

Chapter 5. Fair Employment and Housing Council

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Chapter 5. Fair Employment and Housing Council

Subchapter 1. Administration

Article 1. Administration

§ 11000. Generally.

The authority for the rules and regulations set forth in this chapter is briefly described at the beginning of each subchapter herein and in some cases is set out with more particularity at the beginning of a constituent article within a subchapter. Special definitions or rules of construction, which only apply to a particular subchapter or article, are set forth at the beginning of the subchapter or article to which they pertain.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2, Government Code.

§ 11001. Construction.

(a) These rules and regulations are to be construed liberally so as to further the policy and purposes of the statutes they interpret and implement.

(b) Except as required by the Supremacy Clause of the United States Constitution, federal laws and their interpretations regarding discrimination in employment and housing are not determinative of the construction of these rules and regulations and the California statutes they interpret and implement but, in the spirit of comity, shall be considered to the extent practical and appropriate.

(c) Unless the context dictates otherwise, terms used herein that are in the singular include the plural, and terms that are in the plural include the singular.

(d) If any rule or regulation, or portion thereof, in this chapter is adjudged by a court of competent jurisdiction to be invalid, or if any such rule or regulation, or portion thereof, loses its force and effect by legislative action, that judgment or action does not affect the remainder of the rules and regulations.

(e) Pursuant to the Governor's Reorganization Plan No. 1 (1980), the Fair Employment Practice Act is renamed the Fair Employment and Housing Act and renumbered in Part 2.8 of Division 3 of Title 2 of the Government Code.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2 of the Government Code.

§ 11002. Definitions.

Unless a different meaning clearly applies from the context, the meaning of the words and phrases as defined in this section shall apply throughout this chapter:

- (a) "Council or FEHC" means the State Fair Employment and Housing Council created by section 12903 of the Government Code pursuant to Senate Bill 1038 (2011-2012 Reg. Sess.) (State. 2012, ch. 46).
- (b) "Department or DFEH" means the Department of Fair Employment and Housing created by section 12901 of the Government Code pursuant to the Governor's Reorganization Plan No. 1 (1980).
- (c) "Person" includes one or more individuals, partnerships, associations or corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
- (d) "Complainant" means the person who files a timely, verified complaint with the DFEH alleging aggrievement by an unlawful practice.
- (e) "Respondent" means the person who is alleged to have committed an unlawful practice in a complaint filed with the DFEH.
- (f) "Act" means the California Fair Employment and Housing Act, created by Government Code section 12900.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12903 and 12925, Government Code.

Article 2. Powers and Duties of the Council

§ 11003. Rules, Regulations and Guidelines.

- (a) The Council shall adopt, promulgate, amend and rescind suitable rules, regulations and guidelines as are necessary to interpret, implement and apply laws within its jurisdiction and as are necessary to carry out all of its other functions and duties.
- (b) All rules and regulations shall be adopted pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Note: Authority cited: Section 12935(a), Government Code. Reference: Part 2.8 of Division 3 of Title 2, Government Code

§ 11004. Other Powers and Duties.

The functions, powers and duties of the Council shall also include, but are not limited to, the authority to:

- (a) Make inquiries into general discrimination problems and issue informal and formal findings, including published reports;
- (b) Establish such advisory agencies and councils as will assist in fostering goodwill, cooperation and conciliation among groups and elements of the population of the state through studies, conciliation, hearings, and recommendations to the Council;
- (c) Hold hearings, issue publications, results of inquiries and research, and reports to the Governor and the Legislature that, in its judgment, will tend to aid in effectuating the purpose of the Fair Employment and Housing Act, promote good will, cooperation and conciliation, and minimize or eliminate unlawful discrimination, or advance civil rights in the State of California.
- (d) Advise and concur with the Secretary of Health and Human Services in establishing standards and guidelines determining unlawful practices of state contractors under section 11135, et seq.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 11139.5, 12935, 12946 and 12990, Government Code.

Subchapter 2. Discrimination in Employment

Article 1. General Matters

§ 11005. Fair Employment and Housing Council - Conflict of Interest Code.

The Political Reform Act ([Gov. Code § 81000 et seq.](#)) requires state and local government agencies to adopt and promulgate conflict of interest codes. The Fair Political Practices Commission has adopted a regulation ([Cal. Code Regs., tit. 2., § 18730](#)), which contains the terms of a standard conflict of interest code, which can be incorporated by reference, and which may be amended by the Fair Political Practices Commission to conform to amendments in the Political Reform Act after public notice and hearings. Therefore, the terms of [California Code of Regulations, title 2, section 18730](#) and any amendments to it duly adopted by the Fair Political Practices Commission are hereby incorporated by reference and, along with the attached appendix in which officials and employees are designated and disclosure categories are set forth, constitute the conflict of interest code of the Fair Employment and Housing Council.

Designated employees shall file statements of economic interests with their agency. Upon receipt of the statements of the Council members, the agency shall make and retain a copy and forward the original of these statements to the Fair Political Practices Commission. The statements for all other designated positions shall be retained with the agency and made available for public inspection and reproduction upon request. ([Gov. Code, § 81008.](#))

Appendix A

<i>Designated Positions</i>	<i>Disclosure Category</i>
Council Members	1
Consultants ¹	1

¹ With respect to Consultants, the Chairperson may determine in writing that a particular consultant is hired to perform a range of duties that are limited in scope and thus is not required to comply with the disclosure requirements described in these categories. Such determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. The Chairperson's determination is a public record and shall be retained for public inspection at offices of the Fair Employment and Housing Council. Nothing herein excuses any such consultant from any other provision of this Conflict of Interest Code.

Appendix B

General Provisions

When a designated employee is required to disclose investments and sources of income, he or she need only disclose investments in business entities and sources of income that do business in the jurisdiction, plan to do business in the jurisdiction or have done business in the jurisdiction within the past two years. In addition to other activities, a business entity is doing business within the jurisdiction if it owns real property within the jurisdiction. When a designated employee is required to disclose interests in real property, he/she need only disclose real property that is located in whole or in part within or not more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the Fair Employment and Housing Council.

Designated employees shall disclose their financial interests pursuant to the appropriate disclosure category as indicated in appendix A.

Disclosure Categories

Category 1

Designated officials and employees assigned to this disclosure category must report all investments and business positions in business entities, sources of income and interests in real property.

Category 2

Designated officials and employees assigned to this disclosure category must report investments and business positions in business entities and sources of income of the type which within the past two years have contracted to provide services, supplies, materials or equipment to the Department.

Note: Authority and reference cited: [Section 81000 et seq., Government Code](#).

§ 11005.1. Department of Fair Employment and Housing - Conflict of Interest Code.

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

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

Appendix A

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

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

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

Appendix B

Disclosure Requirements

Disclosure Category 1

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

Disclosure Category 2

Individuals holding designated positions in Disclosure Category 2 must report investments and business positions in business entities, and income, including gifts, loans, and travel payments, from sources, of the type to provide services, supplies, materials, or equipment to the Department. Such services include, but are not limited to, legal recording/reporting services.

Disclosure Category 3

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

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

§ 11006. Statement of Policy and Purpose.

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

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

§ 11007. Authority.

The FEHC issues these regulations under the authority vested in the Council by the Fair Employment and Housing Act, specifically [Government Code section 12935\(a\)](#).

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: Part 2.8 of Division 3 of Title 2, Government Code.

§ 11008. Definitions.

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

(a) “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 each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year.

(2) For purposes of “counting” the (five or more) employees, the individuals employed need not be employees as defined below; nor must any of them be full-time employees.

(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).

(b) "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 parents, by his or her spouse, or by his or her 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 may be considered an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual 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.

(c) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(d) "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.

(e) "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) "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 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).

(g) "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.

(h) "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 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 application prior to being interviewed, tested or hired.

(i) "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.](#)

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12925, 12940, 12941 and 12942, Government Code](#).

§ 11009. Principles of Employment Discrimination.

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

(b) Liability of Employers. In view of the common law theory of *respondeat superior* and its codification in [California Civil Code section 2338](#), an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in section 11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, the applicant or employee has suffered a loss of or has been denied an employment benefit.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12920, 12921, 12940, 12941, 12942 and 12961, Government Code](#).

§ 11010. Affirmative Defenses to Employment Discrimination.

If employment discrimination is established, this employment discrimination is nonetheless lawful where a proper, relevant affirmative defense is proved and less discriminatory alternatives are not shown to be available. Except where otherwise specifically noted, one or more of the following affirmative defenses may be appropriate in a given situation to justify the employment practice in question. The following defenses are generally referred to in the text of these regulations as "Permissible Defenses:"

(a) Bona Fide Occupational Qualification (BFOQ). Where an employer or other covered entity has a practice that on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

(b) Business Necessity. Where an employer or other covered entity has a facially neutral practice that has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact.

(c) Job-Relatedness. See section 11017(e) for the defense of job-relatedness, which is permissible in employee selection cases.

(d) Security Regulations. Notwithstanding a showing of discrimination, an employment practice that conforms to applicable security regulations established by the United States or the State of California is lawful.

(e) Non-Discrimination Plans or Affirmative Action Plans. Notwithstanding a showing of discrimination, an employment

practice that conforms to the following is lawful:

- (1) A bona fide voluntary affirmative action plan as discussed below in section 11011;
- (2) A non-discrimination plan, pursuant to [Government Code section 12990](#); or
- (3) An order of a state or federal court or administrative agency of proper jurisdiction.

(f) Otherwise Required by Law. Notwithstanding a showing of discrimination, such an employment practice is lawful where required by state or federal law or an order of a state or federal court of proper jurisdiction.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12920, 12921, 12940, 12941, 12942, 12961 and 12990, Government Code](#).

§ 11011. Affirmative Action Programs.

Voluntary action by employers and other covered entities is an effective means for eliminating employment discrimination. The Council hereby adopts the *Affirmative Action Guidelines* of the federal Equal Employment Opportunity Commission (EEOC). [(29 C.F.R. Section 1608 (1979).)]

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

[§ 11012 is a placeholder]

§ 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 or DFEH 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 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 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 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) shall be preserved by the employer or other covered entity for a period of two years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. 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 for a period of two 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 applicant identification information for a period of two 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.

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

(B) 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 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.

(C) The term "fully and finally disposed of and all appeals from related proceedings have concluded" 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.

(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

§ 11014. Statement of Purpose.

Certain employment practices have the effect, either directly or indirectly, of discriminating against individuals on a basis enumerated in the Act. Such practices are discussed in this article and the provisions are applicable to all discriminatory actions as more specifically discussed in the following articles.

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

§ 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 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 minorities, individuals of one sex or the other, individuals with disabilities, individuals over 40 years of age, and any other individual covered by the Act.

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

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

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

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

(b) Pre-Employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense. Except as provided in the Americans with Disabilities Act of 1990 ([Public Law 101-336](#)) ([42 U.S.C.A. §12101 et seq.](#)) and the regulations adopted pursuant thereto, nothing in [Government Code section 12940\(d\)](#) or in this subdivision, shall prohibit any employer from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

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

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

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

§ 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, as defined in section 11017(e). 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. Except as otherwise provided by law (e.g., [12 U.S.C. § 1829](#); [Labor Code section 432.7](#)), it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning:

(A) Any arrest or detention that did not result in conviction;

(B) Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated (e.g., juvenile offense records sealed pursuant to [Welfare and Institutions Code section 389](#) and [Penal Code sections 851.7](#) or [1203.45](#)); any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to [Penal Code section 1203.4](#); or

(C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to [Penal Code sections 1000.5](#) and [1001.5](#).

(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 or other means of selection that is facially neutral, but that has an adverse impact (as described 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 sufficiently related to an essential function of the job in question to warrant its use. (See section 11017(a).)

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

§ 11018. Compensation. (Reserved.)

§ 11019. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. (Reserved.)

(b) Harassment.

(1) Harassment includes but is not limited to:

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

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

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

(D) Sexual favors, e.g., unwanted sexual advances, which condition an employment benefit upon an exchange of sexual

favours. [See also section 11034(f)(1).]

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

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

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

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

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

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

(e) Seniority. (Reserved.)

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

§ 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.

(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](#).

§ 11021. Retaliation.

(a) Retaliation Generally. It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment that the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Council or Department or its staff.

(1) Opposition to practices prohibited by the Act includes, but is not limited to:

(A) Seeking the advice of the Department or Council, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is ultimately sustained;

(B) Assisting or advising any person in seeking the advice of the Department or Council, whether or not a complaint is filed, and if a complaint is filed, whether or not the complaint is ultimately sustained;

(C) Opposing employment practices that an individual reasonably believes to exist and believes to be a violation of the Act;

(D) Participating in an activity that is perceived by the employer or other covered entity as opposition to discrimination, whether or not so intended by the individual expressing the opposition; or

(E) Contacting, communicating with or participating in the proceeding of a local human rights or civil rights agency regarding employment discrimination on a basis enumerated in the Act.

(2) Assistance with or participation in the proceedings of the Council or Department includes, but is not limited to:

(A) Contacting, communicating with or participating in the proceedings of the Department or Council due to a good faith belief that the Act has been violated; or

(B) Involvement as a potential witness, which an employer or other covered entity perceives as participation in an activity of the Department or the Council.

(b) Exception for Reasonable Discipline. Nothing in these regulations shall be construed to prevent an employer or other covered entity from enforcing reasonable disciplinary policies and practices, nor from demonstrating that the actions of an applicant or employee were either disruptive or otherwise detrimental to legitimate business interests so as to justify the denial of an employment benefit.

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

§ 11022. Association.

(a) It is unlawful for an employer or other covered entity to deny employment benefits to, harass, or intimidate any applicant or employee because the employer or other covered entity disapproves generally of the applicant's or employee's association with individuals because they are in a category enumerated in the Act.

(b) It shall be unlawful for an employer or other covered entity to deny equal consideration to any applicant or employee on the basis that he or she sympathizes with, encourages or participates in groups organized for the protection or assertion of rights protected under the Act.

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

§ 11023. Sexual Harassment Training and Education.

(a) Definitions. For purposes of this section:

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

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

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

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

(C) “Webinar” training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training’s interactive content, discussion questions, hypothetical scenarios, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance.

(D) Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training.

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

(4) “Employer” means any of the following:

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

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

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

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

(7) “New” supervisory employees are employees promoted or hired to a supervisory position after July 1, 2005.

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

(9) “Trainers” or “Trainers or educators” qualified to provide training under this section are individuals who, through a

combination of training and experience have the ability to train supervisors about the following: 1) what are unlawful harassment, discrimination and retaliation under both California and federal law; 2) what steps to take when harassing behavior occurs in the workplace; 3) how to report harassment complaints; 4) how to respond to a harassment complaint; 5) the employer's obligation to conduct a workplace investigation of a harassment complaint; 6) what constitutes retaliation and how to prevent it; 7) essential components of an anti-harassment policy; and 8) the effect of harassment on harassed employees, co-workers, harassers and employers.

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

1. "Attorneys" admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or
2. "Human resource professionals" or "harassment prevention consultants" working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a. designing or conducting discrimination, retaliation and sexual harassment prevention training; b. responding to sexual harassment complaints or other discrimination complaints; c. conducting investigations of sexual harassment complaints; or d. advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or
3. "Professors or instructors" in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964.

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

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

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

(b) Training.

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

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

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

(2) Documentation of Training. An employer shall keep documentation of the training it has provided its employees under this section to track compliance, including the name of the supervisory employee trained, the date of training, the type of training, and the name of the training provider and shall retain the records for a minimum of two years.

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

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

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

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

(c) Content.

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

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

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

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

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

(4) Remedies available for sexual harassment.

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

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

(7) The limited confidentiality of the complaint process.

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

(9) The employer's obligation to conduct an effective workplace investigation of a harassment complaint.

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

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

(d) Remedies.

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

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

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12926\(q\), 12940\(j\)\(5\), 12950 and 12950.1, Government Code](#).

§ 11024. Labor Organizations. (Reserved.)

§ 11025. Apprenticeship Programs. (Reserved.)

§ 11026. Employment Agencies. (Reserved.)

Article 3. Race and Color Discrimination (Reserved)

Article 4. National Origin and Ancestry Discrimination

§ 11027. Defenses.

These regulations incorporate the defenses set forth in section 11010.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12940, Government Code](#).

§ 11028. Specific Employment Practices.

(a)-(c) (Reserved)

(d) An employer may have a rule requiring that employees speak only in English at certain times, so long as the employer can show that the rule is justified by business necessity (See section 11010(b)) and the employer has effectively notified its employees of the circumstances and time when speaking only in English is required and of the consequences of violating the rule.

(e) (Reserved)

(f) Citizenship requirements. Citizenship requirements that 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.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12940, Government Code](#).

Article 5. Ancestry Discrimination (Reserved)

Article 6. Sex Discrimination

§ 11029. General Prohibition Against Discrimination on the Basis of Sex.

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

(b) Statement of Purpose. The purpose of the law against discrimination in employment because of sex is to eliminate the means by which individuals of the female sex have historically been relegated to inferior jobs and to guarantee that in the future both sexes will enjoy equal employment benefits.

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

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

§ 11030. Definitions.

(a) "Sex." An applicant's or employee's gender; however, nothing herein shall limit protections due an individual on account of pregnancy, childbirth, or related medical conditions.

(b) "Sex Stereotype." An assumption about an individual's ability or inability to perform certain kinds of work based on a myth or generalization about the individual's gender.

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

§ 11031. Defenses.

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

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

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

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

- (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
- (2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and
- (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

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

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

§ 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.

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 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.

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

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

(a) Compensation.

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

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

(b) Fringe Benefits.

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

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

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

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

(c) Lines of Progression.

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

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

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

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

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

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

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

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

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

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

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

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

(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in [Labor Code Section 6300 et](#)

seq.

(e) Working Conditions.

- (1) Where rest periods are provided, equal rest periods must be provided to employees of both sexes.
- (2) Equal access to comparable and adequate toilet facilities shall be provided to employees of both sexes. This requirement shall not be used to justify any discriminatory employment decision.
- (3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee's sex.
- (4) Job duties shall not be assigned according to sex stereotypes.
- (5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual of one sex and not the other on the grounds that the individual is not sterilized or refuses to undergo sterilization.
- (6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.

(f) Interpersonal Conduct and Appearance.

- (1) Sexual Harassment. Sexual harassment is unlawful as defined in section 11091(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances.
- (2) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful.

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

Article 6a. Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions

§ 11035. Definitions.

The following definitions apply only to this article:

- (a) "Affected by pregnancy" means that because of pregnancy, childbirth, or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," as set forth in [Government Code section 12945](#), it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by her employer.
- (b) "Because of pregnancy" means due to an employee's actual pregnancy, childbirth or a related medical condition.
- (c) "CFRA" means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, [Gov. Code §§ 12945.1 and 12945.2](#).) "CFRA leave" means family care or medical leave as those leaves are defined at section 11087.
- (d) A "condition related to pregnancy, childbirth, or a related medical condition," as set forth in [Government Code section 12945](#), means a physical or mental condition intrinsic to pregnancy or childbirth that includes, but is not limited to, lactation. Generally lactation without medical complications is not a disabling related medical condition requiring pregnancy disability leave, although it may require transfer to a less strenuous or hazardous position or other reasonable accommodation.
- (e) A "covered entity" is any person (as defined in [Government Code section 12925](#)), labor organization, apprenticeship training program, training program leading to employment, employment agency, governing board of a school district, licensing board or other entity to which the provisions of [Government Code sections 12940, 12943, 12944 or 12945](#) apply.

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

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

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

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

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

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

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

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

(n) “Health care provider” means:

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

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

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

(o) “Intermittent leave” means leave taken in separate periods of time because of pregnancy, rather than for one continuous period of time. Examples of intermittent leave include leave taken on an occasional basis for medical appointments, or leave

taken several days at a time over a period of several months for purposes related to pregnancy, childbirth or a related medical condition.

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

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

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

(s) “Reasonable accommodation” of an employee affected by pregnancy is any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. Reasonable accommodation may include, but is not limited to an employer:

(1) modifying work practices or policies;

(2) modifying work duties;

(3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);

(4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices; or

(5) providing a reasonable amount of break time and use of a room or other location in close proximity to the employee’s work area to express breast milk in private as set forth in [Labor Code section 1030 et seq.](#)

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

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

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

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

§ 11036. Prohibition Against Harassment.

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

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

§ 11037. No Eligibility Requirements.

There is no eligibility requirement, such as minimum hours worked or length of service, before an employee affected or

disabled by pregnancy is eligible for reasonable accommodation, transfer, or disability leave.

Note: Authority cited: [Sections 12935\(a\), Government Code](#). Reference: [Section 12945, Government Code](#).

§ 11038. Responsibilities of Covered Entities Other than Employers.

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](#).

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), below. Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;

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

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

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

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

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

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

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

section 11040 below;

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

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

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

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

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

§ 11040. Reasonable Accommodation.

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

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

(2) The requested accommodation is reasonable.

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

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

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

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

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

§ 11041. Transfer.

(a) Transfer - All Employers

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

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

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

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

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

(b) Burden of Proof

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

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

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

(d) Right to Reinstatement After Transfer

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

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

§ 11042. Pregnancy Disability Leave.

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

(a) Four-Month Leave Requirement for all Employers

All employers must provide a leave of up to four months, as needed, for the period(s) of time an employee is actually disabled because of pregnancy even if an employer has a policy or practice that provides less than four months of leave for other similarly situated temporarily disabled employees.

(1) A "four month leave" means time off for the number of days or hours the employee would normally work within four calendar months (one-third of a year or 17 1/3 weeks). For a full time employee who works 40 hours per week, "four months" means 693 hours of leave entitlement, based on 40 hours per week times 17 1/3 weeks.

(2) For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis.

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

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

An employer may account for increments of intermittent leave using an increment no greater than the shortest period of

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

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

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

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

(B) In contrast, a part-time employee who normally works 20 hours per week, would be entitled to 346.5 hours of leave. If that employee takes intermittent leave of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of leave, approximately two months of leave, leading up to and after her childbirth.

(4) Minimum Duration

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

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

(b) Employers With More Generous Leave Policies

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

(c) Denial of Leave is an Unlawful Employment Practice

It is an unlawful employment practice for an employer to refuse to grant pregnancy disability leave to an employee disabled by pregnancy

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

(2) whose health care provider has advised that the employee is disabled by pregnancy. The employer may require medical certification of the medical advisability of the leave, as set forth in sections 11049(a) and (b), and 11050(b).

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

§ 11043. Right to Reinstatement from Pregnancy Disability Leave.

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

(a) Guarantee of Reinstatement

An employee who exercises her right to take pregnancy disability leave is guaranteed a right to return to the same position, or, if the employer is excused by section 11043(c)(1), to a comparable position, and the employer shall provide the guarantee in writing upon request of the employee. It is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified by the defenses below in subdivisions (c)(1) and (c)(2). If the employee takes intermittent leave or a reduced work schedule, only one written guarantee of reinstatement is required.

(b) Refusal to Reinstatement

(1) Definite Date of Reinstatement

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

(2) Change in Date of Reinstatement

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

(c) Permissible Defenses - Employment Would Have Ceased

(1) Right to Reinstatement to the Same Position

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

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

(2) Right to Reinstatement to a Comparable Position

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

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

(B) There is no comparable position available.

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

2. An employer has an affirmative duty to provide notice of available positions to the employee by means

reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or email, or by links to postings on the company's website if there is a section for job openings.

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

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

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

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

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

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

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

§ 11044. Terms of Pregnancy Disability Leave.

(a) Paid Leave

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

(b) Accrued Time Off

(1) Sick Leave

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

(2) Vacation Time and Other Accrued Time Off

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

(c) Continuation of Group Health Coverage

(1) An employer shall maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period, beginning on the

date the pregnancy disability leave begins, at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.

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

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

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

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

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

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

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

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

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

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

(d) Other Benefits and Seniority Accrual

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

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

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

(e) Employee Status

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

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

2000e et seq.).

§ 11045. Relationship Between Pregnancy Leave and FMLA Leave.

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

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

(b) FMLA Coverage

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

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

§ 11046. Relationship Between CFRA and Pregnancy Leaves.

(a) Separate and Distinct Entitlements

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

(b) Serious Health Condition - Pregnancy

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

(c) CFRA Leave after Pregnancy Disability Leave

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

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

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

(d) Maximum Entitlement

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

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

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

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

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

[§ 11048 is a placeholder]

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

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

An employer shall give its employees reasonable advance notice of employees' FEHA rights and obligations regarding pregnancy, childbirth or related medical conditions as set forth below at section 11049(e) and (f), and as contained in Notice A and Notice B as set forth below at section 11051(a) and (b), or their equivalents.

(b) Content of Employer's Reasonable Advance Notice

An employer shall provide its employees with information about:

- (1) an employee's right to request reasonable accommodation, transfer, or pregnancy disability leave;
- (2) employees' notice obligations, as set forth in section 11050, to provide adequate advance notice to the employer of the need for reasonable accommodation, transfer or pregnancy disability leave; and
- (3) the employer's requirement, if any, for the employee to provide medical certification to establish the medical advisability for reasonable accommodation, transfer, or pregnancy disability leave, as set forth in section 11050(b).

(c) Consequences of Employer Notice Requirement

- (1) If the employer follows the requirements in section 11049(d) below, such compliance shall constitute reasonable advance notice to the employee of the employer's notice obligations.
- (2) Failure of the employer to provide reasonable advance notice shall preclude the employer from taking any adverse action against the employee, including denying reasonable accommodation, transfer or pregnancy disability leave, for failing to furnish the employer with adequate advance notice of a need for reasonable accommodation, transfer, or pregnancy disability leave.

(d) Distribution of Notices

- (1) Employers shall post and keep posted the appropriate notice in a conspicuous place or places where employees congregate. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section.
- (2) An employer is also required to give an employee a copy of the appropriate notice as soon as practicable after the employee tells the employer of her pregnancy or sooner if the employee inquires about reasonable accommodation, transfer, or pregnancy disability leaves.

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

(4) Non-English Speaking Workforce

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

(e) Notice A

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

(f) Notice B

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

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

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

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

(a) Adequate Advance Notice

(1) Verbal or Written Notice

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

(2) 30 Days Advance Notice

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

(3) When 30 Days Is Not Practicable

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

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

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

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

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

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

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

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

(b) Medical Certification

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Failure to Provide Medical Certification

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

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

(d) Release to Return to Work

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

(e) Medical Certification Form

Employers requiring written medical certification from their employees who request reasonable accommodation, transfer or

disability leave because of pregnancy may develop their own form, utilize one provided by the employee's health care provider or use the form provided below.

FAIR EMPLOYMENT & HOUSING COMMISSION

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

Employee's Name: _____

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

Time off for medical appointments.

Specify when and for what duration:

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

Beginning (Estimate): _____

Ending (Estimate): _____

Intermittent leave. Specify medically advisable intermittent leave schedule:

Beginning (Estimate): _____

Ending (Estimate): _____

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

Beginning (Estimate): _____

Ending (Estimate): _____

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

Beginning (Estimate): _____

Ending (Estimate): _____

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

Beginning (Estimate): _____

Ending (Estimate): _____

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

Signature of health care provider:

Date:

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

§ 11051. Employer Notices.

(a) "Notice A"

YOUR RIGHTS AND OBLIGATIONS AS A PREGNANT EMPLOYEE

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

• California law protects employees against discrimination or harassment because of an employee’s pregnancy, childbirth or any related medical condition (referred to below as “because of pregnancy”). California also law prohibits employers from denying or interfering with an employee’s pregnancy-related employment rights.

• Your employer has an obligation to:

◦ reasonably accommodate your medical needs related to pregnancy, childbirth or related conditions (such as temporarily modifying your work duties, providing you with a stool or chair, or allowing more frequent breaks);

◦ transfer you to a less strenuous or hazardous position (where one is available) or duties if medically needed because of your pregnancy; and

◦ provide you with pregnancy disability leave (PDL) of up to four months (the working days you normally would work in one-third of a year or 17 1/3 weeks) and return you to your same job when you are no longer disabled by your pregnancy or, in certain instances, to a comparable job. Taking PDL, however, does not protect you from non-leave related employment actions, such as a layoff.

◦ provide a reasonable amount of break time and use of a room or other location in close proximity to the employee's work area to express breast milk in private as set forth in [Labor Code section 1030, et seq.](#)

• For pregnancy disability leave:

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

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

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

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

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

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

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

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

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

Notice Obligations as an Employee.

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

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

• PLEASE NOTE that if you fail to give your employer reasonable advance notice or, if your employer requires it, written medical certification of your medical need, your employer may be justified in delaying your reasonable accommodation, transfer, or PDL.

This notice is a summary of your rights and obligations under the Fair Employment and Housing Act (FEHA). For more information about your rights and obligations as a pregnant employee, contact your employer, look at the Department of Fair

Employment and Housing's website at www.dfeh.ca.gov, or contact the Department at (800) 884-1684. The text of the FEHA and the regulations interpreting it are available on the Fair Employment and Housing Commission's website at www.dfeh.ca.gov.

(b) "Notice B"

FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE

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

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

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

If you are CFRA-eligible, you have certain rights to take BOTH PDL and a separate CFRA leave for reason of the birth of your child. Both leaves guarantee reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under the law.

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

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

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

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

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

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

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

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

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

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

Article 7. Marital Status Discrimination

§ 11052. General Prohibition Against Discrimination on the Basis of Marital Status.

(a) Statutory Source. These regulations are adopted by the Fair Employment and Housing Council pursuant to [Section 12940 of the Government Code](#).

(b) Statement of Purpose. The purpose of the law prohibiting marital status discrimination is to make it unlawful for an employer or other covered entity to deny or grant employment benefits for the reason that an applicant or employee is either married or unmarried.

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

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

§ 11053. Definitions.

(a) “Marital Status.” An individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state.

(b) “Spouse.” A partner in marriage as defined in [Family Code section 300](#).

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

§ 11054. Establishing Marital Status Discrimination.

Marital status discrimination may be established by showing that an applicant or employee has been denied an employment benefit by reason of:

(a) The fact that the applicant or employee is not married;

(b) An applicant’s or employee’s single or married status, or

(c) The employment or lack of employment of an applicant’s or employee’s spouse.

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

§ 11055. Defenses.

Any defense permissible under Article 1 of Subchapter 2 is applicable to this article, in addition to any other defense provided herein.

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

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her marital status as part of a pre-employment inquiry 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 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 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](#).

§ 11057. Employee Selection.

(a) Employment of Spouse. An employment decision shall not be based on whether an individual has a spouse presently employed by the employer except in accordance with the following criteria:

(1) For business reasons of supervision, safety, security or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse.

(2) For business reasons of supervision, security or morale, an employer may refuse to place both spouses in the same department, division or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.

(b) Accommodation for Co-Employees Who Marry. If co-employees marry, an employer shall make reasonable efforts to assign job duties so as to minimize problems of supervision, safety, security, or morale.

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

§ 11058. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits.

(1) The availability of benefits to any employee shall not be based on the employee's marital status. However:

(A) Bona fide fringe benefit plans or programs may provide benefits to an employee's spouse or dependents;

(B) Such bona fide fringe benefit plans or programs may decline to provide benefits to any individual who is not one of the following: an employee of the employer, a spouse of an employee of the employer, or a dependent of an employee of the employer.

(2) Insofar as an employment practice discriminates against individuals on the basis of marital status, fringe benefits shall not be conditioned upon whether an employee is head of household, principal wage earner, secondary wage earner, or other similar status.

(b) Inter-Personal Conduct.

(1) An employer or other covered entity shall not use job responsibilities such as travel, entertainment, or other non-office hour duties as a justification for discriminating on the basis of marital status.

(2) It is unlawful to require a married female applicant or employee to use her husband's name.

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

Article 8. Religious Creed Discrimination

§ 11059. General Prohibition Against Religious Creed Discrimination.

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

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

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

§ 11060. Establishing Religious Creed Discrimination.

“Religious creed” includes any traditionally recognized religion as well as beliefs, observances, or practices, which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing:

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

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

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

§ 11061. Defenses.

Any permissible defense set forth in Article 1 of this Subchapter shall be applicable to this Article.

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

§ 11062. Reasonable Accommodation.

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

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

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

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

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

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

(4) The type of the employer’s or other covered entity’s operation, including the composition and structure of the

workforce or membership;

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

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

(7) Any available reasonable alternative means of accommodation.

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

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

(2) Dress Standards. Dress standards or requirements for personal appearance shall be flexible enough to take into account religious practices.

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

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

§ 11063. Pre-Employment Practices.

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

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

Article 9. Disability Discrimination

§ 11064. General Prohibitions Against Discrimination on the Basis of Disability.

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

(b) Statement of Purpose. The Fair Employment and Housing Council is committed to ensuring each individual employment opportunities commensurate with his or her abilities. These regulations are designed to ensure discrimination-free access to employment opportunities notwithstanding any individual's actual or perceived disability or medical condition; to preserve a valuable pool of experienced, skilled employees; and to strengthen our economy by keeping people working who would otherwise require public assistance. These regulations are to be broadly construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental disability or medical condition that is disabling, potentially disabling or perceived to be disabling or potentially disabling. The definition of disability in these regulations shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the Fair Employment and Housing Act (FEHA). As with the Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendment Act of 2008 ([Pub. L. No. 110-325](#)), the primary focus in cases brought under the FEHA should be whether employers and other covered entities have provided reasonable accommodation to applicants and employees with disabilities, whether all parties have complied with their obligations to engage in the interactive process and whether discrimination has occurred, not whether the individual meets the definition of disability, which should not require extensive analysis.

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

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

Government Code.

§ 11065. Definitions.

As used in this article, the following definitions apply:

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) “Mental Disability,” as defined at [Government Code section 12926](#), includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. “Mental Disability” includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as “mental retardation”), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) “Physical Disability,” as defined at [Government Code section 12926](#), includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

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

(B) limits a major life activity.

(C) “Disability” includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility

impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease.

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

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

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

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

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

(6) A “Perceived Potential Disability” includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) “Medical condition” is a term specifically defined at [Government Code section 12926](#), to mean either:

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

(B) a “genetic characteristic,” as defined at [Government Code section 12926](#). “Genetic characteristics” means:

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

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

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

(9) “Disability” does not include:

(A) excluded conditions listed in the [Government Code section 12926](#) definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and “sexual behavior disorders,” as defined at

section 11065(q), of this article; or

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

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

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

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

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

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

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

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

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

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

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

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

(h) “Genetic information,” as defined at [Government Code section 12926](#), means genetic information derived from an individual’s or the individual’s family members’ genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual’s family members.

(i) “Health care provider” means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who

directly treats or supervises the treatment of the applicant or employee; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify,

enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

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

(3) "Auxiliary aids and services," which include:

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

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

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

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

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

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

(7) Reasonable accommodations.

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

(p) "Reasonable accommodation" is:

(1) modifications or adjustments that are:

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

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

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

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

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

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

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

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

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job

functions in a job with multiple responsibilities;

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

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

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

(I) Modifying an employer policy;

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

(K) Providing additional training;

(L) Permitting an employee to work from home;

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

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

(O) other similar accommodations.

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

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

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

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

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

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

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

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

§ 11066. Establishing Disability Discrimination.

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

(b) Disability discrimination is established if a preponderance of the evidence demonstrates a causal connection between a qualified individual’s disability and denial of an employment benefit to that individual by the employer or other covered

entity. The evidence need not demonstrate that the qualified individual's disability was the sole or even the dominant cause of the employment benefit denial. Discrimination is established if the qualified individual's disability was one of the factors that influenced the employer or other covered entity and the denial of the employment benefit is not justified by a permissible defense, as detailed below at section 11067 of this article.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code](#); *Green v. State of California* (2007) 42 Cal.4th 254, 260; and *Mixon v. Fair Empl. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1319.

§ 11067. Defenses.

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

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

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

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

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

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

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

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

§ 11068. Reasonable Accommodation.

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

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

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

(d) Reassignment to a vacant position.

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

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

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

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

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

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

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

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

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

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

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

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

appointments with a health care provider.

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

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

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

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

§ 11069. Interactive Process.

(a) Interactive Process. When needed to identify or implement an effective, reasonable accommodation for an employee or applicant with a disability, the FEHA requires a timely, good faith, interactive process between an employer or other covered entity and an applicant, employee, or the individual's representative, with a known physical or mental disability or medical condition. Both the employer or other covered entity and the applicant, employee or the individual's representative shall exchange essential information identified below without delay or obstruction of the process.

(b) Notice. An employer or other covered entity shall initiate an interactive process when:

(1) an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodations, or

(2) the employer or other covered entity otherwise becomes aware of the need for an accommodation through a third party or by observation, or

(3) the employer or other covered entity becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, for the employee's own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that further accommodation is still necessary for recuperative leave or other accommodation for the employee to perform the essential functions of the job. An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate [California Code of Regulations, title 2, section 11091\(b\)\(1\) & \(b\)\(2\)\(A\)1.](#), prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."

(c) Obligations of Employer or Other Covered Entity. An employer or other covered entity shall engage in a timely, good faith, interactive process as follows:

(1) The employer or other covered entity shall either grant the applicant's or employee's requested accommodation, or reject it after due consideration, and initiate discussion with the applicant or employee regarding alternative accommodations.

(2) When the disability or need for reasonable accommodation is not obvious, and the applicant or employee has not already provided the employer or other covered entity with reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation, the employer or other covered entity may require the applicant or employee to provide such reasonable medical documentation.

(3) When the employer or other covered entity has received reasonable medical documentation, it shall not ask the applicant or employee about the underlying medical cause of the disability, but may require medical information, as set forth in section 11071 below, and second opinions from other health care providers.

(4) If information provided by the applicant or employee needs clarification, then the employer or other covered entity shall identify the issues that need clarification, specify what further information is needed, and allow the applicant or employee a reasonable time to produce the supplemental information.

(5) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity shall analyze the particular job involved and the essential functions of the job.

(6) When needed to assess a requested accommodation or to advance the interactive process, the employer or other covered entity may consult experts.

(7) In consultation with the applicant or employee to be accommodated, the employer or other covered entity shall identify potential accommodations and assess the effectiveness each would have in enabling the applicant to have an equal opportunity to participate in the application process and to be considered for the job; or for the employee to perform the essential function of the position held or desired or to enjoy equivalent benefits and privileges of employment compared to non-disabled employees.

(8) The employer or other covered entity shall consider the preference of the applicant or employee to be accommodated, but has the right to implement an accommodation that is effective in allowing the applicant or employee to perform the essential functions of the job.

(9) If reassignment to an alternate position is considered as an accommodation, the employer or other covered entity may ask the employee to provide information about his or her educational qualifications and work experience that may help the employer find a suitable alternative position for the employee, and shall comply with section 11068(d).

(d) Obligations of Applicant or Employee. The applicant or employee shall cooperate in good faith with the employer or other covered entity, including providing reasonable medical documentation where the disability or the need for accommodation is not obvious and is requested by the employer or other covered entity, as follows:

(1) Reasonable medical documentation confirms the existence of the disability and the need for reasonable accommodation. Where necessary to advance the interactive process, reasonable medical documentation may include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee. Disclosure of the nature of the disability is not required.

(2) If reassignment to an alternate position is considered as an accommodation, the employee shall provide the employer or other covered entity information about his or her educational qualifications and work experience that may help the employer or other covered entity find a suitable alternative position for which the employee is qualified and for which the employee can perform the essential functions.

(3) An employee's mental or physical inability to engage in the interactive process shall not constitute a breach in either the employee's or the employer's obligation to engage in a good faith interactive process.

(4) Direct communications between the employer or other covered entity and the applicant or employee rather than through third parties are preferred, but are not required.

(5) Required medical information. Where the existence of a disability and/or the need for reasonable accommodation is not obvious, an employer or other covered entity may require an applicant or employee to obtain and provide reasonable medical documentation from a health care provider that sets forth the following information:

(A) The name and credentials of the health care provider, which establish that the individual falls within the definition of "health care provider" under section 11065(i), of these regulations.

(B) That the employee or applicant has a physical or mental condition that limits a major life activity or a medical condition, and a description of why the employee or applicant needs a reasonable accommodation to have an equal opportunity: to participate in the application process and to be considered for the job, or to perform the employee's job

duties, or to enjoy equal benefits and privileges of employment compared to non-disabled employees. The employer or other covered entity shall not ask for unrelated documentation, including in most circumstances, an applicant's or employee's complete medical records, because those records may contain information unrelated to the need for accommodation.

(C) If an applicant or employee provides insufficient documentation in response to the employer's or other covered entity's initial request, the employer or other covered entity shall explain why the documentation is insufficient and allow the applicant or employee an opportunity to provide supplemental information in a timely manner from the employee's health care provider. Thereafter, if there is still insufficient documentation, the employer may require an employee to go to an appropriate health care provider of the employer's or other covered entity's choice.

1. Documentation is insufficient if it does not specify the existence of a FEHA disability and explain the need for reasonable accommodation. Where relevant, such an explanation should include a description of the applicant's or employee's functional limitation(s) to perform the essential job functions.

2. Documentation also might be insufficient where the health care provider does not have the expertise to confirm the applicant's or employee's disability or need for reasonable accommodation, or other objective factors indicate that the information provided is not credible or is fraudulent.

(6) If an applicant or employee provides insufficient documentation, as described above, an employer or other covered entity still must provide reasonable accommodation but only to the extent the reasonable accommodation is supported by the medical documentation provided to date. If the medical documentation provided to date does not support any reasonable accommodation, no reasonable accommodation need be required. If supplemental medical documentation supports a further or additional reasonable accommodation, then such further or additional reasonable accommodation shall be provided.

(7) Any medical examination conducted by the employer's and other covered entity's health care provider must be job-related and consistent with business necessity. This means that the examination must be limited to determining the functional limitation(s) that require(s) reasonable accommodation.

(8) If an employer or other covered entity requires an employee to go to a health care provider of the employer's or other covered entity's choice, the employer or other covered entity shall pay all costs and allow the employee time off for the visit(s). An employee may use sick leave for the time off.

(9) If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced-schedule basis for planned medical treatment of the employee's disability, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

(10) If an employee requests leave on an intermittent or reduced-schedule basis for the employee's disability that may result in unforeseeable episodes of incapacity, such as the onset of migraines or epileptic seizures, reasonable medical documentation includes information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the frequency and duration of the episodes of incapacity.

(e) If an employee requests permission to bring an assistive animal into the workplace as a reasonable accommodation, prior to allowing the animal to be in the workplace, the employer may require that the employee supply:

- (1) a letter from the employee's health care provider stating that the employee has a disability and explaining why the employee requires the presence of the assistive animal in the workplace (e.g., why the animal is necessary as an accommodation to allow the employee to perform the essential functions of the job); and

- (2) confirmation that the animal meets the standards set forth in section 11065(a)(2). Such confirmation may include information provided by the individual with a disability. The employer may challenge that the animal meets that standards set forth in section 11065(a)(2) within the first two weeks the assistive animal is in the work place based on objective evidence of offensive or disruptive behavior. An employer may require an annual recertification from the employee of the continued need for the animal.

(f) For reasonable accommodations extending beyond one year, employers may ask for medical documents substantiating the

need for continued reasonable accommodations on a yearly basis.

(g) Maintenance and Confidentiality of Medical Files. Medical information and/or records obtained during the interactive process shall be maintained on separate forms, and in medical files separate from the employee's personnel file, and shall be kept confidential, except that:

- (1) supervisors and managers may be informed of restriction(s) on the work or duties of employees with disabilities and necessary reasonable accommodations; and
- (2) first aid and safety personnel may be informed, where appropriate, that the condition may require emergency treatment; and
- (3) government officials investigating compliance with this subchapter shall be provided relevant information on request.

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

§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

- (1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.
- (2) It is unlawful to advertise or publicize an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

- (1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.
- (2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:
 - (A) "Do you have any particular disabilities?"
 - (B) "Have you ever been treated for any of the following diseases or conditions?"
 - (C) "Are you now receiving or have you ever received workers' compensation?"
 - (D) "What prescription medications are you taking?"
 - (E) "Have you ever had a job-related injury or medical condition?"
 - (F) Have you ever left a job because of any physical or mental limitations?
 - (G) "Have you ever been hospitalized?"
 - (H) "Have you ever taken medical leave?"

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

a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

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

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

§ 11071. Medical and Psychological Examinations and Inquiries.

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

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

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

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

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

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

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

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

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

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

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

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

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking

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

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

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

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

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

§ 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 a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity. 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 qualification standards, employment tests, or other selection criteria based on an applicant's or employee's uncorrected vision or uncorrected hearing unless the standards, tests, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion 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.

(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. 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.

(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\(b\)](#).

§ 11073. Terms, Conditions and Privileges of Employment.

(a) Fringe Benefits. It shall be unlawful to condition any employment decision regarding an applicant or employee with a disability upon the waiver of any fringe benefit.

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

Article 10. Age Discrimination

§ 11074. General Prohibition Against Discrimination on the Basis of Age over the Age of Forty.

(a) Statement of Purpose. The purpose of the law prohibiting age discrimination in employment is to guarantee all protected individuals 40 or over employment opportunities commensurate with their abilities. These regulations are promulgated to assure that employment opportunities for those protected persons over the age of 40 are based upon their abilities and are not conditioned upon age-based stereotypes and unsupported generalizations about their qualifications or job performance. In addition, these regulations are promulgated to clarify when the use of mandatory retirement programs that are based upon age over the age of 40 is unlawful.

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

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12940, 12941 and 12942, Government Code](#).

§ 11075. Definitions.

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

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

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

§ 11076. Establishing Age Discrimination.

- (a) Employers. Discrimination on the basis of age may be established by showing that a job applicant’s or employee’s age over 40 was considered in the denial of an employment benefit.
- (b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening,

advertising, training, job referral, placement or similar activities that discriminate against an individual or individuals over 40.

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

§ 11077. Defenses.

(a) Defenses. Generally. In addition to any other defense provided herein, once an inference of employment discrimination on the basis of age has been established, an employer or other covered entity may prove one or more appropriate defenses as generally set forth in section 11010 of subchapter 2.

(b) Specific Defenses, Exemptions, Permissible Practices. An employment practice that discriminates on the basis of age is permissible, exempted, or has a valid defense:

- (1) If the practice is otherwise mandated or permitted by federal or state law that preempts, supersedes, or otherwise takes precedence over the Act;
- (2) If the practice, at the time it occurred, was deemed lawful by the terms of one or more sections of this article;
- (3) If the practice is declared by one or more sections of this article to be permissible or lawful.

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

§ 11078. Pre-Employment Practices.

(a) Recruitment and Advertising.

- (1) Recruitment. The provisions of section 11016(a) are applicable and are incorporated by reference herein.

Generally, during recruitment it is unlawful for employers to refuse to consider applicants because they are over 40 years of age. However, it is lawful for an employer to participate in established recruitment programs with high schools, colleges, universities and trade schools. It is also lawful for employers to utilize temporary hiring programs directed at youth, even though such programs traditionally provide disproportionately few applicants who are over 40. However, exclusive screening and hiring of applicants provided through the above recruitment or temporary programs will constitute discrimination on the basis of age if the programs are used to evade the Act's prohibition against age discrimination.

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

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

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

(a) Pre-Employment Inquiries. Pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age are unlawful. 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.

(b) Applications. It is discrimination on the basis of age for an employer or other covered entity to reject or refuse to seriously and fairly consider the application form, pre-employment questionnaire, oral application or the oral or written inquiry of an individual because such individual is over 40. (See section 11016(c), which is applicable and incorporated by reference herein.)

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12941, Government Code](#).

§ 11080. Physical or Medical Examination of Applicants and Employees.

(a) It is not a violation of this article for an employer to require an applicant who is over 40 to undergo physical or medical examinations to determine whether or not the applicant meets the job-related physical or medical standards for the position sought so long as such examinations are uniformly and equally required of all applicants for the position, regardless of their age.

(b) It is not a violation of this article for an employer to require an employee who is over 40 to undergo a physical or medical examination at reasonable times and intervals and at the expense of the employer to determine whether or not the employee continues to meet the job-related physical or medical standards for the position held so long as such examinations are uniformly and equally required of all similarly situated employees in the particular job class regardless of their age.

(c) It is discrimination based on age to require an applicant or employee over 40 to meet physical or medical examination standards which are higher than those standards applied to applicants or employees who are below the age of 40 and are seeking or holding the same job.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12941\(a\), Government Code](#).

§ 11081. Employee Selection.

(a) Selection. So long as age is not a factor, this article does not preclude an employer from selecting an individual who is in fact better qualified than other applicants, and it does not preclude an employer from hiring an individual on the basis of experience and training superior to other applicants.

(b) Selection Based Upon Seniority or Prior Service. So long as age is not a factor, it is not a violation of this article for an employer, during the process of selection, to give a candidate who has a record of seniority or time in prior service with that employer preference over a candidate who has no such record or who has less seniority or time in prior service with that employer. However, where candidates for hire have the same record of seniority or time in prior service, it is discrimination based on age, in selecting from among them, to refuse to select a candidate because he or she is over 40.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12941, Government Code](#).

§ 11082. Promotions.

(a) In selecting a candidate for promotion, it is not, itself, a violation of this article, for an employer to limit the group of eligible candidates to members of the employer's existing workforce or to give a preference in selection to an incumbent employee over a candidate who is not an incumbent employee. However, in evaluating or selecting candidates for promotion from among its existing workforce, it is discrimination on the basis of age for an employer to evaluate unequally or to fail to select a candidate who is over 40 because of the age of the candidate.

(b) In selecting a candidate for promotion, it is not, itself, a violation of this article for an employer to promote a candidate under the age of 40 in preference to a candidate over 40 on the basis of the superior experience and training of the younger candidate, or on the basis of other legitimate reasons, so long as age is not a factor.

(c) It is discrimination on the basis of age for an employer to deny an employee the opportunity to gain the experience and training necessary to achieve promotion, because such employee is over 40.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12942\(a\), Government Code](#).

§ 11083. Terms, Conditions and Privileges of Employment. (Reserved.)

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

§ 11084. Retirement Practices.

(a) Mandatory Retirement - Generally. Generally, it is discrimination on the basis of age for a private employer to discharge

or force the retirement of an employee because such employee has reached a certain chronological age over 40.

(b) Retirement Plans Generally. Generally, any provision in a private employer's retirement plan, pension plan, collective bargaining agreement or similar plan or agreement that requires mandatory retirement of an employee over 40 years of age is unlawful.

(c) Mandatory Retirement Permitted. Mandatory retirement of the following employees is not unlawful:

(1) Any employee who has attained 65 years of age and who for the two year period immediately prior to retirement, was employed in a bona fide executive or high policymaking position, providing that at the time of mandatory retirement, the employee is entitled to receive an immediate non-forfeitable annual retirement benefit from the current employer, which equals a minimum of \$27,000.00, and is either derived from one or a combination of plans such as profitsharing, pension, savings, or deferred compensation plans.

(2) Any employee who has attained 70 years of age and is a physician employed by a professional medical corporation, the articles or bylaws of which provide for compulsory retirement.

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

§ 11085. Procedures for Continuing in Employment Past the Normal Retirement Date.

Where a private employer has a private pension or retirement program, the following procedures apply:

(a) Advisory Notice by the Employer. Private employers must advise their employees who are nearing their normal retirement date that if they intend to continue in employment beyond their NRD, they must file a written notice of this intention. The employer's advisory notice should be in writing and should be provided to the employee no later than 90 days prior to the NRD and no earlier than 180 days prior to the NRD. The advisory notice to the employee must clearly indicate when his or her continuation notice, as described in subsection (b), must be submitted.

(b) Continuation Notice by the Employee. An employee of a private employer who wishes to continue working beyond his or her NRD must provide a written notification of this intention to the employer not more than 45 days after the employee receives an advisory notice from the employer as described in subsection (a).

(c) Notice by Employee Following the Normal Retirement Date. An employee continuing in employment past the normal retirement date has an obligation to provide his or her private employer with written notice in advance of the date on which he or she intends to retire from employment. Such notice of retirement should be provided at a reasonable time, no later than 60 days prior to the employee's anticipated date of retirement.

(d) Notice by Private Employer Following the Normal Retirement Date. Where an employee continues in employment beyond his or her NRD, a private employer does not violate this article by periodically sending a written notice to such employee seeking to determine if the employee intends to continue in employment. However, the initial notice of this kind should not be sent to the employee until at least two years following his or her normal retirement date has elapsed. Subsequent thereto, the notice should not be sent more frequently than on an annual basis.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12942, Government Code](#).

§ 11086. Termination and Disciplinary Actions.

(a) It is not a violation of this article for an employer to terminate, discharge, dismiss, demote or otherwise discipline an employee over 40 who fails to perform the normal functions of his or her position or who fails to conform to the bona fide requirements of his or her position, so long as the performance standards and job requirements do not discriminate against employees over 40.

(b) Where an employee is continuing in employment beyond his or her normal retirement date, it is not a violation of this article for an employer to terminate, force the retirement of, or otherwise discipline such an employee if the employee's job performance no longer satisfies the employer's performance standards. Any such performance standards for quality of work must not be arbitrary and must not be based upon the age of the employee.

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

Article 11. California Family Rights Act

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal Family and Medical Leave Act of 1993 (FMLA) ([29 U.S.C. § 2601 et seq.](#)) and its implementing regulations shall also apply to this article, to the extent that they are not inconsistent with the following definitions:

(a) “Certification” means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee’s child, parent or spouse, or a medical leave for the employee’s own serious health condition.

(1) For family care leave for the employee’s child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in [Government Code section 12945.2](#).

(A) the date, if known, on which the serious health condition commenced,

(B) the probable duration of the condition,

(C) an estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse, and

(D) a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.

1. “Warrants the participation of the employee,” within the meaning of [Government Code section 12945.2](#), includes, but is not limited to, providing psychological comfort and arranging third party care for the child, parent or spouse, as well as directly providing, or participating in, the medical care.

(2) For medical leave for the employee’s own serious health condition, this certification need not, but may, at the employee’s option, identify the serious health condition involved. Any certification shall contain the information identified in [Government Code section 12945.2](#), as is demonstrated in section 11097 of these regulations. For purposes of the certification “unable to perform the function of his or her position” means that an employee is unable to perform any one or more of the essential functions of his or her position. The certification shall contain:

(A) The date, if known, on which the serious health condition commenced,

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position.

(b) “CFRA” means the Moore-Brown-Roberti California Family Rights Act of 1993. (California Family Rights Act, [Gov. Code, §§ 12945.1-12945.2](#).) “CFRA leave” means family care or medical leave taken pursuant to CFRA.

(c) “Child” means a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, or a child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of [Government Code section 12926\(j\)](#) and *(l)*.

(1) “In loco parentis” means in the place of a parent; instead of a parent; charged with a parent’s rights, duties, and responsibilities. It does not require a biological or legal relationship.

(d) “Covered employer” means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs 50 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary. It also

includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full-time. "Employer" as used in these regulations means "covered employer."

(1) "Directly employs" means that the employer maintains an aggregate of at least 50 part or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase "current or preceding calendar year" refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(2) "Perform services for a wage or salary" excludes independent contractors as defined in the Labor Code, but includes persons who are compensated in whole or in part by commission.

(3) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

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

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

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

(e) "Eligible employee" means a full- or part-time employee working in California who has been employed for a total of at least 12 months (52 weeks) with the employer at any time prior to the commencement of a CFRA leave, and who has actually worked (within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave is to commence.

(1) Once the employee meets these two eligibility criteria and takes a leave for a qualifying event, the employee does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same qualifying event during the employee's 12-month leave period.

(2) Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. Nothing in this section prevents an employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly, with respect to all employees with similar breaks in service.

(3) For an employee who takes a pregnancy disability leave, and who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of pregnancy disability leave, not the first day of the subsequent CFRA leave for reason of the birth of her child.

(4) In order to be eligible, the employee must also work for an employer who maintains on the payroll, as of the date the employee gives notice of the need for leave, at least 50 part- or full-time employees within 75 miles, measured in surface miles, using surface transportation, of the worksite where the employee requesting the leave is employed. A worksite can refer to either a single location or a group of contiguous locations.

(A) For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, for the purpose of counting 50 employees, if a salesperson works from home in California, but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50

employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.

(B) When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.

(C) Once the employee meets this eligibility criterion and gives notice of the need for a leave, the employer may not deny the leave, cut short the leave, or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period, even if the number of employees within the relevant 75-mile radius falls below 50. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event.

(5) If an employee is not eligible for CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which he/she is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

(f) "Employment in the same position" means employment in, or reinstatement to, the original position the employee held prior to taking a CFRA leave.

(g) "Employment in a comparable position" means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term "equivalent position" in FMLA and its implementing regulations.

(h) "Family care leave" means either:

(1) Leave of up to a total of 12 workweeks in a 12-month period for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave; or

(2) Leave of up to a total of 12 workweeks in a 12-month period to care for a child, parent, or spouse of the employee who has a serious health condition, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave.

(i) "FMLA" means the federal Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#), and its implementing regulations, 29 C.F.R. Part 825. "FMLA leave" means family care or medical leave taken pursuant to FMLA.

(j) "Health care provider" means either:

(1) an individual holding either a physician's and surgeon's certificate issued pursuant to Article 4 (commencing with [section 2080](#)) of Chapter 5 of Division 2 of the Business and Professions Code or an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with [section 2099.5](#)) of Chapter 5 of Division 2 of the Business and Professions Code, or any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the serious health condition, or

(2) any other person who meets the definition of others "capable of providing health care services," as set forth in FMLA and its implementing regulations.

(k) “Key employee” means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer’s employees who are employed within 75 miles of the employee’s worksite at the time of the leave request, as described in [Government Code section 12945.2](#).

(l) “Medical leave” means leave of up to a total of 12 workweeks in a 12-month period because of an employee’s own serious health condition that makes the employee unable to work at all or unable to perform any one or more of the essential functions of the position of that employee. The term “essential functions” is defined in [Government Code section 12926](#). “Medical leave” does not include leave taken for an employee’s pregnancy disability, as defined in (n) below, except as specified below in section 11093(c)(1).

(m) “Parent” means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child. Parent does not include a parent-in-law.

(n) “Pregnancy disability leave” means a leave taken for disability on account of pregnancy, childbirth, or a related medical condition, pursuant to [Government Code section 12945](#) and defined in section 11035(r) of the regulations.

(o) “Reason of the birth of a child,” within the meaning of [Government Code section 12945.2](#) and these regulations includes, but is not limited to, bonding with a child after birth.

(p) “Reinstatement” means the return of an employee to the position that the employee held prior to CFRA leave, or a comparable position, and is synonymous with “restoration” within the meaning of FMLA and its implementing regulations.

(q) “Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.

(1) “Inpatient care” means a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an “inpatient” when a health care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

(2) “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.

(3) “Continuing treatment” means ongoing medical treatment or supervision by a health care provider, as detailed in section 11097 of these regulations.

(r) “Spouse” means a partner in marriage as defined in [Family Code section 300](#) or a registered domestic partner, within the meaning of [Family Code sections 297](#) through [297.5](#). As used in this article and the Family Code, “spouse” includes same-sex partners in marriage.

(s) “Twelve workweeks” means the equivalent of 12 of the employee’s normally scheduled workweeks. (See also section 11090(c).)

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); *J.E. Robinson v. FEHC* (1992) 2 Cal.4th 226 [5 Cal.Rptr.2d 782]; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11088. Right to CFRA Leave: Denial of Leave; Reasonable Request; Permissible Limitation.

(a) It is an unlawful employment practice for a covered employer to refuse to grant, upon reasonable request, a CFRA leave to an eligible employee, unless such refusal is justified by the permissible limitation specified below in subdivision (c).

(b) Denial of leave.

(1) Burden of proof.

Denial of a request for CFRA leave is established if the Department or the employee shows, by a preponderance of the evidence, that the employer was a covered employer, the employee making the request was an eligible employee, the request was for a CFRA-qualifying purpose, the request was reasonable, and the employer denied the request for CFRA leave.

(2) Reasonable request.

A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements, as specified in section 11091, and if it is accompanied, where required, by a certification, as that term is defined in section 11087(a).

(c) Limitation on Entitlement.

If both parents are eligible for CFRA leave but are employed by the same employer, that employer may limit leave for the birth, adoption or foster care placement of their child to a combined total of 12 workweeks in a 12-month period between the two parents. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

§ 11089. Right to Reinstatement: Guarantee of Reinstatement; Rights upon Return; Refusal to Reinstatement; Permissible Defenses.

(a) Guarantee of Reinstatement.

(1) Upon granting the CFRA leave, the employer shall inform the employee of its guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 11089(d), and shall provide the guarantee in writing upon request of the employee.

(2) It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to reinstate the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(d).

(A) An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(B) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

(b) Rights upon Return.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(1) Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee.

(2) CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act (FEHA).

(c) Refusal to Reinstatement.

(1) Definite Date of Reinstatement.

Where a definite date of reinstatement has been agreed upon at the beginning of the leave, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon.

(2) Change in Date of Reinstatement.

If the reinstatement date differs from the employer's and employee's original agreement, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the employer failed to reinstate the employee to the same or a comparable position within two business days, where feasible, after the employee notifies the employer of his or her readiness to return.

(d) Permissible Defenses.

(1) Employment Would Have Ceased or Hours Would Have Been Reduced.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed on the requested reinstatement date in order to deny reinstatement. As per (a)(1) of this section, this burden shall not be satisfied if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(A) If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(B) If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

(2) "Key Employee."

An employer may refuse to reinstate a "key employee," as defined in section 11087(k) of these regulations, to his or her same position or to a comparable position only if the employer establishes, by a preponderance of the evidence, that all of the following conditions exist:

(A) The employee requesting the CFRA leave is a salaried employee. As used in [Government Code section 12945.2 \(r\)](#), "salaried employee" means an employee paid on a salary basis.

(B) The employee requesting the leave is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request. Whether an employee is "among the highest paid 10 percent," pursuant to [Government Code section 12945.2](#), is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer's employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

(C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer. A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

(D) An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA leave (or when CFRA leave commences, if earlier) that he or she is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(E) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA leave (or who is on CFRA leave), the employer shall notify the employee in writing that it cannot deny CFRA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

(F) If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

(G) After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

(3) Fraudulently-obtained CFRA Leave.

An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA's job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

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

(a) CFRA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period.

(b) If the leave is common to both CFRA and FMLA, this 12-month period will run concurrently with the 12-month period under FMLA. An employer may choose any of the methods (the calendar year, any fixed 12-month "leave year," the 12-month period measured forward from the date any employee's first CFRA leave begins, or a "rolling" 12-month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations, [29 C.F.R. Part 825, section 825.200, subdivision \(b\)](#), for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA leave of its chosen method. If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.

(c) "Twelve workweeks" as that term is defined in section 11087(s), means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of CFRA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) shall be used for calculating the employee's leave entitlement.

(1) For example, for a full-time employee who works five eight-hour days per week, 12 workweeks means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, 12 workweeks may mean 30 eight-hour days or 60 four-hour days, or 12 workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, 12 workweeks means 72 working and/or paid eight-hour days of leave entitlement.

(2) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee needs physical therapy that requires an absence from work of two hours a week, only those two hours may be charged against the employee's CFRA leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

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

(4) If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

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

(d) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the birth, adoption, or foster care placement of a child: CFRA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee. The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks.

(e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health condition of a parent, child, or spouse or for the serious health condition of the employee: Where CFRA leave is taken for a serious health condition of the employee's child, parent, or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, intermittent or reduced work schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if he or she does not receive treatment by a health care provider. An employer must limit leave

increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour.

(1) If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular job. It need not have equivalent duties, although an employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or a reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

(2) CFRA leave, including intermittent leave and/or reduced work schedules, is available to instructional employees of educational establishments and institutions under the same conditions as apply to all other eligible employees.

(3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee shall be permitted to return to work if he or she is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule, provided the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); DLSE Opinion Letter 03.12.2002; DLSE Opinion Letter 04.08.2002; Stats. 1993, ch. 827 (AB 1460), § 2; Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

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

(a) Advance Notice.

(1) Verbal Notice.

Unless an employer waives its employees' notice obligations described herein, an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, provided the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information). An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.

(A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee or the employee's spokesperson, and to give notice of the designation to the employee.

(B) Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or

injury to the employee.

(2) 30 Days' Advance Notice.

An employer may require that employees provide at least 30 days' advance notice before CFRA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. The employee shall consult with the employer and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the operations of the employer. Any such scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent or spouse.

(3) When 30 Days Not Practicable.

If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

(4) Prohibition against Denial of Leave in Emergency or Unforeseeable Circumstances.

An employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, so long as the employee provided notice to the employer as soon as practicable.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements that it adopts. The employer may incorporate its notice requirements in the general notice requirements in section 11095 and such incorporation shall constitute reasonable advance notice. Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.

(6) Employer Response to Leave Request.

The employer shall respond to the leave request as soon as practicable and in any event no later than five business days after receiving the employee's request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(b) Medical Certification.

(1) Serious Health Condition of Child, Parent, or Spouse.

As a condition of granting a leave for the serious health condition of the employee's child, parent or spouse, the employer may require certification of the serious health condition, as defined in section 11087(a)(1). If the certification satisfies the requirements of section 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(2) Serious Health Condition of Employee.

As a condition of granting a leave for the serious health condition of the employee, the employer may require certification of the serious health condition, as defined in section 11087(a)(2). Upon expiration of the time period the health care provider originally estimated the employee needed for his/her own serious health condition, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(A) If the employer has a good faith, objective reason to doubt the validity of the certification the employee provides for his/her own serious health condition, the employer may require, at the employer's own expense, the employee to obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information in the

certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer.

1. The employer may not ask the employee to provide additional information (e.g. symptoms, diagnosis, etc.) in the medical certification beyond that allowed by these regulations.
2. The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(B) In any case in which the second opinion described in (b)(2)(A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by both the employer and the employee, concerning any information in the certification.

(C) The opinion of the third health care provider concerning the information in the certification shall be considered to be final and shall be binding on the employer and the employee.

(D) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee.

(E) As a condition of an employee's return from medical leave, the employer may require the employee to obtain a release to return-to-work from his/her health care provider stating that he/she is able to resume work, but only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability and there is no collective bargaining agreement forbidding the practice. An employer is not entitled to a release to return-to-work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return-to-work for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties.

(F) An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee's return. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity, in accordance with section 11071 of these regulations.

(3) Providing Certification.

The employer may require that the employee provide any certification within no less than 15 calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts. This means that, in some cases, the leave may begin before the employer receives the certification. Absent extenuating circumstances (e.g., unavailability of healthcare provider), if the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. The same rules apply to recertification. If the employee never produces the certification or recertification, the leave is not CFRA leave. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of his or her failure to provide adequate certification.

Note: Authority cited: [Section 12935, Government Code](#). Reference: [Section 12945.2, Government Code](#); [White v. County of Los Angeles \(2014\) 225 Cal.App.4th 690](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

§ 11092. Terms of CFRA Leave.

(a) The following rules apply to the permissible terms of a CFRA leave, to the extent that they are consistent with the requirements of the Employee Retirement Income Security Act (ERISA). Nothing in these regulations infringes on the employer's obligations, if any, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) or prohibits an employer from granting CFRA leave on terms more favorable to the employee than those listed below.

(b) Paid Leave.

An employer is not required to pay an employee during a CFRA leave except:

(1) An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave. An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

(2) For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy, during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(3) An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(4) Only if the employee requests leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including PTO) that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave, the leave will not count against the employee's CFRA leave entitlement.

(A) If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.

1. If the employer denies the employee's request and the employee then provides information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may inquire further into the reasons for the absence. If the absence is CFRA-qualifying, then the rules in section 11092(b)(1) and (2), above, apply.

(5) An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off instead of using CFRA leave provided by this section.

(c) Provision of Health Benefits.

If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave, FMLA leave, or both. The following rules apply:

(1) The employer shall maintain and pay for an employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had not taken CFRA leave.

(2) The employer's obligation commences on the date leave first begins under CFRA for the duration of the leave, up to a maximum of 12 workweeks in a 12-month period. As section 11044(c) of the Council's pregnancy disability leave regulations state, "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."

(3) A "group health plan" is as defined in [section 5000\(b\)\(1\) of the Internal Revenue Code of 1986](#). If the employer's group health plan includes dental care, eye care, mental health counseling, or other types of coverage, or if it includes coverage for an employee's dependents as well as for the employee, the employer shall also continue this coverage.

(4) Although the employer's obligation to continue group health benefits under either FMLA or CFRA, or both, does not

exceed 12 workweeks in a 12-month period, nothing shall preclude the employer from maintaining and paying for health care coverage for longer than 12 workweeks.

(5) An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have failed to return from leave if he/she works less than 30 days after returning from CFRA leave. An employee who retires during CFRA leave or during the first 30 days after returning is deemed to have returned from leave.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.

(6) Group health plan coverage must be maintained for an employee on CFRA leave until:

(A) The employee's CFRA leave entitlement is exhausted;

(B) The employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the period of the CFRA leave; or

(C) The employee provides unequivocal notice of intent not to return to work.

(d) Employee Payment of Group Health Benefit Premiums.

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

(1) If CFRA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

(2) If CFRA leave is unpaid, the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave is foreseeable).

(3) Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

(A) The employer may recover the employee's share of any premium payments missed by the employee for any CFRA

leave period during which the employer maintains health coverage by paying the employee's share.

(B) Regardless of whether an employee pays premiums while on CFRA leave, all other obligations of an employer under CFRA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

(C) If an employer terminates an employee's health benefits coverage in accordance with this section because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(e) Other Benefits and Seniority.

During the period of CFRA leave, the employee is entitled to accrual of seniority and to participate in health plans for any additional period of leave not covered by (c) above; in any employee benefit plans, including life, short-term or long-term disability or accident insurance; pension and retirement plans; and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave.

(1) Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes shall be compared to other unpaid personal leaves offered by the employer. CFRA leave shall not constitute a break in service or cause the employee to lose seniority, even if other paid or unpaid leave constitutes a break in service for purposes of establishing longevity or seniority, or for layoff, recall, promotion, job assignment, or seniority-related benefits.

(2) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on CFRA leave, the employer must give written notice to the employee that he or she is subject to the new or changed plan/benefits to the same extent as if the employee were not on leave.

(f) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement that requires or authorizes any other type of unpaid personal or disability leave or if the employer's other unpaid personal or disability leaves do not allow for the continuation of benefits during these leaves, an employee taking a CFRA leave shall be entitled to continue to participate in the employer's health plans, pension and retirement plans, supplemental unemployment benefit plans or any other health and welfare employee benefit plan, in accordance with the terms of those plans, during the period of the CFRA leave.

(1) As a condition of continued coverage of group medical benefits (beyond the employer's obligation during the 12-week period described above in (c)), life insurance, short- or long-term disability plans or insurance, accident insurance, or other similar health and welfare employee benefit plans during any unpaid portion of the leave, the employer may require the employee to pay premiums at the group rate.

(A) If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.

(2) An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of time accrued under any such plan during any unpaid portion of the CFRA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of these plans, during the unpaid portion of the leave period.

(g) Employee Status.

The employee shall retain employee status during the period of the CFRA leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided

when the leave began, without any new qualification period, physical exam, et cetera.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); ERISA, [29 U.S.C. § 1001 et seq.](#); and COBRA, [29 U.S.C. § 1161 et seq.](#)

§ 11093. Relationship between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave.

(a) Separate and Distinct Entitlements.

The right to take a CFRA leave under [Government Code section 12945.2](#) is separate and distinct from the right to take a pregnancy disability leave under [Government Code section 12945](#) and section 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or a related medical condition is not included as a serious health condition under CFRA. Any period of incapacity or treatment due to pregnancy, including prenatal care, is included as a serious health condition under FMLA.

(c) CFRA Leave after Pregnancy Disability Leave.

At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date. There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave. There is also no requirement that the employee no longer be disabled by her pregnancy, childbirth or a related medical condition before taking CFRA leave for reason of the birth of her child.

(1) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and [Government Code section 12945](#)) and CFRA leave for reason of the birth of the child (under this article) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or a related medical condition for four months and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child. This maximum entitlement does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA.

(e) Disability Leave.

The right to take a CFRA leave under [Government Code section 12945.2](#) is separate and distinct from the right to take a disability leave under [Government Code section 12945](#) and section 11064 et seq. of the regulations. If an employee has a serious health condition that also constitutes a disability as defined by [Government Code section 12926](#) and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12945 and 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and 29 C.F.R. § 825.

§ 11094. Retaliation and Protection from Interference with CFRA Rights.

(a) Any violation of CFRA or its implementing regulations constitutes interfering with, restraining, or denying the exercise of

rights provided by CFRA. “Interfering with” the exercise of an employee’s rights includes, for example, refusing to authorize CFRA leave and discouraging an employee from using such leave. It would also include an action by a covered employer to avoid responsibilities under CFRA, for example:

- (1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50-employee threshold for employee eligibility under CFRA;
- (2) Changing the essential functions of the job in order to preclude the taking of leave;
- (3) Reducing an employee’s hours available to work in order to avoid employee eligibility; and
- (4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying leave in the future.

(b) CFRA’s prohibition against “interference” prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise CFRA rights or giving information or testimony regarding his or her CFRA leave, or another person’s CFRA leave, in any inquiry or proceeding related to any right guaranteed under this article. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid CFRA leave. By the same token, employers cannot use the taking of CFRA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can CFRA leave be counted against an employee under an employer’s attendance policies.

(c) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under CFRA. For example, employees (or their collective bargaining representatives) cannot “trade off” the right to take CFRA leave against some other benefit offered by the employer. This does not prevent the settlement or release of CFRA claims by employees based on past employer conduct without the approval of a court. Nor does it prevent an employee’s voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. An employee’s acceptance of such light duty assignment does not constitute a waiver of the employee’s prospective rights, including the right to be reinstated to the same position the employee held at the time the employee’s CFRA leave commenced or to a comparable position.

(d) All individuals, and not merely employees who are CFRA-qualified, are protected from retaliation for opposing (e.g., filing a complaint about) any practice that is unlawful under CFRA. They are similarly protected if they oppose any practice that they reasonably believe to be a violation of CFRA or its implementing regulations.

(e) In addition to retaliation prohibited by CFRA, retaliation is also prohibited by [Government Code 12940](#) and [section 11021](#) of the regulations.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12940 and 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

§ 11095. Notice of CFRA Rights and Obligations.

(a) Employers to Post Notice.

Every employer covered by the CFRA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. If the employer publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, the employer shall include a description of CFRA leave in the next edition of its handbook it publishes following adoption of these regulations. The employer may include both pregnancy disability leave and CFRA leave requirements in a single notice.

(b) Employers to Give Notice.

Employers are also encouraged to give a copy of the notice to each current and new employee, ensure that copies are otherwise available to each current and new employee, and disseminate the notice in any other way.

(c) Non-English Speaking Workforce.

Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the notice into every language that is spoken by at least 10 percent of the workforce.

(d) Text of Notice.

The text below contains only the minimum requirements of the California Family Rights Act of 1993 and of the employer's obligation to provide pregnancy disability leave. Nothing in this notice requirement prohibits an employer from providing a leave policy that is more generous than that required by CFRA and providing its own notice of its own policy. Covered employers may develop their own notice or they may choose to use the text provided below, unless it does not accurately reflect their own policy.

FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE) AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to a family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances.

Even if you are not eligible for CFRA leave, if you are disabled by pregnancy, childbirth or a related medical condition, you are entitled to take a pregnancy disability leave of up to four months, depending on your period(s) of actual disability. If you are CFRA-eligible, you have certain rights to take BOTH a pregnancy disability leave and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement -for pregnancy disability it is to the same position and for CFRA it is to the same or a comparable position -at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

We may require certification from your health care provider before allowing you a leave for pregnancy disability or for your own serious health condition. We also may require certification from the health care provider of your child, parent or spouse, who has a serious health condition, before allowing you a leave to take care of that family member. When medically necessary, leave may be taken on an intermittent or reduced work schedule.

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

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact _____.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Sections 12940, 12945 and 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

§ 11096. Relationship with FMLA Regulations.

To the extent that they are within the scope of [Government Code section 12945.2](#) and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).

§ 11097. Certification Form. [also available [here](#)]

For leaves involving serious health conditions, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form so long as the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient.

FAIR EMPLOYMENT & HOUSING COUNCIL
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act (CFRA))

IMPORTANT NOTE: The California Genetic Information Nondiscrimination Act of 2011 (CalGINA) prohibits employers and other covered entities from requesting, or requiring, genetic information of an individual or family member of the individual except as specifically allowed by law. To comply with the Act, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information," as defined by CalGINA, includes information about the individual's or the individual's family member's genetic tests, information regarding the manifestation of a disease or disorder in a family member of the individual, and includes information from genetic services or participation in clinical research that includes genetic services by an individual or any family member of the individual. "Genetic Information" does not include information about an individual's sex or age.

1. Employee's Name: _____

2. Patient's Name (If other than employee): _____

Patient's relationship to employee: _____

If patient is employee's child, is patient either under 18 or an adult dependent child:

Yes No

3. Date medical condition or need for treatment commenced
[NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:

4. Probable duration of medical condition or need for treatment: _____

5. Below is a description of what constitutes a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify as a serious health condition?

Yes No

6. If the certification is for the serious health condition of the employee, please answer the following:

Yes No

Is employee able to perform work of any kind?
(If "No," skip next question.)

Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)

7. If the certification is for the care of the employee's family member, please answer the following:

Yes No

Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation?

After review of the employee's signed statement (See Item 10 below), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)

8. Estimate the period of time care is needed or during which the employee's presence would be beneficial:

9. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule.

Yes No

 Intermittent Leave: Is it medically necessary for the employee to be off work on an intermittent basis due to the serious health condition of the employee or family member?

If yes, please indicate the estimated frequency of the employee's need for intermittent leave due to the serious health condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: ___ times per ___ week(s) ___ month(s)

Duration: ___ hours or ___ day(s) per episode

Yes No

 Reduced Schedule Leave: Is it medically necessary for the employee to work less than the employee's normal work schedule due to the serious health condition of the employee or family member?

If yes, please indicate the part-time or reduced work schedule the employee needs:

___ hour(s) per day; ___ days per week, from _____ through _____

Yes No

 Time Off for Medical Appointments or Treatment: Is it medically necessary for the employee to take time off work for doctor's visits or medical treatment, either by the health care practitioner or another provider of health services?

If yes, please indicate the estimated frequency of the employee's need for leave for doctor's visits or medical treatment, and the time required for each appointment, including any recovery period:

Frequency: ___ times per ___ week(s) ___ month(s)

Duration: ___ hours or ___ day(s) per appointment/treatment

ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.

****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

11. Printed name of health care provider:

Signature of health care provider:

Date: _____

12. Signature of Employee:

Date: _____

— Serious Health Condition —

“Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse. A serious health condition may involve one or more of the following:

1. Hospital Care
Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. A person is considered an “inpatient” when a health care facility formally admits him or her to the facility with the expectation that he or she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.
2. Absence Plus Treatment
 - (a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:
 - (1) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
 - (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
3. Pregnancy [NOTE: An employee’s own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA]
Any period of incapacity due to pregnancy or for prenatal care.
4. Chronic Conditions Requiring Treatment
A chronic condition which:
 - (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician’s assistant under direct supervision of a health care provider;
 - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
 - (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
5. Permanent/Long-term Conditions Requiring Supervision
A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.
6. Multiple Treatments (Non-Chronic Conditions)
Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

Note: Authority cited: [Section 12935\(a\), Government Code](#). Reference: [Section 12945.2, Government Code](#); California Genetic Information Nondiscrimination Act, Stats. 2011, ch. 261; Family and Medical Leave Act of 1993, [29 U.S.C. § 2601 et seq.](#); and [29 C.F.R. § 825](#).