover, it is an incorrect statement of the law regarding fraud, both civil and criminal. Therefore, no changes have been made.

Comment: This section should be amended to ensure there is no confusion regarding the elements of this defense.

Council Response: The Council agrees and has made changes to the text to ensure clarity.

Comment: This section should be revised to state that an employee who fraudulently obtains CFRA leave is also not protected from CFRA's maintenance of health benefits provisions, in conformity with the FMLA regulations.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The proposed regulation should be amended to provide that an employer is not required to prove that the employee actually engaged in fraud, but rather, that the employer's good faith belief that an employee committed fraud and misused leave time is sufficient grounds to deny CFRA rights.

Council Response: The Council disagrees with the comment's proposed standard as it is not sufficient to adequately protect the rights of employees and leaves room for abuse by employers. The "good faith belief" defense is not applicable to statutory requirements such as the CFRA, which does not involve motive except for in provisions related to retaliation. As a result, no changes have been made.

Comment: The last sentence should be deleted because the employee is the one who carries the burden of proof to establish that he/she was entitled to CFRA leave, not the employer.

Council Response: The Council disagrees because while an employee may need to establish that he/she was entitled to CFRA leave, this provision is about raising an affirmative defense, and the burden of proof is on the party raising the defense, in this case, the employer. As a result, no changes have been made.

Comment: This section should identify whether the lesser falsifying offense of CFRA abuse is included or excluded from the scope of fraudulently-obtained CFRA leave.

Council Response: The Council disagrees with this comment. If the Council understands the comment correctly, then this subdivision of the text is limited to fraud and the results of thereof. To include lesser offenses would cause confusion as to what bad acts are prohibited. As a result, no changes have been made.

Section 11090 – Computation of Time Periods: Twelve Workweeks; Minimum Duration.

Comment: The following language should be added to provide employers with guidance on how to calculate "twelve workweeks" when an employee's schedule had changed during the

prior 12 months: "If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA, and prior to the employee notice of need for CFRA leave), the hours worked under the new schedule are to be used for making this calculation."

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11090(b) – Leave Periods Common to Both CFRA and FMLA.

Comment: Language should be added to this section requiring an employer to provide written notice in the language spoken by the requesting employee explaining its chosen method of calculating the 12-month period.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: "... in California" should be added to the end of this section to clarify that the employer is only required to apply the same method of calculating the 12-month period to California employees.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This section should be clarified to address whether the FMLA rules allowing an employer to change the method of counting the 12-month period apply.

Council Response: Subsequent changes made by the Council properly and adequately address the concerns of this comment.

Section 11090(c) – Definition: "Twelve workweeks."

Comment: This section is inconsistent in its use of the term "scheduled" in certain provisions, and "works" in others, and should be changed accordingly, preferably using the term "work" or "worked."

Council Response: The Council is confident in its word choice and does not find any resulting ambiguities. As a result, no changes have been made.

Comment: The word "would" in the final line of this section should be replaced with "shall."

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11090(c)(2) – Computation of Twelve Workweeks If Employee Works an Intermittent Schedule.

Comment: The adoption of 29 C.F.R. § 825.203, which requires an employee to make a "reasonable effort to schedule the [intermittent] treatment so as not to disrupt unduly the employer's operations," should be reconsidered as it places an unnecessary burden on workers who must already contend with the busy schedules of physicians as well as those of friends or family members they may need to rely on for transportation to/from appointments.

Council Response: The Council disagrees that requiring an employee to make only "reasonable efforts" to schedule treatment so as to not "unduly disrupt"

the employer's operations is an unnecessary burden on workers. This text only requires that if an employer will suffer a significant, excessive, and unjustifiable disruption to operations, then, and only then, will there be an expectation that the employee seeking treatment make a "reasonable effort" to avoid that disruption – which is not a bright line rule requiring that the employee *must* avoid the disruption. In this instance, such a simple burden on the employee does not outweigh the benefit to the employer. As a result, no changes have been made to the text.

Section 11090(c)(4) – Effect of Overtime Requirement on Calculation of CFRA Entitlement.

Comment: The adoption of 28 C.F.R. § 825.205(c) should be reversed because it opens the door to confusion among employers and employees regarding what constitute regularly "required" overtime versus what constitutes "voluntary" overtime.

Council Response: The Council disagrees that any serious confusion will arise from the distinction drawn between "required" and "voluntary" overtime. Each of these descriptive words are sufficiently precise to clearly draw a line between overtime that is a mandatory part of an employee's regular schedule, and that overtime which an employee may elect to work. Therefore, no changes have been made.

Section 11090(d) – Minimum Duration for CFRA Leave.

Comment: The section should be clarified with the use of an example, and the addition of the following language: "Nothing in this section precludes an employer from agreeing to permit more than two occasions of leave lasting less than two weeks (e.g., allowing an employee to take one day of bonding leave per week over a number of weeks)."

Council Response: First, clarity will not be served by the addition of an example as additional text will likely result in a saturation of information in a place where the text is already sufficiently clear. Second, the Council ultimately agrees and added "and may grant requests for additional occasions of leave lasting less than two weeks."

Comment: This provision is unclear as to whether an employer and an employee may agree to allow the employee to take leave on an intermittent or reduced schedule basis for the birth, adoption or foster care placement of a child. Further, the proposed Section 11090(e)(1) provides clarification on this issue by recognizing that an employer may agree "to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care." Thus, it is recommended that the foregoing provision should also be included in Section 11090(d), rather than only in Section 11090(e)(1).

Council Response: The Council agrees with the sentiment of this comment and has made changes to the text to account for intermittent or reduced schedule leave.

Comment: This section should specify that there is no requirement that the employer agree to a request to take intermittent leave or a reduced schedule, but that the employer must approve the request for intermittent leave to bond with a newborn/placed child keeping clear

what the basic minimum leave duration is, and that on any two occasions the employer must grant a request for leave of less than two weeks.

Council Response: The Council disagrees with the necessity of this comment and finds the text sufficiently clear and precise as written. As a result, no changes have been made.

Comment: This section should be amended to be consistent with the FMLA and allow the employer to determine if it wants to allow bonding leave to be taken on an intermittent or reduced schedule basis, rather than continuing with the allowance of two instances of bonding leave less than two weeks in duration.

Council Response: Subsequent changes made by the Council adequately and properly address the concerns of this comment.

Comment: The proposed language states that the family member need not receive treatment by a health care provider if the intermittent or reduced work schedule leave is due to a chronic condition. While it may be implied that a proper certification must originally be submitted to support a request for this type of leave, the proposed wording leaves open whether certification is required for this type of leave. Thus, this section should be changed accordingly.

Council Response: The Council disagrees with this necessity of the proposed change. There is no ambiguity in the text that results without this clarification as the addition would be duplicative of a fact that must be true in such a circumstance – namely that proper certification was submitted to the employer. As a result, no changes have been made.

Comment: The meaning of “two occasions” should be explained in this section.

Council Response: The Council disagrees with the necessity of defining “two occasions.” This section clearly defines the minimum single occasion, and from that “two occasions” is easily inferable and non-duplicative. As a result, no changes have been made.

Section 11090(e) – Minimum Duration for CFRA Leaves Taken for the Serious Health Condition of an Employee or their Family Member.

Comment: To prevent CFRA leave abuse that would likely result from allowing an employee with a chronic condition to take CFRA leave for absences, even if not for treatment with a health care provider, this section should provide the employer with the ability to require that the employee seek treatment and provide a physician's note that they were seen for the FML condition, compliant with any different time periods which might be specified by the employee's bargaining unit contract.

Council Response: The Council disagrees with this comment. An employer should not be allowed to require proof of a chronic condition where the condition has only resulted in the employee needing the minimum allowable leave. Moreover, the statute dictates when an employer may request a note, so this is a policy decision best reserved for the legislature. Thus, no changes have been made.

Comment: This section should be revised for administrative consistency between the FMLA and CFRA to state that the increment shall not be greater than one hour, which is consistent with the minimum increment calculation set forth in the FMLA.

Council Response: The Council agrees with this comment and has made changes to the text accordingly.

Comment: The wording of this section should be changed to more precisely align with the definition.

Council Response: The Council disagrees with this comment and feels the text is already properly aligned with the rest of the regulations. As a result, no changes have been made.

Comment: This section should be changed to reflect that the employer “must,” rather than “may,” limit the leave increments to the shortest period of time that the employer utilizes for other forms of leave under the FMLA.

Council Response: The Council agrees and has made the corresponding change to the text.

Section 11090(e)(1) – Employer May Require Employee to Transfer Positions Temporarily if Intermittent Leave is Required.

Comment: Language should be added clarifying the employer’s obligation to reinstate an employee to the same or a comparable position after the employee’s need for intermittent leave ends.

Council Response: The Council disagrees with this comment as any further clarifying language would lead to unnecessary repetition that would not, in fact, result in further clarity. As a result, no changes have been made.

Comment: The term “equivalent” should be reinstated since use of the word “same” will create confusion.

Council Response: The Council agrees and changed the language accordingly.

Comment: The phrase “have to have” is not the most appropriate wording for this section and should be changed.

Council Response: The Council agrees and changed the language accordingly.

Comment: Under this proposed clause, the employer may not have any actual right to transfer the employee who needs intermittent time off due to planned medical treatment. Transferring the employee can almost always cause a hardship for the employee, unless of course the regulation is intended to give authority to the employee when the employee wants the transfer. This issue should be clarified.

Council Response: The Council disagrees that any such ambiguity exists. Additionally, safeguards included in this section are meant to protect the employee from any potential hardships that may result from such a transfer. As a result, no changes have been made.

Comment: The new language, "employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee," is too broad and takes away the discretion of the employer for what position it may transfer the employee to accommodate the schedule restrictions and time off, without harming the operations of the employer. Similarly, there is no definition for what "hardship" might be claimed by the employee, due to the transfer. Thus, this language should be removed because it is unnecessary and the concepts implied are already incorporated under other regulations.

Council Response: The Council disagrees with this comment. These regulations are meant to offer protection to employees who need to take leave from work for various reasons defined in the FEHA and these regulations. In doing so, an employer's discretion to transfer employees must be restricted in some limited circumstances in order to protect employees from employers who wish to discourage employees from taking protected leave. Additionally, a resulting hardship on an employee can be reasonably inferred from the plain meaning of the text. As a result, no changes have been made to the text.

Section 11090(e)(3) – Designation of Time as CFRA Leave Where Working a Reduced Shift is Physically Impossible.

Comment: Clarification is needed as to whether the last sentence is required of employers.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The proposed section provides that, even if there is a physical impossibility, an employee may return to work if she is able to perform other aspects of work such as administrative duties that are not physically impossible. This is not in the statute and differs from the FMLA, which does not have this provision. This is likely to create confusion and uncertainty for employers because it is not defined how employers are to determine when and if other aspects of work are possible. Thus, the rule should be changed to mirror the FMLA.

Council Response: The Council disagrees with this comment. While changes made in response to other comments may alleviate some of these concerns, the Council nevertheless disagrees that any confusion or uncertainty will result. The conclusion of the section is meant to better tailor the narrow physical impossibility exception to instances when it is truly physically impossible. As a result, no changes have been made.

Comment: The proposed section should not be included because an employer should not be permitted to force an employee out on leave for an entire shift where the employee only needs a reduction in hours. Such a practice may have a negative impact on an employee who cannot afford taking a full shift of CFRA leave without pay, and it also could result in the premature exhaustion of an employee's CFRA entitlement. Further, section 11090(e)(1) already permits an employer to temporarily transfer an employee to a position that better accommodates that employee's intermittent leave.

Council Response: The Council disagrees with this interpretation of the text. The proposed language clearly and unambiguously states that only the period for

which the employee's leave renders it physically impossible for them to perform work shall count against CFRA entitlement. As a result, no changes have been made.

Section 11090(e)(4) – Employers May Deduct Exempt Employee's Pay Only as Permitted by the California Labor Code and Industrial Welfare Commission Wage Orders.

Comment: Presumably the intent of this proposed change was to conform to the FMLA's regulation, which clarifies, that, under federal law, deductions may be made from an exempt employee's salary due to leave. However, the wording provides no clarity on the subject to California employers or employees and should be amended to either refer to the federal law making reductions possible and state that this is also permissible under state law, or state the actual rule in the regulation.

Council Response: The Council has made changes to the text that appropriately address the concerns of this comment.

Comment: The California Labor Code and Wage Orders should be inserted into the reference section.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Neither the Labor Code nor the IWC Wage Orders specify that an employer may reduce an exempt employee's pay. However, California Government Code 12945.2(d) provides that "an employer shall not be required to pay an employee" for CFRA leave. The Labor Commissioner has twice opined that California law allows an employer to reduce an exempt employee's salary for intermittent CFRA leave, consistent with similar deductions for FMLA leave permitted under federal law. (3/1/02 and 11/23/09 Opinion letters) In order to avoid any confusion, the following language of this section should be deleted: "only as permitted by the California Labor Code and Industrial Welfare Commission Wage Orders."

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: For clarification purposes, confirmation should be solicited from the California Division of Labor Standards Enforcement that California employers may follow FMLA regulation 29 C.F.R. § 825.206 as to deductions from exempt employee salaries for intermittent or reduced schedule leave.

Council Response: The Council has researched the necessity and accuracy of the proposed changes to the text of this section.

Section 11091 – Requests for CFRA Leave: Advance Notice; Certification; Employer Response.

Comment: To provide ramifications for a failure of an employee to comply with the notice requirement, this section should include an additional provision explaining that the employer has the right to delay an employee's leave if the employee does not provide the required notice.

Council Response: The Council disagrees with the necessity of the proposed changes, though the modifications addressed below should address the commenter's concerns. As a result, no changes have been made.

Comment: This section should be amended to state that an employee is obligated to respond to an employer's request for additional information that is needed to determine whether an absence qualifies for CFRA leave.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11091(a) – Advance Notice.

Comment: The 2013 FMLA regulations should not be adopted, or, in the alternative, clarification should be provided to the effect that these burdensome restrictions do not apply for purposes of providing notice under the CFRA because the wholesale incorporation of the 2013 FMLA regulations would narrow the window of time and method by which an employee notifies an employer of her need for leave. Under the current FMLA regulations, for unforeseeable leaves, an employee must use the employer's usual and customary notice and procedural requirements for requesting leave. 29 C.F.R. § 825.303(c). This regulation means that in a time of family medical crisis, workers will have the added burden of complying with these procedures even if they have otherwise informed their employer of their need for leave for a qualifying reason. If they do not, and no unusual circumstances justify noncompliance, leave can be delayed or denied. Further, a worker who did not give 30 days' notice of foreseeable leave can be required to explain the reason for not meeting this requirement and must provide notice within one day of learning of the need for leave. 29 C.F.R. § 825.302

Council Response: The Council disagrees with the necessity of the proposed change. This section, as amended in response to other comment, provides clear provisions for the adequacy of verbal notice in times when unforeseeable CFRA-qualifying leave is required. As a result, there should be no added burden on employees to comply with the usual notice requirements under such circumstance. As a result, no changes have been made.

Comment: The following language should be added at the conclusion of this section or as a new subsection: "A request for vacation time or other paid time off to care for a parent, child, spouse, or domestic partner with a serious health condition, for an employee's own serious health condition, or to bond with a new child constitutes sufficient notice to make the employer aware of an employee's need for CFRA-qualifying leave. The mere mention of "vacation" or other paid time off does not render the notice insufficient, as long as the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. Nor does an employee's failure to adhere to an employer's particular policies or procedures for requesting leave render notice insufficient, where an employee's notice is otherwise sufficient under the law."

Council Response: The Council agrees with the sentiment behind this proposed language and has made modifications to the text to address this comment.

Section 11091(a)(1) – Verbal Notice.

Comment: The CFRA should be changed to be consistent with the FMLA in its requirement that an employee must indicate that he is taking time off for a previously approved leave so that the employer can be assured that the employee is taking leave for an approved CFRA/FMLA leave and can appropriately track how much time the employee has taken and the employee's entitlement.

Council Response: The Council has amended the text to require employees to respond to permissible questions from an employer when an employer is unable to determine whether the employee's leave qualifies for CFRA. This modification is sufficient to assure employers that they have enough information to appropriately determine the amount of leave an employee is entitled to and to track the leave already taken by the employee.

Comment: The reference to "medical treatment" should be expanded because medical treatment by itself may be sufficient notice for the employer to inquire further, yet insufficient information to establish CFRA. There needs to be some reference to incapacity, even just a comment that the treatment is to avoid incapacity.

Council Response: The Council disagrees with the necessity of requiring employees to state such a specific reason for why leave is needed – an employer is not entitled to know an employee's diagnosis. California's strong privacy protections and the federal HIPAA's privacy rule conflict with this proposal. As a result, no changes have been made.

Comment: This section should identify that "other pertinent information" more importantly includes an employer receiving information from the employee that the absence is caused by a serious health condition or for bonding with a new child.

Council Response: The Council has modified the text to no longer include use of the term "other pertinent information," but rather use "other permissible information." This modification better clarifies what information an employer may request of an employee.

Comment: The language, "The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain the necessary information concerning the leave," incorrectly implicates that an employee can request CFRA leave, and the employer's role is to determine if such a request is being made, and should be changed.

Council Response: The Council disagrees with the implications drawn by this comment. The language is already clear on its face. As a result, no changes have been made.

Sections 11091(a)(1)(A) and (B).

Comment: This section needs to clarify whether the CFRA is going to adopt a U.S. DOL rule on non-designation as its own. CFRA Regulations have already adopted the DOL's regulation and rule for late retroactive designations. Yet there is no regulation in the CFRA which adopts FMLA's rule for no designation at all.

Council Response: The Council disagrees with the necessity of this comment. Further elaboration would not lead to additional clarity, but instead is likely to bring confusion to what is already a clear and comprehensible section. If understood correctly, the incorporation by reference section should adequately address commenter's concerns. As a result, no changes have been made.

Section 11091(a)(1)(A) – Employer's Duty to Designate Leave.

Comment: To "give notice of the designation to the employee" should include the following words of "CFRA protections": "...to give notice of the designation and give explanation of CFRA protections to the employee."

Council Response: The Council disagrees with the necessity of the proposed change. Additionally, the comment is nonresponsive to any changes proposed by the Council. As a result, no changes have been made.

Section 11091(a)(1)(B) – Retroactive Designation of CFRA Leave Allowed.

Comment: This section sets a significantly higher standard than current law, and is inconsistent with FMLA. Specifically, as set forth in 29 C.F.R. § 825.301(d), an employer must provide the employee with adequate notice before retroactively designating the leave, but does not have to obtain the employee's consent. Additionally, Section 825.301(d) also allows the employee and employer to mutually agree to retroactively designate the leave as FMLA. Accordingly, the proposed phrase, "without the employee's consent," should be deleted, and instead language amended to conform the regulation to federal law interpreting FMLA on this issue.

Council Response: The Council has removed the phrase "without the employee's consent," and has made additional changes to the text to address the concerns of this comment, including a requirement of adequate notice to the employee before retroactively designating leave.

Comment: For clarity, this section should be more specific as to under which circumstances an employer is able to retroactively designate a leave as CFRA leave instead of referring to the FMLA.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11091(a)(2) – 30 Days' Advance Notice.

Comment: The statutes state that an employee shall consult with the employer about planned medical treatments to avoid workplace disruption. § 11091(a)(2). However, even though the word "shall" is used, there are no identifiable consequences for the employee failing to comply. The Council should consider whether or not a consequence should be identified, or consider reducing the obligation to the word "should."

Council Response: The Council disagrees with the necessity of the proposed change. Additionally, the comment is nonresponsive to any changes proposed by the Council. As a result, no changes have been made.

Section 11091(a)(4) – Prohibition against Denial of Leave in Emergency or Unforeseeable Circumstances.

Comment: This provision should be revised to read, "...on the basis that the employee did not provide advance notice of the need for the leave, provided that the employee provided notice to the employer as soon as practicable," in order to clarify that the employer may deny the leave if the employee does not provide notice to the employer of the need for leave as soon as practicable after the emergency or unforeseeable circumstances have occurred.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11091(b) – Medical Certification.

Comment: The 2013 FMLA regulations allow employers to contact an employee's medical provider for clarification and authentication of a complete and sufficient medical certification. 29 C.F.R. § 825.307. This jeopardizes workers' privacy and creates the risk that employers will gain access to employees' or their family members' medical information. This provision is inconsistent with the California Constitution, and thus the CFRA regulations should be amended to clarify that such a process is impermissible in California.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Under the 2013 FMLA regulations, a worker taking intermittent leave may be forced to provide a fitness for duty certificate every 30 days in which she takes leave if the employer has a policy of requiring such certificates and has "reasonable safety concerns." 29 C.F.R. § 825.312(f). This will impose an unnecessary burden and cost on workers to visit a health care provider and obtain a new certification. For many workers, it is both cost prohibitive and difficult – if not impossible – to schedule frequent appointments for re-certification purposes. Therefore the 2013 FMLA regulations should not be adopted in whole, or, in the alternative, language should be added clarifying that this requirement does not apply to intermittent CFRA-qualifying leave.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Additional clarity is needed regarding the certification form to be used by employers. The FMLA form requests the disclosure of sensitive medical information which "may include symptoms [or] diagnosis," all of which is protected under California's strict privacy laws. The regulations should clarify that an employer may not require disclosure of the diagnosis (regarding either the serious health condition of the employee or her family member), and make clear that it is unlawful to require an employee to complete the Department of Labor's FMLA form in lieu of the CFRA certification form.

Council Response: The Council agrees and changes to the language have been made accordingly, particularly in section 11097.

Comment: This section should make it clear that second and third opinions for employees' family members are prohibited under CFRA. Despite the fact that the Government Code and CFRA simply do not specifically authorize such second/third opinions for family members, as are

authorized for certifications from employees' own health care providers, there could be an argument that it is not specifically prohibited.

Council Response: The Council disagrees with this comment. The addition of text prohibiting second and third opinions for employees' family members is unnecessary and can be easily inferred from the text. The proposed addition is likely to take away from the clarity and ease of comprehending this section. As a result, no changes have been made.

Sections 11091(b)(1) to (2).

Comment: The limitations on recertification and second opinions for family member leave requests permit fraud and leave employers with no regulatory remedies to address potential fraud and abuse. Clarification is needed as to whether the word "only" suggests that recertification is limited to situations when the original need for leave is over or refers to the fact that recertification can only be requested when the employee needs additional leave. Additionally, clarification is needed as to what, under CFRA, is the maximum duration for a certification that does not have a specified duration of the condition that necessitates the need for leave.

Council Response: The Council disagrees with this comment. The purpose of these sections is to address medical certification, and not remedies for fraud, which was added as section 11089(d)(3) and may allay the commenter's concerns. Adding remedies to this section is unnecessary and likely to result in confusion. The use of the word "only" is sufficiently clear and unambiguous as it only applies to situations when additional leave is requested – regardless of whether the additional leave is related to the original need, or some new need. Finally, including a limitation on medical certifications is unnecessary as it is likely to create confusion and more issues for both employers and employees. As a result, no changes have been made.

Comment: These paragraphs reference when an employer may require an employee to use paid time off or vacation time while on unpaid CFRA leave. A recent case interpreting FMLA regulations has stated that an employee receiving disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation. *Repa v. Roadway Express*, 477 F.3d 938, 941 (7th Cir. 2007). To eliminate any confusion on this issue with regard to CFRA, whether unpaid leave includes or excludes disability payments should be defined.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns expressed in this comment. As a result, no additional changes have been made.

Section 11091(b)(1) – Employer May Require Certification of Serious Health Condition of a Child, Parent or Spouse.

Comment: The addition of the phrase "but only" to the qualification of when an employer can request re-certification for CFRA leave for an employee to provide care for a spouse, child, or parent does not further the purpose of providing clarity, and thus should not be changed.

Council Response: The Council disagrees with this comment. The use of the words “but only” is sufficiently clear and unambiguous as it only applies to situations when additional leave is requested. This language is not inaccurate to the text of the statute in that it is unknown if the leave is required at the time an employee requests further leave. Hence, recertification may be necessary to determine if additional leave is required. As a result, no changes have been made.

Comment: The referral to § 11087(b)(1) causes frustration and needs to be fixed because § 11087(b)(1) refers to another referral in the Government Code.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Section 11091(b)(2) – Employer May Require Certification of Serious Health Condition of Employee.

Comment: The addition of the phrase “but only” to the qualification of when an employer can request a re-certification for CFRA leave for the employee's own serious health condition does not further the purpose of providing the clarification of the statute as claimed in The Statement of Reasons, and thus should not be changed.

Council Response: The Council disagrees with this comment. The use of the words “but only” is sufficiently clear and unambiguous as it only applies to situations when additional leave is requested. This language is not inaccurate to the text of the statute in that it is unknown if the leave is required at the time an employee requests further leave. Hence recertification may be necessary to determine if the leave is required. As a result, no changes have been made.

Comment: CFRA regulations should be modified to incorporate aspects of federal FMLA recertification regulations allowing the employer to request recertification where the circumstances supporting a prior certification have changed, the employer has received information that casts doubt on grounds supporting the leave, or such information casts doubt on the continuing validity of the certification. All three reasons are consistent with the intent of the CFRA to authorize leave only for CFRA qualifying reasons, and can be addressed by adding the following language after the first paragraph of section 11091(b)(1), and after the first paragraph of section 11091(b)(2): “Consistent with federal FMLA regulations, the employer may request recertification at any time if: (1) circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, nature or severity of the illness, complications, etc.); or, (2) the employer receives information that casts doubt upon the employee’s stated reason for the absence or the continuing validity of the certification.”

Council Response: The Council disagrees with this comment. Limiting the circumstances for which an employer may seek recertification is necessary to preserve privacy rights and protect employees on CFRA-qualifying leave from the unnecessary burden of being required to repeatedly justify their need for leave when medical authorization for the leave has already been provided.

Additionally, expanding the circumstances for recertification would dilute what is currently a clear and easy to follow standard. As a result, no changes have been made.

Comment: The referral to § 11087(b)(2) causes frustration and needs to be fixed because § 11087(b)(2) refers to another referral in the Government Code.

Council Response: The Council disagrees with the necessity of the proposed changes. All references are clear, consistent, and necessary. Moreover, in response to other comments, the Council has modified the proposed text in a manner that should largely address and clarify the concerns of this comment. As a result, no changes have been made.

Section 11091(b)(2)(A) – Employer May Require, at Its Own Expense, Second Certification if there is Reason to Doubt Validity of Original Certification.

Comment: This section significantly increases the standard by which an employer may require the employee to obtain the opinion of a second health care provider for the employee's own serious health condition. Currently, an employer may require a second opinion whenever the employer has a reason to doubt the validity of the certification provided by the employee. Under the proposed language, the employer must first "establish" a reason to doubt the validity of the original certification before requiring a second opinion. The term "establish" is undefined, which leaves ambiguity as to how much or what evidence an employer needs to provide in order to justify a second opinion. Additionally, it is unclear as to whom the employer must "establish" doubt regarding the validity of the certification, whether such evidence must be documented, and who ultimately determines whether the employer has "established" doubt. This standard is also inconsistent with FMLA and, therefore, will create two different standards for health conditions that trigger leave under CFRA and FMLA. See 29 C.F.R. § 825.307. Accordingly, the term "establishes a" should be deleted and the word "has" retained.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The proposed stricken language should be restored to enhance clarity. The issue of certification is one of crucial importance. The language proposed to be stricken outlines extremely important aspects of the certification process. While the language does appear in the statute, this section of the regulations is sufficiently complex and flushed out that the elimination of the language from the regulation would lead, in actuality, to more confusion and increased probability of reduced compliance.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: With respect to FMLA, this CFRA proposal makes a significant departure for California employers. "Establishing a reason" connotes a burden on the employer to prove the doubting of the validity, whereas the FMLA requirement, "had reason," is much more flexible. There is nothing inherently incorrect about having this difference. Yet it will cause some consternation in the employer community and some welcome business for California trial lawyers.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: This provision is demanding, tricky, obscure, and complicated. The Council should enumerate questions that may be permissibly asked by employers to employees.

Council Response: The Council disagrees with the necessity of the proposed changes. To provide questions would only serve to make the regulations less clear and comprehensible. As a result, no changes have been made.

Section 11091(b)(2)(B) – Employer May Require, At Own Expense, Third Certification if Opinion in Second Certification Differs in Opinion from Original Certification.

Comment: The word “designated” has special meaning within CFRA, and it should not be used for other purposes.

Council Response: The Council disagrees with this comment. If a new term were used, it is likely that the new term would be misinterpreted as a purposeful deviation from the prior language. Additionally, this comment is nonresponsive to any proposed modifications made by the Council. As a result, no changes have been made.

Section 11091(b)(2)(E) – Employer May Require Employee to Obtain “Return to Work” Release upon Return from Leave.

Comment: Clarification is needed as to whether the language “...requiring such releases from other employees returning to work after illness...” is a reference to “all other employees,” or only “other similar situated employees.”

Council Response: The Council disagrees that there is any ambiguity in the reference to “other employees” as it is properly qualified as meaning “other employees returning to work after illness.” Additionally, this comment is nonresponsive to any proposed modifications made by the Council. As a result, no changes have been made.

Section 11091(b)(3) – Providing Certification.

Comment: The proposed language, “no less than,” is awkward given the existing sentence structure. We would propose redrafting that initial sentence as follows: “An employer requiring certification as described in Section 11091 of these regulations shall permit the employee at least 15 calendar days to provide such certification. . .”

Council Response: The Council disagrees that the proposed text is awkward or suffers from any ambiguity. As a result, no changes have been made.

Comment: The structure of the third sentence lacks sufficient clarity and should be changed to read as follows: “If the employee fails to timely return the certification through fault of his or her own, the employer may deny . . .”

Council Response: The Council disagrees that the proposed text is unclear. As a result, no changes have been made.

Comment: Adding the phrase, "no less than," in the first sentence does not clarify that 15 days is allowed at a minimum, and therefore the change is not necessary and should be rejected.

Council Response: The Council disagrees with this comment. The addition of the phrase "no less than" properly and more clearly identifies a 15 day minimum. As a result, no changes have been made.

Comment: The proposed regulation states that an employer may deny CFRA protections "until sufficient certification is provided." The regulation should be amended to address the situation where an employee never provides a certification by adding the following as the last sentence: "If the employee never produces the certification or recertification, the leave is not CFRA leave."

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: In order to address employer difficulties that arise from certification forms from health care providers that are either incomplete (one or more entries not completed), insufficient (information provided is vague, ambiguous or not responsive) or both, CFRA regulations should incorporate the requirements of 29 C.F.R. § 825.305(c).

Council Response: The Council disagrees with the necessity of this addition. The requirements of § 825.305(c) are not inconsistent with these regulations, and are incorporated by reference to the extent that they are not inconsistent with the rest of the CFRA regulations. To avoid unnecessary duplication and a lengthy addition about an intuitive topic like including complete and sufficient information, no changes have been made. Moreover, the response to the comment immediately below addresses this comment, as well.

Comment: In order to address employer difficulties that arise from receiving certification forms from health care providers that appear to lack authenticity, are incomplete (one or more entries not completed), or are insufficient (information provided is vague, ambiguous or not responsive), CFRA regulations should incorporate the guidelines set forth in 29 C.F.R. § 825.307. Additional provisions should be added addressing California specific medical release requirements required by the CFRA as a prerequisite to communications with a health care provider (e.g., those imposed by the California Confidentiality of Medical Records Information Act, etc.).

Council Response: The Council has modified the proposed text in a manner that should address the concerns of this comment. The Council has added a requirement that employers must advise an employee of the anticipated consequences of his or her failure to provide adequate certifications. This change allows employers to put employees on notice about the consequences of returning certification forms that appear to lack authenticity, are incomplete, or are insufficient. Once on notice of the consequences, employees will be more likely to return adequate certification forms, thus alleviating some of the mentioned difficulties of employers.

Comment: The parenthetical example should be removed because it is not consistent with the expressed intention to follow the FMLA regulation on this topic, and there is no such example in the FMLA regulations.

Council Response: The Council disagrees with this comment. Inclusion of the parenthetical example is necessary to provide additional clarity as to what the term “extenuating circumstance” is meant to include. As a result, no changes have been made.

Comment: Elaborating on the exception for the employee’s good faith efforts may be necessary. Should the regulation specifically require the employee to inform the employer of these efforts, and who is the primary decision-maker as to whether they were sufficiently good faith? Is there a timeframe for the employee to inform the employer of the good faith – like before the 15 calendar days expire?

Council Response: The Council disagrees with the necessity of the proposed changes and is confident that the text as modified in response to other comments should allay this commenter’s concerns. As a result, no further changes have been made.

Section 11092(b) – Paid Leave.

Comment: The 2013 FMLA regulations require an employee to meet the employer’s requirements for using paid vacation or personal leave in order to receive such pay while on FMLA leave. 29 C.F.R. § 825.207(a). Many employers have policies restricting the use of vacation or other paid leave (e.g., requiring 5 days’ notice before using paid vacation), which could make it difficult or impossible for a worker to receive pay during a FMLA/CFRA leave—and thus may mean that eligible workers who need leave will not take it because they cannot afford to take unpaid leave, or will be forced to go without critical pay. Thus, there should not be an adoption of the 2013 regulations, or, in the alternative, it should be clarified that the restrictions mentioned above do not apply under the CFRA.

Council Response: The Council disagrees with the necessity of this commenter’s suggestion. Government Code section 12945.2 reads in relevant part “[a]n employee taking a leave permitted by subdivision (a) may elect, or an employer may require the employee, to substitute, for leave allowed under subdivision (a), any of the employee’s accrued vacation leave or other accrued time off during this period or any other paid or unpaid time off negotiated with the employer.” To the extent that that statutory provision is not controlling, the potential undesirable effects would be the result of prior policies/agreements amongst the employer and employee, assuming those policies/agreements are lawful, and not the result of this regulation. As a result, no changes have been made.

Comment: The word “substitute” within CFRA is becoming increasingly antiquated and should be revised.

Council Response: The Council disagrees with this comment, as the use of “substitute” is most accurate and clear. The 2013 FMLA regulations, which are

certainly not antiquated, use a form of “substitute” 27 times. As a result, no changes have been made.

Comment: Section 11092(b) explains the circumstances under which an employee may choose to, or be required to, utilize paid benefits during CFRA leave. It is our experience that when employees are receiving short- or long-term disability benefits, paid family leave benefits or workers' compensation benefits that only provide a partial wage replacement, employers and employees may prefer to “top off” the benefits with paid vacation, paid time off or sick time such that the employee receives one hundred percent of his or her wages during CFRA leave. Under the proposed regulations, it is unclear whether “topping off” is allowed. Accordingly, the following provision should be included in Section 11092(b) to resolve this ambiguity: “If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off or sick time, supplement the partial wage replacement benefit, unless otherwise prohibited by law.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11092(b)(1) – Employee May Elect to Use or Employer May Require Employee to Use Accrued Paid Time Off During CFRA Leave.

Comment: Employees often use Paid Family Leave (“PFL”) benefits during a CFRA-qualifying leave. Unlike the two-week limit imposed by the PFL statute, the proposed language of this section permits an employer to require an employee to use vacation pay throughout the entire duration of her CFRA leave. The different requirements could foreseeably lead to a problematic situation wherein an employee could make over 100% of her salary after the two-week PFL limitation, receiving 55% of her wages through PFL in addition to 100% of her wages through vacation pay from her employer. To avoid such confusion and contradiction, we recommend that the Council adopt the following language: “California Paid Family Leave provides partial wage replacement (up to 55% of weekly wages) to an eligible employee taking leave to bond with a new child or care for a family member with a serious health condition. Where an employee elects to use Paid Family Leave benefits during a CFRA-qualifying leave, an employer may require that employee to use up to two weeks of earned but unused vacation leave before beginning Paid Family Leave benefits, but must then either refrain from requiring additional use of vacation leave, or agree to integrate vacation leave with the Paid Family Leave benefits (e.g., to pay the employee 45% of her vacation leave in addition to the 55% wage replacement provided under Paid Family Leave).”

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: Section 11092(b)(1) proposes language so that the employer can require, or the employee may elect to use vacation or accrued time off during CFRA leave, but then there is a section about the use of sick leave which was deleted from what was previously in the regulations as subsection (b)(3), and now the language is proposed for this section instead. However, it first says the employer can require the use of sick leave, and yet at the end seems

to say the use of sick leave must be mutually agreeable. Therefore, the employer cannot require it. If the last phrase is meant to mean that sick leave, if mutually agreeable, can be used for CFRA leave for a relative, then it was clear in the regulations before and this current change should be rejected. Therefore, this language regarding the use of sick leave should be removed from this section and remain under the separate sub-section previously in the regulations.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Section 11092(b)(3) – Employer May Only Require Employee to use Accrued Paid Time Off if Leave Requested for a CFRA Qualifying Event.

Comment: New Section 11092(b)(3) is unnecessary because, as confirmed in The Statement of Reasons, this is a non-substantive change and the regulations are silent currently about this. This new language does not clarify any application of CFRA leave because if the leave does not qualify under CFRA, then none of these regulations apply. That does not need to be restated.

Council Response: The Council disagrees with this comment. While the proposed additions may not be substantive, they are meant to make clear and explicit that if and when an employee takes non-CFRA-qualifying paid leave, the employee's entitlement to CFRA-qualifying leave may not be reduced in any way. As a result, no changes have been made.

Comment: The first sentence is awkward and should be re-worded for clarity because it could be inaccurately interpreted to believe that the employer can only require the use of accrued vacation if the employees ask for leave that is CFRA-qualifying.

Council Response: The Council disagrees that the first sentence of this section suffers from any serious ambiguity such that the plain meaning of the text would not convey the intended interpretation of the text. As a result, no changes have been made.

Section 11092(b)(4) – Employer and Employee May Negotiate as to Employees Use of Paid Time Off.

Comment: The language should be amended to clarify that, while employers and employees should be free to negotiate more generous leave beyond what is required under the CFRA – and employers and employees should be free to apply other forms of time off during otherwise qualifying CFRA leaves – unprotected leave may not be substituted for CFRA-qualifying job-protected leave.

Council Response: The Council disagrees that the recommended change is necessary as the proposed text already captures this sentiment in a clear and succinct manner. As such, no changes have been made.

Comment: The proposed regulations provide that an employer and an employee may negotiate for the employee's use of any additional paid or unpaid time off instead of using CFRA leave. The regulation previously read that the employee could substitute paid leave for CFRA leave. This new provision would allow employee to stack leave. The employee would be allowed to

use paid leave which would be designated as FMLA and maintain a full entitlement to CFRA leave. This would allow an employee to take up to 24 weeks of leave for the same leave reason, which would create a burden for employers.

Council Response: This Council disagrees that changing the phrase “substitute for” to “instead of using” will result in any burden for employers as the text provides both employer and employee with the optional power to negotiate. Thus, it is entirely within the power of the employer to avoid such a burden. Moreover, prior subdivisions within 11092(b) clarify that the only time a paid leave will not count against CFRA leave is when the paid leave is not CFRA-qualified. Accordingly, no changes have been made.

Comment: This section uses the word “negotiate” to identify the method by which qualifying CFRA is not used and instead saved for the employee. This word “negotiate” is not appropriate. The regulation should replace the concept of ‘negotiation’, as well as consider the unintended consequences to employer and employee when CFRA is not used.

Council Response: The Council disagrees with this comment. Absent any recommendation as to what a more accurate term would be, the Council believes “negotiation” is the most accurate and appropriate word for this section. “Negotiate” has been in the regulations for many years and has not been problematic. As a result, no changes have been made.

Section 11092(b)(5).

Comment: The following language should be added: “Employers are encouraged to inform employees that their State Disability Insurance or Paid Family Leave may be integrated with accrued but unused paid time off. Employers are further encouraged to agree to such integration where it is requested by an employee.”

Council Response: The Council disagrees that the suggested addition is necessary to these regulations and believes the addition would cause confusion over what is currently clear and comprehensible text. Paid Family Leave is not within the purview of the Fair Employment and Housing Act, and enforcement of the provision lies with a different agency, not the DFEH or the Council. As a result, no changes have been made.

Section 11092(c) – Provision of Health Benefits.

Comment: As proposed, the new regulatory language expands an employer's obligation to provide continued health care coverage to up to seven months where an employee disabled by pregnancy (who is protected by California's pregnancy disability leave statutory provisions) is also eligible for FMLA and/or CFRA leave. The proposed change in the regulation is designed to track the pregnancy disability regulations. See 2 Cal. Code Regs. § 11044(c). However, changing a statute through regulation is not permitted. This change is impermissible and leaves employers who must comply with the FMLA, the CFRA, and California's pregnancy disability law with a conflict between the CFRA statute and CFRA regulations. Instead of providing clarification, employers must either follow the statute and risk challenge of their benefits continuation policy or provide continued health benefits beyond the period required by statute.

Council Response: The Council disagrees with the accuracy of this comment. The proposed text is a reproduction of the language in the pregnancy disability regulations, and thus is not a change in law. Additionally, the proposed regulations clearly describe, rather than alter, the relationship between CFRA leave and pregnancy disability leave. As a result, no changes have been made.

Section 11092(c)(2) – Employer’s Obligation to Continue Benefits Begins at time Leave Begins.

Comment: To enhance clarity regarding an employer's obligations to continue health insurance coverage through pregnancy disability leave and CFRA bonding leave, the newly proposed language should be revised as follows: "The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements. Therefore, an employee who takes pregnancy disability leave and CFRA leave for the reason of the birth of a child would be entitled to continued coverage for up to seven months of leave (four months of pregnancy disability leave and 12 weeks of CFRA bonding leave)."

Council Response: The Council disagrees with this comment. The text of this section is sufficiently clear and succinct and recites the law verbatim. Further additions by way of summarizing the law are likely to cloud the language and bring ambiguities to the currently clear text. As a result, no changes have been made.

Section 11092(c)(3) – All Benefits Included in Employer’s Group Health Plan Shall be Continued.

Comment: This section proposes to eliminate the definition of “group health plan” in accordance with the definition set forth in Internal Revenue Code (IRC) Section 5000(b)(1). Elimination of this reference to the IRC creates significant ambiguity as to what qualifies as a group health plan and what coverage is included. The deletion of this reference is also inconsistent with FMLA. See 29 C.F.R. § 825.209. To prevent this confusion, the existing definition should be maintained.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11092(c)(5)(A) – Employee “Failed to Return From Leave.”

Comment: The timeframes in this section should all be marked as “calendar days.”

Council Response: The Council disagrees that the addition of “calendar day” to the text will provide any additional clarity as the plain meaning of the text is sufficiently clear and not likely to lead to misinterpretations. As a result, no changes have been made.

Section 11092(c)(6) – Maintenance of Group Health Care Coverage: Term.

Comment: This section provides that group health plan coverage must be maintained for an employee on CFRA leave. Two qualifications should be added, namely COBRA and key-employee status, such that the sentence should read as follows: “Group health plan coverage must be maintained for an employee on CFRA leave, except as provided by COBRA or key-employee status, until:”

Council Response: The Council disagrees with the need for this addition. This subdivision is already clear and complete and the proposed addition would make a straightforward subdivision complicated with the reader needing to consult two disparate bodies of law. As a result, no changes have been made. Moreover, the key employee exception is addressed elsewhere in the regulations.

Section 11092(c)(6)(C) – Maintain until Employee Gives Notice of Intent Not To Return.

Comment: This section requires “unequivocal” notice of an employee’s intent not to return to work for an employer to terminate group health plan coverage for the employee on CFRA leave. Qualifying the notice requirement with the term “unequivocal” significantly increases an employer’s obligation under this section and will cause ambiguity with regard to when this standard has been achieved. This qualification is also inconsistent with FMLA and would cause a lack of conformity for employers on this issue. Accordingly, the term “unequivocal” should be deleted.

Council Response: The Council is confident in the use of the term “unequivocal.” The higher standard of notice is necessary to protect employee’s rights to health coverage while out on CFRA leave and sets a clear standard for employers for when they may terminate such health coverage. Case law like *Escriva v. Foster Poultry Farms, Inc.* (9th Cir. 2014) 734 F.3d 126 also requires an employee to be clear in his or her notice to the employer. As a result, no changes have been made.

Section 11092(d) – Employee Payment of Group Health Premiums.

Comment: Proposed Section 11092(d) is an entirely new regulatory scheme for continuing payment of health benefit plans during CFRA leave. It picks and chooses what parts of FMLA regulatory scheme of Section 825.209 through 825.212 to include. This may be a disservice for some employers, since it is only part of the scheme and is deceptive to say it provides clarity for employer obligations when there are exceptions to obligations according to the benefits provided.

Council Response: The Council finds this comment to be an overly broad objection to the proposed text, leaving it unclear as to what a better course of action should be. The Council is confident that this language strikes a good balance between conciseness and thoroughness. Moreover, to the extent that the FMLA regulations are not inconsistent with the Council’s CFRA regulations, they are incorporated by reference. As a result, no changes have been made.

Section 11092(d)(3) – Employer’s Right to Cease Coverage.

Comment: Within this section, it references an employer’s obligation to provide “notice” to the employee before the coverage ceases. The term “written” should be included prior to “notice” in order to instruct employers that written notice is necessary to satisfy this obligation.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This section should not be included because it is unnecessary and duplicative, given the already-existing fraud protections set forth in Proposed Section 11091(b)(2), which permit an employer to obtain second opinions in the event that it doubts the certification's validity as to the employee's own serious health condition.

Council Response: The Council believes this section is necessary to provide clarity to both employees and employers regarding an employee's payment of Group Health Benefit Premiums and the employer's continued provision of such coverage. Specifically, the procedure by which employers must give notice is included to ensure that employers know that they may drop coverage and employees have a fair amount of time to respond accordingly. As a result, no changes have been made.

Section 11092(d)(3)(B) – Employer Obligations Under CFRA Stand Regardless of Unpaid Premiums.

Comment: The text after "under CFRA would continue" in Proposed Section 11092(d)(3)(B) is unnecessary and should be deleted because it contains some reiterative language.

Council Response: The Council disagrees with this comment. The text, while it may be reiterative, is necessary for clarity and to secure the rights of employees who, for whatever reason, may have to stop payment on insurance premiums while on CFRA-qualifying leave. As a result, no changes have been made.

Comment: This second section is a guarantee that if the employee fails to maintain premiums and group health insurance is terminated during the CFRA leave, that the benefit must be restored under the same terms as before termination. This may not be possible after a policy has lapsed. The employer has the burden of re-enrolling an employee to secure the same benefits which may require the employer paying the past due premiums, in a situation when the lapse of payments was due to the employee's fault or choice. Although the law should require that the health care plan not discriminate against an individual on CFRA leave, there is no general obligation here for the plan – only the employer. Although this text is from FMLA, it places the burden on the employer to comply and then have to litigate with the employee health care plan or administrator for exclusions due to policy lapse- potentially causing additional hardship to the employer. This may be a problem not addressed by the regulations, either federal or state.

Council Response: The Council does not think that this comment points out an actual problem, especially since silence on the matter is not a solution. Rather, the Council has decided to include this section from the FMLA regulations for the purpose of aligning, and making consistent, federal and state law on the subject. As a result, no changes have been made.

Section 11092(d)(3)(C) – Wrongful Termination of Benefits by Employer.

Comment: Proposed Section 11092(d)(3)(C) proposes liability for the employer if it fails to reinstate benefits equal to what the employee had before the lapse of a group health plan. Terms can be changed and negotiated during a leave, so that the changes affect the entire

group or just that employee, which is out of the control of the employer. Therefore, this language should not be added because it imposes liability for conditions out of its control.

Council Response: The Council disagrees with this interpretation of the text. The text is clearly limited to an employer not restoring an employee's health coverage properly – not to what level or specific plan it should be restored. As a result, no changes have been made.

Comment: This section should be amended to read as follows: "If an employer terminates an employee's health benefits coverage in accordance with...and fails to restore the employee's health benefits coverage..."

Council Response: The Council agrees with this comment and has modified the text to address the issue raised by this comment.

Section 11092(e) – Other Benefits and Seniority.

Comment: Given the recent additions and amendments to Section 11092, it is unclear as to what this section is referencing. Specifically, what does it mean to be on CFRA leave, but not covered by § 11092(c)? This section should be reviewed to determine whether it is still necessary given recent amendments and, if so, clarify what this section is referencing.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11092(e)(1) – Treatment of Unpaid CFRA Leave as Compared to Other Leaves.

Comment: Under the 2013 FMLA regulations, an employee can be denied a perfect attendance bonus even if the employee was on a job-protected FMLA leave. 29 C.F.R. § 825.215(c)(2). This portion of the 2013 FMLA regulations should not be incorporated. In the alternative, clarification should be provided, perhaps by way of example in this section, that taking into account an employee's CFRA leave for purposes of determining performance with regard to attendance is impermissible.

Council Response: The Council disagrees with this comment and is confident in the proposed text. Adding an example or any additional text would result in a loss of clarity to what is already clear and an accurate statement of the law. Moreover, section 11094(b) already discusses "no fault" attendance policies. As a result, no changes have been made.

Section 11092(e)(2) – Seniority Accrual on Paid Leave.

Comment: This section proposes language to clarify if health insurance or benefits plans do change, the employer must give the employee on CFRA leave the same notice of this change as given to other employees. This subsection would be more logical if moved under section 11092(d)(3)(C), where health benefits and restoration of plans is proposed to be discussed already. This would make it clear to the employee that an employer would not be liable if changes were out of their control and they gave equal notice of such changes.

Council Response: The Council appreciates this comment, but is confident that this is the appropriate location for this section. Moving it to 11092(d)(3)(C) may limit the occasions for when such a notice must be given by the employer in a

manner more limited than intended by the Council. As a result, no changes have been made.

Section 11092(f) – Continuation of Other Benefits.

Comment: For clarity, the deleted language should be retained.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11093(c)(1) – Employer May Allow Use of CFRA Leave Prior to Birth of Child.

Comment: Given that the entitlement to leave as a reasonable accommodation under the FEHA is separate and distinct from both the right to pregnancy disability leave under the Pregnancy Disability Leave law and FMLA and bonding leave under the CFRA, we recommend the following revisions at the end of Section 11093(c)(1): "Therefore, in the event that an employee has exhausted her four months of pregnancy disability leave but is entitled to further leave as a reasonable accommodation for a qualifying disability, she remains entitled to 12 weeks of CFRA bonding leave in addition to the leave extension provided as a reasonable accommodation. In such an event, the employee does not have to requalify for her CFRA bonding leave by meeting the 1250-hour requirement again following her pregnancy and reasonable accommodation leave."

Council Response: The Council disagrees with the necessity of the proposed addition. The calculation of such leave is done on a case-by-case basis, so such a rigid rule is improper and the sentiment is already included in the Council's addition. As a result, no changes have been made.

Comment: The regulatory section on "Early Use of CFRA if PDL is Exhausted" is misplaced, unnecessary, and convoluted.

Council Response: The Council disagrees with this comment as it finds the inclusion of this section necessary for full, comprehensive CFRA regulations. As a result, no changes have been made.

Section 11093(d) – Maximum Entitlement.

Comment: To maintain consistency with § 11093(c)(1), the following language be added to Section 11093(d): "This maximum entitlement does not include leave provided as a reasonable accommodation under the FEHA."

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11093(e) – Disability Leave.

Comment: Similar language as that found in proposed § 11093(c)(1) with regard to non-pregnancy related serious health conditions should be included in section. Employers often fail to recognize their obligation to consider extended leave or other reasonable accommodations for employees who have exhausted their CFRA leave, yet need additional leave due to a serious health condition that also constitutes a "disability" under the FEHA, rather than informing them that they will be terminated if they fail to return at the conclusion of their CFRA leave.

Council Response: In response to other comments, the Council has modified the proposed text related to disability leave in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: Since a leave entitlement is not clearly stated in the Code sections referenced in proposed § 11093(e), the following language should be used instead: "Reasonable Accommodations. Providing CFRA-qualifying leave for an employee's serious health condition does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodations under the disability provisions, where applicable. Such accommodations may include but are not limited to an extension of leave beyond the 12 weeks of CFRA-qualifying leave where such an extension would reasonably accommodate the disability of an employee. If an employee has a serious health condition that also constitutes a disability and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA."

Council Response: The Council agrees with this comment and has amended the proposed text to address the concerns of this comment.

Comment: This section should not be added because it proposes to add language similar to what is already under sub-section 11093(a), and seems to be confusing and redundant. Instead, additional language and a citation to 2 CCR § 11064 et seq. should be incorporated into sub-section 11093(a), to read: "The right to take a CFRA leave under Government Code section 12945.2 and section 11064 et seq. of the regulations is separate and distinct from the right to take a pregnancy disability leave under Government Code section 12945 and section 11035 et seq. of the regulations."

Council Response: The Council disagrees with this comment. While potentially redundant, the current text, along with additional changes made in response to other comments, is necessary to clearly and adequately address the relationship between CFRA leave and pregnancy disability leave. As a result, no changes have been made.

Section 11094 – Retaliation and Protection from Interference with CFRA Rights.

Comment: The deleted language in these sections should be reinstated as it constitutes a clear and succinct explanation of important concepts that are not repetitive of the detailed additions to the subsections that follow.

Council Response: To address the concerns posed by this comment, the Council has added a new section 11094(e).

Comment: Additional language is needed to clarify that an employee is protected from retaliation for requesting CFRA leave even if she is not yet eligible. Therefore, the following language should be added: "Where an employer has a reasonable belief that she is protected under the CFRA and attempts to assert the rights she reasonably believes that she has, an employer cannot retaliate against her for making such a request."

Council Response: The Council agrees with this comment and has made changes to the text accordingly in subdivision (d).

Comment: Under proposed section 11094(a) the scheme provides that "any violation of CFRA or its implementing regulations constitutes interfering with ... denying ... CFRA." This is too broad since a deadline could be inadvertently missed and it would be a violation of CFRA. Previously, this required a clear action on behalf of the employer to either retaliate against or discriminate against an employee. Even though this is language from FMLA, it implies a much lower standard for violating CFRA, which would lead to needless litigation and costs to employers and other entities. Therefore, this change should be rejected.

Council Response: The Council disagrees with this comment and is confident in the use of language necessary to align the CFRA with the FMLA. The previous CFRA regulation was terse on the topic, so the new regulation reflects what has been the law of California. As a result, no changes have been made.

Section 11094(a) – Interference with CFRA Rights.

Comment: In order to prevent the situation where employers engage in anticipatory behavior – for instance, terminating an otherwise eligible employee who informs her supervisor that she is pregnant but has not yet requested CFRA qualifying leave in order to avoid being required to provide CFRA leave would amount to interference with CFRA rights – the following language should be added after subsection (a)(3): "(4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for CFRA qualifying leave in the future."

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11094(b) – Prohibition on Discrimination or Retaliation Due to Exercise of CFRA Rights.

Comment: This section should be amended to reflect that CFRA cannot and shall not be counted against the employee's attendance at all. The protection is not limited to "no fault" attendance policies.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The word "also" should be inserted in the first sentence of this subsection immediately after the word "interference." While "interference" can include things like "discriminating or retaliating against an employee," as acknowledged by Section 11094(a), the restriction on "interference" is much broader than just establishing discrimination or retaliation for exercising CFRA (or FMLA) rights.

Council Response: The Council disagrees with this comment, as the addition of the word "also" may have the inaccurate and unintended result of equating discrimination with interference. This language was taken from FMLA and a deviation may be misinterpreted as a purposeful, substantive change rather than just a preference for including the word "also." As a result, no changes have been made.

Comment: This section should be amended to cover the situation that may arise in the context of employees who have annual sales goals. For example, if such an employee has a \$1 Million annual sales goal, but takes three months of covered CFRA leave, that employee's annual performance cannot be judged on that \$1 Million goal. Rather, it should be judged on a \$750,000 goal. This is a concept that often gets overlooked and leads to adverse consequences and disputes. Therefore, the following language should be added after the last sentence of this subsection: "Similarly, employers must adjust performance metrics to account for employees who have exercised their right to CFRA leave thereby ensuring that such employee's performance ratings do not reflect adversely the time used as protected leave."

Council Response: The Council is confident that the proposed text already addresses this situation in a clear and satisfactory manner. As a result, no changes have been made.

Section 11095 – Notice of Right to Request CFRA Leave.

Comment: "Electronic posting" has no fixed definition in the FMLA regulations (see 29 C.F.R. 825.300) or the draft CFRA regulations. The DOL has not clarified what "electronic posting" means or provided any guidance on how an employee could electronically post a poster in a conspicuous place or places where employees would tend to view it in the workplace. This issue needs clarification.

Council Response: The Council disagrees that the lack of a set definition for "electronic posting" is problematic, as the plain meaning of the phrase is sufficiently clear, succinct, and easily comprehensible for purposes of these regulations.

Comment: The proposed CFRA regulations provide that an employer must translate the CFRA notice into every language spoken by at least 10% of workforce. The FMLA regulations provide that notice must be provided if there is a "significant population" of non-English speaking employees. The FMLA rule is less burdensome to employers and should be followed for CFRA. A 10% rule is difficult to track and administer. Employers would have to determine the percentage of employees who spoke other languages each time an employee requested leave. That would create an undue hardship on employers.

Council Response: The Council disagrees with this comment. The language requirement is necessary to assure that non-English speaking employees receive notice of their rights. The 10% mark has been chosen as a reasonable compromise between the right of non-English speaking employees to receive notice, and the burden placed on employers who will have to have such notice translated. The "significant population" standard significantly lacks in clarity as it is ambiguous and provides little guidance to employers and employees alike. As a result, no changes have been made.

Comment: Under the previous FMLA regulations, employers provided a single Leave Designation and Eligibility Notice to employees in response to a request for potentially qualifying leave. Under the current FMLA regulations, that process is split up into two separate notices (an Eligibility Notice and a Designation Notice) and many California employers have

adopted this two part process. It does not appear that the proposed revised CFRA regulations expressly address this specific issue, other than to require an employer response to a request within 5 business days. Are there currently any plans to expressly address this issue in the CFRA regulations and/or to prepare a model CFRA and FMLA compliant notice or notices?

Council Response: The CFRA regulations incorporate the FMLA to the extent that the federal law is not inconsistent with the explicit text for CFRA. The Council has provided notice for all of the proposed changes to be made to the text of the CFRA.

Comment: In the authorities section, the citation for the code of federal regulations is incomplete. It should be "825."

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11095(a) – Employers to Post Notice.

Comment: The language suggesting that electronic posting of the notice is sufficient should be deleted. It is unclear why this language is necessary since posting a hardcopy version of the notice is not burdensome to an employer. Further, not all employees may have the same access to a computer or the intranet where such notice may be posted. While electronic posting is not in itself sufficient, it would be best to require both hardcopy and electronic posting by employers who have telecommuting employees or employees who do not otherwise regularly meet at a central worksite. In such situations, electronic posting may be the most visible method of ensuring notice, and should be paired with (but not substituted for) hardcopy posting at the physical worksites.

Council Response: The Council believes that the updated language creates the appropriate flexibility to ensure that the most effective version of notice posting is utilized in the myriad of different workplace environments.

Section 11095(b) – Employers to Give Notice.

Comment: The following language should be added in order to clarify an employer's obligation to notify individual employees of their leave rights upon learning of their need for qualifying leave: "An employer is obligated to individually inform an eligible employee of his or her right to CFRA bonding leave as soon as any of the following events occur: the employee asks about pregnancy leave; the employee informs the employer that she is pregnant; the employee informs the employer that he or she is expecting a child (even where he or she is the spouse or registered domestic partner of the pregnant individual), or that he or she is adopting or fostering a child. At the same time, an employer should provide notice that the employee is or may be eligible for partial wage replacement under California's State Disability Insurance Program and/or Paid Family Leave Program."

Council Response: The Council disagrees with the suggested text as it is unnecessary and places an unprecedented, heavy burden on employers. Moreover, this comment is unresponsive since the Council did not propose any changes to this subdivision. As a result, no changes have been made.

Section 11095(c) – Non-English Speaking Workforce.

Comment: Upon learning that an employee requires leave from work for a CFRA-qualifying reason, employers are obligated to provide that employee notice of her right to take such job-protected leave. This section should therefore clarify that, where a non-English speaking employee requests a leave for a reason qualifying under the CFRA, an employer must provide that employee written notice in her own language of her rights, responsibilities, and the consequences of non-compliance.

Council Response: The Council disagrees with this comment. The language requirement is necessary to assure that non-English speaking employees receive notice of their rights. The 10% mark has been chosen as a reasonable compromise between the right of non-English speaking employees to receive notice, and the burden placed on employers who will have to have such notice translated. To require translations into every language would over-burden employers. As a result, no changes have been made.

Section 11095(d) – Text of Notice.

Comment: Pregnancy disability leave reinstatement rights are to both the same, or to a comparable position. The draft text of notice is erroneous. Therefore, this section should be amended to read: “Both leaves contain a guarantee of reinstatement ~~for pregnancy disability it is to the same position and for CFRA it is~~ to the same or a comparable position– at the end of the leave, subject to any defense allowed under the law.”

Council Response: The Council disagrees with the accuracy of this comment and finds the proposed text correct as written. As a result, no changes have been made.

Comment: The notice should not scare employees into thinking that CFRA is unpaid. Of course, CFRA does not provide any extra pay. Even in CFRA’s regulation 11091(a)(1)(a), it is stated that CFRA can be paid or unpaid. The text of 11091(a)(1)(a) reads in part: “...it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying...” Therefore, the general notice should be aligned with the regulations.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: CFRA protections should have its own primary paragraph for this notice. However, the only mention of CFRA protections is within the paragraph on pregnancy. The reader knows that this paragraph pertains to pregnancy because it has a topic sentence about pregnancy. Then it veers off course in a subtle, yet misleading manner. Many readers could presume by reading or more often scanning this notice that CFRA protections might only exist for those employees who are pregnant. The words do not state this impression, but the message is there in the way the notice is organized.

Council Response: The Council disagrees with this comment; CFRA protections are mentioned throughout the notice. The notice, as written, is clear, succinct, and not misleading in any way. To make the proposed additions would result in

a notice that is very lengthy and difficult to comprehend. As a result, no changes have been made.

Comment: The notice implies, and employees can certainly infer, that the only information that needs to be conveyed for unforeseeable events is that the employee must state to the employer that the employee needs a leave of absence. While the employee does not have to reveal much more information, the notice should identify that the employee must state enough information for the employer to recognize that the reason for leave is CFRA-qualifying, or probably CFRA-qualifying.

Council Response: The Council disagrees with this comment. The stated notice required of employees aligns with what is required in the regulations, and, as a result, no changes have been made.

Comment: It is not accurate that CFRA requires a medical certification before the employer will allow the employee to take leave. Rather, the two sentences that discuss this should be worded in the following way: “we may require certification from your health care provider **before approving the protections and rights that are provided under CFRA leave** for your own serious health condition. We also may require certification from the health care provider of your child, parent or spouse, who has a serious health condition, **before approving the protections and rights that are provided under CFRA leave** to take care of that family member. When medically necessary, leave may be taken on an intermittent or reduced work schedule.”

Council Response: The Council disagrees with this comment, as it is accurate to say that an employer *may* require certification from a health care provider before approving CFRA leave. As a result, no changes have been made.

Comment: The last sentence is too limited. It states that if you as the employee want more information about either eligibility or seniority/benefits, then contact the employer’s representative.

Council Response: The Council disagrees with this comment, as it is unclear how this last sentence is too limited when the only purpose of the sentence is to direct an employee to the proper person for more information on CFRA leave. Moreover, this comment is somewhat unresponsive since the Council did not propose any changes to this paragraph. As a result, no changes have been made.

Section 11096 – Relationship with FMLA Regulations.

Comment: Former § 11097, now re-numbered § 11096, addresses applying FMLA regulations to the CFRA statute and its regulations. Previously, when the FMLA regulations were changed and the CFRA regulations still referred to the 1995 regulations, employers faced uncertainty and difficulty in administering leaves that qualified for both FMLA and CFRA coverage. While the proposed revision is now updated to refer to the most current FMLA regulations, the problem inherent with the existing regulation remains the same. If or when the FMLA regulations are again updated to reflect changes in the law, the CFRA regulations will refer to outdated regulations, leaving employers and employees with uncertainty whether they may use the most current FMLA regulations as guidance. Because the original language refers to ensuring use of

the FMLA regulations falls within the scope of Government Code section 12945.2 and other state law and the California Constitution, it is recommended that the reference to the date the FMLA regulations became effective be removed.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11097 – Certification Form.

Comment: The last sentence of this section should be revised to read: “Employers may also utilize any other certification form so long as it includes a notice to health care providers informing them that disclosure of the underlying diagnosis of the serious health condition is not required, and may not be disclosed without the consent of the patient. However, if the requesting employee wishes to use the state certification form, reproduced below, the employer must accept this version and may not require the employee to provide another type or form of certification.”

Council Response: The Council disagrees with this comment. The final sentence, as written, sufficiently and succinctly leads to the same result as the suggested text, but is preferable because it is clearer and more succinct. As a result, no changes have been made.

Comment: The proposed regulations state that an employer can utilize other certifications forms (in addition to the form published by the Fair Employment and Housing Council) as long as the HCP does not disclose diagnosis without patient consent. Therefore, this regulation can be construed to allow an employer to use the DOL forms to administer CFRA requests provided that the employer adds a prohibition to the form that directs the HCP to not disclose diagnosis without patient consent. However, clarification is needed to address the inconsistency between the amount of information that can be required to certify a leave under Section 11087(b)(1) and the amount of information requested on other certification forms, particularly the DOL form. Allowing employers to use the DOL forms would be the most efficient and consistent approach. However, employers need direction on whether they can use these forms and if they do and receive information that cannot be required to certify a CFRA leave request, can the employer use that information to evaluate the leave request. Statutory amendments to CFRA should be considered in order to mirror the information that can be required to certify an FMLA leave request, since managing leave requests in California is so difficult.

Council Response: The Council disagrees with this comment, as it is not within the scope of the Council’s power to make statutory amendments. As a result, no changes have been made.

Comment: The description of “serious health condition” within the CFRA Certification form is isolated from FMLA, and also separated from CFRA’s own section of ‘Definitions’. There are several parts of the problem. Under the proposal, “Hospital Care” as newly defined on the Certification form is now different from FMLA. Another pathway to serious health care condition, “Absence Plus Treatment” is also now different because the Council has not described the most recent changes to FMLA on its CA Certification form. A third path to serious health care condition, “Chronic Conditions Requiring Treatment” now has some small

differences, again because the Council has not included the most recent changes to FMLA on the CA Certification form. Thus, the Certification form not only goes its isolated way from FMLA, but it also does not follow 11087(r)(2).

Council Response: The Council has made changes to the form to more closely follow section 11087(r)(2), but disagrees that changes are necessary to align the form with the FMLA since such alignment is not necessary, nor preferable. The proposed certification form is meant to provide more clarity and offer more ease of completion to health care providers. As a result, no changes have been made.

Comment: The Council should not only review its Certification form, but also specifically inform Californians what are permissible inquiries in the Certification process, what are not, and what, if any, inquiries might be acceptable questions, even if their responses cannot be required.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: The Following language should be added to the top of the form to comply with the Genetic Information Nondiscrimination Act (GINA): "IMPORTANT NOTE: The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting, or requiring, genetic information of an Individual or family member of the individual except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic Information,' as defined by GINA Includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an Individual's family member sought or received genetic services, and genetic information of a fetus carried by an Individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Regarding question 2, to assist in determining whether CFRA leave is available to care for a family member patient, questions should be included regarding the patient's relationship to the employee (so that the employer can confirm that it is a covered family member), and if the patient is the employee's child, the child's age (so that the employer can confirm whether it is a minor or adult child).

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: Regarding question 3, any inquiry which incorporates an "either/or" question is highly problematic, and thus this should be separated into two distinct questions.

Council Response: The Council disagrees that the text is highly problematic as the question is very straightforward. Additionally, the comment is nonresponsive to

any proposed changes made by the Council. As a result, no changes have been made.

Comment: The current question 4 is insufficient on its own to provide information regarding the duration of the employee's need for leave, which is often different than the "probable duration" of the condition or need for treatment, which is all that Question 4 currently asks. Therefore, a new question, Question 4b should be added below to ask "Probable duration of the employee's need for medical leave (if different from the response to 4.a.)."

Council Response: The Council disagrees with the necessity of the proposed change as it is a nuance that lawyers may understand, but unfair to ask of doctors and their patients. Moreover, the information requested on the form mirrors the information required under the CFRA statute at Government Code section 12945.2(k)(1). Additionally, the comment is nonresponsive to any proposed changes made by the Council. As a result, no changes have been made.

Comment: Regarding question 4, any inquiry which incorporates an "either/or" question is highly problematic, and thus this should be separated into two distinct questions.

Council Response: The Council disagrees that the text is highly problematic as the question is very straightforward. Additionally, the comment is nonresponsive to any proposed changes made by the Council. As a result, no changes have been made.

Comment: Regarding question 5, the format is particularly underdeveloped, the use of a numbering system completely isolated from the definitions is poorly displayed, and the use of the word "so" is also inappropriate. This inquiry should be re-written, and at least include the headings/topics for each health condition next to the number.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: Regarding question 9, obtaining sufficient medical certification to manage intermittent and reduced schedule leaves is one of the biggest challenges for employers. The form should be updated to include questions regarding intermittent and reduced schedule leave to provide both employers and employees with a better understanding of the amount and type of intermittent or reduced schedule leave a health care provider is certifying.

Council Response: In response to other comments, the Council has modified the proposed text in a manner that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: Regarding question 11, a new line should be added asking for the printed name of the health care provider.

Council Response: The Council agrees with this comment and has made changes accordingly.

Comment: Regarding question 11, the following inquiries should also be made regarding the health care provider: business name as health care provider, medical degree, specialty and type of practice, license number, type of license, telephone and fax, address, and a certifying statement.

Council Response: The Council has modified the text of question 11 to also ask for the printed name of the health care provider. Since signatures can often be hard to read, a printed name will provide the employer with all it needs to easily find answers to all of the inquiries listed in the comment.

Comment: Regarding question 6, for serious health condition, the form identifies that this type of condition is for “non-chronic conditions.” This reference is mistaken, especially if CFRA adopts the FMLA regulations for defining serious health condition.

Council Response: The Council disagrees with this comment, as it is non-responsive to any proposed changes made by the Council and misstates, or at least oversimplifies, current law. As a result, no changes have been made.

Comment: The order of the questions on the form should be fixed because it is unnecessarily erratic and uneven because Question 6 applies to the employee, Questions 7 and 8 apply to the family member, Question 9 applies to both the employee and the family member, and Question 10 applies to the family member and is apparently intended to be completed on a separate paper.

Council Response: The Council disagrees with this comment. The form is very clear and precise overall and is not likely to cause any problems for employees, employers, or health care providers. Neither the commenter nor the Council have a better ordering, particularly because doctors and employers have grown accustomed to the form and its current order.

Other Comments.

Comment: The Council should give serious consideration to explaining in its definitions the important concepts of “granting CFRA” and “designating CFRA.” See §§ 11087(h), 11088(a), 11090(e)(3), 11094(a).

Council Response: The Council disagrees with this comment as it is unlikely to result in further clarity and should be clear from common usage. As a result, no changes have been made.

Comment: The CFRA certification form and other parts of the regulations, including 11093(b), state that an employee’s own pregnancy disability is not a serious health condition under CFRA. However, this statement is incorrect if the CFRA regulatory definitions are accepted. As identified above in 11087(m), medical leave for pregnancy is not part of CFRA leave. This exclusion is the precise construction in which pregnancy disability is excluded from CFRA. The CFRA definitions do not exclude pregnancy as a serious health condition – neither the employee’s nor the employee’s qualifying family members. Also to this point, the CFRA definitions for continuing treatment adopt the entire FMLA framework, which includes pregnancy as a serious health condition. Thus, the CFRA regulations and the CFRA certification

form should be scoured to correct all locations, such as 11093(b), where this misconception exists.

Council Response: The Council disagrees with this interpretation of the proposed text and believes the commenter has not considered pregnancy disability leave and regular disability leave. The Council is confident in the consistency offered by the proposed text of the regulations with other law, including the FMLA. As a result, no changes have been made.

Comment: The Council should emphasize and insert the phrase "CFRA-protected" more often. This concept is unduly and unfortunately sparse throughout the regulations. Moreover, when it does arise, it is sometimes in the negative ("the employee may be denied CFRA-protections"), or in the anti-retaliations section.

Council Response: The Council disagrees with the necessity of this comment, as it is unlikely to bring more clarity to the text. As a result, no changes have been made.

Comment: By our count, there are no fewer than 12 instances where the Council has proposed striking existing regulatory language in favor of a cross-reference to the statute. Each of these proposed amendments should be rescinded and the original language restored.

Council Response: The Council agrees that reinstatement would result in enhanced clarity, despite enhancing duplication with the statute, and changes to the language have been made accordingly.

Comment: In multiple areas of the proposed regulations, the term "employer" is used instead of the defined term of "covered employer." While it may be presumed that only a "covered employer" must comply with the CFRA regulations, stating that the interchangeable use of "covered employer" and "employer" throughout the regulations means "covered employer" would help to avoid confusion and unnecessary litigation on this issue. Alternatively, the use of the term "employer" could be changed to "covered employer" to provide clarity.

Council Response: The Council agrees and changes to the language have been made accordingly, particularly in section 11087(d).

Comment: Language should be provided to assist public agencies on compliance with Labor Code Section 4850(e). Many public agencies are confused about the use of 4850 Leave as it is a unique type of leave, and there is no guidance about the interplay of 4850 Leave and CFRA. It should be clarified that time spent on 4850 Leave does not count toward the employee's 1,250 hours as it is not "hours worked." In addition, many public agencies are unclear about what their notice obligations to an officer designated on 4850 Leave are, and would benefit from clarification about this.

Council Response: The Council disagrees with the necessity for this addition as the proposed change is too specific in nature, outside of the Council's jurisdiction, and likely to cause confusion. As a result, no changes have been made.

Comment: The Ninth Circuit Court of Appeals ruled that an employee can affirmatively decline to use FMLA and CFRA leave, even if the underlying reason for seeking the leave would have invoked FMLA/CFRA protection. Employers are left with many questions as a result of the *Escriba* case. Does the Council agree with the Ninth Circuit's interpretation of the CFRA that an employee refuse to take CFRA Leave and prohibit an employer from designating CFRA leave? Does an employer have an affirmative obligation to advise an employee of his/her right to refuse to take CFRA leave? If so, in what manner must this information be conveyed to the employee? Is there an affirmative obligation to advise the employee of the risks of refusing CFRA leave? In such circumstances, is it the position of the Council that the employee will forfeit all protections of the CFRA, including the job protection? These issues need clarification.

Council Response: The Council disagrees that the issues require further clarification, as *Escriba v. Foster Poultry Farms, Inc.* (9th Cir. 2014) 734 F.3d 126, was thoroughly considered in drafting these regulations. The regulations already make clear that not taking CFRA leave, even though qualified to do so, does not constitute a waiver of CFRA entitlement. As a result, no changes have been made.

Comment: One area that remains unaddressed is the fact that employers have a defense to being unable to accommodate a disabled employee, but no such defense exists for CFRA leave. While we recognize that the existence of an undue hardship would be inconsistent with the goals and purposes of the CFRA, we submit that there are limited circumstances under which a defense is appropriate and should be considered by the Council, including (1) hardship due to intermittent and reduced schedule leave, and (2) hardship due to baby bonding leave.

Council Response: The Council disagrees with this comment and cannot legislate new defenses, particularly one that seems very subjective and harmful to employees. If the Legislature had intended there to be such an affirmative defense, it surely would have inserted it in the statute. Additionally, this comment is nonresponsive to any changes proposed by the Council. As a result, no changes have been made.

Comment: While the proposed regulations retain the statement that California incorporates the FMLA regulations to the extent that they are not inconsistent with California law, we submit that the Council should provide further clarification on some of the provisions of the FMLA that are not contained in the CFRA, and do not seem to be anticipated by the CFRA. However, because they are not strictly prohibited by the CFRA, employers are unclear about whether they are truly "inconsistent" with California law.

Council Response: The Council disagrees with this comment. The proposed additions seem nebulous and indefinite, would make the regulations even longer, would detract from the clarity of these regulations, and would be unnecessarily duplicative of the FMLA. As a result, no changes have been made.

Comment: Clarification is needed as to whether it is lawful for an employer to designate an employee on CFRA when that employee is off work due to a pregnancy-related disability and has fully exhausted all available PDL and FMLA time. As written, the regulations flatly prohibit

the use of CFRA for a pregnancy related disability by excluding it from the definition of serious health condition. However, there are times when a woman is disabled by pregnancy for longer than four months, and it would be to her benefit to be able to use the job and benefits protection prior to the birth of the child. As such, there should be an exception to the CFRA exclusion of pregnancy-related conditions to afford women who have an extended pregnancy-related disability the protections of the CFRA.

Council Response: Modifications made in response to other comments adequately address the concerns posed by this comment.

Comment: Under the current and proposed CFRA regulations, it is unclear to what extent an employer may communicate with an employee during his or her leave of absence, other than requiring an employee to provide a certification. The only provision that appears to address this issue is Section 11091(b)(2)(A)(1). However, the foregoing provision is located in the portion of the CFRA regulations discussing the certification requirements. It is unclear whether the provision is intended to mean that an employer cannot request additional information in the certification beyond what is set forth in the regulations, or if the provision is intended to be broader in scope. It is impractical to prohibit an employer from obtaining any additional information whatsoever from an employee on leave, particularly if the employee took an unexpected leave due to an emergency. An employer should have the ability to communicate briefly with the employee to the extent the employer needs information from the employee regarding work matters, such as the status of a project the employee was handling or the location of a file. Therefore, Section 11091(b)(2)(A)(1) be amended such that its scope is limited as preventing an employer from requesting additional information regarding the medical certifications.

Council Response: The Council agrees with this comment and changes to the language have been made accordingly.

Comment: An employer should be able to communicate with the employee periodically regarding the employee's status and intent to return to work. Such communication is authorized under the FMLA regulations, and the provision would allow an employer to take appropriate measures to ensure that an employee's workload is covered during a leave and to plan for the employee's return. See 29 C.F.R. § 825.311(a). Thus, the CFRA regulations should be amended to include the following provision: "An employer may require an employee on CFRA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation."

Council Response: The Council disagrees with the right of an employer to communicate with an employee under such circumstances, and hence finds the proposed text unnecessary and inappropriate for this section. If an employee needs to extend his or her CFRA leave, the employee will necessarily be in contact with the employer; otherwise, there should be no need for communication during the leave. As a result, no changes have been made.

Comment: There are several contradictions and uncertainties regarding retroactive designations. Clarification is needed to reconcile the rules on “employers must respond in five business days” and “employers may retroactively designate in certain situations.”

Council Response: In response to other comments, the Council has modified the proposed text related to retroactive designations that should address and clarify the concerns of this comment. As a result, no additional changes have been made.

Comment: According to the NPRM, one of the purposes of the proposed regulations is to conform the CFRA regulations to the Family and Medical Act ("FMLA") regulations adopted on March 8, 2013, where appropriate. Also, the NPRM reiterates that CFRA regulations incorporate by reference all FMLA regulations to the extent that they are not inconsistent with the CFRA regulations. Therefore, we conclude that the following provisions of the FMLA (which are not addressed in the CFRA regulations) are incorporated by reference and can be used to guide administration of CFRA leave requests but would like confirmation of this interpretation: (a) New certification in a new leave year, (b) Background information for 2nd/3rd opinions, (c) Right to cure, (d) Employer contact with HCP, (e) Fit for duty ("FFD"), (f) Use of information received from disability, Workers' Compensation or Americans with Disabilities Act review, (g) Light duty-FMLA regulations specify the impact of light duty on FMLA entitlement and restoration rights, (h) Call-in procedures, (i) Attendance bonuses, (j) Worksite, and (k) Increments of time.

Council Response: The Council has provided notice for all of the proposed changes to be made to the text of the CFRA. The CFRA regulations incorporate the FMLA to the extent that the federal law is not inconsistent with the explicit text for CFRA or otherwise inconsistent with California law.

Comment: Pertaining to the underlying diagnosis, the words “need not” in 11087(b) convey a weakened restriction, not even a prohibition, in CFRA. It is conveyed elsewhere in the regulations that such inquiries are forbidden, such as in 11097, which introduces the certification form.

Council Response: The Council disagrees with this comment’s analysis of the meaning of “need not.” Additionally, the comment is nonresponsive to any proposed changes made by the Council. As a result, no changes have been made.

Comment: The phrase “same or comparable position” is the standard and correct usage for CFRA, specifically in Sections 11087(q), 11089(b), and 11087(f). Use of other words, instead of the word “same”, is not preferable.

Council Response: The Council disagrees with this proposed word choice and finds the proposed text to be clear and consistent throughout in its word choice, which was taken from the statute. As a result, no changes have been made.

Comment: The term “accommodation” or other forms of the word connote very special meanings within FEHA. Most of the usages within Sections 11089(a)(1), 11089(b)(2), 11089(d),

11090(e)(1), and 11093(c)(1) do not incorporate the concept of reasonable accommodation, even though their usage in the general world are not incorrect. Nevertheless, this usage should be reconsidered, while those few references to reasonable accommodation could remain.

Council Response: The Council disagrees with this comment. The word choice in each section has been carefully considered and evaluated for clarity, necessity, and consistency. Replacing “accommodation” would likely give the false impression that a substantive change has been made rather than just a change in drafting convention. As a result, no changes have been made.

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

Section-by-Section Analysis.

Section 11087(a)(2) – Criteria to be Included in Certification for Leaves for One’s Own Serious Health Condition.

Comment: The added language should be amended as follows: “For purposes of the certification ‘unable to perform the function of his or her position’ means that an employee is unable to perform any one or more of the essential functions of his or her position in his or her current employment environment. The fact that an employee continues to engage in similar employment with another employer does not conclusively establish that he or she does not have the requisite serious health condition rendering her unable to perform the essential functions of the job from which she is taking leave.” See *Lonicki v. Sutter Health Central* (Cal. 2008) 43 Cal. 4th 201, 216.

Council Response: The Council disagrees with the necessity of the proposed change as it would take away from the clarity of the text. The suggested additions, while not inaccurate, would likely overburden readers with information and ultimately lead to confusion about what is really needed in the certification. As a result, no changes have been made.

Sections 11087(c) and (d).

Comment: Without inclusion of the factors to be considered when determining the existence a “joint employer” relationship, the language lacks clarity and presents confusion as to what aspects of the employment relationship should be viewed in their “totality” in order to make this determination. Therefore, the following language from § 825.106(a) of the FMLA regulations should be added prior to the final sentence of this subsection, as follows:

“Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

“(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

“(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

“(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

“A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion but rather the entire relationship is to be viewed in its totality.”

Council Response: The Council agrees with this comment, as the suggestion will provide flexibility and ultimately adds clarity to the test. Changes to the language have been made accordingly.

Section 11087(j)(1) – “Health care provider.”

Comment: It appears the Council mistakenly proposes deleting the “or” in the first sentence and replacing it with “and.” As such, the sentence reads: “an individual holding either a physician’s and surgeon’s certificate. . .” This sentence does not make sense as written. The Council should maintain the “or” so the sentence will read: “an individual holding either a physician’s or surgeon’s certificate. . .”

Council Response: The Council disagrees with this comment as the proper name of the certificate uses the word “and,” as reflected in the CFRA statute at 12945.2(c)(6)(A). As a result, no changes have been made.

Section 11087(q)(1) – Definition: “Inpatient Care.”

Comment: The mere treatment at a hospital emergency room is not sufficient to constitute “inpatient care,” because employees often submit documentation indicating simply that they were treated at a hospital emergency room. As such, the following should be added to the end of this section: “Treatment at a hospital emergency room is not considered “inpatient care” unless the patient is admitted to the hospital.”

Council Response: The Council disagrees with this suggested change. Modifications to the text after the first round of comments already address this change. As a result, no changes have been made.

Comment: The proposed modifications are still more expansive than the federal FMLA and will create confusion amongst employers with regard to what “inpatient care” triggers CFRA leave versus FMLA.

Council Response: The Council disagrees that any confusion will result amongst employers as a result of the proposed modifications to the text. The text provides a very clear and accessible understanding as to what “inpatient care” means for purposes of the CFRA. It is also a more medically accurate definition and consistent with other California regulatory definitions such as the Workers’ Compensation regulations. As a result, no changes have been made.

Comment: We appreciate the Council's broadening of the definition of what constitutes "inpatient care," as we agree that it is possible that such care could exist even if the patient does not ultimately stay in the hospital overnight, but is expected to do so.

Council Response: No response required.

Section 11087(s) – Definition: "Spouse."

Comment: It appears that the Council inadvertently deleted the phrase "in marriage" at the end of the last sentence. If this phrase is not included, then the definition of spouse will be greatly expanded to include all individuals with same-sex partners, whether or not they are married or in a registered domestic partnership. This is not what was intended and is beyond the scope of the CFRA.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The definition of "Spouse" should read: "means a partner in marriage as defined in Family Code section 300 Fam. Code, § 300, as amended by 2014 Cal. Legis. Serv. Ch. 82 (S.B. 1306)". With this change, there would be no need for language that states: As used in this article, 'spouse' includes same-sex partners, unless you intend to include those same-sex partners who are not married or are not part of a registered domestic partnership."

Council Response: The Council agrees and changes to the language have been made accordingly. Despite the fact that it is technically redundant, the Council has retained the clarification of same-sex partners in marriage because it believes it will contribute to clarity on the topic given the recent changes to the Family Code with respect to same-sex partners in marriage.

Section 11088(c) – Limitation on Entitlement.

Comment: The Council should reinstate the phrases "a combined total of" and "between the two parents," as the deletion of these phrases reduces clarity.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11089(d)(2)(C) – "Substantial and Grievous Economic Injury."

Comment: The first sentence of subsection (C) should be reinstated, as without it, the requirement that there be a "substantial and grievous injury" is absent from the regulation (only the definition of this type of injury is included).

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The language proposed in the Modifications to more fully define "substantial and grievous injury" should mostly be stricken and the language originally proposed in the amended regulations restored. The newly proposed language is awkward and confusing. Affirmatively stating that "[a] precise test cannot be set..." is unusual and carries little meaning. The Modifications then go on to state in two sentences what the original proposed amendment stated in one sentence. Nothing is added to the clarity or substance of the language by splitting

it up into two sentences. The final sentence in the Modifications could be maintained, but the word “certainly” should be deleted.

Council Response: The Council partially agrees with this comment and has reinstated part of the originally proposed language, while maintaining the text of the most recent modification to the sections. This change is a more complete approach and should alleviate any potential confusion. While unusual, explicitly mentioning that a precise test cannot be set must be stated in order to recognize the reality that no such test exists. Further, the Council is confident in its use of the word “certainly,” which is consistent with the use of the term in the FMLA regulations.

Section 11089(d)(3) – Fraudulently-obtained CFRA Leave.

Comment: Why are any protections of CFRA available to one who obtains leave fraudulently? This section should be changed to make it clear that an employee who commits fraud to obtain CFRA leave is not entitled to any CFRA protection. This section should not be limited only to CFRA's job and benefit protections. Fraudulently-obtained CFRA leave should not be protected in any way.

Council Response: The Council disagrees that any further clarity is necessary. As written, this section does not provide any job restoration or maintenance of health benefits protections to employees who have fraudulently obtained CFRA leave. Other CFRA protections would still be applicable to an employee such as the protection against retaliation.

Comment: Despite the slightly altered language, we renew our previously-stated objection to the addition of this section as unnecessary and duplicative, given the already-existing fraud protections set forth in Proposed Section 11091(b)(2) which permit an employer to obtain second opinions in the event that it has a good faith, objective reason to doubt the certification's validity as to the employee's own serious health condition. See June 2 letter, p. 6.

Council Response: The Council disagrees with this comment. This section is necessary to clarify the ramifications of fraudulently obtaining CFRA leave, and is non-duplicative because 11091(b)(2) is limited in scope to obtaining and verifying medical certification and recertification. As a result, no changes have been made.

Section 11090(b) – Leave Periods Common to Both CFRA and FMLA.

Comment: This section, as modified, still does not fully articulate the requirements for notice of method of computation and consequence of failure to provide such notice. Thus, the final sentence of this subsection should be further modified as follows: “The employer, must however, apply the chosen method consistently and uniformly to all employees in California and provide at least 60 days’ advance written notice to employees requesting CFRA leave of its chosen method. If the employer fails to provide such written notice, then the computation that provides the most beneficial outcome for the employee shall be used.” Our proposed modifications – both the 60 days’ notice and the consequences of failure to properly designate – are drawn directly from the FMLA regulations. (See 29 C.F.R. §§ 825.200(d)(1), (e).).

Council Response: The Council agrees with this comment and changes to the language have been made that should adequately address these concerns.

Comment: Language should be added clarifying that the notice shall be “in writing.”

Council Response: The Council disagrees with adding the requirement that notice under this section must be in writing, and prefers leaving the method of notice open to employer’s preferences and what works in the given workplace. As a result, no changes have been made.

Section 11090(c) – Definition: “Twelve workweeks.”

Comment: In the final line of this subsection, the word “would” should be replaced with “shall.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11090(d) – Minimum Duration for CFRA Leave.

Comment: The CFRA, unlike the FMLA, always has permitted bonding leave on an intermittent basis, subject to the minimum duration specified in this section. However, California employers have never been required to grant CFRA bonding leave on a reduced leave schedule basis. Therefore, the Council should remove this new reference in the heading of this section to avoid any misunderstanding that the CFRA provides for reduced leave schedule bonding leave.

Council Response: The Council disagrees that the heading for this section will cause any confusion or misunderstanding. The text, as modified, clearly establishes what is meant by the minimum duration for CFRA leave, and the title does not detract from that clarity. As a result, no changes have been made.

Comment: For clarity, the Council should add “(i.e., part-time)” after “on a reduced leave schedule.”

Council Response: The Council disagrees that the suggested addition will provide any clarity to the text. Rather, it would make it redundant and use an imprecise term; “reduced leave schedule” is used by the courts when discussing CFRA. As a result, no changes have been made.

Comment: The Council should provide clarification of this existing section by way of an example, such as the following: “For example, if an employee wishes to use only one week or one day of bonding leave, the employer must allow the employee to do so on at least two occasions.”

Council Response: The Council agrees that additional clarification is needed and has made changes accordingly. However, use of an example, including that which has been suggested, will ultimately be too specific and unique for purposes of this section. As a result, no changes have been made.

Comment: We appreciate the added language clarifying that an employee may permit additional requests for intermittent leave lasting less than two weeks. We would only renew our recommendation that the following example of such permission be added: “(e.g., allowing an employee to take one day of bonding leave per week over a number of weeks).”

Council Response: The Council disagrees with the necessity of including the example suggested. The suggested text offers a very specific example of a concept and terminology that are not inherently confusing. As a result, no changes have been made.

Section 11090(e) – Minimum Duration for CFRA Leaves Taken for the Serious Health Condition of an Employee or their Family Member.

Comment: For clarity, the language should be revised as follows: “The employer must provide intermittent leave in increments at least as short as the shortest period of time that the employer’s payroll system uses to account for absences of leave, and in no instance may the employer require that intermittent leave be taken in increments greater than an hour.”

Council Response: The Council disagrees with the necessity of the proposed change, and finds the text, as modified, to be clear and complete. As a result, no changes have been made.

Section 11090(e)(1) – Employer May Require Employee to Transfer Positions Temporarily if Intermittent Leave is Required.

Comment: For purposes of clarity, the Council should revert back to language stating that the “alternative position must have the same rate of pay and benefits,” instead of changing “same” to “equivalent.” Regarding this same section, we renew our recommendation that the Council add language clarifying the employer’s obligation to reinstate an employee to the same or a comparable position after the employee’s need for intermittent leave ends.

Council Response: The Council disagrees with this comment. Use of the word “equivalent” is best because during intermittent leave when the transfer is “temporary,” the new temporary position may not be identical, and as such, the pay not be the exact same. Further, this section is sufficiently clear and unambiguous, and to add any more to the text would take away from the clarity. As a result, no changes have been made.

Section 11090(e)(4) – Employers May Deduct Exempt Employee’s Pay Only as Permitted by the California Labor Code and Industrial Welfare Commission Wage Orders.

Comment: In the third line of this subsection, the Council should replace the phrase “so long as” with “provided.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11091(a)(1) – Verbal Notice.

Comment: In the eighth line of this subsection, the Council should replace the phrase “so long as” with “provided.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The following language should be added: “Nor does an employee’s failure to adhere to an employer’s particular policies or procedures for requesting leave render notice insufficient, where an employee’s notice is otherwise sufficient under the law.”

Council Response: The Council disagrees that the suggested language is necessary. The Council is confident that the section is clear and succinct as written. To make the proposed additions would only serve to dilute what is already an easily comprehensible rule, which encapsulates the sentiment of the comment. As a result, no changes have been made.

Section 11091(a)(1)(B) – Retroactive Designation of CFRA Leave Allowed.

Comment: This section should read: “If an employee takes paid or unpaid leave and the employer does not designate the leave as CFRA leave at the time the leave is commenced, the leave taken does not count against an employee’s CFRA entitlement.” This language is required in order to bring the regulations in line with the statute. The proposed language in the Modifications appears to be an attempt to adopt the rule articulated in the revised FMLA regulations related to retroactive employer designation of FMLA leave. However, that provision (Section 12945.2(a)) directly contradicts the CFRA. This language precludes the concept of retroactive designation. Any attempt to incorporate the FMLA’s retroactive designation language into these regulations, then, would contradict the statute, would result in the elimination of a substantive right of employees granted by the Legislature, and would violate the California regulatory provision that FMLA and its regulations shall only be incorporated into these regulations “to the extent they are not inconsistent with” CFRA. (See 2 CCR § 11087 [preamble].)

Council Response: The Council disagrees with this comment. The Council believes this section should continue to track the FMLA regulation, as it has for the last twenty years, since the inception of these regulations by the former Commission in 1995. Doing so is consistent with our own statute, the CFRA, and protective of CFRA qualifying employees. 12945.2(a) clarifies that leave requested for CFRA shall not be deemed to have been granted unless the employer provides the employee, *upon granting the leave request*, a guarantee of employment in the same or comparable position upon the termination of the leave. The statutory language on this is clear on its face, and the regulations acknowledge and implement it extensively at 11087(h), 11089, and 11091(a)(3) and (4). The statutory language referenced in the comment does not address the separate issue of retroactive designation for leave never granted as CFRA leave in the first place and, if interpreted in the manner suggested by the comment, would render other portions of the statute incomprehensible, such as 12945.2(h) and (i) which deal with CFRA leave when advance notice is not practicable. For a detailed discussion of the Council’s rationale on this topic, please see its Response to more expansive comments on this topic in the section addressing the Second Fifteen Day Comment Period. As a result, no changes have been made.

Section 11091(a)(4) – Prohibition against Denial of Leave in Emergency or Unforeseeable Circumstances.

Comment: In the third line of this subsection, the Council should replace the phrase “so long as” with “provided.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11091(b) – Medical Certification.

Comment: With the patient's voluntary authorization, an employer should be permitted to contact the employee's family member's health care provider to assist an employee in obtaining sufficient medical certification (when the initial certification provided is insufficient to certify CFRA leave) or clarification as permitted under the FMLA regulations. (See, e.g., §§ 825.305(c) and (d), 825.306(e), 825.307(a)). The FMLA regulations include safeguards to ensure that only a health care provider, human resources professional, leave administrator, or management official may make the contact, and specify that under no circumstances may the employee's direct supervisor contact the employee's health care provider. Such safeguards would be incorporated into these amended CFRA regulations by reference. Therefore, the last sentence should read, "The employer may not contact a health care provider *without the patient's voluntary authorization* for any reason other than to authenticate a medical certification," to give employees the benefit of voluntarily having the employer assist in obtaining sufficient certification rather than being compelled to go back to the health care provider themselves.

Council Response: The Council disagrees with this comment. The suggested change would not be a benefit to employees because it creates a way for employers to potentially use the "voluntary authorization" in bad faith for reasons beyond simply seeking medical certification. Rather than create this potential harm to employees, the Council prefers the clear, bright line rule proposed in the modifications. As a result, no changes have been made.

Section 11091(b)(1) – Employer May Require Certification of Serious Health Condition of a Child, Parent or Spouse.

Comment: We restate our concern that even this level of contact with an employee's provider conflicts with the privacy protections. Allowing such contact is yet another example of an instance in which the adoption of a 2013 FMLA regulation conflicts with the strong privacy protections afforded Californians. Accordingly, we request that the Council strike language allowing an employer to breach the privacy of Californians by contacting their medical providers, especially given the other measures available to employers who have a good faith, objective reason to doubt the veracity of a certification (e.g., the right to request a second opinion).

Council Response: The Council disagrees that there would be any breach of privacy in allowing employers to contact health care providers for the very limited purpose of authenticating a medical certification – a task that should only require verification that the health care provider did in fact complete the Certification Form. As a result, no changes have been made.

Section 11091(b)(2) – Employer May Require Certification of Serious Health Condition of Employee.

Comment: The word "but" should be deleted from the fifth line of this subsection.

Council Response: The Council disagrees with this comment and is confident in the word choice for this section. As a result, no changes have been made.

Comment: With the patient's voluntary authorization, an employer should be permitted to contact the employee's family member's health care provider to assist an employee in obtaining sufficient medical certification (when the initial certification provided is insufficient to certify CFRA leave) or clarification as permitted under the FMLA regulations. (See, e.g., §§ 825.305(c) and (d), 825.306(e), 825.307(a)). The FMLA regulations include safeguards to ensure that only a health care provider, human resources professional, leave administrator, or management official may make the contact, and specify that under no circumstances may the employee's direct supervisor contact the employee's health care provider. Such safeguards would be incorporated into these amended CFRA regulations by reference. Therefore, the last sentence should read, "The employer may not contact a health care provider without the patient's voluntary authorization for any reason other than to authenticate a medical certification," to give employees the benefit of voluntarily having the employer assist in obtaining sufficient certification rather than being compelled to go back to the health care provider themselves.

Council Response: The Council disagrees with this comment. The suggested change would not be a benefit to employees because it creates a way for employers to potentially use the "voluntary authorization" for reasons beyond simply seeking medical certification. Rather than create this potential harm to employees, the Council prefers the clear, bright line rule proposed in the modifications. As a result, no changes have been made.

Comment: We renew our request for additional clarity regarding the certification form to be used by employers. We often hear from employees whose employers have directed them to complete the Department of Labor's FMLA form, which requests the disclosure of sensitive medical information which "may include symptoms [or] diagnosis." An employer may not realize that this form includes improper inquiries and may require an employee to complete it, in violation of California's privacy laws. We therefore renew our suggestion that the Council clarify that an employer may not require disclosure of the diagnosis (regarding either the serious health condition of the employee or her family member), and that it is unlawful to require an employee to complete the Department of Labor's FMLA form in lieu of the CFRA certification form.

Council Response: Changes made to the certification form properly and adequately address the concerns of this comment.

Section 11091(b)(2)(A) – Employer May Require, At Own Expense, Second Certification if there is Reason to Doubt Validity of Original Certification.

Comment: The phrase "good faith, objective" should be deleted from this section. This standard does not mirror FMLA, and would create confusion amongst employers who are trying to comply with both Acts.

Council Response: The Council disagrees with this comment. The use of this phrase is necessary to clarify the type of doubt an employer must have regarding

a medical certification before the employer may require further proof from an employee, and is necessary to protect employees from employers requiring more without reason. This standard is reasonable and unlikely to cause confusion amongst employers. As a result, no changes have been made.

Comment: The addition of a requirement by the Council of a "good faith" reason to doubt the validity of the certification provides sufficient protection against employers demanding second opinions for no good reason. However, the inclusion of the additional requirement of a good faith, objective reason is ambiguous and unclear. Therefore, the Council should remove the term "objective" from this regulation.

Council Response: The Council disagrees with this comment and is confident in the use of the word "objective." The word is not necessarily ambiguous or unclear, but rather is intended to inform employers of the need to step back and evaluate the reason for requiring further medical certification based on neutral, objective data. As a result, no changes have been made.

Section 11091(b)(2)(E) – Employer May Require Employee to Obtain "Return to Work" Release upon Return from Leave.

Comment: The Council's addition of the final sentence in section (b)(2)(E) is unnecessary and confusing in the context of the CFRA. Because California's privacy protections do not permit the employer to request an employee's diagnosis or other detailed information regarding the nature of her serious health condition, it is unclear how an employer who has approved intermittent leave under the CFRA could have "reasonable safety concerns...regarding the employee's ability to perform his or her duties, **based on the serious health condition for which the employee took such leave.**" Accordingly, this sentence should be stricken.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: It appears that the new language was added in the wrong place. Otherwise, it would be unclear as to what is meant by "other policy agreement" in the last sentence above. The FMLA regulation on this topic only addresses limits in collective bargaining agreements, and no explanation is provided to justify an expansion beyond the FMLA. See 29 C.F.R. 825.312(g).

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: The newly proposed language is not clear. If the employer does not choose to have a uniformly applied practice or policy of requiring releases to return to work, yet has concerns that an employee who is off on intermittent or reduced leave may pose a safety concern in performing their duties, it is unclear whether the employer may still require a medical release every 30 days from that employee to return to work or perform work duties. The proposed amendment seems to pose an exception for when the employer can require a release to return to work. As written, the proposed amendment is also unclear about absences and the degree of information upon which the employer must rely to request that release. No diagnostic information can be requested. However, the employer can request a medical release based on safety concerns related to the employee's "serious health condition." However, it is unclear

how the employer would know about the serious health condition. It is possible the requirement may lead to arbitrary requests for medical certifications, e.g. requested for cancer treatment patients subject to radiation and chemotherapy, but not for surgical procedure absences. It would make more sense if an employer could seek a medical release based on a good faith and objective reason for why it might be needed, both due to the nature of the work the employee performs and the length of the leave requested.

Council Response: Changes made by the Council increase clarity and eliminate any concerns there may be regarding an employer making judgments based on an employee's serious health condition. Additionally, including the requirement that an employer must have a uniform practice or policy for requiring a return-to-work release is justified by the Council's intent to protect employees from an unwarranted and unnecessary burden and to implement CFRA's anti-retaliation provisions.

Section 11091(b)(2)(F) – Employer May Not Require Employee to Undergo Fitness-for-duty Exam upon Return from Leave.

Comment: The proposed language in this section precludes an employer from requiring an employee to undergo a fitness-for-duty examination as a condition of an employee's return to work, and references *White v. County of Los Angeles* (2014) 225 Cal.App.4th 690, as the authority. The Council should include the following language that is also consistent with *White*, supra: "After an employee returns from CFRA leave, any medical examination must be at the employer's expense, by the employer's health care provider, and related and consistent with business necessity." This additional language will clarify the balance between CFRA and the Americans with Disabilities Act.

Council Response: The Council agrees and changes to the language have been made accordingly.

Sections 11091(b)(1) and (2).

Comment: The Fair Employment and Housing Council (FEHC) proposes to amend subsection 11091 (b)(1) and 11091 (b)(2) to eliminate an employer's ability to clarify a medical certification provided by an employee, restrictions that are not justified under either the California Family Rights Act or the federal Family Medical Leave Act. The FEHC failed to identify or explain these changes in its Initial Statement of Reasons for the amendments.

Council Response: The Council disagrees with this comment. Limiting the circumstances for which an employer may seek recertification is necessary to preserve privacy rights and protect employees on CFRA-qualifying leave. Additionally, the restrictions are consistent with the CFRA statute, which requires a less invasive/extensive list of affirmations than the FMLA. As a result, no changes have been made.

Section 11091(b)(3) – Providing Certification.

Comment: The Council should strike the second-to-last sentence of subsection (b)(3), reading as follows: "If the employee never produces the certification or recertification, the leave is not CFRA leave." Given the immediately preceding sentence, which allows an employer to,

“[a]bsent extenuating circumstances..., deny CFRA protections...following the expiration of the 15-day time period until a sufficient leave certification is provided,” this newly added sentence is redundant and confusing.

Council Response: The Council disagrees with this comment. Any redundancy is meant to provide unambiguous clarity to this section, and the Council is confident the text is easy to comprehend and follow. As a result, no changes have been made.

Section 11092(b) – Paid Leave.

Comment: A new subsection following subsection (b)(2) should be added as follows: “An employee receiving paid family leave to care for the serious health condition of a family member or to bond with a new child is not on ‘unpaid leave,’ and an employer may not require that employee to use paid time off, sick leave, or accrued vacation.”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: We renew our recommended addition of the following language, perhaps as an additional subsection to (b): “Employers are encouraged to inform employees that their State Disability Insurance or Paid Family Leave may be integrated with accrued but unused paid time off. Employers are further encouraged to agree to such integration where it is requested by an employee.”

Council Response: The Council disagrees with the necessity of this suggested text. The suggested additions create an unjustified burden within the CFRA that employers provide notice related to a separate statute. As a result, no changes have been made.

Section 11092(e) – Other Benefits and Seniority.

Comment: The Modifications propose striking the language “for any additional period of leave . . . and also . . .” This proposed deletion contradicts the statutory language of CFRA. The regulatory language “for any additional period of leave” mirrors CFRA’s “for any period during which coverage is not provided by the employer,” so the proposed deletion contradicts the statute. Thus, the Council should withdraw its proposed deletion and restore the language.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11093(e) – Disability Leave.

Comment: Given the second sentence’s juxtaposition with the first sentence, it has the potential to lead to confusion. The first sentence is clearly intended to address pregnancy disability while the second sentence, by its language, appears intended to address other types of disability. The divergence of clarity is created by the reference to Gov. Code § 12945 in the first sentence, but the lack of statutory reference in the second sentence. To enhance clarity, we suggest the Council add a reference to Gov. Code § 12926, for instance: “If an employee has a serious health condition that also constitutes a disability as defined by Government Code section 12926 and cannot return to work...”

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: This whole provision is unnecessary because an employer's obligations under the FEHA already are detailed elsewhere in the regulations. Accordingly, the Council should delete proposed section 11093(e) in its entirety.

Council Response: The Council disagrees with this comment. This section is necessary to provide clarity to employers by explicitly addressing the relationship between the CFRA and disability leave. As a result, no changes have been made.

Comment: There is no right to leave under the FEHA or its regulations. Rather, leave must be considered as a possible reasonable accommodation absent undue hardship. Further, there is no need to include the interactive process requirement in the CFRA regulations, given that it already is a statutory requirement under the FEHA. The language that we recommend deleting could be used to allege a separate legal violation against an employer for the same act - failure to engage in an interactive process - which is duplicative, unfair, and unnecessary. Employers already are obligated by the FEHA to engage in an interactive process with a disabled employee who requests leave as an accommodation following a CFRA leave (see 2 CCR § 11068(c)). Therefore, if the Council keeps section 11093(e), then it should remove the last sentence.

Council Response: The Council disagrees with this comment. The proposed final sentence of this section is necessary to ensure the rights of employees suffering from a serious health condition that is also a disability. This section is necessary to provide clarity to employers by explicitly addressing the relationship between the CFRA and disability leave. The text is sufficiently clear and unlikely to cause any confusion among employers that a separate cause of action is intended or created. As a result, no changes have been made.

Section 11095(a) – Employers to Post Notice.

Comment: Language suggesting that electronic posting of the notice is sufficient should be deleted. It is unclear why this language is necessary since posting a hardcopy version of the notice is not burdensome to an employer. Further, not all employees may have the same access to a computer or the intranet where such notice may be posted. However, while we would argue that electronic posting is not in itself sufficient, the Council should require both hardcopy and electronic posting by employers who have telecommuting employees or employees who do not otherwise regularly meet at a central worksite. In such situations, electronic posting may be the most visible method of ensuring notice, and should be paired with (but not substituted for) hardcopy posting at the physical worksites.

Council Response: The Council disagrees with this comment. As the comment implies, there are instances of workplaces where electronic postings reach employees more efficiently and effectively than hard copy documents. In such situations, when all other requirements are met, it makes the most sense for an employer only to post notices electronically. As a result, no changes have been made.

Section 11095(b) – Employers to Give Notice.

Comment: We renew our recommendation that the following language be added in order to clarify an employer's obligation to notify individual employees of their leave rights upon learning of their need for qualifying leave: "An employer is obligated to individually inform an eligible employee of his or her right to CFRA bonding leave as soon as any of the following events occur: the employee asks about pregnancy leave; the employee informs the employer that she is pregnant; the employee informs the employer that he or she (or his or her spouse or registered domestic partner) is expecting a child, or that he or she is adopting or fostering a child. At the same time, an employer should provide notice that the employee is or may be eligible for partial wage replacement under California's State Disability Insurance Program and/or Paid Family Leave Program."

Council Response: The Council again disagrees with the suggested text as it is unnecessary, places too heavy of a burden on employers, and exceeds the Council's authority. The comments are also outside of the scope of the comment period, since the Council did not make any changes to the text since the previous comment period. As a result, no changes have been made.

Section 11097 – Certification Form.

Comment: Regarding Question 2, a footnote with the definition of "adult dependent child" (including the definition of "incapable of self-care" from § 825.122(d)(1) of the FMLA regulations) should be added, because most health care providers will not know the definition of "adult dependent child" to be able to answer that question accurately.

Council Response: The Council disagrees that this will be a difficulty for health care providers and prefers not including the definition in order to avoid a lengthy, messy, and incomprehensible form. As a result, no changes have been made.

Comment: A Question 4b should be added regarding the duration of the need for leave, if that is different from the time period specified in response to Question 4a.

Council Response: The Council disagrees with the necessity of the proposed addition. It should not be left to the health care provider to speculate how long an employee will need leave in the future; at issue is the need for a CFRA leave at the present time. The requested modification also exceeds the information required by the CFRA statute. As a result, no changes have been made.

Comment: Regarding Question 5, the Council should continue to include the question asking the health care provider to identify the category of serious health condition because it will help ensure that the certification is accurate, particularly given that the definitions of serious health condition are on another page of the document.

Council Response: The Council disagrees with this comment. All that is required for the certification by a health care provider is that the health care provider confirms that some serious health condition applies. Any more than that is unnecessary, likely to be a breach of privacy, and exceeds the information required by the CFRA statute. As a result, no changes have been made.

Comment: The Council should add questions regarding intermittent and reduced schedule leave to provide both employers and employees with a better understanding of the amount and type of intermittent or reduced schedule leave a health care provider is certifying.

Council Response: The Council agrees and changes to the language have been made accordingly.

Comment: "Treatment at a hospital emergency room is not considered "inpatient care" unless the patient is admitted to the hospital," should be added to the end of the definition of "Hospital Care" to clarify that mere treatment at a hospital emergency room is not sufficient to constitute "inpatient care."

Council Response: The Council disagrees with this comment. The text is sufficient as written and adequately aligns with the definition of inpatient care under state law provisions such as Workers' Compensation. As a result, no changes have been made.

Comment: For consistency with the definitions of "serious health condition" and "continuing treatment" contained in sections 825.113 and 825.115 of the FMLA regulations (incorporated by reference into section 11087(q)(3)), the Council should revise the definitions section to conform with the federal regulations and section 11087(q)(3) of these regulations and to avoid confusion.

Council Response: The Council disagrees with this comment. The definition of "serious health condition" that appears on the form was carefully crafted to both align with the definition included in the regulations, and provide healthcare providers with a clear and precise idea of what is meant by this term of art for purposes of CFRA. As a result, no changes have been made.

Comment: We restate our recommendation that the last sentence in this section be revised as follows: "Employers may also utilize any other certification form so long as it includes a notice to health care providers informing them that disclosure of the underlying diagnosis of the serious health condition is not required, and may not be disclosed without the consent of the patient." We also recommend the addition of the following language immediately thereafter: "However, if the requesting employee wishes to use the state certification form, reproduced below, the employer must accept this version and may not require the employee to provide another type or form of certification."

Council Response: The Council disagrees with this comment. The final sentence, as written, sufficiently and succinctly leads to the same result as the suggested text, but is preferable because of the higher level of clarity by which it presents the information. Additionally, the suggested new text is unnecessary and redundant of what can easily be inferred from the current text. As a result, no changes have been made.

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

Section-by-Section Analysis.

Section 11087(d)(3) – Joint Employers and Integrated Employers.

Comment: The proposed language in this section that seeks to define a joint employment relationship largely mirrors that under the Family and Medical Leave Act, specifically 29 C.F.R. section 825.106. However, it notably omits significant provisions that are included in the FMLA, which we believe should be included in CFRA as well. Specifically, 29 C.F.R. subsections 825.106 (c)-(e) specify that the primary employer is responsible for giving notices required under FMLA and for job restoration, as well as factors to identify who is the primary employer. Subsection (d) sets forth that such employees must be counted by both employers for determining employee coverage and eligibility. We believe such provisions should be included in CFRA as well, to avoid any confusion amongst employers in a joint employment relationship regarding responsibilities and coverage. Accordingly, we respectfully request the Council to include similar provisions in CFRA as are found in 29 C.F.R. subsections 825.106 (c)-(e).

Council Response: The Council disagrees with the necessity of the proposed addition. The proposed additions are incorporated into the text of the CFRA, and their inclusion would not lend to the clarity of this section, which is intentionally limited to addressing the test for determining when an entity will be considered a joint or integrated employer. Reference can be made to the FMLA regulations, to the extent they are not inconsistent with these CFRA regulations. As a result, no changes have been made.

Section 11091(a)(1)(B) – Retroactive Designation of CFRA Leave Allowed.

Comment: The FEHC is exceeding its authority. (See Gov. Code §§ 11349(b), 11349.1(a)(2).) The Council should strike all language in the subsection as set forth in the Further Modifications and instead replace it with the following language: “If an employee takes paid or unpaid leave and the employer does not designate the leave as CFRA leave at the time the leave is commenced, the leave taken does not count against an employee’s CFRA entitlement.”

Council Response: The Council disagrees with this comment. As an initial matter, the comment is outside of the scope of the present comment period, since no modifications were made to the text of the provision since the last comment period. With respect to the substance of the comment, the Council believes this section should continue to track the FMLA regulation, as it has for the last twenty years, since the inception of these regulations by the former Commission in 1995. Doing so is consistent with our own statute, the CFRA, and protective of CFRA qualifying employees. 12945.2(a) clarifies that leave requested for CFRA shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or comparable position upon the termination of the leave. The statutory language on this is clear, and the regulations acknowledge and implement it extensively at 11089 and also at 11087(h).

However, the guarantee of reinstatement upon granted CFRA leave is a separate question from when, if ever, leave that was not granted as CFRA leave can be retroactively designated. Indeed the very premise of retroactive designation

presumes the leave was not granted as CFRA leave in the first place. Our statute does not speak to retroactive designation with any greater clarity than the FMLA does and these regulations have tracked the FMLA on the topic of retroactive designation since their very existence in 1995. Moreover, the United States Supreme Court decision in *Ragsdale v. Wolverine World Wide, Inc.*, which addresses this issue directly, in the context of the FMLA, is certainly persuasive in the context of our own statute. There are no cases that distinguish the CFRA from the FMLA on the topic of retroactive designation or interpret the statutory provision in question in the manner suggested by the comments.

A close examination of the statutory text at 12945.2 (a) compels the Council to conclude that the text should not be read to speak to the issue of retroactive designation in the manner suggested. Rather, it is a provision that speaks to the important need to guarantee reinstatement when granting CFRA leave. Again, the sentence reads: “Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave.”

There are two ways to read this, both of which focus on the phrase “upon granting the leave request.” Either, “the leave” refers specifically to CFRA leave, which is probably the fairest reading. But when you give it that meaning, it is easy to see how the sentence simply addresses a separate issue from retroactive designation – the very concept of retroactive designation presumes the leave wasn’t officially granted as CFRA in the first place. So as a practical matter, to technically comply with this provision in the context of retroactive designation, an employer would simply provide the guarantee of reinstatement upon its retroactive granting of the CFRA leave.

The other way to read the sentence is to presume that “granting the leave request” refers not merely to CFRA leave, but to any leave granted under circumstances that would have qualified as CFRA leave. It is a stretch to say that “leave” in the sentence refers to any leave, rather than CFRA leave, since the provision of the statute is geared towards addressing CFRA leave specifically and there is no language to indicate that a broader definition of leave applies to this particular sentence.

But assuming for the moment that the argument goes, whenever any leave of whatever kind is granted during events that might be CFRA qualifying, a guarantee of reinstatement is required; reading the statutory text in this fashion would render numerous other statutory provisions nonsensical. Most notably those dealing with the circumstances surrounding when it is acceptable not to

request CFRA leave in advance such as 12945.2(h) and (i) (i.e. when its need is not foreseeable). (See also sections 11091(a)(3) and (4).)

Take the example of an employee that gets in a car accident and needs medical attention. The leave request is not provided in advance and may not be made until days after the accident, and the employer will often allow an employee to take leave to tend to their injuries while verification is made as to whether the employee is eligible for CFRA leave. Sometimes the employee won't even become eligible until part of the way through the leave, when he or she completes a year of service. To read the expression "granting the leave request" to include any sort of leave, such as this one, would place employers in the bind of guaranteeing reinstatement before they have even verified whether the employee and injuries are CFRA qualifying, or to provide more than 12 weeks of leave because they didn't provide a guarantee of reinstatement at the time they told the employee that he or she could take the work days off to tend to their medical needs. In the Council's view, that is not the result the statute intends and is inconsistent with the request and notice provisions the statute contemplates and provides.

Finally, it is important to note that, like the FMLA regulation, our regulation clarifies that retroactive designation is not permissible when it causes harm and injury to the employee. The Council agrees that this harm/injury threshold should be read expansively and, indeed, the FMLA regulation at 29 C.F.R. C.F.R. § 825.301(d) provides a very helpful and fair example of when retroactive designation would cause harm or injury and when it wouldn't.

It was suggested that retroactive designation, by its very nature, harms employees. Initially, the Council was in agreement with this, but upon reflection, while the Council continues to think that this is often true, it is easy to identify some circumstances when it does not. Keep in mind that CFRA leave cannot be accrued and carried over year after year. It is capped at 12 weeks per year. You cannot carry remaining weeks over and have 16 weeks the following year. It is also not paid leave, like vacation days, that are paid out when an employee leaves employment. Rather, it is unpaid leave that employees can avail themselves of when they need it. There are numerous times that employees need all 12 weeks and could benefit from additional weeks and would carefully budget their 12 weeks if they were informed that their leave was CFRA leave at the outset. However, there are also instances when employees would not take all 12 weeks of leave, because it is unpaid leave and their personal circumstances don't require them to take it. Indeed, that is no doubt true for the majority of workers in a given year.

Ultimately, for the foregoing reasons, we believe the regulation on retroactive designation should continue to track the FMLA, as it has since 1995. We are also

confident that we address and implement the statutory text at 12945.2(a), which focuses on the guarantee of reinstatement upon granting CFRA leave and is addressed extensively at 11087(h), 11089, and 11091 of the regulations. As a result, no changes have been made.

California Family Rights Act Regulations – Addendum to the Final Statement of Reasons.

The following changes need to be made to the Final Statement of Reasons:

I. Nonduplication Statement

The Following shall be added to the Final Statement of Reasons at page 2 after the Updated Informative Digest:

NONDUPLICATION STATEMENT [1 CCR 12].

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

II. Section 11087(e): “Eligible Employee.”

The following shall be inserted with the comments made under Section 11087(e) on page 7 of the Final Statement of Reasons:

Comment: If the illness is for a specific body part, for example the right knee, would a leave within the 12-month period requested for the left knee qualify as the same “qualifying event” since it is not specifically the right knee prompting the leave request.

Council Response: This comment is not relevant to the rulemaking process. It appears to be seeking an improper advisory opinion. As a result, no changes have been made.

III. Section 11087(e)(3) – Relationship with Pregnancy Disability Leave.

Comment: The first day of FMLA in a pregnancy situation should be the marker for an employee’s eligibility when taking subsequent CFRA bonding leave, not the first day of PDL.

Council Response: The Council disagrees with the necessity of the proposed change since the law as stated is based on statute and, as a result, no changes have been made.

The preceding comment and response from page 10 of the Final Statement of Reasons shall be deleted and replaced with the following:

Comment: The first day of FMLA in a pregnancy situation should be the marker for an employee’s eligibility when taking subsequent CFRA bonding leave, not the first day of PDL.

Council Response: The Council disagrees with the necessity of the proposed change. It is unclear what the commenter is asking, but since the law, as stated in the proposed text, is based upon and thus consistent with the corresponding statute, the Council is confident in the proposed text. Additionally, the proposed text strives to make clear that only state law is being regulated and removing “that is also a FMLA leave” ensures that an inference cannot be made that the Council is regulating federal law. The pregnancy disability regulations that are not a part of this rulemaking action sufficiently address the rest of this comment. As a result, no changes have been made.

IV. Section 11090(a) – Computation of Time Periods: Twelve Workweeks.

The following shall be inserted on page 23 of the Final Statement of Reasons, between comments relating to Section 11090 and Section 11090(b):

Section 11090(a) – Computation of Time Periods: Twelve Workweeks.

Comment: The Council should address the issue of what happens when an employer error occurs in the designation process with regards to the start date of CFRA-protected leave.

Council Response: The comment is nonresponsive to any proposed changes made by the Council. As a result, no changes have been made.

V. Section 11092(b)(4) – Employer and Employee May Negotiate as to Employees Use of Paid Time Off.

Comment: This section uses the word “negotiate” to identify the method by which qualifying CFRA is not used and instead saved for the employee. This word “negotiate” is not appropriate. The regulation should replace the concept of ‘negotiation’, as well as consider the unintended consequences to employer and employee when CFRA is not used.

Council Response: The Council disagrees with this comment. Absent any recommendation as to what a more accurate term would be, the Council believes “negotiation” is the most accurate and appropriate word for this section. “Negotiate” has been in the regulations for many years and has not been problematic. As a result, no changes have been made.

The preceding comment and response from page 41 of the Final Statement of Reasons shall be deleted and replaced with the following:

Comment: This section uses the word “negotiate” to identify the method by which qualifying CFRA is not used and instead saved for the employee. This word “negotiate” is not appropriate. The regulation should replace the concept of ‘negotiation’ with the phrase “an employer and an employee can mutually agree,” as well as consider the unintended consequences to employer and employee when CFRA is not used.

Council Response: The Council disagrees with this comment. Not only is the comment nonresponsive to any proposed modifications, but the Council believes “negotiation” is the most accurate and appropriate word for this section. “Negotiate” has been used consistently in the regulations for many years and has not been problematic. The proposed phrase, “an employer and an employee can mutually agree,” lacks the clarity provided by the term “negotiation.” As a result, no changes have been made.

VI. Section 11092(c)(2) – Employer’s Obligation to Continue Benefits Begins at time Leave Begins.

The following shall be inserted with the comments made under Section 11092(c)(2) on page 42 of the Final Statement of Reasons:

Comment: The Government Code states that the 12 workweeks for CFRA health benefits shall commence “on the date that FMLA commences....” The Code further details that if PDL is taken, and if FMLA applies, then the 12 weeks for CFRA health benefits commence with FMLA. CFRA health benefits do not commence when CFRA starts once PDL is over, unless PDL and FMLA did not run concurrently,

and unless FMLA has not begun at all. Therefore, the Council should reverse its proposal and retain the current CFRA regulation, or proceed to the legislature to amend the Government Code.

Council Response: The Council disagrees with this comment. Although the comment is unclear and difficult to understand, the Council is confident that the comment conflates FMLA and PDL and ultimately relates to a rulemaking action from 2012. If read further, the regulation subsequently clarifies commenter's concerns. Further, case law consistently expresses the same result as the regulation. Additionally, the comment lacks consistency with the rest of the regulations. A recommendation to proceed to the legislature at this time is not within the scope of this rulemaking action. As a result, no changes have been made.

VII. Section 11096 – Relationship with FMLA Regulations.

Comment: Former § 11097, now re-numbered § 11096, addresses applying FMLA regulations to the CFRA statute and its regulations. Previously, when the FMLA regulations were changed and the CFRA regulations still referred to the 1995 regulations, employers faced uncertainty and difficulty in administering leaves that qualified for both FMLA and CFRA coverage. While the proposed revision is now updated to refer to the most current FMLA regulations, the problem inherent with the existing regulation remains the same. If or when the FMLA regulations are again updated to reflect changes in the law, the CFRA regulations will refer to outdated regulations, leaving employers and employees with uncertainty whether they may use the most current FMLA regulations as guidance. Because the original language refers to ensuring use of the FMLA regulations falls within the scope of Government Code section 12945.2 and other state law and the California Constitution, it is recommended that the reference to the date the FMLA regulations became effective be removed.

Council Response: The Council agrees and changes to the language have been made accordingly.

The preceding comment and response from page 52 and 53 of the Final Statement of Reasons shall be deleted and replaced with the following:

Comment: Former § 11097, now re-numbered § 11096, addresses applying FMLA regulations to the CFRA statute and its regulations. Previously, when the FMLA regulations were changed and the CFRA regulations still referred to the 1995 regulations, employers faced uncertainty and difficulty in administering leaves that qualified for both FMLA and CFRA coverage. While the proposed revision is now updated to refer to the most current FMLA regulations, the problem inherent with the existing regulation remains the same. If or when the FMLA regulations are again updated to reflect changes in the law, the CFRA regulations will refer to outdated regulations, leaving employers and employees with uncertainty whether they may use the most current FMLA regulations as guidance. Because the original language refers to ensuring use of the FMLA regulations falls within the scope of Government Code section 12945.2 and other state law and the California Constitution, it is recommended that the reference to the date the FMLA regulations became effective be removed.

Council Response: In accordance with 1 CCR 20(c)(4), it is necessary that the Council maintain the specific date that the FMLA regulation became effective. This is a global change that affects all incorporations by reference. As a result, no changes have been made.

VIII. Section 11089(d)(3) – Fraudulently-obtained CFRA Leave.

The following shall be inserted with the comments made under Section 11089(d)(3) on page 64 of the Final Statement of Reasons:

Comment: While the proposed language is generally acceptable, the Council should further modify the proposed text to clarify limitations on the honest/good faith defense for employers who suspect fraud. Namely, the Council should fill this hole by redrafting the final sentence to read: "An employer has the burden of proving, by objective evidence, that the employee in fact fraudulently obtained or used CFRA leave."

Council Response: The Council disagrees with this comment as unnecessary. The modified text clearly states the rule and is consistent with other law. The commenter's proposal is inconsistent with the scope of these regulations and impinges upon the Evidence Code. As a result, no changes have been made.

IX. Sections 11091(b)(1) and (2).

Comment: The Fair Employment and Housing Council (FEHC) proposes to amend subsection 11091 (b)(1) and 11091 (b)(2) to eliminate an employer's ability to clarify a medical certification provided by an employee, restrictions that are not justified under either the California Family Rights Act or the federal Family Medical Leave Act. The FEHC failed to identify or explain these changes in its Initial Statement of Reasons for the amendments.

Council Response: The Council disagrees with this comment. Limiting the circumstances for which an employer may seek recertification is necessary to preserve privacy rights and protect employees on CFRA-qualifying leave. Additionally, the restrictions are consistent with the CFRA statute, which requires a less invasive/extensive list of affirmations than the FMLA. As a result, no changes have been made.

The preceding comment and response from page 71 of the Final Statement of Reasons shall be deleted and replaced with the following:

Comment: The Fair Employment and Housing Council (FEHC) proposes to amend subsection 11091 (b)(1) and 11091 (b)(2) to eliminate an employer's ability to clarify a medical certification provided by an employee, restrictions that are not justified under either the California Family Rights Act or the federal Family Medical Leave Act. The FEHC failed to identify or explain these changes in its Initial Statement of Reasons for the amendments.

Council Response: The Council disagrees with this comment. Limiting the circumstances for which an employer may seek recertification is necessary to preserve privacy rights and protect employees on CFRA-qualifying leave. Additionally, the restrictions are consistent with the CFRA statute, which requires a less invasive/extensive list of affirmations than the FMLA. Because this comment was made during the 15-day comment period in response to modifications to the proposed text, the reasoning in the Initial Statement of Reasons is not meant to be applicable to this version of the text. As a result, no changes have been made.

X. October 6, 2014 Public Hearing

The Following shall be added to the Final Statement of Reasons at page 61:

PUBLIC HEARING COMMENTS MADE OCTOBER 6, 2014 [Government Code Section 11346.9(a)(3)].

Department of Fair Employment and Housing

No oral comments were made at this meeting.

XI. December 8, 2014 Public Hearing

The Following shall be added to the Final Statement of Reasons at page 75:

PUBLIC HEARING COMMENTS MADE DECEMBER 8, 2014 [Government Code Section 11346.9(a)(3)].

Noah Lebowitz reiterated previously expressed sentiments and his comments are responded to in depth on pages 76-79.

XII. January 13, 2015 Public Hearing

The Following shall be added to the end of the Final Statement of Reasons at page 79:

PUBLIC HEARING COMMENTS MADE JANUARY 13, 2015 [Government Code Section 11346.9(a)(3)].

Comments made by both Noah Lebowitz and Rachel Langston at the January 13, 2015 public hearing were non responsive since a new draft was not being discussed and ultimately reiterations of previous comments made by each commenter during previous comment periods. Each of their previous comments are summarized and responded to on the preceding pages, specifically on pages 76-79 for Mr. Lebowitz's comments and pages 61-75 for Ms. Langston's comments.