

**FAIR EMPLOYMENT AND HOUSING COMMISSION  
DISABILITY REGULATIONS  
INITIAL STATEMENT OF REASONS**

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**

These regulations interpret the disability discrimination provisions of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), to conform to changes made by the following sources:

- The Prudence Kay Poppink Act of 2000 (Stats. 2000, c. 1049 ([A.B. 2222](#)), § 6; Gov. Code, §§ 12926, 12926.1 & 12940);
- The California Supreme Court’s decision in *Green v. State of California* (2007) 42 Cal. 4th 254 ([Green](#)); and
- The Genetic Information Non-discrimination Act of 2008 ([GINA](#)) (Stats. 2008, c. 10 (A.B. 1543), § 13) (Pub. Law 110-233).<sup>1</sup>

The Prudence Kay Poppink Act ([PKP Act](#)) affirmed that the California Legislature intended the FEHA to provide wider coverage and stronger protections to Californian applicants and employees with disabilities than the Americans with Disabilities Act of 1990 ([ADA](#)) (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.). The 2000 legislation stated that the ADA provided the “floor of protection” but not a ceiling for disability rights in employment. The [PKP Act](#) also made the failure to engage in the interactive process a separate violation, and adopted the Equal Employment Opportunity Commission’s (EEOC) interpretative guidance on the interactive process. Accordingly, these regulations also conform, to the extent permitted by California law, to the ADA, as amended by the ADA Amendment Act of 2008 ([ADAAA](#)) (Public Law 110-325), and to the EEOC’s recently revised [ADAAA interpretative regulations](#) (29 C.F.R. pt. 1630, et seq, eff. May 24, 2011) to ensure that the FEHA meets their “floor of protection,” and to allow

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<sup>1</sup> The Commission adopted these proposed amended disability regulations on October 3, 2011, before new amendments to the FEHA covering genetic characteristics and genetic information went into effect. (See Stats. 2011, c. 261 ([S.B. 559](#)), referred to as “Cal-GINA” and modeled after the federal Genetic Information Non-discrimination Act of 2008 (GINA), which the Commission had followed in crafting language about genetic information.) The Commission intends to incorporate any further changes necessitated by [S.B. 559](#) into subsequent amendments to these regulations after considering public comments it receives on this issue. For ease of reference, this Initial Statement of Reasons references the current, 2012 Government Code subsection numbers listed in section 12926, rather than the subsection numbers in effect when the Commission adopted these regulations in 2011. There were no substantive amendments to these definitional subsections.

employers, other covered entities, employees, and applicants to deal with familiar, consistent provisions wherever possible.

In proposing these regulations, the Commission relied on the Economic Impact Assessment it prepared pursuant to Government Code section 11346.3, subdivision (b), and any other documents identified within each proposed regulation.

**§ 7293.5, subd. (a) Statutory Source.**

This subdivision adds a reference to Government Code section 12926.1 added by the 2000 amendments to the FEHA (Stats. 2000, c. 1049 ([A.B. 2222](#)), § 6.).

**§ 7293.5, subd. (b) Statement of Purpose.**

The Commission substituted “assure” with “ensure” to correct this grammatical mistake. In order to reflect all of the purposes of the FEHA, the Commission added a reference to the three purposes Government Code section 12926.1 identified by the bill’s author, former Assembly Member Sheila Kuehl, in the Assembly Judiciary Committee’s Comments of April 11, 2000 regarding [A.B. 2222](#). To conform to Government Code section 12926.1, subdivision (b), the Commission also added that definitions are to be broadly construed and, reference the [ADAAA](#) to add that the determination of whether an individual has a disability should not require extensive analysis. The Commission anticipates that these amendments will refocus attention on the social and economic benefits of preventing discrimination against applicants and employees with disabilities and of providing reasonable accommodation for such individuals.

**§ 7293.5, subd. (c) Incorporation of General Regulations**

Unchanged.

**§ 7293.6. Definitions.**

The Commission reorganized this section to accommodate additional and amended definitions. The definitions in these proposed regulations interpret key terms or concepts used in Government Code sections 12920, 12926, 12926.1, and 12940, and these regulations, and clarify them for applicant, employees, employers, and other covered entities seeking to understand their rights and responsibilities under the Fair Employment and Housing Act’s provisions covering disability, including the 2000 amendments to FEHA. (Stats. 2000, c. 1049 [[A.B. 2222](#)], § 6.) The Commission anticipates these definitions will also help distinguish the differences between the FEHA and the ADAAA, and thus, will reduce litigation.

**§ 7293.6, subd. (a) “Disability”**

The Commission reorganized the definition of “Disability” into alphabetical order at section 7293.6, subdivision (c), of these regulations.<sup>2</sup>

**§ 7293.6, subd. (a) “Assistive Animal”**

The Commission added a definition of “assistive animal” and the minimum standards for assistive animals because “assistive animal” is a term referred to in section 7293.9, subdivision (d)(1)(C), as an example of reasonable accommodation. Section 7294.1,

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<sup>2</sup> All section citations are to the California Code of Regulations, title 2, unless stated otherwise.

subdivision (f), also provides the minimum standards for assistive animals that an employer can require before allowing an assistive animal into the workplace. The Commission adapted this definition from that used for “guide, signal and service dogs” in Civil Code section 54.1 to provide expanded coverage and to be consistent with both the EEOC’s interpretative guidance on the ADA that references “service animals” and California case law. (The EEOC’s Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (j)(5), app. § 1630.2, subd. (j)(1)(vi) [“...use of a *service animal*, job coach, or personal assistant would certainly be considered types of mitigating measures.”]; the EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at Question No. 16 [“An employee with a disability may need leave for a number of reasons related to the disability, including, but not limited to: . . . training a service animal (e.g., a guide dog).”]; *Auburn Woods I Homeowners’ Assn. v. Fair Empl. & Hous. Com.* (2004) 121 Cal.App.4th 1578, [a companion animal may be a reasonable accommodation for a mental disability].)

#### **§ 7293.6, subd. (a)(1)(A)-(D) Examples of Types of Assistive Animals**

This subpart provides clarifying examples of types of assistive animals expanded into subparts (A)-(D) for ease of reference.

#### **§ 7293.6, subd. (a)(2)(A)-(C) Minimum Standards for Assistive Animals**

This subpart provides minimum standards for assistive animals that the Commission adapted from those set by Assistance Dogs International, Inc. and expanded into subparts (A)-(C) for ease of reference. (See, <http://www.assistancedogsinternational.org/Standards/>) The Commission anticipates that this provision will strike a balance between the employee’s need for an assistive animal as a reasonable accommodation and the employer’s need to ensure that the assistive animal provides effective accommodation without disrupting the working environment.

#### **~~§ 7293.6, subd. (b) “Disability” does not include:~~**

The Commission reorganized the disability exceptions into alphabetical order at section 7293.6, subdivision (c)(9).

#### **§ 7293.6, subd. (b) “CFRA”**

The subdivision adds a definition of “CFRA” (the California Family Rights Act, officially entitled the Moore-Brown-Roberti Family Rights Act) (Gov. Code, § 12945.1 et seq.) because medical leave is used as an example of reasonable accommodation at section 7293.9, subdivision (b)(3). Although the definition references the current version of CFRA, the Commission intends the reference to include subsequent amendments.

#### **~~§ 7293.6, subd. (c) Homosexuality and bisexuality are not impairments~~**

The Commission eliminated the language indicating that “homosexuality and bisexuality are not impairments” as currently unnecessary clarification, reflecting evolving societal norms and changes to other provisions of the FEHA. For example, pre-1973, homosexuality was listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-II) as a mental disorder. In 1973, the American Psychiatric Association voted to remove homosexuality from the DSM-II. (See Bayer, R. (1987) *Homosexuality and American Psychiatry: The Politics of Diagnosis* (2nd Ed.). Princeton, NJ: Princeton University Press.) The language in the current FEHC disability regulations reflects and emphasizes this change.

Since then, the California Legislature has amended the FEHA to include protections against sexual orientation discrimination, and the definition of “sexual orientation” includes, at Government Code section 12926, subdivision (r), “heterosexuality, homosexuality, and bisexuality.” (Stats. 1999, c. 592 [A.B. 1001] § 3.7.) Thus, not only are homosexuality and bisexuality not considered “disorders,” they are a subset of a protected classification, “sexual orientation.”

#### **§ 7293.6, subd. (c) “Disability”**

The Commission reorganized the definition of “disability” from former section 7293.6, subdivision (a), into alphabetical order. The Commission also reorganized the disability exceptions from former section 7293.6, subdivision (b) into subpart (c)(9) of this subdivision for ease of reference.

The Commission added the requirement that “disability” shall be broadly construed to conform to both Government Code section 12926.1, subdivision (b), and the EEOC’s recently amended regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.1, subd. (c)(4) [“...the definition of ‘disability’ in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADAAA. The primary object of attention in cases brought under the ADAAA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.”].) This addition allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA meets the ADAAA’s “floor of protection,” as required by Government Code section 12926.1, subdivision (c).

#### **§ 7293.6, subd. (c)(1) “Mental Disability”**

The Commission reorganized the definition of “mental disability” from former section 7293.6, subdivision (a)(3), into alphabetical order. The Commission cross-referenced the definition of this term provided in Government Code section 12926, subdivision (j), for ease of reference. The Commission restated this definition in these regulations to provide the context for the references to “chronic or episodic” mental or psychological disorder or condition and “clinical depression and bipolar disorder” that the Commission added as examples of mental disabilities to conform to Government Code section 12926.1, subdivision (c). This allows interested parties to deal with familiar, consistent provisions.

#### **§ 7293.6, subd. (c)(1)(A) “Intellectual or Cognitive Disability”**

The Commission added “intellectual...disability” as an example of a “mental disability” to conform to the ADAAA’s “floor of protection,” as required by Government Code section 12926.1. The EEOC’s regulations interpreting the ADAAA include this term as an example of a “mental disability.” (29 C.F.R. pt. 1630.2, subd. (h)(2) [“Any mental or psychological disorder, such as an *intellectual disability* (formerly termed “*mental retardation*”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.”][emphasis added].)

The Commission added the reference to “cognitive” disabilities, a subset of the broad range of intellectual disabilities, in response to public comments that express inclusion was needed to

ensure coverage. As stated in this subpart, intellectual disabilities were formerly referred to as mental retardation. As a result, the public associates intellectual disabilities with such inherent conditions. Yet, employers deal more often with employees with normal IQ who have developed cognitive impairments (such as confusion, forgetfulness and difficulty concentrating) from brain injuries or medication side effects. The express inclusion of “cognitive” disabilities clarifies that such impairments are “mental disabilities” covered by the FEHA.

#### **§ 7293.6 , subd. (c)(1)(B) “Specific Learning Disability”**

The FEHA includes in its definition of “mental disability” the term “specific learning disability.” The definition of this term cross-references and conforms to the definition of “child with a disability” provided by the federal Individuals with Disabilities Education Act (“IDEA”) and its implementing regulations at part 300.8, title 34, of the Code of Federal Regulations. The Commission modified the IDEA definition by wordsmithing only - substituting “mental processes” for “psychological processes” to conform to the FEHA’s use of “mental disability” rather than “psychological disability.” No substantive changes in the IDEA definition are intended. Adopting this IDEA definition for use within the FEHA allows interested parties to deal with consistent, familiar terms and ensures that the FEHA conforms to federal law.

#### **§ 7293.6, subd. (c)(2) “Physical Disability”**

The Commission reorganized the definition of “physical disability,” from former section 7293.6, subdivisions (a)(1) and (e), into alphabetical order.

#### **§ 7293.6, subd. (c)(2)(A) “Affects one or more body systems:”**

The Commission added the reference to the “circulatory” system to conform to the ADA’s “floor of protection,” as required by Government Code, section 12926.1, subdivision (a). The EEOC’s regulations interpreting the ADA, include the circulatory system as a body system. (29 C.F.R. pt. 1630.2, subd. (h)(1) [“Any physiological disorder...affecting one or more body systems, such as ... circulatory...”].)

#### **§ 7293.6, subd. (c)(2)(B) “Limits a major life activity”**

The Commission reorganized this subpart from former section 7293.6, subdivision (e)(2). The Commission substituted “a major life activity” for “an individual’s ability to participate in major life activities” to conform to Government Code sections 12926, subdivisions (j)(1)(A) and (l)(1)(B), and 12926.1, subdivision (c), which require a limitation of only a single major life activity. Accordingly, this amendment corrected the previous inconsistency.

#### **§ 7293.6, subd. (c)(2)(C) “Examples of Disabilities”**

The Commission added this subpart to conform to Government Code section 12926.1, subdivision (c), which expressly included “chronic and episodic conditions” and the clarifying examples as “disabilities” under the FEHA. The Commission restated these examples of disabilities in these regulations for ease of reference. The express inclusion of chronic and episodic conditions as disabilities clarifies that health conditions with symptoms that wax and wane are still considered disabilities even when they have no present disabling effect provided that they limit a major life activity when active.

### **§ 7293.6, subd. (c)(3) “Special Education Health Impairment”**

The Commission added “special education health impairment” as a “disability” to conform to the definition of individuals with disabilities under the federal Individuals with Disabilities Education Act (IDEA), and its implementing regulations. The Commission also added a cross-reference to the IDEA definition for ease of reference. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.8.) Adopting this IDEA definition for use within the FEHA allows interested parties to deal with consistent, familiar terms, and ensures that the FEHA conforms to federal law.

### **§ 7293.6, subd. (c)(4) “Record or History of Disability”**

The definition of “record or history of disability” clarifies the meaning of this phrase as used in Government Code section 12926, subdivisions (j)(3) and (l)(3). The Commission adapted this definition from the EEOC’s regulations to be as consistent with the ADAAA as California law permits. (29 C.F.R. pt. 1630.2, subd. (k) [“Has a record of such an impairment — (1) *In general.* An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities....”].) The Commission eliminated the reference to “substantially” limits because, unlike the ADAAA, the Government Code section 12926.1, subdivision (d), requires only a limitation of a major life activity. This definition allows interested parties to deal with familiar provisions while maintaining the FEHA’s greater protections.

### **§ 7293.6, subd. (c)(5) “Regarded As”, “Perceived As”, or “Treated As” Having a Disability.**

The Commission reorganized the definition of “regarded as having a disability” from former section 7293.6, subdivision (e)(2)(C), putting the definition into alphabetical order. The definition interprets the FEHA terms stated at Government Code sections 12926, subdivisions (j)(4), (l)(4), and (n), and 12926.1, subdivision (b). The Commission adapted this definition from the EEOC’s definition of “regarded as” to be as consistent with the ADAAA and its regulations as California law permits. (29 C.F.R. pt. 1630.2, subd. (l)(1) [“[A]n individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment”].) The Commission eliminated the reference to “substantially” limits because, unlike the ADAAA, the Government Code section 12926.1, subdivision (d), requires only a limitation of a major life activity. This definition allows interested parties to deal with familiar provisions while maintaining the FEHA’s greater protections.

The Commission also added a reference to “perceived as” to conform to Government Code sections 12926, subdivision (n), and 12926.1, subdivision (b), and a reference to “treated as” to conform to Government Code section 12926, subdivisions (j)(4) and (l)(4). In response to public inquiries seeking clarification of any distinctions, the terms “regarded as”, “perceived as”, or “treated as” are grouped together to signal that they may be used interchangeably. The Commission further amended the EEOC’s definition by adding “special education health impairment” to the list of disabilities for internal consistency with section 7293.6, subdivision (c)(1)(B).

**§ 7293.6, subd. (c)(6) “Regarded As,” “Perceived As,” or “Treated As” Having a Potential Disability.**

The FEHA includes “being “regarded as”, “perceived as”, or “treated as” having a potential disability” by the employer or other covered entity in its definition of “disability”. The definition interprets the FEHA terms stated at Government Code sections 12926, subdivisions (j)(4), (l)(4), and (n), and 12926.1, subdivision (b). The Commission reorganized this definition from former section 7293.6, subdivision (e)(2)(D), into alphabetical order. The Commission amended this definition by adding a reference to “perceived as” to conform to Government Code section 12926.1, subdivision (b), and by adding a reference to “treated as” to conform to Government Code section 12926, subdivisions (j)(5) and (l)(5). In response to public inquiries seeking clarification of any distinctions, the Commission grouped together the terms “regarded as”, “perceived as” or “treated as” to signal that these terms may be used interchangeably. The Commission further amended the definition by adding “special education health impairment” to the list of disabilities for internal consistency with section 7293.6, subdivision (c)(1)(B).

**§ 7293.6, subd. (c)(7) “Medical Condition”**

The Commission reorganized the definition of “medical condition” from former section 7293.6, subdivisions (a)(3) and (g), into alphabetical order. The Commission added “genetic characteristics” as a “medical condition” to conform to both Government Code section 12926, subdivision (i)(2) and the amendments to Title VII necessitated by the Genetic Information Non-discrimination Act of 2008 (“GINA”) (Pub. Law 110-233). The Commission expanded the definition into subparts (A)-(B) to accommodate this addition and for ease of reference.

**§ 7293.6, subd. (c)(7)(A) Cancer-Related Impairment**

The Commission reorganized this definition from former section 7293.6, subdivision (g), into alphabetical order. The Commission added “physical and mental” before “health impairment” to clarify that both types of impairments are covered. The public readily associates physical impairments, such as hair loss, fatigue, nausea, and skin problems as side-effects of chemotherapy treatment of cancer. Yet, mental impairments, such as memory and cognitive dysfunctions, are also common, but often overlooked, side-effects of chemotherapy. (See, e.g., chemotherapy side-effects on the websites of the National Cancer Institute at the National Institutes of Health at <http://www.cancer.gov/cancertopics/coping/chemo-side-effects/memory>; and the Cancer Centers of America at <http://www.cancercenter.com/after-care-services/cognition-memory.cfm>) The Commission also amended the definition by wordsmithing to update the language and syntax. No substantive changes are intended.

**§ 7293.6, subd. (c)(7)(B) Genetic Characteristic**

The Commission added “a genetic characteristic” as a “medical condition” to conform to both Government Code section 12926, subdivision (i)(2), and the amendments to Title VII necessitated by the Genetic Information Non-discrimination Act of 2008 (“GINA”) (Pub. Law 110-233). This addition allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA meets the “floor of protection” provided by the ADAAA, as required by Government Code section 12926.1, subdivision (a).

**§ 7293.6, subd. (c)(8) Intersection of the Definitions of “Disability” in FEHA and ADA.**

The Commission reorganized the explanation of the intersection of the definitions of “disability” provided in the FEHA and the ADA from former section 7293.6, subdivision (a)(4), into alphabetical order. The Commission amended the definition by wordsmithing to update the cross-references and to conform to the format of the other definitions. No substantive changes are intended.

**§ 7293.6, subd. (c)(9) “Disability” Exclusions**

The Commission reorganized the disability exclusions from former section 7293.6, subdivision (b), into a subpart of the definition of “disability” for clarity. The Commission expanded the relocated disability exclusions into subparts A-B to accommodate the addition of the “temporary disability” exclusion.

**§ 7293.6, subd. (c)(9)(A) “Sexual Behavior Disorders”**

The Commission amended this relocated subpart by subsuming the examples of specific “sexual behavior disorders” into a cross-reference to the “sexual behavior disorders” disability exceptions provided in Government Code section 12926, subdivisions (j) and (l), and a cross-reference to the definition of this term in section 7293.6, subdivision (p), for brevity, internal consistency, and ease of reference.

**§ 7293.6, subd. (c)(9)(B) “Temporary Disability”**

The Commission added the “temporary disability” exception to conform to the “broad definitions of physical disability, mental disability, and medical condition” required by Government Code section 12926.1, and to provide the clarification sought by the court in *Diaz v. Federal Express Corp.* (C.D. Cal. 2005) 373 F.Supp. 2d 1034, 1051-1052.

~~**§ 7293.6, subd. (d) Unlawful use of controlled substances or other drugs**~~

The Commission reorganized this disability exception into alphabetical order at section 7293.6, subdivision (c)(9), for clarity and ease of reference.

~~**§ 7293.6, subd. (e)(d) “Disorder”**~~

The Commission added the definition of “disorder” because this term is used throughout the regulations. The Commission adapted the definition from Princeton University’s WordNet 3.0 definition of this term to include “mental” as well as “physical” disorders. (see, “disorder” at <http://wordnet.princeton.edu/> [“disorder,...a physical condition in which there is a disturbance of normal functioning”].) This addition clarifies a key term for interested parties seeking to understand their rights and responsibilities under the FEHA.

~~**§ 7293.6, subd. (e) “Physical Disability”**~~

The Commission reorganized the definition of “physical disability” into alphabetical order at section 7293.6, subdivision (c)(2).

**§ 7293.6, subd. (e) “Essential Job Functions”**

The Commission added a definition of “essential job functions” and cross-referenced the fuller definition of “essential functions of the job” provided at section 7293.8, subdivision (g) [“Defenses”] for ease of reference. Public inquires indicated that there had been difficulty

locating the definition, and that interested parties were uncertain as to whether these terms are synonymous. This addition clarifies that “essential job functions” and “essential functions of the job” are used interchangeably in these regulations. For internal consistency, the Commission adapted the definition of this term from the definition of “essential functions” provided at Government Code section 12926, subdivision (f). For brevity, the Commission omitted the second sentence (“Essential functions’ do not include the marginal functions of the position.”) as unnecessary in light of the cross-reference to the fuller definition provided at section 7293.8, subdivision (g).

**§ 7293.6, subd. (f) “Mental Disability”**

The Commission reorganized the definition of “mental disability” into alphabetical order at section 7293.6, subdivision (c)(1).

**§ 7293.6, subd. (f) “Family Member”**

The Commission added the definition of “family member” to conform to the amendments to Title VII necessitated by the Genetic Information Non-discrimination Act of (2008) (“GINA”) (Pub. Law 110-233). This addition clarifies a key term used in these regulations, and allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA conforms to the ADAAA’s “floor of protection,” as required by Government Code section 12926.1, subdivision (c). The Commission adapted the EEOC’s definition of this term in its regulations interpreting the ADAAA by changing “to the first to fourth degree” to “from the first to fourth degree” to correct the grammatical error. (29 C.F.R. pt. 1635.3, subd. (a) (2009).

**§ 7293.6, subd. (g) “Medical Condition”**

The Commission reorganized the definition of “medical condition” into alphabetical order at section 7293.6, subdivision (c)(7).

**§ 7293.6, subd. (g) “FMLA”**

The Commission added the definition of “FMLA” because medical leave is used as an example of a reasonable accommodation in section 7293.9, subdivision (d)(3). Although the definition references the current version of the FMLA and its regulations, the Commission intends it to include any and all subsequent amendments to the FMLA or its regulations.

**§ 7293.6, subd. (h) “Health Care Provider”**

The Commission added a definition of “health care provider.” The Commission adapted the definition of this term from the FMLA’s regulations (29 C.F.R. pt. 825.800) to conform to the definition of “health care provider” that the Commission proposes to use in its revised pregnancy regulations at California Code of Regulations, title 2, section 7291.2, subdivision (m). This addition clarifies a key term used throughout these regulations, and allows interested parties to deal with familiar, consistent provisions. The Commission expanded this definition into subparts (1) – (3) for clarity and ease of reference.

**§ 7293.6, subd. (h)(1) “Licensed Physician”**

The definition of “health care provider” includes licensed physicians. The Commission adopted the definition of this term from the FMLA regulations (29 C.F.R. pt. 825.800 [“Health Care Provider” definition at subpart (i)] “A doctor of medicine or osteopathy who is authorized to

practice medicine or surgery (as appropriate) by the State in which the doctor practices”].) and its recently revised pregnancy regulations. This allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA conforms to federal law.

**§ 7293.6, subd. (h)(2) “Other Persons Capable of Providing Health Care”**

The FEHA also includes “other persons capable of providing health care” as a “health care provider.” The Commission added clarifying examples of persons other than licensed physicians who qualify as “health care providers” under the FEHA. The Commission adopted the definition of this term from the FMLA regulations (29 C.F.R. pt. 825.800 [“Health Care Provider” definition at subparts (2)(i) & (ii)].) and its recently revised pregnancy regulations. This allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA conforms to federal law.

**§ 7293.6, subd. (h)(1) “Person Accepted by the Health Care Plan’s Benefits Manager”**

The FEHA includes “a health care provider from whom an employer, or other covered entity, or a group health plan’s benefit manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits” in its definition of “health care provider.” The Commission included this provision to conform to the FMLA’s definition of this term. (29 C.F.R. pt. 825.800 [“Health Care Provider” definition at subpart (2)(iv)].) This allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA conforms to federal law.

**§ 7293.6, subd. (i) “Interactive Process”**

The Commission added the definition of “interactive process” because the 2000 amendment to the FEHA added a failure to engage in a timely, good faith, interactive process as a separate, independent violation of the FEHA under Government Code section 12940, subdivision (n). Although the ADAAA does not provide a separate cause of action for failure to engage in the interactive process, the Legislature adopted the EEOC’s interpretative guidance on the interactive process, and affirmed its importance in determining reasonable accommodation. (Gov. Code, § 12926.1, subd. (e).) Accordingly, the definition of this term conforms to both Government Code section 12940, subdivision (n), and the EEOC’s interpretative guidance on the interactive process. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at Questions 5-11.) The Commission cross-referenced the regulations at section 7294.1 that interpret the interactive process for ease of reference.

**§ 7293.6, subd. (j) “Major Life Activities”**

The Commission reorganized the definition of “major life activities” from former subpart (e)(2)(A), into alphabetical order. The Commission amended this definition to update the language, and added the broad construction requirement to conform to Government Code section 12926.1, subdivision (c). This definition clarifies that, unlike the ADAAA, but consistent with the FEHA’s purpose to govern employment, the FEHA continues to give primary attention to those life activities that affect employability, or otherwise present a barrier to employment or advancement. (The EEOC’s Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (i), app. § 1630.2, subd. (i) [“Major life activities are those basic activities that the average person in the general population can perform with little or no

difficulty”].) The Commission anticipates that this provision will reduce litigation by preventing unnecessary inquiry into whether the activity in question is “integral to one’s daily existence” in FEHA disability cases.

#### **§ 7293.6, subd. (j)(1) Examples of Major Life Activities**

This subpart provides a non-exhaustive list of clarifying examples of major life activities. The Commission added “standing, sitting, reaching, lifting, bending, learning, reading, concentrating, thinking, communicating, and interacting with others” to the list previously provided at former section 7293.6, subdivision (e)(2)(a), to conform to the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.2, subd. (i)(1)(i) [“(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to: (i) 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...”].) This amendment allows interested parties to deal with familiar, consistent provisions.

#### **§ 7293.6, subd. (j)(2) Major Life Activities Include Major Bodily Functions**

The Commission added “bodily functions” as a major life activity to conform to the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.2, subd. (i)(1)(ii) [“Major life activities include by are not limited to...[t]he operation of a major bodily function...”] This amendment allows interested parties to deal with familiar, consistent provisions, and ensures that the FEHA meets the ADAAA’s “floor of protection,” as required by Government Code section 12926.1, subdivision (a).

#### **§ 7293.6, subd. (j)(3) “Limits”**

The Commission added a definition of “limits” to conform to Government Code sections 12926, subdivisions (j)(1)(B) and (l)(1)(B)(ii), and 12926, subdivision (c). [Gov. Code, § 12926, subs. (j)(1)(B) and (l)(1)(B)(ii) [“...limits a major life activity if it makes the achievement of the major life activity difficult”]. This addition reinforces one of the major differences between the FEHA and the ADAAA, which requires that an impairment “substantially limit” a major life activity. (29 C.F.R. pt. 1630.2, subd. (j).) The Commission expanded the definition of this term into subparts (A)-(E) for clarity and ease of reference.

#### **§ 7293.6, subd. (j)(3)(A) “Difficulty” Measured Against the General Population**

The Commission adopted the “general population” measurement standard for “difficulty” from the EEOC’s interpretative regulations to conform to the “floor of protection” provided by the ADA, as required by Government Code section 12926.1, subdivision (a). (29 C.F.R. pt. 1630.2, subd. (i) [“difficulty” is measured against “most people in the general population”].) This addition allows interested persons to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (j)(3)(B) “Difficulty” Measured by a Common-Sense Standard**

The Commission adopted the “common-sense” measurement standard for “difficulty” from the EEOC’s regulations to conform to the “floor of protection” provided by the ADAAA, as required by Government Code section 12926.1, subdivision (a). (Gov. Code, § 12926.1, subd. (a); 29 C.F.R. pt. 1630.2, subd. (j)(2)(iv) [limitation generally measured using a “common sense standard, without resorting to scientific or medical evidence.”].) This addition allows interested persons to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (j)(3)(C) “Limits” Measured Without Regard to “Mitigating Measures”**

The Commission added the general exclusion of “mitigating measures” to conform to Government Code section 12926.1, subdivision (c), and for ease of reference. The EEOC’s regulations interpreting the ADAAA now conform to the FEHA’s approach of disregarding any mitigating measures when analyzing a limitation. (Gov. Code, § 12926.1, subd. (c); 29 C.F.R. pt. 1630.2, subd. (j)(1)(vi) [“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures...”].) This allows interested parties to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (j)(3)(D) “Working”**

The Commission added the definition of “working” to conform to Government Code section 12926.1, subdivision (c), and for ease of reference. This addition clarifies one of the major differences between the ADAAA and the FEHA. (Gov. Code, § 12926.1, subd. (c); 29 C.F.R. pt. 1630.2, subd. (j), app. § 1630.2, subd. (j) [“In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities.”]

### **§ 7293.6, subd. (j)(3)(E) “Limits” Regarding Episodic or Remitted Impairments**

The Commission added this subpart to conform to Government Code section 12926.1, subdivision (c), which expressly added “episodic” conditions as disabilities. Because the symptoms of episodic conditions wax and wane, the Commission clarified that the limitations are measured when the condition is active. The Commission adapted the EEOC’s interpretative regulations by omitting “substantially” before “limit” to conform with Government Code sections 12926, subdivisions (j)(1) and (l)(1)(B), and 12926.1, subdivision (c), which require only a “limitation” of a major life activity. (29 C.F.R. pt. 1630.2, subd. (j)(1)(vii) [“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”].)

### **§ 7293.6, subd. (k) “Medical Examination”**

In response to public inquiries for clarification, the Commission added the definition of “medical examination” to provide guidance on what constitutes a medical examination for purposes of the FEHA. The definition is as consistent with the EEOC’s *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* (EEOC Notice 915.002, at B2) (Jul. 27, 2000) as California law allows. (See, e.g., “California’s medical privacy protections” listed in section 7293.8, subdivision (e)(1).)

### **§ 7293.6, subd. (l) “Mitigating Measure”**

The Commission added the definition of a “mitigating measure” because it is a key term used in Government Code sections 12926, subdivisions (j)(1)(A), (l)(1)(B)(i), and 12926.1, subdivision (c), and throughout these regulations. The definition of this term clarifies that anything that ameliorates the limitations of a disability is a “mitigating measure.”

### **§ 7293.6, subd. (l)(1) Examples of Mitigating Measures**

The Commission added a non-exhaustive list of clarifying examples of mitigating measures in subparts (1)(A)-(F) to conform to the “floor of protection” provided by the ADA, as required by Government Code section 12926.1, subdivision (a). (29 C.F.R. pt. 1630.2, subds. (j)(5) [non-exhaustive list of examples of mitigating measures, including the new subpart (j)(5)(v) that added “psychotherapy, behavioral therapy, or physical therapy” as examples of mitigating measures].) This allows interested person to deal with familiar, consistent provisions. The Commission substituted the term “assistive animal” for “service animal” to update the language, and for internal consistency.

### **§ 7293.6, subd. (l)(1)(A) Medications, etc.**

The Commission added medications, etc. as a type of mitigating measure to conform to the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.2, subd. (j)(5)(i) [non-exhaustive list of examples of this type of mitigating measure].) This allows interested persons to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (l)(1)(B) Assistive Devices, etc.**

The Commission added assistive devices as a type of mitigating measure to conform to the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.2, subd. (j)(5)(ii)(B) [non-exhaustive list of examples of this type of mitigating measure].) This allows interested person to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (l)(1)(C) Reasonable Accommodation or Auxiliary Aids & Services**

The Commission added auxiliary aids and services as a type of mitigating measure to conform to the ADAAA and the EEOC’s interpretative regulations and guidance. (42 U.S.C. § 12103, subd. (1); 29 C.F.R. pt. 1630.2, subd. (j)(5)(iii) [non-exhaustive list of examples of this type of mitigating measure].) This allows interested person to deal with familiar, consistent provisions. The Commission expanded the list into subparts (1)-(4) to provide a clarifying example of each subcategory of this type of mitigating measure.

### **§ 7293.6, subd. (l)(1)(D) Learned Behavioral or Adaptive Neurological Modifications**

The Commission included learned behavior as a type of mitigation measure to conform to the ADAAA and the EEOC’s interpretative regulations and guidance. (42 U.S.C. § 12103, subd. (1); 29 C.F.R. pt. 1630.2, subd. (j)(5)(iv) [non-exhaustive list of examples of this type of mitigating measure].) This allows interested person to deal with familiar, consistent provisions.

### **§ 7293.6, subd. (l)(1)(E) Surgical Interventions**

The FEHA includes “surgical interventions” as a type of a “mitigating measure.” The Commission added this subpart to clarify that surgery that permanently eliminates a disability is excluded as a mitigating measure.

**§ 7293.6, subd. (l)(1)(F) Psychotherapy, Behavioral Therapy, or Physical Therapy**

The Commission included “therapy” as a type of mitigating measure to conform to the ADAAA and the EEOC’s interpretative regulations and guidance. (42 U.S.C. § 12103, subd. (1); 29 C.F.R. pt. 1630.2, subd. (j)(5)(v) [non-exhaustive list of examples of this type of mitigating measure].) This allows interested person to deal with familiar, consistent provisions.

**§ 7293.6, subd. (m) “Qualified Individual”**

The Commission added a definition of “qualified individual” to conform to the California Supreme Court’s holding in *Green v. State of California* (2007) 42 Cal.4th 254, 263, which makes it a part of the applicant’s or employee’s burden in a disability discrimination claim to prove s/he was an otherwise qualified individual with a disability. To conform to Government Code section 12926.1, subdivision (a), the Commission adopted the definition of this term from the EEOC’s regulations interpreting the ADA. (29 C.F.R. pts. 1630.2, subd. (m) [“The term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition] and 1630.3 [excluding an illegal drug user, but including a rehabilitated former illegal drug user, as a “qualified individual”].) This allows interested person to deal with familiar, consistent provisions.

**§ 7293.6, subd. (n) “Reasonable Accommodation”**

The Commission added the definition of “reasonable accommodation” because failure to provide reasonable accommodation is a separate violation of the FEHA at Government Code section 12940, subdivision (m). The Commission adapted the definition of this term from the EEOC’s regulations interpreting the ADA. (29 C.F.R. pt. 1630.2, subd. (o)(1).) This allows interested person to deal with familiar, consistent provisions.

**§ 7293.6, subd. (n)(1) “Reasonable Accommodation for an Applicant”**

The Commission adapted the definition of this term from the EEOC’s regulations interpreting the ADA. (29 C.F.R. pt. 1630.2, subd. (o)(1)(i) [“Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires”].) This allows interested person to deal with familiar, consistent provisions. The Commission substituted “effective in enabling” for “enable” to emphasize that to be an “accommodation,” the modification or adjustment must overcome the limitation. (*U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 400 [“An ineffective “modification” or “adjustment” will not accommodate a disabled individual’s limitations”].)

**§ 7293.6, subd. (n)(2) “Reasonable Accommodation for an Employee”**

The Commission adapted the definition of this term from the EEOC’s regulations interpreting the ADA. (29 C.F.R. pt. 1630.2, subd. (o)(1)(ii) [“Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position”].) This allows interested person to deal with familiar, consistent provisions. The Commission substituted “effective in enabling” for “enable” to

emphasize that to be an “accommodation,” the modification or adjustment must overcome the limitation. (*U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 400 [“An ineffective “modification” or “adjustment” will not accommodate a disabled individual's limitations”].)

### **§ 7293.6, subd. (o) “Sexual Behavior Disorders”**

The definition of “sexual behavior disorders” now excludes references to transvestism, transsexualism and gender identity disorders to narrow an overly broad list now out of date with current protections under the FEHA. For example, in 2004, the California Legislature amended the FEHA’s definition of “sex” to incorporate the Penal Code’s definition of “gender” (Pen. Code, § 422.56).<sup>3</sup>

### **§ 7293.6, subd. (p) Undue Hardship**

The Commission restated the definition of “undue hardship” provided at Government Code section 12926, subdivision (t), for internal consistency. The Commission also added a cross-reference in its interpretative regulation at section 7294.0, subdivision (b), for ease of reference.

### **§ 7293.7. Establishing Disability Discrimination.**

The Commission amended the essential elements of a disability discrimination claim to conform to *Green v. State of California* (2007) 42 Cal.4th 254, 263, which makes it a part of plaintiff’s burden in a disability discrimination claim to prove s/he was a “qualified individual” with a disability. The Commission also added a cross-reference to the affirmative defenses provided in the regulations for ease of reference.

### **§ 7293.8 Defenses**

The Commission renumbered this section to accommodate the rescinding of former section 7293.8, subdivision (b), “Inability to Perform” defense, necessitated by the California Supreme Court’s decision in *Green v. State of California* (2007) 42 Cal.4th 254, which shifted the burden of proof of this element from the employer or other covered entity to the employee or applicant.

### **§ 7293.8, subd. (a) Cross-Reference to Employment Discrimination Defenses**

The Commission substituted “in these disability regulations” for “herein” to update the language and to provide clarity. The Commission amended the cross-reference to the affirmative defenses to employment discrimination provided at section 7286.7 to specify the section number, rather than just the subchapter, for ease of reference.

### **§ 7293.8, subd. (b) Inability to Perform**

The Commission rescinded this former affirmative defense to conform to *Green v. State of California* (2007) 42 Cal.4th 254, 263, which makes it a part of plaintiff’s burden of proof in a disability discrimination claim to prove s/he was a “qualified individual” with a disability, who is able to perform the essential functions of the job held or desired.

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<sup>3</sup> As of 2012, the Fair Employment and Housing Act was amended to incorporate the Penal Code definition regarding gender identity and gender expression into FEHA’s definition of “sex” which now provides, in relevant part: “‘Gender’ means sex, and includes a person’s gender identity and gender expression. ‘Gender expression’ means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” (Gov. Code § 12926, subd. (q); Stats. 2011, c. 261 (S.B. 599), § 9.)

**§ 7293.8, subd. (e)(b) Health And Safety Of An Individual With A Disability**

The Commission amended this affirmative defense by adding fulfillment of the interactive process as an essential element of the defense to conform to Government Code section 12926.1, subdivision (e). The amendment clarifies that an employer has the burden of proving that, after engaging in the interactive process, there was no reasonable accommodation which would allow the employee or applicant to perform the essential functions of the position in question because of his or her disability as part of the “health and safety of an individual with a disability” affirmative defense.

**§ 7293.8, subd. (d)(c) Health and Safety of Others**

The Commission amended this affirmative defense by adding fulfillment of the interactive process as an essential element of the defense to conform to Government Code section 12926.1, subdivision (e). The amendment clarifies that an employer has the burden of proving that, after engaging in the interactive process, there was no reasonable accommodation which would allow the employee or applicant to perform the essential functions of the position in question because of his or her disability as part of the “health and safety of others” affirmative defense.

**§ 7293.8, subd. (e)(d) Future Risk**

The Commission eliminated “and the individual is able to safely perform the job over a reasonable length of time. A “reasonable length of time” is to be determined on an individual basis” from the original regulation because it believed that this language produced greater confusion rather than greater clarity.

**§ 7293.8, subd. (f)(e) Factors for Consideration**

The Commission amended this subdivision by inserting the term “subdivisions” in the cross-reference for internal consistency.

**§ 7293.8, subd. (f)(e)(1) Limitations of the Disability**

The Commission amended this subpart by substituting “limitation(s)” for “nature” to conform to:

- Article 1, section 1 of the California Constitution and Civil Code section 56 et seq., that protect an employee’s right to privacy of medical information;
- Government Code section 12940, subdivision (f)(1), which prohibits inquiry into the “nature and severity” of a disability;
- Civil Code section 56.10, subdivision (c)(8)(B), which limits the disclosure of private medical information to an employer to a description of “the functional limitations of the patient that may entitle the patient to leave from work or limit a patient’s fitness to perform his or her present employment, provided no statement of cause is included in the information”;
- *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 410-411 [employer violated Civ. Code, § 56.20, subd. (c), and employee’s right to privacy by receiving from its medical examiners disclosure of the employee’s medical information that exceeded the limits set by Civ. Code, § 56.10, subd. (c)(8)(B).]; and
- The CFRA regulations at California Code of Regulations, title 2, sections 7297.4, subdivision (b)(2)(A)(1) [“The employer may not ask the employee to provide additional

information beyond that allowed by these regulations.”] and 7297.11 [“Employers may also use any other certification forms...provided the health care provider does not disclose the underlying diagnosis to the serious health condition without the consent of the employee.”].

These stronger protections for privacy of medical information provided by California law are referred to collectively in this Initial Statement of Reasons as “California’s medical privacy protections.” This amendment clarifies that, consistent with California’s medical privacy laws, the FEHA does not require an applicant or employee to disclose the diagnosis of the health condition underlying his or her disability. In making this amendment, the Commission was also mindful of the distinction between a disability and the limitation(s) resulting from it. (*Taylor v. Principal Financial Group, Inc.* 93 F.3d 155, 164 (5th Cir. 1996) [“[I]t is important to distinguish between an employer’s knowledge of an employee’s disability versus an employer’s knowledge of any limitations experienced by the employee as a result of that disability. This distinction is important because the ADAAA requires employers to reasonably accommodate limitations, not disabilities.”].)

The Commission is also concerned with avoiding the stigma that attaches to some diseases and disorders. (See, e.g. *Dept. Fair Empt. & Hous. v. Avis Budget Group* (Oct. 19, 2010) No. 10-05-P [2010 WL 4901733 (Cal.F.E.H.C.)] [employer revoked employee’s reasonable accommodation and terminated her employment after employee disclosed that her need for accommodation arose from her mental disability].)

The Commission considered, but rejected utilizing the word “nature” for “limitation,” believing that California’s medical privacy protections required this result.

#### **§ 7293.8, subd. (f)(2) Length of the Training Period**

The Commission added the phrase “for the position” to the original regulation to clarify that that the “length of the training” relates to the position held or desired by the applicant or employee. To resolve any ambiguity or uncertainty, the Commission preferred expressly to state that “length of the training” relates to the position held or desired rather than relying on this implication.

#### **§ 7293.8, subd. (g)(f) Essential Functions**

The Commission amended the definition of “essential functions” by relocating the reference to “marginal functions” to subpart (5) of this subdivision. The definition of this term conforms to EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.2, subd. (n) [“The term “essential functions” means the fundamental job duties...”].) This allows interested parties to deal with familiar, consistent provisions.

#### **§ 7293.8, subd. (g)(f)(1) Factors for Consideration of Essential Functions**

Unchanged.

#### **§ 7293.8, subd. (g)(f)(1)(A) Job Exists to Perform Function**

Unchanged.

**§ 7293.8, subd. (g)(f)(1)(B) Limited Number of Employees to Assume Function**  
Unchanged.

**§ 7293.8, subd. (g)(f)(1)(C) Specialized Nature of the Function**  
Unchanged.

**§ 7293.8, subd. (g)(f)(2) Evidence of Whether A Function is Essential**  
Unchanged.

**§ 7293.8, subd. (g)(f)(2)(A) Employer's or Other Covered Entity's Judgment**  
The Commission added “or other covered entity's” after “employer's” for internal consistency.

**§ 7293.8, subd. (f)(2)(B) Job Description**  
The Commission eliminated the original regulatory language copied verbatim from Government Code section 12926, subdivision (f)(2)(B), that required the written job description to be “prepared before advertising or interviewing applicants for the job,” and substituted “accurate, current written job descriptions.” The original regulatory language also conformed to the EEOC's interpretative regulations and guidance. (29 C.F.R. pt. 1630.2, subd. (n)(3)(ii) [“Written job descriptions prepared before advertising or interviewing applicants for the job].)

Nonetheless, the Commission is concerned that some employers use out-of-date job descriptions that do not accurately reflect the job duties or job functions that the employee actually performs. (See, e.g., *Dept. of Fair Empt. & Hous. v. Air Canada, Inc.* (July 14, 2011) No. 11-07-P, [2011 WL 4424426 (Cal.F.E.H.C.)].) The Commission anticipates that this amendment will encourage employers to update job descriptions frequently and accurately, while protecting an applicant or employee from the employer introducing inaccurate, out-of-date job descriptions.

**§ 7293.8, subd. (f)(2)(C) Time Spent Performing the Function**  
Unchanged.

**§ 7293.8, subd. (f)(2)(D) Consequences of Non-Performance**  
The Commission added to the original regulatory language copied verbatim from Government Code section 12926, subdivision (f)(2)(B), by inserting “legitimate business” before “consequences” to clarify that an employer may not use any consequence as a factor for consideration. The original regulatory language also conformed to the EEOC's interpretative regulations and guidance. (29 C.F.R. pt. 1630.2, subd. (n)(3)(iv) [“The consequences of not requiring the incumbent to perform the function”].) To resolve any ambiguity or uncertainty, the Commission preferred to expressly state that “legitimate business” modifies “consequence,” rather than relying on this implication.

**§ 7293.8, subd. (f)(2)(E) Collective Bargaining Agreement Terms**  
Unchanged.

**§ 7293.8, subd. (f)(2)(F) Past Incumbents' Work Experience In the Job**  
Unchanged.

**§ 7293.8, subd. (f)(2)(G) Incumbents' Work Experience In Similar Jobs**  
Unchanged.

**§ 7293.8, subd. (f)(2)(H) References to the Job Function in Prior Performance Reviews**  
The Commission added “reference to the importance of the performance of the job function in prior performance reviews” as evidence of whether a job function is essential. The Commission anticipates that such references in performance reviews will give a more realistic list of evolving job functions actually performed by an employee than a job description written years before.

**§ 7293.8, subd. (f)(3) “Essential Functions” Exclude “Marginal Functions”**  
The Commission reorganized the definition of “marginal functions” from section 7293.8, subdivision (g), to this subpart for ease of reference. The Commission amended the definition of this term to conform to section 7293.8, subdivision (f)(1)(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.”], which was copied verbatim from EEOC’s Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630, subd. (n)(ii). This allows interested parties to deal with familiar, consistent provisions.

In response to public comments, the Commission also clarified that the FEHA definition of “marginal functions” includes functions that can be readily reallocated. (See, similarly, the EEOC’s Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (o), app. § 1630.2, subd. (o) [“An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions.”].)

**§ 7293.9. Reasonable Accommodation.**

The Commission substantially reorganized this section to provide more guidance on reasonable accommodation. The provisions are as consistent with the EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) as the FEHA’s broader protections and California’s medical privacy protections allow. This allows interested parties to deal with familiar, consistent provisions whenever possible.

**~~§ 7293.9, subd. (a) Examples of Reasonable Accommodation.~~**

The Commission relocated this subdivision to section 7293.9, subdivision (d), to allow the former preamble to be placed at section 7293.9, subdivision (a), for internal consistency.

**§ 7293.9, subd. (a) Affirmative Duty**

The Commission relocated this subdivision from the former preamble, and amended it to emphasize the “affirmative” nature of the employer’s duty to provide reasonable accommodation. (*Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 950-951 [An employer has an “affirmative duty” to provide reasonable accommodation to an employee with a

known disability].) The Commission substituted “an employer” for “any employer” to correct the grammar, and substituted “applicant or employee” for “individual” for internal consistency. The Commission added a reference to the “interactive process” to conform to Government Code section 12926.1, subdivision (e), which affirmed the importance of this process in determining reasonable accommodation.

**§ 7293.9, subd. (b) Undue Hardship**

The Commission reorganized this subdivision on undue hardship to its own separate section (§ 7294.0) for ease of reference and to signal that the burden of proof shifts to the employer to prove this affirmative defense.

**§ 7293.9, subd. (b)(1)-(3) “Accommodation”**

The Commission added this subdivision to provide measurement standards for determining whether the modification or adjustment provided by the employer or other covered entity is effective at overcoming the limitation, and thus constitutes an “accommodation.” The Commission adapted these measurement standards from EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at “General Principles: Reasonable Accommodation.” This allows interested parties to deal with familiar, consistent provisions. The Commission substituted “are effective in enabling” for “enable” because the Commission wished to stress that to constitute an “accommodation,” the modification or adjustment be effective at overcoming the limitation. (*U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 400 [“An ineffective “modification” or “adjustment” will not accommodate a disabled individual's limitations”].) These various measurement standards were expanded in subparts (1)-(3) to provide clarity and ease of reference.

**§ 7293.9, subd. (e) Accessibility Standards**

The Commission relocated this section to section 7293.9, subdivision (e), to allow examples of reasonable accommodation to follow its definition as closely as possible.

**§ 7293.9, subd. (c) No Lowering of Standards Required.**

The Commission added this subdivision to conform to the EEOC’s guidance interpreting the ADA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at Question No. 19.) This allows interested parties to deal with familiar, consistent provisions. In response to public inquiries, this addition also clarifies that, generally, an employer is not required to lower its quality and quantity of work standards as an accommodation, but may need to accommodate an employee with a disability to enable him to meet its standards for quality and quantity. For example, an employer may require a data entry clerk to type 35 words per minute, but may need to provide him or her with an ergonomic keyboard to accommodate a carpal tunnel disability so that the clerk can meet that 35 words per minute production standard. An employer, however, must adjust production standards on a pro rata basis for an employee who had taken full-time or part-time leave as an accommodation by excluding the leave time taken from its assessment of the employee’s productivity. For example, if employer awards a bonus to a full-time technician who assembled 100 widgets per year, then the employer must also award a bonus to a full-time technician who assembled 75 widgets during the year in which s/he took three month’s recuperative leave as an accommodation for a disability or medical condition.

**§ 7293.9, subd. (a) subd. (d) Examples of Reasonable Accommodation.**

The Commission relocated this subdivision from former section 7293.9, subdivision (a), and expanded it into subparts to provide examples of the types of accommodations listed in Government Code section 12926, subdivision (o), and the EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02) (10/17/02) at "Types of Reasonable Accommodation Related to Job Performance." This allows interested parties to deal with familiar, consistent provisions. The Commission added the language in the preamble to this subdivision to emphasize that an accommodation must be *effective* in enabling an applicant to compete equitably for a job or an employee with a disability to perform the essential functions of the job held or desired in order to constitute a reasonable accommodation. (*U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 400 ["An ineffective "modification" or "adjustment" will not accommodate a disabled individual's limitations"].)

**§ 7293.9, subd. (d)(1) Accessibility.**

The Commission relocated this subpart from former section 7293.9, subdivision (a)(2). The Commission amended the definition of "accessibility" to include a reference to "applicants" for internal consistency, and expanded it into subparts (A)-(F) to provide non-exhaustive list of clarifying examples of accessibility accommodations.

**§ 7293.9, subd. (d)(1)(A) Accessible Facilities**

Both the FEHA at Government Code section 12926, subdivision (o)(1), and the ADAAA, at 42 U.S.C. § 12111(9), require an employer or other covered entity to make the workplace accessible to employees with disabilities. The Commission added examples of accessible facilities to conform to those provided in the EEOC's interpretative guidance on the ADA. (The EEOC's Appendix to Part 1630—*Interpretive Guidance on Title I of the Americans With Disabilities Act*, 29 C.F.R. pt. 1630.2, subd. (o), app. § 1630.2, subd. (o) ["[M]aking existing facilities used by employees readily accessible to, and usable by, individuals with disabilities...includes both those areas that must be accessible for the employee to perform essential job functions, as well as non-work areas used by the employer's employees for other purposes. For example, accessible break rooms, lunch rooms, training rooms, restrooms etc., may be required as reasonable accommodations."].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(1)(B) Adjustments to the Work Environment**

The Commission relocated this subpart from former section 7293.9, subdivision (a)(2). The Commission added "acquiring or modifying furniture" to the examples of adjustments to the work environment previously provided in section 7293.9, subdivision (a)(2), to clarify that it constituted a "similar adjustment" that may be required to make the workplace accessible to an employee with a disability.

**§ 7293.9, subd. (d)(1)(C) Assistive Animals**

The Commission added "allowing assistive animals into the workplace" as an example of a possible accessibility accommodation to clarify that, under the FEHA, access is not limited to "guide dogs" – the example used in the EEOC's Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (o), app. § 1630.2, subd. (o) ("[I]t would be a reasonable accommodation for an employer to permit an individual who is blind to

use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.”).

**§ 7293.9, subd. (d)(1)(D) Transferring an Employee to a More Accessible Worksite**

The Commission added this subpart to clarify that transferring an employee to a more accessible worksite might be a reasonable accommodation. Consistent with section 7293.9, subdivision (d)(4), the employer or other covered entity should consider involuntary transfer as an accommodation of last resort. (See also, Cal. Code Regs., tit.2, § 7286.7 [“...less discriminatory alternatives” are unavailable].)

**§ 7293.9, subd. (d)(1)(E) Providing Qualified Readers or Interpreters**

The Commission relocated this subpart from former section 7293.9, subdivision (a)(2), as this accommodation related more to “accessibility” than to “job restructuring.” Otherwise, this subpart conforms to Government Code section 12926, subdivision (o)(2), and to the EEOC’s guidance on the ADAAA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at “Reasonable Accommodation”) (10/17/02) [“There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or adjustments in how and when a job is performed. These include: . . . providing qualified readers or interpreters.”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2) Job Restructuring.**

The Commission relocated the non-exhaustive list of examples of “job restructuring” accommodations from former section 7293.9, subdivision (a)(2), added some more clarifying examples, and expanded the examples into subparts (A)-(F) for ease of reference.

**§ 7293.9, subd. (d)(2)(A) Reallocation of Marginal Functions**

The Commission added reallocation of marginal job functions as an example of a possible reasonable accommodation to conform to the EEOC’s guidance on the ADAAA. (The EEOC’s Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (o), app. § 1630.2, subd. (o) [“An employer or other covered entity may restructure a job by reallocating or redistributing nonessential, marginal job functions.”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2)(B) Part-time or Modified Work Schedules**

The Commission relocated this example of job restructuring from former section 7293.9, subdivision (a)(2). This subpart conforms to Government Code section 12926, subdivision (o)(2), and the EEOC’s regulations interpreting the ADAAA. [29 C.F.R. pt. 1630.2, subd. (o)(2)(ii) [“(2) *Reasonable accommodation* may include but is not limited to:...(ii)...part-time or modified work...”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2)(C) Alteration of When and How an Essential Function is Performed**

The Commission added this possible reasonable accommodation to the list of examples of job restructuring to conform to the EEOC’s guidance on the ADAAA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at

“Reasonable Accommodation”) (10/17/02) [“There are a number of possible reasonable accommodations that an employer may have to provide in connection with modifications to the work environment or *adjustments in how and when a job is performed.*” (emphasis added).] This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2)(D) Modification of Examinations, Training Materials or Policies.**

The Commission relocated this possible reasonable accommodation from former section 7293.9, subdivision (a)(2). This subpart conforms to Government Code section 12926, subdivision (o)(2). This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2)(E) Other Similar Actions**

The Commission relocated this job restructuring accommodation from former section 7293.9, subdivision (a)(2). This catch-all provision conforms to Government Code section 12926, subdivision (o)(2). This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(2)(F) No Reallocation of Essential Functions Required**

The Commission added this provision to emphasize that § 7293.9, subd. (d)(2)(A) relates to reallocation of marginal functions only. The Commission often receives public inquiries about reallocation of essential functions. This addition clarifies that an employer may reallocate an essential job function as an accommodation, but the FEHA does not require the employer to do so.

**§ 7293.9, subd. (d)(3) Paid or Unpaid Leave**

The Commission added “holding a job open for an employee on a leave of absence...” as a possible accommodation to conform to *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 263 [“[h]olding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation . . . where it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future”] and to EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at Question No. 19) (10/17/02) [reinstatement to the same or alternate position following a leave, if possible, is required for this accommodation to be a *non-retaliatory, effective* accommodation]. (See also, the analogous CFRA right to reinstatement at Cal. Code Regs., tit. 2, § 7297.2.) In response to public input, in the last sentence, the Commission substituted the adjunctive “and” for the disjunctive “or” to clarify that if the employee fails to prove that the leave “appears likely” to enable the employee to return to work at some time in the foreseeable future, then the employer would prevail, thereby eliminating any need for the employer to prove an undue hardship affirmative defense.

In response to some public input, the Commission initially considered the alternative of setting a pre-determined limit on the period of leave, such as seven months (consistent with the four months of pregnancy disability leave plus 12 weeks of CFRA bonding leave to which some female employees are entitled) or one year (consistent with the Workers’ Compensation Act, Lab. Code § 3200, et seq.). In response to other public input, the Commission ultimately decided that to do so was contrary to the individualized assessment of both reasonable accommodation and undue hardship required by the FEHA and the ADAAA that sets the “floor of protection” for the FEHA. (Gov. Code, § 12926.1, subd. (a); Cal. Code Regs., tit. 2, § 7294.1, subd. (e); 29

C.F.R. pt. 1630.9, app. § 1630.9 [“Whether a particular form of assistance would be required as a reasonable accommodation must be determined on an individualized, case by case basis...”]; the EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at “Undue Hardship Issues”) (10/17/02) [“undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense”]

**§ 7293.9, subd. (d)(4) Reassignment to a Vacant Position**

The Commission added this provision to conform to three separate legal authorities:

- (1) Government Code section 12926, subdivision (o)(2) [“reassignment to a vacant position”],
- (2) *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 950-951 [“an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship”]; and
- (3) *Spitzer v. The Good Guys, Inc.* (2008) 80 Cal. App. 4th 1376, 1389 [“Courts have made it clear that ‘an employer has a duty to reassign a disabled employee if an already funded, vacant position at the same level exists.’”].

The Commission anticipates that this addition will clarify the interested parties’ various rights and responsibilities when reassignment is the reasonable accommodation, and reduce litigation on this issue.

**§ 7293.9, subd. (b)(4)(A) If accommodation of current position is impossible.**

The Commission added subpart (A), requiring exhaustion of efforts to accommodate the employee in his or her own job before considering reassignment, to conform to Government Code section 12926.1, subdivision (e), and the EEOC’s guidance interpreting the ADA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at “Reassignment”) (10/17/02) [“Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position...”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(4)(B) If accommodation of current position creates an undue hardship.**

The Commission added subpart (B) to conform to EEOC’s guidance on the ADA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at “Reassignment”) (10/17/02) [“Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that:... (2) all other reasonable accommodations would impose an undue hardship.”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (d)(4)(C) If requested to gain access to medical treatment.**

The Commission added subpart (C) to conform to *Buckingham v. U.S.* (9th Cir. 1993) 998 F.2d 735, 740-41 [Under the Rehab. Act, a federal agency was required to grant transfer from Mississippi to Los Angeles to employee who sought better treatment for AIDS].

**§ 7293.9, subd. (d)(4)(D) Reassignment to lesser paid position permitted.**

The Commission added subpart (D) to conform to *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal. App. 4th 215, 227 [offering a vacant position may be a reasonable accommodation, even if the position pays less than the disabled employee's former job, if he or she can no longer perform the former job's duties], and to *Smith v. Midland Brake, Inc.* (10th Cir. 1999) 180 F.3d 1154, 1177 (en banc) [The employer should first consider lateral moves to positions that are regarded as equivalent. Reassignment to a lower level position is permissible only in cases where no accommodation can be made in the current position and no positions are vacant at the same level]. The Commission adapted the provision from the EEOC's guidance interpreting the ADA. (The EEOC's Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA* (7/1/09) (29 C.F.R. pt. 1630.2, app. § 1630.2, subd. (o) ["An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation."].) This allows interested parties to deal with familiar, consistent provisions.

The Commission substituted "funded, vacant, comparable position" for "vacant equivalent positions" for internal consistency with subdivision section 7293.9, subdivision (d)(4) (which uses "suitable, funded, vacant position") and CFRA (which uses "comparable position"). (Gov. Code, § 12945.1, subds. (a) & (c)(4).)

**§ 7293.9, subd. (d)(4)(E) Reassignment to a Temporary Position.**

The Commission added subpart (E) to conform to *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 264 ["Jensen was offered a temporary job, and does not dispute that she rejected it. A temporary position is not, however, a reasonable accommodation. It represents, like unpaid leave, a way to put a disabled employee on hold while the attempt to locate a permanent position is ongoing."].

**§ 7293.9, subd. (d)(4)(F) Preferential Reassignment Required.**

The Commission added subpart (F) to conform to *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 265 [The FEHA entitled the disabled employee to "preferential consideration" in reassignment of existing employees]. (See, also *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 397 ["[P]references shall sometimes be necessary to achieve the Act's basic equal opportunity goal."].)

**§ 7293.9, subd. (d)(4)(G) Creation of a New Position Not Required.**

The Commission added subpart (G) to conform to *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828 [employer is not required to create a new position as an accommodation], and to *Raine v. City of Burbank* (2006) 135 Cal. App. 4th 1215, 1224 [an employer is not required to convert light duty assignment into a permanent position outside employee's civil service classification].

**§ 7293.9, subd. (d)(4)(H) Seniority Rights Generally Supersede Accommodation Rights.**

The Commission added subpart (H) to conform to *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 405 [An employer’s showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an “accommodation” is not “reasonable.” However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case].

**§ 7293.9, subd. (d)(5) Any and All Accommodations Considered.**

The Commission added the provision that the employer or other covered entity should consider any and all accommodations, but should consider any requested accommodation first to conform to the EEOC’s guidance interpreting the ADA. (The EEOC’s *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at No. 9) (10/17/02) [“If more than one accommodation is effective, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7293.9, subd. (e) Reasonable Accommodation for a Past Disability**

The Commission added this subdivision to conform to Government Code sections 12926, subdivisions (j)(3) and (l)(3) [“disability” includes a “record or history of disability”] and 12940, subdivision (n) [requiring reasonable accommodation of a disability]. The Commission adapted this provision from the EEOC’s regulations interpreting the ADAAA, by eliminating the “substantially limiting” requirement to conform to Government Code section 12926.1, subdivision (c). (Gov. Code, § 12926.1, subd. (c) [a “limitation” on a major life activity is sufficient]; 29 C.F.R. pt. 1630.3, subd. (k)(3) [“*Reasonable accommodation.* An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or “monitoring” appointments with a health care provider.”].) This allows interested parties to deal with familiar, consistent provisions, while preserving the FEHA’s greater protections.

**§ 7293.9, subd. (e), subd. (f) Accessibility Standards**

The Commission relocated this subdivision from former section 7293.9, subdivision (c). The Commission amended this section by updating the cross-references to the accessibility standards.

**§ 7294.0 Pre-Employment Practices**

The Commission relocated this section to section 7294.2 to allow the sections on undue hardship and the interactive process to immediately follow the section on reasonable accommodation.

**§ 7293.9, subd. (b) 7294.0 Undue Hardship**

The Commission relocated this “Undue Hardship” section from former section 7293.9, subdivision (b), for ease of reference and to signal that the burden of proof shifts to the employer to prove this affirmative defense.

### **§ 7294.0, subd. (a) Undue Hardship Affirmative Defense**

The Commission added this subdivision to stress that “undue hardship” is an affirmative defense.

### **§ ~~7293.9, subd. (b)~~ 7294.0, subd. (b) “Undue Hardship” definition.**

The Commission amended the definition of “undue hardship” provided in former subdivision section 7293.9, subdivision (b), by inserting “any of” before “the following factors” to clarify that under the FEHA an undue hardship defense may be established by any one or more of these factors.

### **§ ~~7293.9, subd. (b)(1)~~ 7294.0, subd. (b)(1) The Nature and Net Cost of the Accommodation**

The Commission relocated this subdivision from former section 7293.9, subdivision (b)(1). The Commission amended this provision by including the reference to “tax credits and deductions, and/or outside funding” to conform to the EEOC’s interpretative guidance on the ADAAA (*Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, Notice Number 915.002 (Oct. 17, 2002), at fn. 115), and to remind employers that there may be external funds available to help pay for the accommodation of an employee.

### **§ ~~7293.9, subd. (b)(2)~~ 7294.0, subd. (b)(2) The Impact on the Facility**

The Commission relocated this subdivision from former section 7293.9, subdivision (b)(2). The Commission amended this provision by adding “including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business” to provide clarification of “the impact otherwise of these accommodations upon the operation of the facility. The Commission anticipates that any hardship will be experienced at the facility where the employee works, and that these additional factors provide better guidance on how to measure the hardship adequately.

### **§ 7294.0, subd. (b)(3)-(5) Undue Hardship Factors**

Unchanged, other than the reorganization from former section 7293.9, subdivision (b).

### **§ 7294.1 Employee Selection**

The Commission reorganized the section on employee selection to section 7294.4 to allow the sections on undue hardship and the interactive process to immediately follow the section on reasonable accommodation.

### **§ 7294.1 Interactive Process**

The Commission added this section as the Legislature established in the 2000 amendment to the FEHA (PKP Act) that failure to engage in good faith in an interactive process is a separate claim at Government Code section 12940, subdivision (n), and the Legislature further emphasized its importance at Government Code sections 12926.1, subdivision (e). Pursuant to the Legislature’s instruction in Government Code section 12926.1, subdivision (e), this subdivision conforms, to the extent allowed by California law, to the EEOC’s interpretative guidance on the ADAAA. (EEOC’s Appendix to Part 1630 - *Interpretive Guidance on Title I of the ADA* at 29 C.F.R. pt. 1630.9, app. § 1630.9 [“Process of Determining the Appropriate Reasonable Accommodation”] and the EEOC’s *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, Notice Number 915.002 (Oct. 17, 2002) [“Requesting Reasonable Accommodation”]; for examples of non-conforming provisions, see, Gov. Code, § 12926.1 and

California's greater privacy protections at § 7293.8, subd. (e)(1).) This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (a) Exchange of Essential Information Required**

The Commission added subdivision (a) to provide a general description of the interactive process that, consistent with the Legislature's instructions in Government Code section 12926.1, subdivision (e), conforms with the EEOC's interpretative guidance on the interactive process. (See EEOC's Appendix to Part 1630 – *Interpretive Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.9, app. § 1630.9 [“Process of Determining the Appropriate Reasonable Accommodation”], and *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 261 [“[T]he interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees' with the goal of identify[ing] an accommodation that allows the employee to perform the job effectively. . . . For the process to work “[b]oth sides must communicate directly, exchange essential information and neither side can delay or obstruct the process”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (b) Notice**

In response to public inquiries, the Commission added this subdivision to provide guidance on when the employer should initiate the interactive process required by Government Code section 12940, subdivision (n).

**§ 7294.1, subd. (b)(1) Notice From Employee's Request For Accommodation**

The Commission added subpart (b)(1) to conform to Government Code section 12940, subdivision (n).

**§ 7294.1, subd. (b)(2) Notice from Employer's Knowledge of Limitations**

The Commission added subpart (b)(2) to conform to *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 952, 954-955 [describing employer's accommodation duty as an “affirmative duty” and rejecting employer's argument that “the disabled employee must first come forward and request a specific accommodation before the employer has a duty to investigate such accommodation.”] and *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 882, 887 [“[A]n employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.”]. Consistent with the Legislature's instructions in Government Code section 12926.1, subdivision (e), this addition also conforms to the EEOC's guidance on the interactive process. (The EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Notice 915.002) (Oct. 17, 2002) at Question 40 [“...an employer should initiate the reasonable accommodation interactive process without being asked if the employer: (1) knows that the employee has a disability, (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, and (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation. If the individual with a disability states that s/he does not need a reasonable accommodation, the employer will have fulfilled its obligation.”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (b)(3) Intersection of FEHA and CFRA re Notice**

The Commission added subpart (b)(3) to alleviate public concerns about a perceived conflict between an employer's duty to engage in the interactive process in response to a request for CFRA leave and CFRA's prohibition against further inquiry into medical information other than certification that the medical leave was necessitated by a "serious medical condition." (See, *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 882, 887 [A chiropractor's work status report advising that an employee is "unable to perform regular job duties" for a month was sufficient notice of that the employee was disabled and was requesting CFRA leave as an accommodation, thereby triggering the employer's duty to engage in an interactive consultation]; Cal. Code Regs, tit. 2, § 7297.4, subds. (b)(1) & (b)(2)(A)(1) [an employer may require certification of an employee's "serious medical condition," but "may not ask the employee to provide additional information beyond those allowed by these regulations."]; see also, California's medical privacy protections at § 7293.8, subd. (e)(1).

The Commission, however, does not perceive any conflict in these provisions. Under section 7294.1, subdivision (c)(1), an employer that promptly grants an employee's specifically requested accommodation (e.g., CFRA leave), has *fulfilled* its duty to engage in an interactive consultation, unless or until the employer has notice that further accommodation is needed. The CFRA prohibition against further inquiry into the "serious health condition" expires when the employee exhausts his/her CFRA leave entitlement. If after exhausting CFRA leave, the employee requests further recuperative leave (or any other accommodation), then the employer must initiate the interactive process, and may require the employee to produce the "required medical information," as defined in section 7294.3, subdivision (d)(5).

**§ 7294.1, subd. (c) Employer's Obligations:**

Pursuant to the Legislature's instruction in Government Code section 12926.1, subdivision (e), this subdivision conforms, to the extent allowed by California law, to the procedures described in the EEOC's interpretative guidance on the ADA. (The EEOC's Appendix to Part 1630 - *Interpretative Guidance on Title I of the ADA* at 29 C.F.R. pt. 1630, app. § 1630.9 ["Process of Determining the Appropriate Reasonable Accommodation"]; and the EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Notice 915.002) (Oct. 17, 2002). For examples of the FEHA's non-conforming provisions, see, Gov. Code, § 12926.1 and California's greater privacy protections at § 7293.8, subd. (e)(1).) This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (c)(1) Either Grant Request or Suggest Alternative Accommodations.**

The Commission added subpart (c)(1) to conform to *Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138-1139 [when an employer receives an employee's request for an accommodation it had only two legal alternatives: "it could have either granted the request or initiated discussions with Humphrey regarding other alternatives." ...Rejecting an employee's suggested accommodation while proposing no practical alternative is, "as a matter of law" a "failure to engage in the interactive process"].

**§ 7294.1, subd. (c)(2) If Employee Does Not Provide Concise List of Restrictions, Employer Shall Ask For It.**

The Commission added this subpart to conform to *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 266 [“It is an employee’s responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee. [I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process.”]. (See also, *Taylor v. Phoenixville Sch. Dist.* (3rd Cir. 1999) 184 F.3d 296, 317 [“Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, *request information about...what limitations the employee has*, ask the employee what he or she specifically wants, show some sign of having considered employee’s request, and offer and discuss available alternatives when the request is too burdensome”] (emphasis added, and quotation excerpted to conform to California’s greater privacy protections at § 7293.8, subd. (e)(1).).)

**§ 7294.1, subd. (c)(3) Prohibited Inquiries**

The Commission added this subpart to conform to Government Code section 12940, subdivision (f), and California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1).

**§ 7294.1, subd. (c)(4) When Supplemental Information Is Needed**

The Commission added this subpart to conform to EEOC’s guidance on the ADAAA. (The EEOC’s *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* (Notice 915.002 at No. 11) (7/27/00) [“[I]f an employee provides insufficient documentation in response to the employer’s initial request, the employer should explain why the documentation is insufficient and allow the employee an opportunity to provide the missing information in a timely manner.”].) This allows interested parties to deal with familiar, consistent provisions. The Commission also wished to emphasize that “[I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process.” (*Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 266.) Just as an employer cannot be expected to be clairvoyant about an employee’s need for accommodation (*King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 442-444), an employee cannot be expected to be clairvoyant about an employer’s need for clarification of the medical information provided. It is employer’s duty to articulate what clarification is needed.

**§ 7294.1, subd. (c)(5) Analysis of Essential Functions.**

The Commission added this subpart to conform to Government Code sections 12926, subdivision (f), and 12926.1, subdivision (e). The Commission adapted these procedures from those described in the EEOC’s interpretative guidance on the ADAAA. (The EEOC’s Appendix to Part 1630 – *Interpretive Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630, app. § 1630.9 [“Process of Determining the Appropriate Reasonable Accommodation...(1) Analyze the particular job involved and determine its purpose and essential functions”].) This allows interested parties to deal with familiar, consistent provisions. However, the Commission omitted the language “and determine its purpose” as confusing.

**§ 7294.1, subd. (c)(6) Identify and Assess Accommodations.**

The Commission added this subpart to conform to Government Code section 12926.1, subdivision (e). The Commission adapted this subpart from the procedures described in the EEOC's interpretative guidance on the ADAAA. (The EEOC's Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630, app. § 1630.9 [“Process of Determining the Appropriate Reasonable Accommodation... (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation”].) The Commission also adapted the measurement standard used to “assess the effectiveness” of “potential accommodations” from the EEOC's guidance on the ADAAA. (The EEOC's Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.2, subd. (o), app. § 1630.2, subd. (o) [“There are three categories of reasonable accommodation. These are (1) accommodations that are required to *ensure equal opportunity in the application process*; (2) accommodations that *enable the employer's employees with disabilities to perform the essential functions of the position held or desired*; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.” (emphasis added)].) Accordingly, an accommodation for an *applicant* is “effective” if it overcomes an applicant's limitations and enables the applicant to have an equal opportunity to participate in the application process. An accommodation for an *employee*, however, is “effective” if it overcomes the employee's limitations and enables the employee to perform the essential functions of the job held or desired. This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (c)(7) First Consideration of Employee's Preference Required.**

The Commission added this subpart to conform to Government Code section 12926.1, subdivision (e), and the EEOC's interpretative guidance on the ADAAA. (The EEOC's Appendix to Part 1630 – *Interpretative Guidance on Title I of the ADA*, 29 C.F.R. pt. 1630.9, app. § 1630.9 (2009) [“Process of Determining the Appropriate Reasonable Accommodation” EEOC's *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA* (Notice 915.02 at No. 9) (10/17/02) [“If more than one accommodation is effective, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations.”]; *Taylor v. Phoenixville Sch. Dist.* (3rd Cir. 1999) 184 F.3d 296, 317 [“Employers can show their good faith in a number of ways, such as taking steps like the following: meet with the employee who requests an accommodation, request information about...what limitations the employee has, *ask the employee what he or she specifically wants, show some sign of having considered employee's request*, and offer and discuss available alternatives when the request is too burdensome”] (emphasis added); see also § 7293.9, subd. (d)(5) [“Any and all reasonable accommodations”].) This allows interested parties to deal with familiar, consistent provisions.

**§ 7294.1, subd. (c)(8) When Reassignment is Considered as an Accommodation.**

The Commission added this subpart to alleviate public concerns that an employer might invade an employee's right to privacy by requesting information about an employee's qualifications and experience. The Commission intended this subpart to reflect the reciprocal rights and responsibilities set forth in section 7294.1, subdivision (d)(2) (“Employee's Obligations When

Reassignment is Considered as an Accommodation”). The Commission, however, substituted “shall ask” for “may ask” because “shall” seemed to imply that an employer was per se liable if it failed to ask for this information. The Commission also cross-referenced the reassignment accommodation requirements set forth in section 7293.9, subdivision (d)(4) (“Reassignment to a Vacant Position”) for ease of reference.

**§ 7294.1, subd. (d) Employee’s Obligations:**

The Commission added this subpart to conform to Gov. Code 12940, subdivision (n), and *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 950 (citations omitted, emphasis in original):

The employee bears the burden of giving the employer notice of the disability. This notice then triggers the employer’s burden to take “positive steps” to accommodate the employee’s limitations. The employee, of course, retains a duty to cooperate with the employer’s efforts by explaining [his or] her disability and qualifications. *Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee’s capabilities and available positions.*

The Commission added “(including relevant and appropriate medical information)” to emphasize that the employee must produce such information about his or her limitation(s) to the employer on demand.

**§ 7294.1, subd. (d)(1) Relevant Medical Information**

The Commission added this subpart to conform to *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 266 [“It is an employee’s responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions which must be met to accommodate the employee. [I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process.”] (See also; *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 442-444 [Employer not expected to be clairvoyant about needs of employee for accommodation. It is the employee’s duty to inform the employer of each limitation that needs accommodation].) The Commission limited the definition of “relevant medical information” to any job-related limitations to conform to California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1).

**§ 7294.1, subd. (d)(2) When Reassignment is Considered as an Accommodation**

The Commission added this subpart to address public concerns that an employer might be invading an employee’s right to privacy by requesting information about an employee’s qualifications and experience. The Commission intended this subpart to reflect the reciprocal rights and responsibilities set forth in section 7294.1, subdivision (c)(8). The Commission added “for which the employee is qualified” to conform to *Green v. State of California* (2007) 42 Cal.4th 254, 263, and to emphasize that a “suitable alternative position” is a position for which the employee with a disability is otherwise qualified, and that an employer has no duty to reassign an employee to a position for which s/he is not qualified. The Commission also cross-referenced the reassignment accommodation requirements set forth in section 7293.9, subdivision (d)(4), [“Reassignment to a vacant position”] for ease of reference.

### **§ 7294.1, subd. (d)(3) Employee’s Inability to Engage in an Interactive Process**

The Commission added this subpart to clarify that a party does not cause a breakdown in the interactive process when the circumstances are beyond its control. For example, an employee who is on medical or recuperative leave may not be physically or mentally able to engage meaningfully in an interactive process.

### **§ 7294.1, subd. (d)(4) Direct Communication Preferred.**

The Commission added this subpart to conform to *Claudio v. Regents of Univ. of Calif.* (2005) 134 Cal. App. 4th 224, 247 [“Ordinarily, an employee has no right to withdraw himself from the process and force the employer to engage in the interactive process through the employee’s attorney. The kind of information designed to be elicited by the interactive process (job skills and interests, etc.) is personal to the individual employee. Requiring the employer to use the employee’s attorney as a conduit for this personal information would slow the process unnecessarily.” But, in this case, the employee’s uncertainty about his employment status caused by the University informing him four times that his employment had been terminated made the employee’s insistence that the employer communicate through his attorney reasonable.]. The Commission also added this subpart to conform to *Hanson v. Lucky Stores, Inc.*, (1999) 74 Cal. App. 4th 215, 229 [employer excused from failure to engage in interactive process after consulting extensively with several of employee’s medical doctors and physical therapists acting on employee’s behalf].

### **§ 7294.1, subd. (d)(5) Required Medical Information**

The Commission added this subpart to be as consistent with the EEOC’s interpretative guidance on the ADA as California law allows. (EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), EEOC Notice No. 915.002, 7/27/00, 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“An employer may require an employee to provide documentation that is sufficient to substantiate that s/he has an ADA disability and needs the reasonable accommodation requested, but cannot ask for unrelated documentation. This means that, in most circumstances, an employer cannot ask for an employee’s complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation. . . . Documentation is sufficient if it: (1) describes the nature, severity, and duration of the employee’s impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee’s ability to perform the activity or activities; and, (2) substantiates why the requested reasonable accommodation is needed.”]. For California law limiting the scope of relevant medical information, see, e.g., California’s greater privacy rights set forth in § 7293.8, subd. (e)(1).)

### **§ 7294.1, subd. (d)(5)(A) Contact Information of Physician Imposing Restrictions.**

The Commission added this subpart so that an employer may ascertain whether the health care provider is authorized to practice medicine and the scope of the health care provider’s expertise. The Commission initially considered requiring the production of the health care physician’s “address, telephone number, and fax number” but substituted “and medical credentials” instead to avoid encouraging the employer to contact the employee’s treating health care professional without the employee’s written authorization for the release of his or her medical information, thereby violating the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)

(Pub.L. 104-191, 110 Stat. 1936, enacted August 21, 1996.) (29 U.S.C. § 1181 et.seq.) and to give employers assurance that the medical information was provided by a qualified health care practitioner.

**§ 7294.1, subd. (d)(5)(B) Concise List of Restrictions**

The Commission added this subpart to be consistent with section 7294.1, subdivision (d)(1), that requires the employee to produce a concise list of restrictions. The Commission intends this subpart to balance an employee's rights under California's medical privacy protections set forth in section 7293.8, subdivision (e)(1), with the employer's duty to provide accommodation. In the last sentence, the Commission eliminated a reference to "the disability" because the important information to be ascertained by the applicant's or employee's health care provider is the applicant's or employee's limitation(s), not the employee's disability. The health care provider does not need to opine about whether the employee has a disability under the FEHA, but does need to provide sufficient information about the employee's limitations that arise from a health condition to allow the employer to ascertain whether the employee has a disability which requires accommodation, and if so, what accommodation, if any, is possible and reasonable.

**§ 7294.1, subd. (d)(5)(C) When Supplemental Information Is Needed**

The Commission added this subpart to be consistent with an employer's duty under section 7294.1, subdivision (c)(4), to request clarification or supplementation of the medical information already provided.

**§ 7294.1, subd. (d)(5)(C)(1) Documentation Insufficient If Limitations Not Described.**

The Commission added this subpart to be consistent with the employee's duty under section 7294.1, subdivision (d)(1), to produce a concise list of restrictions. The Commission adapted this subpart from the EEOC's interpretative guidance on the ADA in light of California law medical privacy protections. (The EEOC's [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), EEOC Notice 915.002 of 7/27/00 at No. 11 ["Documentation also might be insufficient where, for example: . . . the information does not specify the functional limitations due to the disability."]) This allows interested parties to deal with familiar, consistent provisions while preserving California law's greater medical privacy protections.

**§ 7294.1, subd. (d)(5)(C)(2) Further Examples Of Insufficient Documentation.**

The Commission added this subpart to be as consistent as possible with the EEOC's interpretative guidance on the ADAAA. (The EEOC's [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), EEOC Notice 915.002 of 7/27/00 at No. 11 ["Documentation also might be insufficient where, for example: the health care professional does not have the expertise to give an opinion about the employee's medical condition and the limitations imposed by it...or other factors indicate that the information provided is not credible or is fraudulent."]; see, e.g., Gov. Code, § 12926.1 and California's greater privacy protections set forth in § 7293.8, subd. (e)(1).) This allows interested parties to deal with familiar, consistent provisions while preserving California law's greater medical privacy protections.

**§ 7294.1, subd. (d)(6) Delay in Interactive Process Due To Insufficient Documentation.**

The Commission added this subpart to address public concerns that an employer might be held responsible for a delay in providing accommodation where an employee has failed to provide sufficient documentation of his or her need for accommodation. (See, § 7294.1, subds. (c)(4) and (d)(5)(C), requiring an employer to request clarification or supplementation of the medical information already provided; see also, *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 266 [“[I]t is the responsibility of both sides to keep communications open and neither side has a right to obstruct the process.”].) This subpart also conforms with the EEOC’s interpretative guidance on the ADAAA. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), EEOC Notice 915.002 of 7/27/00 at No. 11 [“If an employee provides insufficient documentation, an employer does not have to provide reasonable accommodation until sufficient documentation is provided.”].)

**§ 7294.1, subd. (d)(7) Medical Examination**

The Commission added this subpart to provide guidance on the limited scope of an employer-ordered medical examination to ensure that it does not invade the employee’s rights under California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1). (See also, § 7294.3 [“Medical Examinations”].)

**§ 7294.1, subd. (d)(8) Employer Must Pay Costs and Wages Related to A Required Medical Examination**

The Commission adapted this subpart from the EEOC’s guidance interpreting the ADAAA. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (EEOC Notice No. 915.002 at No. 7) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“If an employer requires an employee to go to a health professional of the employer’s choice, the employer must pay all costs associated with the visit(s)”]. This allows interested parties to deal with familiar, consistent provisions. The Commission inserted “and wages” after “all costs” to clarify that the employer must pay the employee for the time spent attending the medical examination.

**§ 7294.1, subd. (d)(9) When Intermittent or Reduced Work Schedule Leave For Medical Treatment Is Requested**

The Commission added this subpart to conform to the new FMLA regulations (29 C.F.R. pt. 825.306, subd. (a)(6).) to the extent allowed by California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1).

**§ 7294.1, subd. (d)(10) When Intermittent or Reduce Work Schedule Leave For Episodic Conditions Is Requested**

The Commission added this subpart to conform to the new FMLA regulations (29 C.F.R. pt. 825.306, subd. (a)(7).) to the extent allowed by California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1).

**§ 7294.1, subd. (e) Individualized Assessment Required**

The Commission added this subpart to conform to *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 49, fn. 11 (100% healed policies violate the FEHA’s requirement of an individualized assessment of reasonable accommodation and undue hardship).

#### **§ 7294.1, subd. (f) When an Assistive Animal Is Requested**

The Commission added this subdivision to provide guidance on the minimum standards that must be met before an employer is required to allow the presence of an assistive animal into the workplace. The Commission adapted these minimum standards from those set by Assistance Dogs International, Inc. (see, <http://www.assistancedogsinternational.org/Standards/>), and expanded these standards into subparts (1) and (2) for ease of reference. The Commission anticipates that this provision will balance the employee's need for an assistive animal as a reasonable accommodation with the employer's need to prevent disruption of the working environment.

#### **§7294.0 § 7294.2 Pre-Employment Practices.**

The Commission reorganized this section from former section 7294.0 to allow the addition of sections on undue hardship and the interactive process to immediately follow the section on reasonable accommodation. The Commission amended this section mostly by wordsmithing (e.g., by substituting "applicants" for "individuals" for internal consistency). No substantive changes are intended.

#### **§ 7294.2, subd. (a) Recruiting and Advertising**

Unchanged.

#### **§ 7294.2, subd. (a)(1) Consideration on an Equal Basis Required**

The Commission amended this subpart by substituting "applicants" for "individuals" for internal consistency, by inserting "or without" between "with" and "disabilities" and deleting "with individuals without disabilities" for brevity. This is wordsmithing. No substantive changes are intended.

#### **§ 7294.2, subd. (a)(2) No Discriminatory Advertisements**

The Commission amended this subpart by substituting "applicants" for "individuals" for internal consistency. This is wordsmithing. No substantive changes are intended.

#### **§ 7294.2, subd. (b) Application and Disability-Related Inquiries.**

The Commission amended this heading by adding "and disability-related inquiries" to more accurately describe the content of this subdivision.

#### **§ 7294.2, subd. (b)(1) Consideration of Applications on an Equal Basis**

The Commission amended this subpart by inserting "and accept" between "consider" and "applications" to emphasize that the FEHA requires equal treatment of applicants with disabilities. The Commission also amended this subpart by inserting "or without" between "with" and "disabilities" and deleting from "with applications from..." onwards for brevity. This is wordsmithing. No substantive changes are intended.

#### **§ 7294.2, subd. (b)(2) Prohibited Inquiries.**

The Commission amended this subpart by inserting "or questions likely to elicit information about a disability" after "questions on disability" to provide additional guidance.

**§ 7294.2, subd. (b)(2)(A) “Any disabilities?”**

Unchanged.

**§ 7294.2, subd. (b)(2)(B) “Any Past Medical Treatment?”**

Unchanged.

**§ 7294.2, subd. (b)(2)(C) “Any Worker’s Compensation benefits?”**

Unchanged.

**§ 7294.2, subd. (b)(2)(D) “Any Prescription Medication?”**

The Commission added this question about an employee’s prescription medications as an example of a prohibited inquiry in subpart (D) to conform to Government Code section 12940, subdivision (e)(1) and the EEOC’s guidance on the ADA. (The EEOC’s [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), (EEOC Notice No. 915.002 at No. 7) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“[Prohibited] [d]isability-related inquiries may include the following: asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee’s taking of such drugs or medications”].)

**§ 7294.2, subd. (b)(2)(E) “Any job-related injury or illness?”**

The Commission added this question about an employee’s industrial injuries or illnesses as an example of a prohibited inquiry in subpart (E) to conform to Government Code section 12940, subdivision (e)(1) and the Workers’ Compensation Act (Lab. Code. § 3200, et seq.).

**§ 7294.2, subd. (b)(3) Permissible Job-Related Inquiry.**

The Commission amended this subpart by updating the reference to the ADA to include a reference to the ADA. The Commission also amended this subpart by inserting “whether the applicant can perform job-related functions” after “as to”; by substituting “any limitations...reasonable accommodation” for “or a request... safety of others” to conform to Government Code section 12940, subdivision (e)(2) and to California’s medical privacy protections set forth in section 7293.8, subdivision (e)(1). The Commission added the last sentence “An employer or other covered entity may make an inquiry...needs reasonable accommodation” to be internally consistent with the interactive process duties set forth in section 7294.1, subdivisions (c)(2)-(4) and (d)(5).

**§ 7294.2, subd. (c) Interviews.**

The Commission amended this subdivision by substituting “applicant” for “individual” for internal consistency. This is wordsmithing. No substantive changes are intended.

**§ 7294.0, subd. (d) 7294.3 Medical Examinations**

The Commission relocated this subdivision from former section 7294.0, subdivision (d), to allow the sections on undue hardship and interactive process to immediately follow the section on reasonable accommodation. The Commission substantially reorganized this relocated section to differentiate among the various types of medical examinations: pre-offer medical examinations of applicants prohibited under Government Code section 12940, subdivision (e)(1), post-offer

medical examinations of entering employees allowed under Government Code section 12940, subdivision (e)(3), and medical examinations of current employees allowed under Government Code section 12940, subdivision (f). This section conforms, to the extent allowed by California law, to the EEOC's guidance on the ADAAA. (The EEOC's [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000); Gov. Code, § 12926.1; and California's medical privacy protections set forth in § 7293.8, subd. (e)(1).) This allows interested parties to deal with familiar, consistent provisions while preserving California law's greater medical privacy protections.

### **§ 7294.3, subd. (a) Pre-Offer Medical Examinations**

The Commission relocated this section from former section 7294.0, subdivision (d). This subdivision conforms to Government Code section 12940, subdivision (e)(1). The Commission adapted the definition of "medical examination" from the EEOC's guidance on the ADAAA. (The EEOC's [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) at (B)(2) ["A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health."'] [emphasis in original].) The Commission similarly added the illegal drug use test exception. (The EEOC's [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) at (B)(2) ["There are a number of procedures and tests employers may require that generally are not considered medical examinations, including: . . . tests to determine the current illegal use of drugs."].) This allows interested parties to deal with familiar, consistent provisions while preserving California law's greater medical privacy protections.

### **§ 7294.3, subd. (b) Post-Offer Medical Examinations**

The Commission relocated this subdivision from former section 7294.0, subdivision (d). This subdivision conforms to Government Code section 12940, subdivision (e)(3). The Commission inserted the adjective "real" before "offer of employment" and added the definition of "real offer of employment" to conform to *Leonel v. American Airlines, Inc.* (9th Cir. 2005) 400 F.3d 702, 708-709 ("[T]he ADA and FEHA not only bar intentional discrimination, they also regulate the sequence of employer's hiring processes. Both statutes prohibit medical examinations and inquiries until after the employer is made a 'real' job offer to an applicant. . . . To offer a 'real' offer under the ADA and FEHA, therefore, 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.").

### **§ 7294.3, subd. (b)(1) Uniform testing required**

Unchanged.

### **§ 7294.3, subd. (b)(2) When an Independent Medical Examination is Allowed**

Unchanged.

### **§ 7294.3, subd. (b)(3) Medical Examination Records**

The Commission reorganized this subpart to section 7294.0, subdivision (d)(5), to avoid duplication, because these recordkeeping requirements apply to both post-offer medical examinations of entering employees and medical examinations of current employees.

### **§ 7294.3, subd. (c) Withdrawal of Offer**

The Commission added this subdivision to clarify the circumstances under which an employer may withdraw an offer of employment based on the results of a post-offer medical examination. The Commission adopted this provision from the EEOC's guidance on the ADAAA. (The EEOC's [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), (Notice No. 915.002 at Nos. 4 & 5) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) ["If an employer withdraws the offer based on medical information (i.e., screens him/her out because of a disability), it must show that the reason for doing so was job-related and consistent with business necessity...."] Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.>"; for non-conforming provisions, see, e.g., Gov. Code, § 12926.1 and California's greater privacy protections set forth in § 7293.8, subd. (e)(1).) This allows interested parties to deal with familiar, consistent provisions while preserving California law's greater medical privacy protections.

### **§ 7294.3, subd. (d)(1) Medical Examinations and Disability Inquiries During Employment.**

The Commission added this subpart to conform to Government Code section 12940, subdivision (f)(2).

### **§ 7294.3, subd. (d)(1)(A) "Job-Related"**

The Commission added a definition of "job-related" that is internally consistent with section 7286.7, subdivision (b) ["Job-Relatedness Affirmative Defense"]. This allows interested parties to deal with familiar, consistent provisions.

### **§ 7294.3, subd. (d)(1)(B) "Consistent with Business Necessity"**

The Commission added a definition of "consistent with business necessity" to conform to *Conroy v. New York State Dept. of Correctional Services* (2nd Cir. 2003) 333 F.3d 88, 99-100 [business necessity justifying a medical examination of an employee requires the employer to show through objective, non-speculative evidence obtained prior to the medical examination that: (1) the asserted business necessity is "vital to the business" rather than merely convenient or expedient, (2) the medical examination is narrowly tailored, and (3) the medical examination is reasonably effective in achieving the employer's goal...courts will readily find a business necessity if an employer can demonstrate that a medical examination or inquiry is necessary to determine 1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work) or 2) whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy]; and to *Yin v. State of California* (9th Cir. 1996) 95 F.3d 864, 868-869 ["We conclude that when health problems have had a substantial and injurious impact on an employee's job

performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability. If such an examination is governed by the provisions of § 12112(d)(4)(A), it is covered by the business necessity exception.”]. This allows interested parties to deal with familiar, consistent provisions while preserving California law’s greater medical privacy protections.

**§ 7294.3, subd. (d)(1)(C) Reliable, Non-Speculative Basis for Medical Exam Required.**

This subpart conforms, to the extent allowed under California law, to EEOC’s interpretative guidance on the ADA. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002 at No. 6) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“[I]f the information learned is reliable and would give rise to a reasonable belief that the employee’s ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition, an employer may make disability-related inquiries or require a medical examination.”].

“Factors that an employer might consider in assessing whether information learned from another person is sufficient to justify asking disability-related questions or requiring a medical examination of an employee include: (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information; (4) how the person learned the information (e.g., directly from the employee whose medical condition is in question or from someone else); and (5) other evidence that the employer has that bears on the reliability of the information provided.”]; see also, *Conroy v. New York State Dept. of Correctional Services* (2nd Cir. 2003) 333 F.3d 88, 99-100 [business necessity justifying a medical examination of an employee requires the employer to show through objective, non-speculative evidence obtained prior to the medical examination].) This allows interested parties to deal with familiar, consistent provisions while preserving California law’s greater medical privacy protections.

**§ 7294.3, subd. (d)(2) Fitness for Duty Examination**

This subpart conforms to Government Code section 12940, subdivision (f)(2), [an employer may conduct a fitness-for-duty examination of an employee if it is job-related and consistent with business necessity]; *Tice v. Centre Area Transp. Auth.* (3d Cir. 2001) 247 F.3d 506, 517-18 [such an examination should, “at a minimum, be limited to an evaluation of the employee’s condition only to the extent necessary under the circumstances to establish the employee’s fitness for the work at issue.”]; and to tort law holding that where a principal may be directly liable for authorizing or directing an agent’s wrongful acts. (See, 2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 163; see, e.g., *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 444-445, 459 [employer’s medical examiner violated employee’s medical privacy rights by disclosing underlying nature of the disability to the employer, and employer violated these rights by receiving the employee’s confidential medical information].)

**§ 7294.3, subd. (d)(3) Drug or Alcohol Testing**

The Commission adapted this subpart from the EEOC’s guidance on the ADA to provide clarification about drug and alcohol testing under the FEHA. (The EEOC’s [Enforcement](#)

[Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002 at No. 1 & 2, FN 26 & 27) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“FN26. Employers also may maintain and enforce rules prohibiting employees from being under the influence of alcohol in the workplace and may conduct alcohol testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol at work. FN27. An individual who currently uses drugs illegally is not protected under the ADA; therefore, questions about current illegal drug use are not disability-related inquiries. (42 U.S.C. § 12114(a) (1994); 29 C.F.R. pt.1630.3, subd. (a) (1998).)”].) This allows interested parties to deal with familiar, consistent provisions while preserving California law’s greater medical privacy protections.

The Commission expanded this section into subparts (A) and (B) to clearly distinguish between the lack of FEHA protection for current illegal drug users, and the FEHA prohibition against disability discrimination, including prohibiting an employer or any other covered entity from making any inquiries about past addiction to illegal drugs or a related rehabilitation program.

#### **§ 7294.3, subd. (d)(3)(A) Medical Marijuana**

The Commission added subpart (A) to conform to *Ross v. Ragingwire Telecommunications, Inc.*(2008) 42 Cal. 920 [FEHA does not protect an employee who uses medical marijuana at home on physician’s recommendation under the Compassionate Use Act of 1996.]

#### **§ 7294.3, subd. (d)(3)(B) Past Addiction**

The Commission added subpart (B) to conform to the EEOC’s guidance on the ADA. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002 at No. 1 & 2, FN 27) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“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 drugs illegally, are protected under the ADA. (29 C.F.R. pt.1630.3(b)(1),(2) (1998).)”].) This allows interested parties to deal with familiar, consistent provisions while preserving California law’s greater medical privacy protections.

#### **§ 7294.3, subd. (d)(4) Other Acceptable Disability Related Inquiries and Medical Examinations.**

The Commission added this subpart to provide further guidance on the rights and responsibilities of employers and employees under Government Code section 12940, subdivision (e). This subpart conforms to the EEOC’s guidance on the ADA, as indicated in each expanded subpart. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000).)

#### **§ 7294.3, subd. (d)(4)(A) Employee Assistance Program**

This subpart conforms to the EEOC’s interpretative guidance on the ADA. (The EEOC’s [Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA](#), (Notice No. 915.002 at No. 20) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“An EAP counselor may ask employees about their medical condition(s) if s/he: (1) does not act

for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; and, (3) has no power to affect employment decisions. Many employers contract with EAP counselors so that employees can voluntarily and confidentially seek professional counseling for personal or work-related problems without having to be concerned that their employment status will be affected because they sought help.”].) This allows interested parties to deal with familiar, consistent provisions.

#### **§ 7294.3, subd. (d)(4)(B) Compliance with Another Federal or State Law or Regulation**

This subpart conforms to the EEOC’s interpretative guidance on the ADAAA. (The EEOC’s [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), (Notice No. 915.002 at No. 21 (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by another federal law or regulation. For example, under federal safety regulations, interstate bus and truck drivers must undergo medical examinations at least once every two years. Similarly, airline pilots and flight attendants must continually meet certain medical requirements. Other federal laws that require medical examinations or medical inquiries of employees without violating the ADA include:

- the Occupational Safety and Health Act;
- the Federal Mine Health and Safety Act; and
- other federal statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals.”].)

This allows interested parties to deal with familiar, consistent provisions.

#### **§ 7294.3, subd. (d)(4)(C) Voluntary Wellness Program**

This subpart conforms to the EEOC’s interpretative guidance on the ADAAA. (The EEOC’s [\*Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA\*](#), (Notice No. 915.002 at No. 22) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000) [“The ADA allows employers to conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program 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.”].) This allows interested parties to deal with familiar, consistent provisions.

#### **§ 7294.3, subd. (d)(5) Maintenance of Medical Files.**

The Commission relocated this subdivision from former section 7294.0, subd. (d)(3), to avoid duplication, because these recordkeeping requirements apply to both post-offer medical examinations of entering employees and medical examinations of current employees. Subparts (A) and (B) were adapted from the ADAAA to the extent allowed by California law. (42 U.S.C. § 12112, subd. (d)(3)(B) [“Employment Entrance Exam”]; see also, *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 444-445, 459 [employer’s medical examiner violated employee’s medical privacy rights by disclosing underlying nature of the disability to the employer, and employer violated

these rights by receiving the employee’s confidential medical information].) This allows interested parties to deal with familiar, consistent provisions while preserving California law’s greater medical privacy protections.

**§ 7294.3, subd. (d)(5)(A) Notice to Supervisors and Managers Allowed.**

Unchanged, except that the Commission substituted “employee” for “individual” for internal consistency. This is wordsmithing. No substantive changes are intended.

**§ 7294.3, subd. (d)(5)(B) First Aid and Safety Personnel**

Unchanged.

**~~§7294.1~~ § 7294.4 Employee Selection.**

The Commission reorganized this section from former section 7294.1 to allow sections on undue hardship and interactive process to immediately follow the section on reasonable accommodation. The Commission amended this section mostly to update terminology, such as substituting “applicant” for “individual” for internal consistency.

**~~§ 7294.1, subd. (a)~~ § 7294.4, subd. (a) Prospective Need for Reasonable Accommodation.**

The Commission reorganized this provision from former section 7294.1, subdivision (a). The Commission amended this subdivision by substituting “applicant and employee” for “individual” for internal consistency. This is wordsmithing. No substantive changes are intended.

**~~§ 7294.1, subd. (b)~~ Testing**

The Commission relocated this subdivision to section 7294.4, subdivision (b), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.)

**§ 7294.4, subd. (b) Qualification Standards and Tests**

The Commission relocated this subdivision from section 7294.1, subdivision (b), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.) The Commission amended this subdivision by adding “qualification standards” to more accurately reflect that this subdivision covers both qualification standards and testing.

**~~§ 7294.1, subd. (b)(1) Use of Discriminatory Testing Criterion~~**

The Commission relocated this subdivision to section 7294.4, subdivision (b)(4), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.)

**§ 7294.4, subd. (b)(1) Discriminatory Qualifications Standards and Employment Tests.**

The Commission added this subdivision to clarify that using qualifications standards and employment tests to screen out applicants or employees with disabilities constitutes disability discrimination, in violation of Government Code section 12940, subdivision (a). The Commission also added this subdivision to conform to the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.10, subd. (a) [“(a) *In general.* It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to

screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.”.) This allows interested parties to deal with familiar, consistent provisions. The Commission amended the EEOC’s regulation by substituting “employer or other covered entity” for “a covered entity” for internal consistency and clarity.

**~~§ 7294.1, subd. (b)(2) Tests of Agility and Strength~~**

The Commission relocated this subpart to section 7294.4, subdivision (b)(5), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.)

**§ 7294.4, subd. (b)(2) Qualification Standards and Tests Related to Uncorrected Vision.**

The Commission added this subpart to conform the EEOC’s regulations interpreting the ADAAA. (29 C.F.R. pt. 1630.10, subd. (b) [“*Qualification standards and tests related to uncorrected vision.* Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual’s uncorrected vision unless the standard, test, or other selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity’s application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.”].). This allows interested parties to deal with familiar, consistent provisions. The Commission omitted the last sentence of the EEOC’s regulation for brevity. No substantive changes are intended.

**~~§ 7294.1, subd. (b)(3)(A)-(F) Administration of Tests~~**

The Commission relocated this provision and its subparts (A)-(F) to section 7294.4, subdivision (b)(6)(A)-(G), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.)

**§ 7294.4, subd. (b)(3) Qualification Standards and Tests Related to Hearing.**

The Commission added this subpart to conform to *Dept. Fair Empl. & Hous. v. City of Fullerton* (May 6, 2008) FEHC Dec. No. 08-05-P [2008 WL 2335108 at \*10 (Cal.F.E.H.C.)] [failure to promote and subsequent discharge of a hearing impaired employee as “unqualified” constituted disability discrimination].)

**~~§ 7294.1, subd. (b)(4) Use of Readers, Interpreters, or Similar Supportive Individuals.~~**

The Commission relocated this subpart to section 7294.4, subdivision (b)(6)(G), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.)

**~~§ 7294.1, subd. (b)(1)~~ § 7294.4, subd. (b)(4) No Discriminatory Use of Testing Criterion**

The Commission relocated this subpart from section 7294.1, subdivision (b)(1), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.). The Commission amended the relocated

subpart by substituting “applicant and employee” for “individual” for internal consistency. This is wordsmithing only. No substantive changes are intended.

**§ 7294.1, subd. (b)(2) § 7294.4, subd. (b)(5) Tests of Agility or Strength.**

The Commission relocated this subpart from section 7294.1, subdivision (b)(2), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.). The Commission amended the relocated subpart by inserting “as a basis for selection or retention of employment” after “used” to clarify that non-job-related tests of agility or strength shall not be used as the basis for any employment decision.

**§ 7294.1, subd. (b)(3) § 7294.4, subd. (b)(6) Administration of Tests.**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(A)-(F), during the substantial reorganization of this section to conform to the EEOC’s recently revised regulations interpreting the ADAAA. (29 C.F.R. pt. 1630 et seq.).

**§ 7294.1, subd. (b)(3)(A) § 7294.4, subd. (b)(6)(A) Accessible Test Site**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(A). The Commission amended this provision by inserting “and employees” after “applicants” for internal consistency. This is wordsmithing only. No substantive changes are intended.

**§ 7294.1, subd. (b)(3)(B) § 7294.4, subd. (b)(6)(B) Blind or Visually Impaired**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(B). The Commission amended this provision by substituting “applicants and employees who are blind or visually impaired” for “blind persons.” This is wordsmithing only. No substantive changes are intended. The Commission also amended this subpart by inserting “provide or allow enlarged print, real time captioning, or digital format,” after “Braille,” to reflect newly available accommodations. The Commission similarly updated this provision by inserting “human” before “reader” and adding “or screen reader, provide or allow the use of other computer technology” after “reader.”

**§ 7294.1, subd. (b)(3)(C) § 7294.4, subd. (b)(6)(C) Quadriplegic**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(C). The Commission amended this relocated subpart by substituting “applicants and employees who are quadriplegic or have spinal cord injuries” for “quadriplegic individuals.” This is wordsmithing only. No substantive changes are intended.

**§ 7294.1, subd. (b)(3)(D) § 7294.4, subd. (b)(6)(D) Hearing Impaired**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(D). The Commission amended this relocated subpart to substitute “applicants and employees who are hearing impaired” for “individuals with hearing impairments.” This is wordsmithing only. No substantive changes are intended.

**§ 7294.1, subd. (b)(3)(E) § 7294.4, subd. (b)(6)(E) Communication Impaired**

This subpart was relocated from section 7294.1, subdivision (b)(3)(E), and amended to substitute “applicants and employees” for “individuals;” and is wordsmithing only, so is not intended to

make any substantive change. It was also amended by inserting “read, process” before “communicate” to clarify that these mental processes are related to communication skills. This is wordsmithing only. No substantive changes are intended.

**§ ~~7294.1, subd. (b)(3)(F)~~ § 7294.4, subd. (b)(6)(F) Adjustments Due to Test Modification**

The Commission relocated this subpart from section 7294.1, subdivision (b)(3)(F). This relocated subpart is otherwise unchanged.

**§ ~~7294.1, subd. (b)(4)~~ § 7294.4, subd. (b)(6)(G) Readers, Interpreters, Etc.**

The Commission relocated this subpart from section 7294.1, subdivision (b)(4). The Commission amended this relocated subpart by substituting “persons” for “individuals” for internal consistency. This is wordsmithing only. No substantive changes are intended.

**§ 7294.4, subd. (c) No Testing for Genetic Characteristics.**

The Commission added this provision to conform to Government Code section 12940, subdivision (o), and to the new federal protections provided by amendments to Title VII necessitated by the Genetic Information Non-discrimination Act of (2008) (“GINA”) (Pub. Law 110-233). (See also, Cal. Code Regs, tit. 2, § 7293.6, subd. (c)(7) [The FEHA’s definition of “medical condition” includes “a genetic characteristic”].) This allows interested parties to deal with familiar, consistent provisions.

**§ ~~7294.2~~ § 7294.5 Terms and Conditions of Employment.**

The Commission reorganized this section from former section 7294.2 to allow sections on undue hardship and interactive process to immediately follow the section on reasonable accommodation. The relocated section remains unchanged.

**NECESSITY.**

The Commission amended its regulations on disability:

1. to conform to changes in law covering disability discrimination in employment made by the following sources:
  - The Prudence Kay Poppink Act of 2000 (Stats. 2000, c. 1049(A.B. 2222), § 6, Kuehl ([PKP Act](#)); Gov. Code, §§ 12926, 12926.1 & 12940);
  - The California Supreme Court’s decision in *Green v. State of California* (2007) 42 Cal. 4th 254 ([Green](#)); and
  - The Genetic Information Non-discrimination Act of 2008 ([GINA](#)) (Stats. 2008, c. 10 (A.B. 1543), § 13) (Pub. Law 110-233).
2. to provide greater clarity in the language and organization of the regulations.
3. to be as consistent as possible with the ADAAA and its interpretative regulations.
4. to give greater guidance to employers on disability definitions, the interactive process, reasonable accommodation, and when an employer may require testing or make medical inquiries during the application and employment process and during employment.

**TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS.**

The Commission relied upon the following documents, which are referenced in its Notice of Proposed Rulemaking, with hyperlinks, or included as exhibits in its Fiscal Impact Statement, as given below:

Exhibit Nos. (from Fiscal Impact Statement)	Description
1	The Prudence Kay Poppink Act of 2000 (Stats. 2000, c. 1049(A.B. 2222), § 6, Kuehl ( <a href="#">PKP Act</a> ); Gov. Code, §§ 12926, 12926.1 & 12940
	<a href="#">Green v. State of California</a> (2007) 42 Cal. 4th 254
	The Genetic Information Non-discrimination Act of 2008 ( <a href="#">GINA</a> ) (Stats. 2008, c. 10 (A.B. 1543), § 13) (Pub. Law 110-233)
	Stats. 2011, c. 261 (S.B. 559), " <a href="#">Cal-GINA</a> "
	The Americans with Disabilities Act Amendment Act of 2008 ( <a href="#">ADAAA</a> ) (Public Law 110-325) (S 3406)), 42 U.S.C. § 12101, et seq.
3	The <a href="#">ADAAA interpretative regulations</a> (29 C.F.R. pt. 1630, et seq, eff. May 24, 2011)
	EEOC's Appendix to Part 1630 – <a href="#">Interpretative Guidance on Title I of the ADA, 29 C.F.R. pt. 1630.2, subd. (j)(5), app. § 1630.2, subd. (j)(i)(vi)</a>
	EEOC's <a href="#">Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA</a> , (EEOC Notice No. 915.002 at No. 7) (7/27/00), 2 EEOC Compl. Man. (CCH) ¶6910 (2000)
	<a href="#">Cassista v. Community Foods, Inc.</a> (1993) 5 Cal.4th 1050. 1065 (obesity per se is not a disability)
	EEOC guidance on the ADAAA, which includes "severe obesity" as a disability. ( <a href="#">ADAAA interpretative regulations</a> , 29 C.F.R. pt. 1630.3; EEOC's <i>Section 902 Definition of Disability</i> , § 902.2, subd. (c)(5)(ii).)
	<a href="#">Enforcement Guidance on Disability-Related Inquiries and Medical Exams of Employees under the ADA</a>
2	Table 1, <a href="#">CA EDD Data</a> (last checked 11/4/11), included in Fiscal Impact Statement annotations as Exhibit 2
6	Pie Chart Showing 2010 Employment Accusations Filed by DFEH by Protected Basis, included in Fiscal Impact Statement as Exhibit 6
7	Job Accommodation Network (JAN), "Workplace Accommodations: Low Cost, High Impact," Updated September 1, 2011, page 5 (available at <a href="http://askjan.org/media/LowCostHighImpact.doc">http://askjan.org/media/LowCostHighImpact.doc</a> ), included in Fiscal Impact Statement as Exhibit 7
8	<a href="#">BLS National Jobs Report based on October 2011 Data</a> , "The Employment Situation – October 2011, "Table A-6. Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted" (last checked on 11/4/11), included in Fiscal Impact Statement as Exhibit 8

9	<a href="#">ADAAA interpretative regulations</a> , pages 16997-8, citing Elizabeth Emens, <i>Integration Accommodation</i> , 156 U. Pa. L. Rev. 839, 850-59 (2008) (explaining a wide range of potential third-party benefits that may arise from workplace accommodations), included in Fiscal Impact Statement as Exhibit 9
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**REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES.**

The Commission has listed all alternatives it considered above under individual sections of these regulations. Having considered all alternatives, the Commission has determined that no reasonable alternative considered by the Commission or has otherwise been identified and brought to its attention would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Commission invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

**ECONOMIC IMPACT STATEMENT.**

Pursuant to Government Code section 11346.5, subdivision (a)(10), the Commission has determined that its proposed amended pregnancy regulations:

- Will not create or eliminate jobs within California.
- Will not create new businesses or eliminate existing businesses within California.
- Will have no effect on expanding businesses currently doing business within California.
- Will provide significant benefits to both pregnant employees and to businesses employing pregnant employees by allowing pregnant employees to work longer, with accommodations, to clarify existing law eliminating small employer exceptions, by providing for group health care coverage throughout a woman’s pregnancy disability leave, and by protecting against interference with a woman’s rights to reasonable accommodation for her pregnancy-related conditions, transfer and pregnancy disability leave. A more detailed description of the benefits of these regulations is provided in the Commission’s Notice of Proposed Rulemaking.

**COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS.**

The Commission estimates that the total statewide costs that businesses may incur to comply with these amended regulations over a five year period would be **\$8,491,500**. The proposed regulations clarify sections 12926, 12926.1, and 12940 and impose no further costs. The Commission arrived at this figure with the following calculations, assumptions and estimates.

The Equal Employment Opportunity Commission (EEOC) completed a fiscal analysis of its newly adopted regulations interpreting the American with Disabilities Act Amendments Act of

2008 (ADAAA).<sup>4</sup> The new amendments to the FEHA regarding the definition of disability are substantially similar to the amended ADAAA and are also inclusive of all types of disability established through the ADAAA. Accordingly, certain findings from the EEOC's analysis of its ADAAA regulations are utilized in the Commission's Fiscal Impact Statement to analyze the new costs associated with the FEHA amendments.

First, the EEOC estimated that there would be between **12 million** and **38.4 million** people nationwide who would now be considered persons with disabilities under the new clarifications to the ADAAA.<sup>5</sup> Using this range and applying it to California which has similar definitions of persons with disabilities, we can extrapolate this estimate to the number of people covered in California. According to the U.S Bureau of Labor Statistics, in October 2011, California had a labor force of **18,067,800**.<sup>6</sup> This is approximately **12%** of the national labor force of 154,198,000.<sup>7</sup> Thus, we can estimate that in California there are about **1,440,000** (based on the 12 million figure) to **4,608,000** (based on the 38.4 million figure) people newly categorized as disabled through the clarifications to the FEHA. Taking an average of these figures, we estimate that approximately **3,024,000** persons would potentially be newly characterized as disabled under the FEHA in California.

Most of these newly categorized persons with disabilities would be also characterized as disabled under the ADAAA, and thus entitled to request needed reasonable accommodations under that statute, regardless of the changes to the FEHA. California employers with 15 or more employees must abide by the ADAAA requirements, so the new FEHA changes would additionally affect only smaller businesses with 5-14 employees who are not covered by the ADAAA.

Based on 2009 third quarter California Employment Development Department data,<sup>8</sup> 6.8% of California employees work at businesses with 5-9 employees and 9.8% of employees work for employers with 10-19 employees. If we assume that half of that 9.8% work in businesses with 10-14 employees, or 4.9%, then **11.7% (6.8% + 4.9%) of California's employees would be covered under the FEHA (employer s with 5-14 employees) but not the ADAA**, representing the actual increase of California businesses covered by the more expansive definition of disability enacted in the 2000 revisions to the FEHA. This gives us **353,808** (3,024,000 new eligible employees x 11.7%) employees with disabilities now covered by the FEHA but not the ADAAA.

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<sup>4</sup> [EEOC Final Disability Regulations](#), p. 16978, et seq., Fiscal Impact Statement, Exhibit 3.

<sup>5</sup> [EEOC Final Disability Regulations](#), page 16991, Fiscal Impact Statement, Exhibit 3.

<sup>6</sup> [BLS Statistics for CA](#) (last checked on 11/4/11), Fiscal Impact Statement, Exhibit 4.

<sup>7</sup> [BLS National Jobs Report based on October 2011 Data](#), "Table A-1, Employment status of the civilian population by sex and age," (last checked on 11/4/11), Fiscal Impact Statement, Exhibit 5.

<sup>8</sup> Table 1, [CA EDD Data](#) (last checked 11/4/11), Fiscal Impact Statement, Exhibit 2.

The EEOC's final regulations utilized a conservative estimate of 16% to represent the number of these newly eligible people who would request an accommodation at work in order to do their job.<sup>9</sup> Applying this 16% to the estimates to people newly categorized as disabled we get **56,609** new requests for accommodations in California under the FEHA.<sup>10</sup>

The EEOC final regulations then found that **\$150** was an appropriate estimation of cost the cost to an employer on a per accommodation basis.<sup>11</sup> It also assumed that the requests for accommodation would not come all at once, but over an estimated five years. Therefore the calculation for the **range of costs** for accommodations per year in California is:

**11,322** new accommodations annually (56,609 over 5 years) x \$150 = **\$1,698,300** per year, or a lifetime cost of **\$8,491,500**.

These costs would affect smaller employers, with 5-14 employees, as large employers, including state and local governments, were already required under the ADAAA to provide these accommodations so there is no additional cost.

### Administrative Costs

Like the EEOC, the Commission anticipates that administrative costs for employers to modify their employee handbooks on disability will be minimal. The Commission expects that it will provide extensive free training seminars and free training materials on its website for small and large employers once its regulations are final to minimize the need for other, paid training to comply with the regulations.

### Legal Costs

The Commission, like the EEOC, is unable to estimate any increased litigation costs from its revised regulations. The Commission notes that the more expansive definition of disability under the FEHA has now been in effect for 11 years and thus, these regulations are not expanding, but merely clarifying the existing law. In 2010, 25.5% of the Department of Fair Employment and Housing's employment discrimination accusations were on the basis of disability.<sup>12</sup>

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<sup>9</sup> [EEOC Final Disability Regulations](#), page 16992, Fiscal Impact Statement, Exhibit 3.

<sup>10</sup> [EEOC Final Disability Regulations](#), page 16992, Fiscal Impact Statement, Exhibit 3. The EEOC acknowledged that its 16% estimate was probably high, as many persons with obvious disabilities, such as persons using wheelchairs, who might need reasonable accommodations such as wider doorways and ramps, would have been covered by the ADA, even without the amendments to that law. The EEOC assumed that most of the costlier accommodations, such as modifications for persons in wheelchairs, would have already been covered under the ADA before the 2008 amendments to the Act.

<sup>11</sup> [EEOC Final Disability Regulations](#), page 16994, Fiscal Impact Statement, Exhibit 3.

<sup>12</sup> Table Showing 2010 Employment Accusations Filed by DFEH by Protected Basis, Fiscal Impact Statement, Exhibit 6.

## ESTIMATED BENEFITS

In its most recent survey of employers, the Job Accommodation Network (JAN) found that the following percentage of respondents reported the following benefits from accommodations they had provided to employees with disabilities:

<b>Direct Benefits</b>	<b>%</b>
Retained a valued employee	89%
Increased the employee's productivity	71%
Eliminated costs associated with training a new employee	60%
Increased the employee's attendance	53%
Increased diversity of the company	43%
Saved workers' compensation or other insurance costs	39%
Hired a qualified person with a disability	13%
Promoted an employee	10%
<b>Indirect Benefits</b>	
Improved interactions with co-workers	68%
Increased overall company morale	63%
Increased overall company productivity	59%
Improved interactions with customers	47%
Increased workplace safety	45%
Increased overall company attendance	39%
Increased profitability	32%
Increased customer base	18% <sup>13</sup>

The EEOC notes: “The JAN study did not attempt to attach numerical figures to the direct benefits noted in the survey. However, taking one of those benefits—increased retention of workers—the [EEOC] notes that employers should experience cost savings by retaining rather than replacing a worker. According to data from the Society for Human Resource Management, the average cost-per-hire for all industries in 2009 was \$1,978. Such costs increase for knowledge based industries, such as high-tech where the cost-per-hire was \$3,045. In addition, the time-to-fill for positions in all industries was an average of 27 days, but time to fill for high-tech positions increased to an average of 35 days. In addition, although limited, the existing data shows that providing flexible work arrangements such as flexible scheduling and telecommuting reduces absenteeism, lowers turnover, improves the health of workers, and increases productivity.”<sup>14</sup>

The Commission agrees with the EEOC that, while it is not possible to state unequivocally that the benefits of increased clarity in the law and its regulations will always

<sup>13</sup> Job Accommodation Network (JAN), “Workplace Accommodations: Low Cost, High Impact,” Updated September 1, 2011, page 5 (available at <http://askjan.org/media/LowCostHighImpact.doc>), Fiscal Impact Statement, Exhibit 7.

<sup>14</sup> [EEOC Final Disability Regulations](#), page 16997, Fiscal Impact Statement, Exhibit 3, citing Council of Economic Advisors, Work-Life Balance and the Economics of Workplace Flexibility (March 2010) (available at <http://www.whitehouse.gov/blog/2010/03/31/economics-workplace-flexibility>).

result in benefits which cancel out costs, it is apparent from surveys conducted of both employers and employees that there are significant direct and indirect benefits to providing accommodations that may potentially be commensurate with the costs.

The Commission also notes that there are potential additional benefits regarding the provision of accommodations made by the FEHA as explained by these regulations. Specifically:

#### Reasonable Accommodation Process Simplified for Employers:

The legislative changes made to the FEHA clarifying what is or is not a disability and the guidance given on the interactive process by the Legislature and by the proposed regulations should make the reasonable accommodation process simpler for employers to understand and to follow. For example, to the extent employers may have spent time before reviewing medical records to determine whether a particular individual's diabetes or epilepsy satisfied the legal definition of a limiting impairment, there may be a cost savings in terms of reduced time spent by front-line supervisors, managers, human resources staff, and even employees who request reasonable accommodation. Further, by clarifying that employers and employees must work together cooperatively to determine an effective reasonable accommodation, the Commission believes that it has increased informal and satisfactory resolutions of potential conflicts short of litigation.

#### Efficiencies in Litigation

The amendments to the FEHA and the Commission's regulations will make it clearer to employers and employees what their rights and responsibilities are under the statute, thus decreasing the need for litigation regarding the definition of disability, the interactive process and reasonable accommodation. To the extent that litigation remains unavoidable in certain circumstances, the amendments to the FEHA and the Commission's regulations reduce the need for costly experts to address "disability" and streamline the issues requiring judicial attention.

#### Fuller Employment

In November 2011, the Bureau of Labor Statistics released employment figures which documented that 21.3% of persons with disabilities participated in the civilian labor force in the United States compared to 69.6% of the comparable non-disabled work force. The unemployment rate for persons with disabilities is 13.2% compared to 8.3% of the general population.<sup>15</sup>

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<sup>15</sup> [BLS National Jobs Report based on October 2011 Data](#), "The Employment Situation – October 2011, "Table A-6. Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted" (last checked on 11/4/11), Fiscal Impact Statement, Exhibit 8.

It should be noted that BLS defines a "person with a disability" as someone who "has at least one of the following conditions: is deaf or has serious difficulty hearing; is blind or has serious difficulty seeing even when wearing glasses; has serious difficulty concentrating, remembering, or making decisions because of a physical, mental, or emotional condition; has serious difficulty walking or climbing stairs; has difficulty dressing or bathing; or has difficulty doing errands alone such as visiting a doctor's office or shopping because of a physical mental, or emotional condition."

Fuller employment of individuals with disabilities will provide savings to the state and local governments and to employers by potentially moving individuals with disabilities into the workforce who otherwise are or would be collecting Social Security Disability Insurance (SSDI) from the government, or collecting short or long-term disability payments through employer-sponsored insurance plans.

Further, fuller employment of individuals with disabilities will stimulate the economy to the extent those individuals will have greater disposable income and enhance the number of taxpayers and resulting government revenue.

### Non-discrimination and other intrinsic benefits

The Commission agrees with the EEOC that a “wide range of qualitative, dignitary, and related intrinsic benefits [also] must be considered . . . such as equity, human dignity, and fairness.”

These benefits include:

- “Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers and potential workers with disabilities by diminishing discrimination against qualified individuals and by enabling them to reach their full potential. This protection against discrimination promotes human dignity and equity by enabling qualified workers to participate in the workforce.”
- “Provision of reasonable accommodation to workers who would otherwise have been denied it reduces stigma, exclusion, and humiliation, and promotes self-respect.”
- “Interpreting and applying the [FEHA] will further integrate and promote contact with individuals with disabilities, yielding third-party benefits that include both (1) diminishing stereotypes often held by individuals without disabilities and (2) promoting design, availability, and awareness of accommodations that can have general usage benefits and also attitudinal benefits.<sup>16</sup>”
- Provision of reasonable accommodation to workers who would otherwise have been denied it benefits both employers and coworkers in ways that may not be subject to monetary quantification, including increasing diversity, understanding, and fairness in the workplace.
- Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers in general and society at large by creating less discriminatory work environments.

The Commission concludes that the amendments to the FEHA and these regulations interpreting those provisions will have extensive quantitative and qualitative benefits for employers, government entities, and individuals with and without disabilities. Regardless of the number of accommodations provided to additional applicants or employees as a result of the FEHA and these regulations, the Commission believes that the resulting benefits will be significant and

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<sup>16</sup> [EEOC Final Disability Regulations](#), pages 16997-8, Fiscal Impact Statement, Exhibit 3, citing Elizabeth Emens, *Integration Accommodation*, 156 U. Pa. L. Rev. 839, 850-59 (2008) (explaining a wide range of potential third-party benefits that may arise from workplace accommodations), Fiscal Impact Statement, Exhibit 9.

could be in excess of the projected costs annually. Although it cannot quantify the benefits, the Commission believes that the benefits (quantitative and qualitative) of these regulations exceed and justify the costs.