

**Civil Rights Council
First Modifications to
Initial Text of Proposed Modifications to Employment Regulations
Regarding Automated-Decision Systems**

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

TEXT

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Text proposed to be deleted for the 45-day comment period is displayed in ~~striketrough~~ type.
Text proposed to be added for the 15-day comment period is displayed in double-underline type and yellow highlighting.
Text proposed to be deleted for the 15-day comment period is displayed in ~~double-striketrough type and blue highlighting.~~

NOTE: Unrelated modifications to Cal. Code Regs., tit. 2, section 11017.1, made through rulemaking (OAL Matter Number 2023-0609-06), became operative after the Initial Text for Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems (“Initial Text”) had been finalized. Accordingly, the Initial Text includes outdated language for section 11017.1. In this first modified text, section 11017.1 has been updated to reflect its current language, and those updates are not subject to public comment since they do not represent proposed modifications to existing law. However, the proposed modifications to section 11017.1 for purposes of this rulemaking, which have been incorporated into the current text and are displayed as described above, are subject to public comment.

Article 1. General Matters

§ 11008. Definitions.

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

(a) “Adverse impact.” An adverse impact includes, ~~but is not limited to, the use of a facially neutral practice that negatively limits, screens out, tends to limit or screen out, ranks, or prioritizes applicants or employees~~ a substantial disparity in the rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of a group of individuals on a basis protected by the Act. “Adverse impact” is synonymous with “disparate impact.”

(b) "Agent." An agent includes Any person acting on behalf of an employer, directly or indirectly, to exercise a function traditionally exercised by the employer, which may include applicant recruitment, applicant screening, hiring, promotion, or decisions regarding pay, benefits, or leave. An agent may include, in appropriate circumstances, a third party that creates an automated-decision system used by or for an employer, or a third party that uses an automated-decision system on behalf of an employer. An agent may include, in appropriate circumstances, a third party that conducts administrative services for an employer, such as payroll and benefits administration. An agent of an employer is also an "employer" for purposes of the Act, ~~including, but not limited to, a third party that provides services related to making hiring or employment decisions (such as recruiting, applicant screening, hiring, payroll, benefit administration, evaluations and/or decision-making regarding requests for workplace leaves of absence or accommodations) or the administration of automated decision systems for an employer's use in making hiring or employment decisions.~~

~~(a)~~(c) "Applicant." Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, "Applicant" is also an individual who can prove that ~~he or she has~~they have been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice. "Applicant" does not include an individual who without coercion or intimidation willingly withdraws ~~his or her~~their application prior to being interviewed, tested or hired.

~~(b)~~(d) "Apprenticeship Training Program." Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

~~(c)~~(e) "Employee." Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) "Employee" does not include an independent contractor as defined in Labor Code section 3353.

(2) "Employee" does not include any individual employed by ~~his or her~~their parents, by ~~his or her~~their spouse, or by ~~his or her~~their child.

(3) "Employee" does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

~~(d)~~(f) “Employer.” Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) “Regularly employing” means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) “Regular basis” refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season “regularly employs” the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) “Employer” includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

~~(e)~~(g) "Employer or Other Covered Entity." Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

~~(f)~~(h) "Employment Agency." An employment agency includes ~~A~~ any person undertaking, for compensation, ~~services to identify, screen, and/or to procure~~ the procurement of job applicants, employees or opportunities to work, including persons undertaking these services through the use of an automated-decision system.

~~(g)~~(i) "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment" or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, "employment benefit" includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) "Employment benefit" also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) "Provision of a discrimination-free workplace" is a provision of a workplace free of harassment, as defined in section 11019(b).

~~(h)~~(j) "Employment Practice." Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual's employment benefits or consideration for an employment benefit.

~~(i)~~(k) "Labor Organization." Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

~~(j)~~(l) "Person performing services pursuant to a contract." A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(m) "Proxy." A technically neutral characteristic or category closely correlated with a basis characteristic protected by the Act.

(k)(n) “Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12925, 12926, 12940, 12941 and 12942, Government Code; *Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850; *Sims v. Worldpac Inc.* (N.D. Cal. Feb. 22, 2013) 2013 WL 663277; *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal. 5th 268.

§ 11008.1. Automated-Decision Systems

(a) “Automated-Decision System.” A computational process that ~~screens, evaluates, categorizes, recommends, or otherwise~~ makes a decision or facilitates human decision making regarding an employment benefit, as defined in section 11008(i) of these regulations, that impacts applicants or employees. An Automated-Decision System may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing or artificial intelligence techniques.

(1) Automated-Decision Systems perform tasks such as:

(A) Using computer-based assessments or tests, such as questions, puzzles, games, or other challenges to:

(i) Make predictive assessments about an applicant or employee;

(ii) Measure an applicant’s or employee’s skills, dexterity, reaction-time, and/or other abilities or characteristics; ~~and/or~~

(iii) Measure an applicant’s or employee’s personality trait, aptitude, attitude, and/or cultural fit; and/or

(iv) Screen, evaluate, categorize, and/or recommend applicants or employees.

(B) Directing job advertisements or other recruiting materials to targeted groups;

(C) Screening resumes for particular terms or patterns; ~~or~~

(D) Analyzing facial expression, word choice, and/or voice in online interviews; or

(E) Analyzing employee or applicant data acquired from third parties.

(2) “Automated-Decision System” excludes word processing software, spreadsheet software, ~~and~~ map navigation systems; web hosting, domain registration, networking, caching, website-loading, data storage, firewalls, anti-virus, anti-malware, spam- and robocall-filtering, spellchecking, calculators, database, or similar technologies, provided that these technologies do not make a decision or facilitate human decision making regarding an employment benefit.

(b) "Algorithm." A set of rules or instructions a computer follows to perform calculations or other problem-solving operations. Algorithms can, for example, detect patterns in datasets and automate decisions making based on those patterns and datasets.

(c) "Artificial Intelligence." ~~A machine learning system that can, for a given set of human defined objectives, make predictions, recommendations, or decisions.~~ A machine-based system that infers, from the input it receives, how to generate outputs. Outputs can include predictions, content, recommendations, or decisions.

(d) "Automated-Decision System Data." ~~Any data used in the process of developing and/or applying machine learning, algorithms, and/or artificial intelligence that is utilized as a part of an automated decision system, including, but not limited to:~~

~~(1) Data used to train a machine learning algorithm utilized as a part of an automated decision system;~~

(1) Any data used in or resulting from the application of an automated-decision system, such as data provided by or about individual applicants or employees, or that includes information about individual applicants or employees or data reflecting employment decisions or outcomes; and/or;

(2) Any data used to design, develop, or customize an automated-decision system for use by a particular employer or other covered entity.

~~(3) Data produced from the application of an automated decision system operation.~~

(e) "Machine Learning." The ability for a computer to use and learn from its own analysis of data or experience and apply this learning automatically in future calculations or tasks.

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

§ 11009. Principles of Employment Discrimination.

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

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

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

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if ~~he or she~~ they alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.

(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

(f) It is unlawful for an employer or other covered entity to use an automated decision system or selection criteria (including a qualification standard, employment test, automated decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of discriminates against an applicant or employee or a class of applicants or employees on a basis protected by the Act, subject to any available defense. ~~As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.~~ Relevant to ~~this inquiry~~ any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

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

§ 11013. Recordkeeping.

Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent California Employer Information Report (CEIR) or appropriate substitute and applicant identification records for each such

unit and shall make them available upon request to any officer, agent, or employee of the Council or Department.

(a) California Employer Information Report. All employers regularly employing one hundred or more employees, apprenticeship programs with five or more apprentices and at least one sponsoring employer with 25 or more employees and at least one sponsoring union, which operates a hiring hall or has 25 or more members, and labor organizations with 100 or more members shall prepare an annual CEIR in conformity with guidelines on reporting issued by the Department.

(1) Substituting Federal Reports. An employer or other covered entity may utilize an appropriate federal report in lieu of the CEIR. Appropriate federal reports include the EEOC's EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).

(2) Sample Forms and Guidelines. Appropriate copies of sample forms and applicable guidelines shall be available to any employer or other covered entity from the Department of Fair Employment and Housing.

(3) Special Reporting. If an employer or other covered entity is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be required. In such case, the employer or other covered entity should so advise the Department and submit a specific proposal for an alternative reporting system prior to the date on which the report should be prepared. If it is claimed that the preparation of the report would create undue hardship, an employer may apply to the Department for an exemption from the requirements of this section.

(4) Remedy for Failure to Prepare or Make Reports Available. Upon application by the ~~FEHC~~ CRD or ~~DFEH~~ CRD for judicial relief, any employer failing or refusing to prepare or to make available reports as required under this section may be compelled to do so by a Superior Court of California.

(5) Penalties for False Statements. The willful making of false statements on a CEIR or other required record is a violation of California Government Code section 12976, and is punishable by fine or imprisonment as set forth therein.

(b) Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which ~~he or she~~ they applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.

(1) For recordkeeping purposes only, "applicant" means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry

or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall either retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be ~~maintained~~ ~~preserved~~ for the time period set forth in subdivisions (c)(1) and (2) below.

(c) Preservation of Records. Any personnel or other employment records ~~made or kept~~ created or received by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee ~~(including all applications, personnel, membership or employment referral records or files and all automated decision system data)~~ shall be ~~preserved~~ maintained by the employer or other covered entity for a period of ~~two~~ four years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. Such records include all applications, personnel records, membership records, employment referral records, selection criteria, automated decision system data, and other records related to a policy, practice, or decision affecting an applicant or employee. ~~However, the State Personnel Board shall maintain such records and files for a period of one year.~~

(1) California Employment Information Report. Every employer subject to subsection (a) above shall ~~preserve~~ maintain for a period of ~~two~~ four years from the date of preparation of the CEIR such records as were necessary for completion of the CEIR.

(2) Applicant Identification Records. Every employer subject to subsection (b) above shall ~~preserve~~ maintain applicant identification information for a period of ~~two~~ four years from the date it was received.

(3) Separate Records on Sex, Race, and National Origin. Records as to the sex, race, or national origin of any individual accepted for employment shall be kept separately from the employee's main personnel file or other records available to those responsible for personnel decisions. For example, such records could be kept as part of an automatic data processing system in the payroll department.

(4) After Filing of Complaint. Upon notice of or knowledge that a complaint has been filed against it under the Act, any respondent, including the State Personnel Board, shall ~~maintain and preserve~~ any and all relevant records and files until ~~such complaint is fully and finally disposed of and all appeals from related proceedings have concluded~~ the later of the following:

(A) The first date after the period of time for filing a civil action has expired.

(B) The first date after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.

~~(A5)~~ For purposes of this subsection, "related proceedings" shall include any action brought in Superior Court pursuant to section 12965 of the Government Code.

(B6) The term “records and files relevant to the complaint” shall include, but is not limited to, personnel or employment records relating to the complaining party and to all other employees holding similar positions to that held or sought by the complainant at the facility or other relevant subdivision where the discriminatory practice allegedly occurred. The term also includes automated-decision system data as well as applications, forms or test papers completed by the complainant and by all other candidates for the same position at that facility or other relevant subdivision where the employment practice occurred. All relevant records made or kept pursuant to subsections (a) and (b) above shall also be ~~preserved~~ maintained.

(E7) The term “fully and finally disposed of and all administrative proceedings, civil actions, appeals, or from-related proceedings have ~~concluded~~ terminated” refers to the expiration of the statutory period within which a complainant or respondent may bring an action in Superior Court, or an agreement has been reached by the parties whereby no further judicial review is available to any of the parties, or a final order has been entered by a body of judicial review for which the time for filing a notice of appeal has expired.

~~(8) Any person who sells or provides an automated decision system or other selection criteria to an employer or other covered entity, or who uses an automated decision system or other selection criteria on behalf of an employer or other covered entity, must maintain relevant records. Relevant records include, but are not limited to, automated decision system data used or resulting from the application of the automated decision system for each such employer or other covered entity to whom the automated decision system is sold or provided or on whose behalf it is used. Relevant records also include training set, modeling, assessment criteria, and outputs from the automated decision system. These records must be maintained for at least four years following the last date on which the automated decision system was used by the employer or other covered entity.~~

(d) Posting of Act. Every employer or other covered entity shall post in a conspicuous place or places on its premises a notice to be prepared and distributed by the Department, which sets forth excerpts of the Act and such relevant information the Department deems necessary to explain the Act. Such employers employing significant numbers, no less than 10% of their work force, of non-English-speaking persons (e.g., Chinese or Spanish speaking) at any facility or establishment must also post in the appropriate foreign language at each such facility or establishment. Such notices may be obtained from the Department.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12946, Government Code.

Article 2. Particular Employment Practices

§ 11015. Definitions.

(a) “Recruitment.” The practice of any employer or other covered entity that has the purpose or effect of informing any individual about an employment opportunity, or assisting an individual to apply for employment, an activity leading to employment, membership in a labor organization, acceptance in an apprenticeship training program, or referral by an employment agency.

(b) "Date of Determination to Hire." The time at which an employer or other covered entity has made an offer of employment to the individual.

(c) "Pre-employment Inquiry." Any oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment.

(d) "Application." Except for recordkeeping purposes, any writing or other device, including but not limited to an automated-decision system, used by an employer or other covered entity to make a pre-employment inquiry or submitted to an employer or other covered entity for the purpose of seeking consideration for employment.

(e) "Placement." Any status, category, rank, level, location, department, division, program, duty or group of duties, or any other similar classification or position for which an employee can be selected or to which an employee can be assigned by any employment practice. Employment practices that can determine placement in this way include, but are not limited to: hiring, discharge, promotion, transfer, callback, or other change of classification or position; inclusion in membership in any group or organization; any referral assignment to any place, unit, division, status or type of work.

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

§ 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.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity, including but not limited to practices accomplished through the use of an automated-decision system, 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, including but not limited to inquiries made through an automated-decision system, that directly

or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense.

(A) An employer may make, 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 the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations.

(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. 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 a 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 a 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 a 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 a medical condition, are you available to work the proposed schedule?"

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

(4) 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.

(5) Automated-Decision Systems. The use of an automated-decision system that, for example, measures an applicant's skill, dexterity, reaction time, and/or other abilities or characteristics may constitute unlawful disparate treatment or have an unlawful adverse impact on discriminate against individuals with certain disabilities or other characteristics protected under the Act. To avoid unlawful discrimination, an employer or other covered entity may need to provide reasonable accommodation to an applicant with a disability as required by Article 9 of these regulations.

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

(1) Automated-Decision Systems. An automated-decision system that, for example, analyzes an applicant's tone of voice, facial expressions or other physical characteristics or behavior may constitute unlawful disparate treatment of or have an unlawful adverse impact on discriminate against individuals based on race, national origin, gender, disability, or a number of other protected characteristics protected under the Act. To avoid unlawful discrimination, an employer or other covered entity may need to provide reasonable accommodation to an applicant with a disability as required by Article 9 of these regulations.

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

§ 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)). The Council herein adopts the Uniform Guidelines on Employee Selection Procedures promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) Placement. Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be "protective" of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under Title VII of the federal Civil Rights Act of 1964.)

(c) Promotion and Transfer. An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

(1) Requests for Transfer or Promotion. An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

(2) Training. Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.

(3) No-Transfer Policies. Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) Specific Practices.

(1) Criminal Records. See Section 11017.1.

(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device, automated-decision system, or other means of selection that is facially neutral, but that has an adverse impact (as defined in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)).

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

§ 11017.1. Consideration of Criminal History in Employment Decisions.

(a) Prohibition of Consideration of Criminal History Prior to a Conditional Offer of Employment. Except in the circumstances addressed in subsection (a)(4) below, employers and other covered entities ("employers" for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant.

(1) Prohibited consideration under this subsection includes, but is not limited to, inquiring about criminal history through an employment application, background check, ~~or internet searches,~~ or the use of an automated-decision system.

(2) Employers are prohibited from including statements in job advertisements, postings, applications, or other materials that no persons with criminal history will be considered for hire, such as "No Felons" or "Must Have Clean Record."

(3) Employers who violate the prohibition on inquiring into criminal history prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an applicant's failure to disclose criminal history prior to the conditional offer as a factor in subsequent employment decisions, including denial of the position conditionally offered.

(4) The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subsections (b) and (d)-(g)):

(A) If the position is one for which an employer is otherwise required by law to conduct a conviction history background check where the employer is a state or local agency;

(B) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(C) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(D) If the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(5) For the exemptions set forth in subsection (a)(4)(A) and (a)(4)(D) to apply, the employer or the employer's agent must be required by law to conduct the criminal background check. A state, federal, or local law requiring another entity, such as an occupational licensing board, to conduct a criminal background check will not exempt an employer from the prohibitions set forth in this subsection and other requirements of this section.

(6) If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer must not consider any information the employer is prohibited from considering under subsection (b). In addition, an employer is prohibited from considering any other conviction history information until after making a conditional offer of employment, unless subsection (a)(4) applies.

(b) Prohibition of Consideration of Certain Types of Criminal History. Employers are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history prior to making a conditional offer, after a conditional offer has been made, and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on their own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952);

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subsections (b)(1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(c) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) Initial Individualized Assessment. If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first conduct an individualized assessment -- a reasoned, evidence-based determination of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.

(A) The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subsection (f)(4).

(i) An applicant's possession of a benefit, privilege, or right required for the performance of a job by a licensing, regulatory, or government agency or board is probative of the applicant's conviction history not being directly and adversely related to the specific duties of that job.

(B) The individualized assessment must include, at a minimum, consideration of the following factors:

(i) The nature and gravity of the offense or conduct. Consideration of this factor may include but is not limited to:

(I) The specific personal conduct of the applicant that resulted in the conviction;

(II) Whether the harm was to property or people;

(III) The degree of the harm (e.g., amount of loss in theft);

(IV) The permanence of the harm;

(V) The context in which the offense occurred;

(VI) Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to the offense or conduct, and if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise;

(VII) Whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct; and/or

(VIII) The age of the applicant when the conduct occurred.

(ii) The time that has passed since the offense or conduct and/or completion of the sentence. Consideration of this factor may include but is not limited to:

(I) The amount of time that has passed since the conduct underlying the conviction, which may significantly predate the conviction itself; and/or

(II) When the conviction led to incarceration, the amount of time that has passed since the applicant's release from incarceration.

(iii) The nature of the job held or sought. Consideration of this factor may include but is not limited to:

(I) The specific duties of the job;

(II) Whether the context in which the conviction occurred is likely to arise in the workplace; and/or

(III) Whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.

(C) To the extent that any evidence of rehabilitation or mitigating circumstances, as described in subsections (c)(2)(D)(i)-(ii), is voluntarily provided by the applicant, or by another party at the applicant's request, before or during the initial individualized assessment, that evidence must be considered as part of the initial individualized assessment. In doing so, an employer may consider, but is not limited to considering, the factors set forth in subsection (c)(1)(B) and subsection (c)(3) as they relate to the evidence of rehabilitation or mitigating circumstances.

~~(D) The use of an automated decision system, in the absence of additional processes or actions, does not constitute an individualized assessment.~~

(2) Notice of Preliminary Decision and Opportunity for Applicant Response. If, after conducting an initial individualized assessment, the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer.

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer).

(C) If an employer's preliminary decision to withdraw the job conditionally offered ~~involved~~ relied, in whole or in part, on the use of an automated-decision system, a copy or description of any report or information from the operation of the automated-decision system, related data, and assessment criteria used as part of an automated-decision system; and

~~(C)(D)~~ Notice of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final.

(D) An explanation informing the applicant that, if the applicant chooses to respond, the response may include submission of either or both of the following types of evidence: evidence challenging the accuracy of the conviction history report that is the basis for the preliminary decision to rescind the offer, or evidence of rehabilitation or mitigating circumstances.

(i) Evidence of rehabilitation or mitigating circumstances may include, but is not limited to, the items listed in paragraphs (I)-(X) below. Any such evidence of rehabilitation or mitigating circumstances is optional and may only be voluntarily provided by the applicant or by another party at the applicant's request.

(I) The length and consistency of employment history before and after the offense or conduct;

(II) The facts or circumstances surrounding the offense or conduct;

(III) The applicant's current or former participation in self-improvement efforts, including but not limited to school, job training, counseling, community service, and/or a rehabilitation program, including in-custody programs;

(IV) Whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct;

(V) The age of the applicant when the conduct occurred;

(VI) Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to the offense or conduct, and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise;

(VII) The likelihood that similar conduct will recur;

(VIII) Whether the applicant is bonded under a federal, state, or local bonding program;

(IX) The fact that the applicant is seeking employment; and/or

(X) Successful completion, or compliance with the terms and conditions, of probation or parole.

(ii) Documentary evidence may include, but is not limited to, the items listed in paragraphs (I)-(V) below. Any such documentary evidence is optional and may only be voluntarily provided by the applicant or by another party at the applicant's request.

(I) Certificates or other documentation of participation in, enrollment in, or completion of an educational, vocational, training, counseling, community service, or rehabilitation program, including in-custody programs;

(II) Letters from current or former teachers, counselors, supervisors, co-workers, parole or probation officers, or others who know the applicant;

(III) Police reports, protective orders, and/or documentation from healthcare providers, counselors, case managers, or victim advocates who can attest to the applicant's status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable offenses;

(IV) Documentation confirming the existence of a disability; and/or

(V) Any other document demonstrating rehabilitation or mitigating circumstances.

(iii) An employer is prohibited from the following actions:

(I) Refusing to accept additional evidence voluntarily provided by an applicant, or by another party at the applicant's request, at any stage of the hiring process (including prior to making a preliminary decision to rescind the applicant's job offer);


(II) Requiring an applicant to submit any of the additional evidence described in this subsection at any time in the hiring process;

(III) Requiring an applicant to provide a specific type of documentary evidence (e.g., a police report as evidence of domestic or dating violence), or disqualifying an applicant from the employment conditionally offered for failing to provide any specific type of documents or other evidence;

(IV) Requiring an applicant to disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses; and/or

(V) Requiring an applicant to produce medical records and/or disclose the existence of a disability or diagnosis.

(E) If an employer's preliminary decision to withdraw the job conditionally offered involved the use of an automated-decision system, a copy or description of any report or information from the operation of the automated-decision system, related data, and assessment criteria used as part of the automated decision system;

 Notice of the deadline for the applicant to respond, if the applicant chooses to do so.

(i) The deadline for providing a response must be at least five business days from the date of receipt of the notice. An employer may offer an applicant more than five business days to respond to the notice regarding its preliminary decision.

(ii) If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States.

(iii) If notice is transmitted through email, the notice shall be deemed received two business days after it is sent.

~~(F)~~^(G) If the applicant timely notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no fewer than five additional business days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

(3) Reassessment. The employer shall consider any information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment. When considering evidence of rehabilitation or mitigating circumstances provided by the applicant, or by another party at the applicant's request, the employer may consider, but is not limited to, the following factors, in addition to the factors set forth in subsection (c)(1)(B), as applicable:

(A) When the conviction led to incarceration, the applicant's conduct during incarceration, including participation in work and educational or rehabilitative programming and other prosocial conduct;

(B) The applicant's employment history since the conviction or completion of sentence;

(C) The applicant's community service and engagement since the conviction or completion of sentence, including but not limited to volunteer work for a community organization, engagement with a religious group or organization, participation in a support or recovery group, and other types of civic participation; and/or

(D) The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured in the above subfactors.

(4) Final Decision. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in writing. The employer may, but is not required to, use the sample final notice form available on the Department's website. However, any notice to the applicant must include the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Civil Rights Department.

(d) Labor contractors, union hiring halls, and client employers.

(1) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(2) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(3) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(4) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) - (c), unless the specific position is exempted pursuant to subsection (a)(4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subsection (a)(4).

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis protected by the Act.

(f) Adverse Impact. In addition to the types of criminal history addressed in subsection (b) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on applicants or employees on a basis protected by the Act, including, but not limited to, gender, race, and national origin.

(1) An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis protected by the Act.

(2) Consistent with sections 11017 and 11010 of these regulations and the *Uniform Guidelines on Employee Selection Procedures* (29 C.F.R. part 1607 (1978)) incorporated by reference in sections 11017(a) and (e), adverse impact includes a substantial disparity in the rate of selection

in hiring, promotion, or other employment decisions which works to the disadvantage of groups of individuals on the basis of any characteristics protected by the Act.

(3) An adverse impact may be established through the use of statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics on conviction records that show a substantial disparity based on any characteristic protected by the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(4) Establishing "Job-Related and Consistent with Business Necessity."

(A) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis protected by the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(i) The nature and gravity of the offense or conduct;

(ii) The time that has passed since the offense or conduct and/or completion of the sentence; and

(iii) The nature of the job held or sought.

(B) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant's or employee's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant or employee the position.

(C) Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subsection (g) below).

(D) An individualized assessment must involve notice to the adversely impacted applicant or employee (before any adverse action is taken) that they have been screened out or otherwise denied an employment opportunity because of a criminal conviction; if more than one conviction appeared on the background report, which conviction(s) were found disqualifying; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer

warrants an exception to the exclusion and shows that the policy as applied to the applicant or employee is not job-related and consistent with business necessity.

(E) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that information cannot be considered in the employment decision.

(5) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

(g) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(h) Claims under the Fair Chance Act, codified at Government Code section 12952, are subject to the procedures set forth in Article 1 of Chapter 7 of the Act, including Government Code section 12965, and the Department's procedural regulations. An individual may file a complaint for investigation by the Department or may obtain an immediate right-to-sue notice.

(i) Employers Seeking the Work Opportunity Tax Credit. An employer who wishes to claim the Work Opportunity Tax Credit ("WOTC") provided for under federal law is not exempt from this section or Section 12952 of the Act.

(1) An employer may require an applicant to complete IRS form 8850 ("Pre-Screening Notice and Certification Request for the Work Opportunity Credit"), as revised March 2016, or its equivalent, before a conditional offer is made, so long as the information gathered is used solely for the purpose of applying for the WOTC. In particular, no applicant may be asked the basis of their qualification for the WOTC other than in the form of questions that do not encourage or force an applicant to identify themselves as a person who has been convicted of a felony or

released from prison following a felony conviction rather than as a person who qualifies for the WOTC under one of the several bases listed in Question 2 on form 8850. Information regarding an applicant's criminal history obtained from the applicant's form 8850 may only be considered as otherwise provided by law.

(2) An employer may require an applicant to complete U.S. Department of Labor Employment and Training Administration form 9061 ("Individual Characteristics Form (ICF) Work Opportunity Tax Credit"), as revised November 2016, or its equivalent, only after a conditional offer has been made. Information regarding an applicant's criminal history obtained from the applicant's form 9061 may only be considered as otherwise provided by law.

(3) An employer must maintain any forms, documents, or information used to complete the forms described in this subsection in confidential files separate from the applicant's general personnel file and shall not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC.

(j) Definitions. For purposes of section 11017.1 of these regulations only:

(1) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment when the employer undertakes a post-conditional offer review and consideration of criminal history; existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer; and an existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, policy, or practice. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post-conditional offer review of the individual's criminal history.

(2) "Employer" includes a labor contractor and a client employer; any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list.

(3) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(4) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.

(5) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(6) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12946 and 12952, Government Code.

§ 11020. Aiding and Abetting.

(a) Prohibited Practices.

(1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination.

(2) It is unlawful to solicit or encourage any person or individual to violate the Act, whether or not the Act is in fact violated.

(3) It is unlawful to coerce any person or individual to commit unlawful employment discrimination with offers of cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit.

(4) It is unlawful to conceal or destroy evidence relevant to investigations initiated by the Department or its staff.

(5) It is unlawful to advertise for employment on a basis prohibited in the Act.

(6)

(i) The prohibited practices set forth in paragraphs (1)-(5) include any such practice conducted in whole or in part by using an automated-decision system.

(ii) Relevant to a claim of employment discrimination or an available defense of that claim is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

~~(b) Automated Decision Systems. The prohibitions in subsection (a) also apply to practices related to the design, development, advertisement, sale, provision, and/or use of an automated decision system on behalf of a person or individual, where the use of the automated decision system constitutes unlawful disparate treatment or has an unlawful adverse impact on applicants or employees on a basis protected by the Act.~~

~~(1) Evidence of risk assessment, anti-bias testing, and/or similar efforts to avoid unlawful discrimination is relevant to this inquiry, including the quality, recency, and scope of such efforts.~~

(b)(c)(b) Permissible Practices.

(1) It shall not be unlawful, without more, to have been present during the commission of acts amounting to unlawful discrimination or to fail to prevent or report such acts, unless it is the normal business duty of the person or individual to prevent or report such acts.

(2) It shall not be unlawful to maintain good faith lawful defenses or privileges to charges of discrimination.

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

Article 4. National Origin and Ancestry Discrimination

§ 11028. Specific Employment Practices.

(a) Language Restrictions.

(1) It is an unlawful employment practice for an employer or other covered entity to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, unless:

(A) The language restriction is justified by business necessity;

(B) The language restriction is narrowly tailored; and

(C) The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

(2) For purposes of this subsection, “business necessity” means an overriding legitimate business purpose, such that:

(A) The language restriction is necessary to the safe and efficient operation of the business;

(B) The language restriction effectively fulfills the business purpose it is supposed to serve; and

(C) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

(3) It is not sufficient that the employer’s language restriction merely promotes business convenience or is due to customer or co-worker preference.

(4) English-only rules violate the Act unless the employer can prove the elements listed in section 11028, subdivisions (a)(1)(A)-(C). English-only rules are never lawful during an employee’s non-work time, e.g., breaks, lunch, unpaid employer-sponsored events, etc.

(b) ~~Employment-discrimination~~ based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question. This prohibition also applies where such discrimination is related

~~to~~ resulted, in whole or in part, from an employer's or other covered entity's use of an automated decision system or selection criteria (including a qualification standard, employment test, ~~automated decision system~~, or proxy).

(c) Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) In determining business necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (e.g., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position. This prohibition also applies where such discrimination ~~related to~~ resulted, in whole or in part, from an employer's or other covered entity's use of an automated decision system or selection criteria (including a qualification standard, employment test, ~~automated decision system~~, or proxy).

(d) It is not unlawful for an employer to request from an applicant or employee information regarding his or her their ability to speak, read, write, or understand any language, including languages other than English, if justified by business necessity.

(e) Retaliation. It is an unlawful employment practice for an employer or other covered entity to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged. Retaliation may include, but is not limited to:

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

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

(f) Immigration-related Practices.

(1) All provisions of the Act and these regulations apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee's or applicant's immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

(2) Discovery or other inquiry into an applicant's or employee's immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.

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

federal immigration law. This prohibition also applies where such discrimination ~~related to~~ **resulted, in whole or in part, from** an employer's or other covered entity's use of **an automated-decision system or selection criteria** (including a qualification standard, employment test, ~~automated decision system,~~ or proxy).

(4) It is an unlawful practice for an employer or other covered entity to retaliate, as described in subdivision (e), against an employee for engaging in activity protected by the Act.

(g) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because ~~he or she~~ they holds or presents a driver's license issued under section 12801.9 of the Vehicle Code. This prohibition also applies where such discrimination ~~related to~~ **resulted, in whole or in part, from** an employer's or other covered entity's use of **an automated-decision system or selection criteria** (including a qualification standard, employment test, ~~automated decision system,~~ or proxy).

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver's license is required by state or federal law; or

(B) Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law. An employer's or other covered entity's policy requiring applicants or employees to present or hold a driver's license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver's license is not needed in order to perform an essential function of the job).

(2) Nothing in this subsection shall limit or expand an employer's authority to require an applicant or employee to possess a driver's license.

(3) Nothing in this subsection shall alter an employer's or other covered entity's rights or obligations under federal immigration law.

(h) Citizenship requirements. Citizenship requirements that are a pretext for discrimination or have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense. This prohibition also applies where such discrimination ~~related to~~ **resulted, in whole or in part, from** an employer's or other covered entity's use of **an automated-decision system or selection criteria** (including a qualification standard, employment test, ~~automated decision system,~~ or proxy).

(i) Human Trafficking. It is an unlawful employment practice for an employer or other covered entity to use force, fraud, or coercion to compel the employment of, or subject to adverse treatment, applicants or employees on the basis of national origin.

(j) Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) The use of epithets, derogatory comments, slurs, or non-verbal conduct based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, or mockery of an accent or a language or its speakers may constitute harassment if the actions are severe or pervasive such that they alter the conditions of the employee's employment and create an abusive working environment. A single

unwelcome act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. (See generally section 11034(f)(2)(A).)

(k) Height and/or weight requirements. Such requirements may have the effect of creating an adverse disparate impact on the basis of national origin. Where an adverse impact is established, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Where such a requirement is job related and justified by business necessity, it is still unlawful if the applicant or employee can prove that the purpose of the requirement can be achieved as effectively through less discriminatory means. This prohibition also applies where such discrimination related to resulted, in whole or in part, from an employer's or other covered entity's use of an automated-decision system or selection criteria (including a qualification standard, employment test, automated decision system, or proxy).

(l) Recruitment and job segregation. It is an unlawful employment practice for an employer or other covered entity to seek, request, or refer applicants or employees based on national origin or to assign positions, facilities, or geographical areas of employment based on national origin, unless pursuant to a permissible defense.

(m) It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, automated decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of discriminates against an applicant or employee or a class of applicants or employees on the basis of their national origin or a proxy of national origin, subject to any available defense. those characteristics which, when considered, may result in an adverse impact on applicants or employees on the basis of national origin, or any of the characteristics set forth in subsections (b) through (f) and (i) of this section. As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice. Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12951, Government Code.

Article 5. Sex Discrimination

§ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see section 11015(a)) shall recruit individuals of both sexes for all jobs unless pursuant to a permissible defense.

(2) It is unlawful for any publication or other media to separate listings of job openings into male and female classifications.

(b) Pre-Employment Inquiries and Applications.

(1) For all employers or other covered entities who provide, accept and consider applications, it shall be unlawful to refuse to provide, accept and consider applications from individuals of one sex unless pursuant to a permissible defense.

(2) It is unlawful for an employer or other covered entity to ask the sex of the applicant on an application form or pre-employment questionnaire, unless the question is asked pursuant to a permissible defense or for recordkeeping purposes. After an individual is hired, the employer or other covered entity may record the employee's sex for non-discriminatory personnel purposes.

(3) It is unlawful for an employer or other covered entity to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question.

(4) It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, automated-decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of discriminates against an applicant or employee or a class of applicants or employees on the basis of sex, subject to any available defense. As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job-related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice. Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

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

§ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. A test of physical agility or strength shall not be used unless the test is administered pursuant to a permissible defense. No applicant or employee shall be refused the opportunity to demonstrate that he or she has they have the requisite strength or agility to perform the job in question.

(b) Height and Weight Standards.

(1) Use of height or weight standards that discriminate against one sex or the other is unlawful unless pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless pursuant to a permissible defense.

(c) Hiring Applicants of Childbearing Age. It is unlawful to refuse to hire a female applicant because she is of childbearing age.

(d) Prior Work Experience. If an employer or other covered entity considers prior work experience in the selection or assignment of an employee, the employer or other covered entity shall also consider prior unpaid or volunteer work experience.

(e) Sex Stereotypes. Use of any criterion that is based exclusively or in part on a sex stereotype is unlawful unless pursuant to a permissible defense.

(f) It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, ~~automated-decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of~~ discriminates against an applicant or employee or a class of applicants or employees on the basis of their sex or any of the characteristics set forth basis prohibited in subsections in (a) through (e) of this section, subject to any available defense. ~~As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.~~ Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

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

Article 6. Pregnancy, Childbirth or Related Medical Conditions

§ 11038. Responsibilities of Covered Entities Other than Employers.

(a) Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under Government Code sections 12926, 12940, 12943 and 12944.

(b) It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, ~~automated-decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of~~ discriminates against an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, subject to any available defense. ~~As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.~~ Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944 and 12945, Government Code.

§ 11039. Responsibilities of Employers.

(a) Employer Obligations

- (1) Except as excused by a permissible defense, it is unlawful for any employer to:
 - (A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;
 - (B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;
 - (C) refuse to promote an employee because of pregnancy or perceived pregnancy;
 - (D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;
 - (E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;
 - (F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;
 - (G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c). Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;
 - (H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;
 - (I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or because she has filed a complaint, testified, or assisted in any proceeding under the FEHA; ~~or~~
 - (J) use an automated decision system or selection criteria (including a qualification standard, employment test, ~~automated decision system,~~ or proxy) that if such use has an adverse impact on or constitutes disparate treatment of discriminates against an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, subject to any available defense unless the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice; or
 - (i) Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy,

recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

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

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

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

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

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

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

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

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

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

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

Article 7. Marital Status Discrimination

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose ~~his or her~~their marital status as part of a pre-employment inquiry, including an inquiry made through the use of an automated-decision system, unless pursuant to a permissible defense.

(b) Request for Names. For business reasons other than ascertaining marital status, an applicant may be asked whether ~~he or she has~~they have ever used another name, e.g., to enable an employer or other covered entity to check the applicant's past work record.

(c) Employment of Spouse. It is lawful to ask an applicant to state whether ~~he or she has~~ they have a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision except as stated below.

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

Article 8. Religious Creed Discrimination

§ 11063. Pre-Employment Practices.

(a) Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used to ascertain their 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 in compliance with section 11016 of these regulations.

(b) It is unlawful for an employer or other covered entity to use an automated decision system or selection criteria (including a qualification standard, employment test, automated decision system, or proxy) that if such use has an adverse impact on or constitutes disparate treatment of discriminates against an applicant or employee or a class of applicants or employees on the basis of religion, subject to any available defense. ~~As a defense, the employer or other covered entity can show that the selection criteria, as used by the employer or other covered entity, is job related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.~~ Relevant to any such claim or available defense is evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

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

Article 9. Disability Discrimination

§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

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

(2) It is unlawful to advertise or publicize, including but not limited to through the use of an automated decision system, an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

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

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

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

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

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

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

(E) "Have you ever had a job-related injury or medical condition?"

(F) Have you ever left a job because of any physical or mental limitations?

(G) "Have you ever been hospitalized?"

(H) "Have you ever taken medical leave?"

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

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

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

§ 11071. Medical and Psychological Examinations and Inquiries.

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an

individual's physical or mental conditions or health but does not include testing for current illegal drug use.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) As used in this article, “~~medical or psychological examinations~~” (a term that is defined in section 11065 of these regulations) or a disability-related inquiry ~~yes can~~ includes any such examination or inquiry administered as part of an automated decision system, but are not limited to, the following: Such examination or inquiry may include a test, question, puzzle, game, or other challenge that leads to the identification of a disability.

~~(1) Personality based questions, including but not limited to such questions included in an automated decision system. Personality based questions include, but are not limited to, tests or questions that measure any of the following:~~

~~(A) optimism and/or positive attitudes;~~

~~(B) personal or emotional stability;~~

~~(C) extroversion or introversion; and/or~~

~~(D) intensity.~~

~~(2) Puzzles, games, or other challenges that evaluate physical or mental abilities, including but not limited to gamified screens included in an automated decision system.~~

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

§ 11072. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or other covered entity to use ~~selection criteria (including a qualification standards, employment tests, automated decision system, or proxy,) or other selection criteria – including but not limited to those administered as part of an automated decision system –~~ that screens out, tends to screen out, or otherwise has an adverse impact on an applicant or employee ~~with a disability~~ or a class of individuals ~~applicants or employees with disabilities~~, on the basis of disability. ~~As a defense, the employer or other covered entity can show that the~~ However, such standard, test, or other unless the standards, tests, or other selection criteria, as used by the employer or other covered entity, are shown to be is lawful when job-related for the position in question, ~~and are consistent with business necessity, and there is no less discriminatory policy or practice~~ standard, test, or other selection criteria that serves the employer's goals as effectively as the challenged ~~policy or practice~~ standard, test, or other selection criteria. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use ~~selection criteria (including a qualification standards, employment tests, automated decision system, or proxy,) or other selection criteria or other selection criteria – including but not limited to those administered as part of an automated decision system –~~ that discriminates against an applicant or employee based on an applicant's or employee's uncorrected vision or uncorrected hearing. ~~As a defense, the employer or other covered entity can show that~~ unless the standards, tests, or other However, such standard, test, or other selection criteria, as used by the employer or other covered entity, are shown to be is lawful when job-related for the position in question, ~~and are consistent with business necessity, and there is no less discriminatory policy or practice~~ standard, test, or other selection criteria that serves the employer's goals as effectively as the challenged ~~policy or practice~~ practice standard, test, or other selection criteria.

(3) An employer or other covered entity shall not make use of any testing criterion, including but not limited to through the use of an automated decision system, that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related. Such tests include but are not limited to those administered as part of an automated-decision system.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills affected by disability are the criteria that the tests purport to measure. Tests concerning employment include, but are not limited to, those administered as part of an automated-decision system. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected. The use of an automated-decision system, in the absence of additional process or actions, does not constitute an individualized assessment.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code; GINA, 42 U.S.C. §2000ff-1(b).

Article 10. Age Discrimination

§ 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 40 or older was considered in the denial of employment or an employment benefit. There is a presumption of discrimination whenever a facially neutral practice, including but not limited to the use of an automated-decision system, has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on an employee(s) age 40 or older, an employer's preference to retain a 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 business necessity, 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(s) age 40 or older.

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

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

(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 employment of people age 40 and older 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 other terms that imply a preference for employees under the age of 40.

(b) 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, including, but not limited to, inquiries made through the use of an automated-decision system, are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, except where age is a 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.

(c) 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 provide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because the individual is age 40 or older. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) Subsection (c) 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 age 40 and older. Use of online application technology or an automated-decision system that limits or screens out older applicants is discriminatory unless age is a bona fide occupational qualification. (See section 11010(a).)

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