

CIVIL RIGHTS COUNCIL

PROPOSED MODIFICATIONS TO CONTRACTOR NONDISCRIMINATION AND COMPLIANCE REGULATIONS

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Civil Rights Department

Chapter 5. Civil Rights Council

Pursuant to Government Code section 12935(a), the Civil Rights Council (Council) has authority to adopt necessary regulations implementing the Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 et seq.) as well as Article 9.5 of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, beginning at Government Code section 11135 (Article 9.5). This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq. and Article 9.5.

Among other protections, FEHA prohibits employment discrimination based on the “race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decision-making, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person.” (Gov. Code § 12940(a).) Under FEHA, any employer “who is, or wishes to become, a contractor with the state for public works or for goods or services is subject to the provisions of [FEHA] relating to discrimination in employment and to the nondiscrimination requirements of this section and any rules and regulations that implement it.” (Gov. Code § 12990(a).) State contracts and subcontracts must include a nondiscrimination clause prohibiting employment discrimination under FEHA. (Gov. Code § 12990(c).)

Article 9.5 prohibits discrimination and the denial of full and equal access to programs, services, or activities conducted, operated, administered, or funded by the state. Specifically, Article 9.5 prohibits such discrimination or denial of access because of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation. (Gov. Code § 11135(a).) Under section 11135, state agencies are responsible for ensuring that recipients of state funds, including contractors, grantees, and local agencies, adhere to the requirements of section 11135. State agencies are authorized to curtail or revoke state funds if a contractor, grantee, or local agency violates these anti-discrimination laws. (Gov. Code §§ 11136, 11137.)

The Council has regulations implementing the state-contractor provisions of FEHA (Gov. Code § 12990; Cal. Code Regs., tit. 2, div. 4.1, ch. 5, subch. 5), which establish standard nondiscrimination clauses for state contracts in order to satisfy FEHA and Article 9.5. In addition, the Council has regulations implementing Article 9.5 (Cal. Code Regs., tit. 2, div. 4.1,

ch. 5, subch. 9).

Chapter 61 of Statutes of 2023 (SB 150) added section 6990.1 to the Public Contract Code, which requires the Labor and Workforce Development Agency, the Government Operations Agency, and the Transportation Agency to convene stakeholders meetings and consult with the Civil Rights Department to gather “input on recommendations to establish terms to be included as a material part of a contract, including measurable results to ensure that investments maximize benefits to marginalized and disadvantaged communities.” (Public Contract Code § 6990.1(a).) The Labor and Workforce Development Agency, the Government Operations Agency, and the Transportation Agency presented their recommendations in an April 2024 report. (CalGovOps, CalSTA, and Labor & Workforce Development Agency, *SB 150 Stakeholder Workshops Update & Recommendations: Report to the Governor and Legislature* (April 2, 2024) (“SB 150 Report”).)¹ The recommendations included proposed updates to the state’s nondiscrimination clause included as a general term and condition in all state contracts. The SB 150 Report recommendations included making the following amendments² to the existing text of the contractor nondiscrimination and compliance clause:

Existing law and the state’s general terms and conditions (included in all state goods and services contracts) requires contractors to certify that they are in compliance with the state’s non-discrimination laws. This language is due for an update and the following possible changes reflect not only current law and regulations, but also stakeholder feedback related to equal opportunities for all workers.

NON-DISCRIMINATION CLAUSE: During the performance of this Agreement, Contractor and its subcontractors shall not deny the contract’s benefits to any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decision-making, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they discriminate against or harass unlawfully any employee or applicant for employment because of any protected characteristic listed above ~~race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status~~. Contractor and its subcontractors shall insure that the evaluation and treatment of employees and applicants for employment are free of such discrimination and harassment. Contractor and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12900 et seq.) and its implementing regulations (Cal. Code Regs., tit. 2, §11000 et seq.).

¹ Available online at: <https://www.labor.ca.gov/wp-content/uploads/sites/338/2024/04/sb150-report.pdf> (last accessed October 10, 2024.)

² Text that the report recommended to add is denoted in underline and text that the report recommended to strike is denoted in strikethrough.

This includes but is not limited to implementing a non-discrimination program that complies with Government Code section 12990, taking all reasonable steps necessary to prevent discrimination and harassment from occurring, taking immediate and appropriate action to correct known harassment, training employees on sexual harassment prevention, complying family and medical leave requirements, providing reasonable accommodations for disabilities, complying with limitations on consideration of an applicant's criminal history, and not retaliating against employees asserting their rights. Contractor and its subcontractors shall also comply with the regulations promulgated thereunder (Cal. Code Regs., tit. 2, §11000 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Gov. Code §§11135-11139.5) and its implementing regulations (Cal. Code Regs., tit. 2, §11000 et seq.), and the regulations or standards adopted by the awarding state agency to implement such article. Contractor and its subcontractors shall permit access by representatives of the Civil Rights Department of Fair Employment and Housing and the awarding state agency upon reasonable notice at any time during the normal business hours, but in no case less than 24 hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or Agency shall require to ascertain compliance with this clause. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. (See Cal. Code Regs., tit. 2, §11105.) Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Agreement.

(*Id.* at pp. 16-17.)

The Council reviewed and considered the recommendations of the SB 150 Report in proposing modifications to the regulations implementing Government Code section 12990.

The Council also proposes to strike citations to sections of Article 9.5 that were repealed by Chapter 870 of Statutes of 2016 (SB 1442) and Chapter 199 of Statutes of 2023 (SB 447).

The specific purpose of each proposed substantive regulation or amendment and the reason it is necessary is described below. The problem that a particular proposed regulation or amendment addresses, and the intended benefits, are outlined under each, as applicable, when the proposed change goes beyond mere clarification.

Some changes are not explained below because they are non-substantial, including correcting grammatical or formatting errors, renumbering or re-lettering provisions, deleting unnecessary citations, and/or eliminating jargon.

Subchapter 1. Administration

Article 2. Powers and Duties of the Council

§ 11004. Other Powers and Duties.

The purpose of this section is to outline the Council's other functions, powers, and duties in addition to its rulemaking authority under section 11003. The proposed edits described below remove references to repealed sections of Article 9.5 enacted by SB 1442.

§ 11004(d)

The Council proposes to delete subsection 11004(d), which authorized the Council to “[a]dvise and concur with the Secretary of Health and Human Services in establishing standards and guidelines determining unlawful practices of state contractors.” Prior to 2017, Government Code section 11139.5 vested enforcement of Article 9.5 with the Secretary of Health and Human Services, and this section required the Secretary to seek the advice and concurrence of the Fair Employment and Housing Council (renamed as the Civil Rights Council, effective July 1, 2022) to “establish standards for determining which persons are protected by this article and standards for determining what practices are discriminatory” under Article 9.5. The Legislature repealed Government Code section 11139.5 in 2016 by passing SB 1442, which transferred authority to enforce Article 9.5 to the Civil Rights Department and regulatory authority to the Council. The repeal took effect on January 1, 2017. Under current law, the Secretary of Health and Human Services is no longer responsible for developing standards and guidelines, and the Council is no longer required to provide advice and concurrence. This amendment is necessary to ensure that the regulations reflect current statutory law.

§ 11004 Note

The Council proposes to remove the citation to Government Code section 11139.5 from the notes of section 11004. Section 11139.5 was repealed by SB 1442 effective January 1, 2017. This amendment is necessary to ensure that the regulations reflect current statutory law.

Subchapter 5. Contractor Nondiscrimination and Compliance

Article 1. General Matters

§ 11105 Nondiscrimination Clause

The purpose of this section is to provide a standardized nondiscrimination clause that must be included in state contracts and subcontracts. The section clarifies the obligations of state contractors and subcontractors under FEHA and of state contractors, subcontractors, and recipients under Article 9.5. The Council proposes modifications to this section to incorporate recommendations from the SB 150 Report.

Section 11105 provides two options for the clause required in state contracts – clause (a) and clause (b). Whereas clause (a) addresses compliance with FEHA, clause (b) addresses

compliance with both FEHA and Article 9.5.

§ 11105 Clause (a)

The Council proposes to reorganize clause (a) into five paragraphs, (a)(1) through (a)(5), and to make other amendments detailed below. This is necessary to clarify the obligations of state contractors and subcontractors under FEHA.

§ 11105 Clause (a)(1)

The Council proposes to revise clause (a)(1) such that it is comprised only of text substantially identical to the third sentence of existing clause (a)(1), which clarifies both that state contractors and subcontractors shall comply with FEHA and its regulations, and that obligations under FEHA are incorporated into state contracts and subcontracts. Placing this language in its own paragraph is necessary for clarity to ensure that state contractors and subcontractors understand their obligation to comply with FEHA and its implementing regulations.

§ 11105 Clause (a)(2)

The Council proposes to relocate and modify most of the current text in existing clause (a)(1) – which addresses more specifically what sorts of conduct constitute prohibited discrimination under FEHA – to clause (a)(2). The Council further proposes to modify this language to make specific that state contractors and subcontractors shall not engage in harassment on the basis of a characteristic protected under FEHA and shall ensure that the evaluation and treatment of employees and applicants for employment are free from such harassment. The addition of the terms “harass” and “harassment” is necessary to implement Government Code section 12940(j) as well as to ensure state contractors and subcontractors understand their responsibilities and explicitly agree to take action to prevent unlawful harassment of employees and applicants under FEHA.

The Council proposes to add a non-exhaustive list of exemplary acts that contractors and subcontractors must take, or are prohibited from taking, to comply with FEHA. This list is comprised of the following:

- the requirement to “implement[] a non-discrimination program that complies with Government Code section 12990” (Gov. Code § 12990(b); Cal. Code Regs., tit. 2, §§ 11102-11103);
- the requirement to take “all reasonable steps necessary to prevent discrimination and harassment from occurring” (Gov. Code § 12940(k); Cal. Code Regs., tit. 2, § 11023);
- the requirement to take “immediate and appropriate action to correct known harassment” (Gov. Code § 12940(j); Cal. Code Regs., tit. 2, § 11019(b)(4));

- the requirement to train employees on sexual harassment prevention (Gov. Code §§ 12950, 12950.1; Cal. Code Regs., tit. 2, § 11024);
- the requirement to comply with pregnancy, family, and medical leave requirements (Gov. Code § 12945; Cal. Code Regs., tit. 2, §§ 11042-11051; Gov. Code §§ 12945.1-12945.2, Cal. Code Regs., tit. 2, §§ 11087-11098; Gov. Code § 12945.6; Gov. Code § 12945.7);
- the requirement to provide reasonable accommodations for disabilities (Gov. Code §§ 12926(p), 12926.1, 12940; Cal. Code Regs., tit. 2, §§ 11068-11069);
- the requirement to comply with limitations on consideration of an applicant's criminal history (Gov. Code § 12952; Cal. Code Regs., tit. 2, § 11017.1); and
- the prohibition against retaliating against employees for asserting their rights (Gov. Code § 12940(h); Cal. Code Regs., tit. 2, § 11021).

This addition is necessary to clarify the obligation of contractors and subcontractors to comply with particular requirements of FEHA and its implementing regulations, which in the Council's expertise are common sources of confusion or unfamiliarity by employers. Furthermore, these additions reflect recommendations of the SB 150 Report. This change is necessary to provide guidance and clarity to contractors and subcontractors regarding practices required or prohibited by FEHA.

The Council proposes additional non-substantial changes in this paragraph, including fixing citations and reorganization.

§ 11105 Clause (a)(3)

The Council proposes to add new paragraph (a)(3), stating that contractors and subcontractors agree to provide CRD access to its facilities, records, and other information upon reasonable notice of at least 24 hours, during regular business hours. This is necessary for clarity and consistency with clause (b) of this section and section 11116. This is also necessary to reinforce contractors' and subcontractors' obligation to comply with the Department's procedures for investigating, approving, certifying, decertifying, monitoring, and enforcing nondiscrimination programs and compliance with FEHA. (Gov. Code § 12990(d)(1); Cal. Code Regs., tit. 2, §§ 11099 et seq.)

§ 11105 Clause (a)(4) and (a)(5)

The Council proposes to renumber the last sentence of existing paragraph (a)(1) ("Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement") as new paragraph (a)(4). The Council further proposes to renumber existing paragraph (a)(2)

("Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract") as new paragraph (a)(5). Placing this language in separate paragraphs adds clarity and emphasis to distinct obligations applicable to state contractors and their subcontractors under FEHA (the obligation to provide notice of their FEHA obligations to labor organizations with which they have an agreement (a)(4); and the obligation to include clause (a) in all subcontracts working on a project (a)(5)). This also accommodates the reorganization of subparagraph 11105(a)(1) into two subparagraphs, (a)(1) and (a)(2), and the addition of subparagraphs (a)(3). No substantial changes were made to the language renumbered as subparagraphs (a)(4) and (a)(5).

§ 11105 Clause (b)(1) and (b)(2)

The Council proposes to reorganize clause (b) of section 11105 to clarify not only state contractors' and subcontractors' obligations under FEHA, but also the requirements of Article 9.5 that apply to state contractors, subcontractors, and recipients. The Council proposes to amend section 11105 clause (b)(1) to focus only on the responsibilities of contractors and subcontractors under FEHA, and (b)(2) to focus only on the obligations of recipients, contractors, and subcontractors under Article 9.5. Setting forth FEHA and Article 9.5 obligations separately is necessary for clarity and to ensure accuracy with the statutes.

§ 11105 Clause (b)(1)

The Council proposes to amend clause (b)(1) to focus on the obligations of state contractors and subcontractors under FEHA. The proposed language in (b)(1) comprises a combination of the proposed language for clause (a)(1) and (a)(2).

The Council proposes to revise existing clause (b)(1) to forefront the duty of contractors and subcontractors to comply with FEHA and its regulations and ensure that obligations under FEHA are incorporated into state contracts and subcontracts. This revision is necessary for clarity to ensure that state contractors and subcontractors understand their obligation to comply with FEHA and its implementing regulations when party to a contract with the state. Separately setting forth FEHA protections in (b)(1) also serves to clarify that the protections under FEHA vary from those under Article 9.5. Particularly, the characteristics protected under FEHA differ to some extent from the characteristics protected under Article 9.5, and a list of the characteristics protected under FEHA is set forth in (b)(1) ("race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decision-making, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status"). This is necessary for clarity and for consistency with clause (b)(2), which sets forth characteristics protected under Article 9.5 ("sex, race, color, religion, ancestry, national origin, ethnic group identification, age, disability (including mental disability and/or physical disability), medical condition, genetic information, marital status, or sexual orientation").

The Council also proposes to add language to clause (b)(1) making explicit that state contractors

and subcontractors shall not engage in harassment on the basis of characteristics protected under FEHA and shall ensure that the evaluation and treatment of employees and applicants for employment are free from such harassment. The addition of the terms “harass” and “harassment” is necessary to clarify state contractors’ and subcontractors’ responsibilities under FEHA. (Gov. Code §§ 12940(j).) This addition is also necessary to ensure consistency with the proposed modifications to clause (a)(1).

The Council also proposes to add a non-exhaustive list of exemplary acts that contractors and subcontractors must take, or are prohibited from taking, to comply with FEHA. This list is comprised of the following:

- the requirement to “implement[] a non-discrimination program that complies with Government Code section 12990” (Gov. Code § 12990(b); Cal. Code Regs., tit. 2, §§ 11102-11103);
- the requirement to take “all reasonable steps necessary to prevent discrimination and harassment from occurring” (Gov. Code § 12940(k); Cal. Code Regs., tit. 2, § 11023);
- the requirement to take “immediate and appropriate action to correct known harassment” (Gov. Code § 12940(j); Cal. Code Regs., tit. 2, § 11019(b)(4));
- the requirement to train employees on sexual harassment prevention (Gov. Code §§ 12950, 12950.1; Cal. Code Regs., tit. 2, § 11024);
- the requirement to comply with family and medical leave requirements (Gov. Code § 12945; Cal. Code Regs., tit. 2, §§ 11042-11051; Gov. Code §§ 12945.1-12945.2, Cal. Code Regs., tit. 2, §§ 11088-11098; Gov. Code § 12945.6; Gov. Code § 12945.7);
- the requirement to provide reasonable accommodations for disabilities (Gov. Code §§ 12926(p), 12926.1, 12940; Cal. Code Regs., tit. 2, §§ 11068-11069);
- the requirement to comply with limitations on consideration of an applicant’s criminal history (Gov. Code § 12952; Cal. Code Regs., tit. 2, § 11017.1); and
- the prohibition against retaliating against employees for asserting their rights (Gov. Code § 12940(h); Cal. Code Regs., tit. 2, § 11021).

This addition is necessary to clarify the obligation of contractors and subcontractors to comply with the requirements of FEHA and its implementing regulations, which in the Council’s expertise are common sources of confusion or unfamiliarity by employers. Furthermore, these additions reflect recommendations of the SB 150 Report. This change is necessary to provide guidance and clarity to contractors and subcontractors regarding practices required or prohibited by FEHA.

§ 11105 Clause (b)(2)

The Council proposes to amend clause (b)(2) to focus only on the responsibilities of recipients, contractors, and subcontractors under Article 9.5, which provides that no person shall be “unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under any program or activity that...is funded directly by the state or receives any financial assistance from the state.” (Gov. Code § 11135(a).) This is necessary for clarity and for consistency with clause (b)(1).

The Council also proposes to add text clarifying that state contractors, subcontractors, and recipients subject to Article 9.5 are prohibited from denying the benefits of the state-funded program or activity, or otherwise discriminating against, individuals based on a characteristic protected under Article 9.5. This amendment is necessary to ensure that recipients, contractors and subcontractors understand their responsibilities and explicitly agree to comply with the requirements of Article 9.5.

The Council further proposes to amend clause (b)(2) to add a reference to section 14020(pp) of the regulations. Section 14020(pp) defines “recipient” as:

any covered entity or person, other than the state or a state agency, whether operating directly or indirectly through another recipient, including any local agency, contractor, subcontractor, agent, successor, assignee, or transferee of a recipient who receives state support. The term “recipient” excludes the ultimate beneficiary of state support.

This proposed modification is necessary to clarify the definition of the term “recipient” which is used throughout clause (b).

§ 11105 Clause (b)(3)

The Council proposes to make non-substantial modifications to clause (b)(3). These amendments ensure clarity and consistency with the proposed language of clause (a)(3).

§ 11105 Clause (b)(5)

The Council proposes to modify clause (b)(5) include the term “recipient.” This amendment is necessary to ensure that recipients and subcontractors understand their responsibilities and explicitly agree to comply with the requirements of FEHA and Article 9.5.

Proposed Non-Substantial Modifications

The Council proposes non-substantial modifications to remove references to repealed sections of Article 9.5 from sections 11004, 11105, 14000, 14003, 14020, 14025, 14051 and 14343 of the regulations. Government Code sections 11138, 11139.3, 11139.5, 11139.6 and 11139.7 were repealed as of January 1, 2017 by SB 1442, and section 11139.8 was repealed effective

September 13, 2023 by SB 447. The Council proposes to remove language referring to repealed code sections in the text in sections 11105 and 14000. Also, the Council proposes to amend 11004, 14000, 14020, 14025, 14051 and 14343 to delete citations to such sections from the notes of the regulations. These amendments are necessary to ensure that the regulations reflect current statutory law.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council relied upon the following technical, theoretical or empirical studies, reports or similar documents in proposing the adoption of these regulations:

CalGovOps, CalSTA, and Labor & Workforce Development Agency, *SB 150 Stakeholder Workshops Update & Recommendations: Report to the Governor and Legislature* (April 2, 2024), <https://www.labor.ca.gov/wp-content/uploads/sites/338/2024/04/sb150-report.pdf>.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments describe and clarify FEHA and Article 9.5 without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying the law, making it easier for state contractors, subcontractors and recipients to understand their rights and obligations, and reducing litigation costs for businesses.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs; the creation of new businesses or the elimination of existing businesses; the

expansion of businesses currently doing business within the state; or worker safety and the environment because the regulations centralize and codify existing law, clarify terms, and make technical changes without affecting the supply of jobs or ability to do business in California. To the contrary, adoption of the proposed amendments is anticipated to benefit the state's judiciary and California businesses and workers, particularly those operating under contracts and subcontracts for the state of California, by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.