

Fair Employment & Housing Council

Modifications to Proposed Employment Regulations

Regarding Religious Creed and Age Discrimination

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 2. Particular Employment Practices; Article 8. Religious Creed Discrimination; Article 10. Age Discrimination

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Article 2. Particular Employment Practices

§ 11016. Pre-employment Practices

(a) Recruitment.

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

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

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

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

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

(b) Pre-Employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries that directly or indirectly identify an individual on a basis enumerated in the Act

are unlawful unless made pursuant to a permissible defense. ~~Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.) and the regulations adopted pursuant thereto, nothing in Government Code section 12940(d) or in this subdivision, shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.~~

(A) An employer may make, in connection with prospective employment, an inquiry as to, or request information, regarding the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations is directly pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger their health or safety or the health or safety of others, except as provided by the Americans with Disabilities Act of 1990 (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.) and the regulations pursuant thereto.

(B) Pre-employment inquiries regarding an applicant's availability for work on certain days and times shall not be used to ascertain the applicant's religious creed, disability, or medical condition. ~~In general, such inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds, in language such as: "Other than time off for reasons related to your religion, a disability, or medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or medical condition, are you available to work the proposed schedule?"~~

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

(c) Applications.

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

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

(3) Schedule Information. An application's request for information related to schedule and availability for work, shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Such requests must clearly communicate that an

employee need not disclose any scheduling restrictions based on legally protected grounds in language such as: "Other than time off for reasons related to your religion, a disability, or medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or medical condition, are you available to work the proposed schedule?"~~in some instances, may deter applicants due to their religious creed, disability, or medical condition.~~
~~Employment applications that request such information will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.~~

(A) The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religious creed, disability, or medical condition. Such a practice is unlawful unless pursuant to a job-related and consistent with business necessity and the online application technology includes a mechanism for the applicant to request an accommodation.

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

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

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

Article 8. Religious Creed Discrimination

§ 11063. Pre-employment practices

Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used ~~as a pretext for~~ to ascertain ~~their his or her~~ religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question, and comply with section 11016 of these regulations.

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

Article 10. Age Discrimination

§ 11075. Definitions.

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

- (a) "Age-based stereotype" refers to generalized opinions about matters including the qualifications, job performance, health, work habits, and productivity of individuals over forty.
- (b) "Basis of age" or "~~ground of age~~" refers to age ~~over 40 or older~~.
- (c) "Collective bargaining agreement" refers to any collective bargaining agreement between an employer and a labor organization that is in writing.
- (d) "Employer" refers to all employers, public and private, as defined in Government Code Section 12926.
- (e) "Employment benefit" refers to employment benefit as defined in section 11008(g). It also includes a workplace free of harassment as defined in section 11019(b) of Subchapter 2.
- (f) "Normal retirement date or NRD" refers to one of the following dates:
 - (1) for employees participating in a private employee pension plan regulated under the federal Employee Retirement Income Security Act of 1974, the NRD refers to the time a plan participant reaches normal retirement age under the plan or refers to the later of either the time a plan participant reaches 65 or the 10th anniversary of the time a plan participant commenced participation in the plan;
 - (2) for employees not described under (1) whose employers have a written retirement policy or whose employers are parties to a collective bargaining agreement that specifies retirement practices, the NRD refers to the normal retirement time or age specified in such a policy or agreement; or
 - (3) for employees not described under either (1) or (2) the NRD refers to the last calendar day of the month in which an employee reaches his or her 70th birthday.
- (g) "~~Over 40~~" refers to the chronological age of an individual who has reached ~~or passed their~~ ~~his or her~~ ~~40th birthday~~.
- (h) "Private employer" refers to all employers not defined in subsection (i) ~~below~~ above.
- (i) "Public employer" refers to public agencies as defined in Government Code Section 31204.
- (j) "Retirement ~~or Pension~~ Program" refers to any plan, program or policy of an employer that is in writing and has been communicated to eligible or affected employees, which is intended to provide an employee with income upon retirement (this may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual Retirement Accounts, employee stock ownership plans, matching thrift plans, or stock bonus plans or other forms of defined benefit or defined contribution plans).

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

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant's or employee's age of over 40 or older was considered in the denial of employment or an employment benefit. There is a presumption of discrimination whenever may be established by showing that a facially neutral practice has an adverse impact on applicant(s) or employee(s) age 40 and older over the age of 40, unless the practice is job-related and consistent with justified by business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on employee(s) age 40 and older over the age of 40, an employer's preference to retain lower paid worker(s), alone, is insufficient to negate the presumption. The practice may still be impermissible, even where it is job-related and consistent with legitimate business necessity exists, where it is shown that an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual or individuals age 40 and older over 40.

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

§ 11077. Defenses.

[No change to text.]

§ 11078. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Recruitment. The provisions of section 11016(a) are applicable and are incorporated by reference herein. Generally, during recruitment it is unlawful for employers to refuse to consider applicants because they are at least over 40 years of age. Examples of unlawful requirements include: a maximum experience limitation; a requirement that candidates be “digital natives” (an individual who grew up using technology from an early age); or a requirement that candidates maintain a college-affiliated email address. However, it is lawful for an employer to participate in established recruitment programs with high schools, colleges, universities and trade schools. It is also lawful for employers to utilize temporary hiring programs directed at youth, even though such programs traditionally provide disproportionately few applicants who are age 40 and older over 40.

However, exclusive screening and hiring of applicants provided through the above recruitment or temporary programs will constitute discrimination on the basis of age if the programs are used to evade the Act's prohibition against age discrimination.

(2) Advertising. It is unlawful for an employer to either express a preference for individuals under 40 or to express a limitation against individuals at least 40 years of age ~~over 40~~ when advertising employment opportunities by any means such as the media, employment agencies, and job announcements.

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

§ 11079. Advertisements, Pre-Employment Inquiries, Interviews and Applications.

(a) Advertisements. Unless age is a bona fide occupational qualification for the position at issue, advertisements for employment that a reasonable person would interpret as deterring or limiting an attempt to deter or limit employment of people age 40 and over are unlawful. (See section 11010(a) for the definition of bona fide occupational qualification.) Where there is no bona fide occupational qualification, Examples of prohibited advertisements include those that designate a preferred applicant age range or that include terms such as young, college student, recent college graduate, boy, girl, or others terms that imply a preference for employees under the age of 40.

(ab) Pre-Employment Inquiries. Unless age is a bona fide occupational qualification for the position at issue, pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, excepting where age is bona fide occupational qualification. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.) Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(cb) Applications. Unless age is a bona fide occupational qualification for the position at issue, it is discrimination on the basis of age for an employer or other covered entity to reject or refuse to seriously and fairly provide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because such individual is age 40 or older ~~over 40~~. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) An application's request for information that could lead to the disclosure of the applicant's date of birth or age (such as graduation date) is not, in itself, unlawful. However, the application's request for such information may tend to deter older applicants or otherwise indicate discrimination against applicants who are over 40.

~~Employment applications that request such information will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.~~

~~(2) This section prohibits the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates or utilize automated selection criteria or algorithms that have the effect of screening out applicants that are age 40 and over. Use of online application technology that limits or screens out older applicants is discriminatory unless pursuant to a bona fide occupational qualification. (See section 11010(a).)~~

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