ADOPTED DISABILITY REGULATIONS
As Adopted by the Commission on December 18, 2012,
And Effective December 30, 2012

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4. Fair Employment & Housing Commission

Chapter 1. Administration

Subchapter 9. Disability Discrimination

§ 7293.5. General Prohibitions Against Discrimination on the Basis of Disability.

(a) Statutory Source. These regulations are adopted by the Commission pursuant to Sections 12926, 12926.1 and 12940 of the Government Code.

(b) Statement of Purpose. The Fair Employment and Housing Commission 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 by 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 Subchapters 1 and 2 of Chapter 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.

§ 7293.6. Definitions.

As used in this subchapter, 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 provide**s** 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 subchapter 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 subchapter, "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 7293.6, subdivisions (d)(1) or (d)(2), of this subchapter, 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 subchapter 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 subchapter, 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 Fair Employment and Housing Act'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 7293.6, subdivision (q), of this subchapter; 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 non-chronic 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. § 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 7294.0, 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 7294.1, 7294.2 and 7294.3, 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 which 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 7293.7, 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 7293.9, subdivision (c);

(N) Providing a reassignment to a vacant position, consistent with section 7293.9, subdivision (d); and

(O) other similar accommodations.

(q) "Sexual behavior disorders," as used in this subchapter, 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 subchapter, 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.

§ 7293.7. 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 7293.8 of this subchapter.

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; *Mixon v. Fair Empl. & Hous. Com.* (1987) 192 Cal.App.3d 1306, 1319.

§ 7293.8. Defenses.

(a) In addition to any other defense provided in these disability regulations, any defense permissible under Subchapter 1, at California Code of Regulations, title 2, section 7286.7, shall be applicable to this subchapter.

(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.

§ 7293.8(c). Defenses, cont'd.

(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 7293.8, subdivisions (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.

§ 7293.9. Reasonable Accommodation.

(a) Affirmative Duty. An employer or other covered entity has an affirmative duty to make reasonable accommodation 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 7293.6, subdivision (p)(2)(A), of this subchapter, 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.

§ 7293.9 Note. Reasonable Accommodation, cont'd.

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

§ 7294.0. 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 7297.4, subdivision (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 7294.2 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 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 7293.9, subdivision (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 establishes that the individual falls within the definition of "health care provider" under section 7293.6, subdivision (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.

§ 7294.0(e). Interactive Process, cont'd.

(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 7293.6, subdivision (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 7293.6, subdivision (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.

§ 7294.1 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.

§ 7294.1(a)(2). Pre-Employment Practices.

(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 applicants 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, subdivision (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.

§ 7294.1. Note. Pre-Employment Practices.

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

§7294.2. 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 7294.0, subdivision (g).

§7294.2. Note. Medical and Psychological Examinations and Inquiries.

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

§ 7294.3. 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).

§ 7294.4. 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.