

**TITLE 2, SECTIONS 7293.5 – 7294.4**  
**DISABILITY DISCRIMINATION**  
Notice published March 2, 2012

**NOTICE OF PROPOSED RULEMAKING**

The California Fair Employment and Housing Commission (“Commission”) proposes to amend existing sections 7293.5 – 7294.1, entitled “Disability Discrimination,” after considering all comments, objections, and recommendations regarding the proposed action.

**PUBLIC HEARINGS**

The Commission will hold two public hearings:

- In **Los Angeles**, starting at **1 p.m. on Tuesday, April 17, 2012**, at the Auditorium located on the ground floor of the Ronald Reagan State Office Building at 300 South Spring Street, Los Angeles, California. The Auditorium is wheelchair accessible.
- In **San Francisco**, starting at **1 p.m. on Thursday, April 19, 2012**, at the Auditorium located in the basement of the Hiram Johnson State Building at 455 Golden Gate Avenue, San Francisco, California. The Auditorium is wheelchair accessible.

At each hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Commission requests, but does not require, that persons who make oral comments at the hearing also submit a written copy and an electronic copy in Word of their testimony at the hearing.

**WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commission. The written comment period closes at **5 p.m. on April 19, 2012**. The Commission will consider only comments received at the Commission offices, delivered in person to Commission personnel at either public hearing referenced above, or through Commission email by that time. **The Commission’s preference is to receive comments electronically, in Word, via the email address given below. The Commission appreciates suggested alternate language to the current proposed revisions in comments it receives.**

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## AUTHORITY AND REFERENCE

Government Code section 12935, subdivision (a), authorizes the Commission to adopt the proposed regulations, which would implement, interpret, or apply changes to the Fair Employment and Housing Act (Gov. Code § 12900, et seq., “FEHA”) 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).<sup>1</sup>

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Commission proposes to amend its disability regulations to provide guidance and clarity to employers, other covered entities, applicants, and employees on changes in disability discrimination law in California under the FEHA. These proposed changes include the Statement of Purpose, Definitions, Establishing Disability Discrimination, Defenses, Reasonable Accommodation, Pre-employment Practices, and Employee Selection. In addition, the Commission proposes to adopt new regulations on the Interactive Process, Undue Hardship, and Medical Examinations.

These proposed changes conform to changes in disability discrimination law referenced above: the [PKP Act](#), the *Green* decision and the federal enactment of [GINA](#). In addition, the Commission proposes to make numerous amendments to its regulations to conform, where possible, with amendments to the federal Americans with Disabilities Act Amendment Act of 2008 ([ADAAA](#)) (Public Law 110-325) (S 3406)), 42 U.S.C. § 12101, et seq., and to the EEOC’s recently revised [ADAAA interpretative regulations](#) (29 C.F.R. pt. 1630, et seq, eff. May 24, 2011).

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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).) The Commission intends to incorporate any 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 Notice of Proposed Rulemaking and the Commission’s Initial Statement of Reasons reference 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.

The PKP Act affirmed the Legislature’s intent that the FEHA provide wider coverage and greater protection than the Americans with Disabilities Act ([ADA](#)) (Public Law 101-336) (42 U.S.C.A. § 12101 et seq.). At the time of the passage of the [PKP Act](#), a number of federal cases had steadily narrowed the definitions of “disability” and California courts often cited these ADA cases also to narrow the definitions of disability under California law. This 2000 legislation required the definition of physical and mental disability and medical condition to be broadly construed, regardless of interpretations of “disability” under the [ADA](#). The [PKP Act](#) also clarified that the definition of physical and mental disabilities: (1) included chronic and episodic conditions and perceived disabilities, (2) required only a limitation or potential limitation of a major life activity (rather than the “substantial limitation required by the [ADA](#)), and (3) that the limitation be determined without regard to any mitigating measures, unless the mitigating measure itself limited a major life activity. The 2000 legislation also defined the “working” limitation more broadly than the [ADA](#), and affirmed the importance of the interactive process in determining reasonable accommodation for an applicant or employee with a disability. The 2000 legislation stated that the [ADA](#) provided the “floor of protection” but not the ceiling for a person with a disability, and adopted the EEOC’s interpretative guidance on the interactive process.

With the enactment of the [PKP Act](#), the disability provisions of the FEHA differed substantially from the [ADA](#). Thereafter, in 2008, Congress amended the [ADA](#) which now much more closely resembles the [PKP Act](#) provisions covering disability. Accordingly, these regulations conform, to the extent permitted by California law, to the [ADA](#), as amended by the [ADAAA](#)<sup>2</sup> and to the EEOC’s recently revised [ADAAA interpretative regulations](#),<sup>3</sup> to ensure that the FEHA at least meets their “floor of protection,” and to allow employers, other covered entities, employees, and applicants to deal with familiar, consistent provisions wherever possible.

## BENEFITS OF REGULATIONS AND EVALUATION OF INCONSISTENT OR INCOMPATIBLE EXISTING STATE REGULATIONS

Government Code section 11346.5, subdivision (a)(3)(C) requires the Commission to state the specific benefits anticipated by the proposed regulations, including nonmonetary benefits such as prevention of discrimination against persons with disabilities or perceived disabilities. In addition, Government Code section 11346.5, subdivision (a)(3)(D) requires the Commission to evaluate whether the proposed regulations are inconsistent or incompatible with existing state regulations. A statement of the benefits of these regulations and evaluation of inconsistency with existing state regulations follows below after “Consideration of Alternatives.”

### **Relevant sections of the Fair Employment and Housing Act interpreted by these regulations include:**

**Government Code section 12926, subdivision (i)**, definition of “medical condition” was expanded to include, in addition, to cancer, genetic characteristics.

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<sup>2</sup> Americans with Disabilities Act Amendments Act of 2008 (ADAAA) (PL 110-325 (S 3406)), 42 U.S.C. § 12101, et seq.

<sup>3</sup> 29 C.F.R. § 1630, et seq., eff. May 24, 2011.

**Government Code section 12926, subdivision (j)**, definition of “mental disability” was expanded to clarify that a mental or psychological disorder or condition needed to merely limit (rather than substantially limit as the ADA required) a major life activity and that this limitation was to be determined without regard to mitigating measures, such as medication, unless the mitigating measure itself limited a major life activity. Further, major life activities were to be broadly construed and included physical, mental and social activities and working.

**Government Code section 12926, subdivision (l)**, definition of “physical disability” was expanded to clarify that a physical disability, like a mental disability, must only limit a major life activity, mitigating measures do not determine this limitation and major life activities are to be broadly construed and include working.

**Government Code section 12926.1, subdivision (a)** affirms that the ADAAA provides a “floor of protection” for a person with a disability, and that the FEHA has always provided additional, independent protections.

**Government Code section 12926.1, subdivision (b)** requires the FEHA’s broad definitions of physical disability, mental disability, and medical condition to be construed to protect applicants and employees from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

**Government Code section 12926.1, subdivision (c)** provides examples of the wider coverage and broader protections provided by the FEHA. This subdivision includes chronic or episodic conditions as physical or mental disabilities, and provides some clarifying examples. It rejects the ADAAA’s requirement that a physical or mental disability substantially limit a major life activity, and finds a “limitation” sufficient under the FEHA. (See Gov. Code § 12926.1, subd. (c).) It states that whether a condition limits a major life activity is to be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity. (*Ibid.*) It also states that “working” is a major life activity regardless of whether the actual or perceived working conditions implicate a particular employment or a class or broad range of employments. (*Ibid.*)

**Government Code section 12926.1, subdivision (d)** provides that, notwithstanding any interpretation in law in [\*Cassista v. Community Foods, Inc.\*](#) (1993) 5 Cal. 4th 1050, the Legislature intends (1) for the FEHA to be independent of the ADA, (2) to require a “limitation” rather than a “substantial limitation” on a major life activity, and (3) for Government Code section 12926, subdivisions (i)(4) and (k)(4) to protect an individual from discrimination based on an erroneous or mistaken belief that the person has a disability.

**Government Code section 12926.1 subdivision (e)** affirms the importance of the interactive process, as described in the Equal Employment Opportunity Commission’s interpretative guidelines to the ADAAA.

**Government Code section 12940, subdivision (n)**, added a separate cause of action for failure to engage in the interactive process.

[GINA](#) prohibits discrimination based on genetic characteristics, and provides additional supporting authority for the inclusion of “genetic characteristics” in the definition of “medical condition,” stated in Government Code section 12926, subdivision (h)(2).

[Green v. State of California](#), *supra*, 42 Cal. 4th at 263 shifted the burden of proving that the applicant or employee was “qualified” for the position held or desired from the employer to the applicant or employee.

As amended, the Commission’s regulations on disability discrimination provide the following:

**Section 7293.5, subdivision (b)**, amends the “Statement of Purpose” to include those purposes 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.

**Section 7293.6** defines terms used in Government Code sections 12926, 12926.1, and 12940 and in these regulations, including, inter alia: “Assistive Animal,” “CFRA,” “Disability,” “Disorder,” “Essential Job Functions,” “Family Member,” “FMLA,” “Health Care Provider,” “Interactive Process,” “Major Life Activity,” “Medical Examination,” “Mitigating Measure,” “Qualified Individual,” “Reasonable Accommodation,” “Sexual Behavior Disorders,” and “Undue Hardship.”

The Commission considered but rejected the Civil Code section 54.1 definition of animals allowed in the workplace (limited to guide, signal and service dogs) and expanded the definition to include “service animal” and “support animals” to conform both to the EEOC’s interpretative guidance on the ADA that references “service animal” and to 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. \(j\)\(i\)\(vi\)](#) [“...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].) The Commission welcomes public comment both on its definition and on requirements for assistive animal behavior in the workplace.

The Commission initially proposed an “obesity” exception to the definition of “disability” provided in section 7293.6, subdivision (c)(9)(C) to conform to the California Supreme Court’s decision in [Cassista v. Community Foods, Inc.](#) (1993) 5 Cal.4th 1050, 1065 (“[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition”). The Commission subsequently omitted the proposed “obesity” exception to conform both to the EEOC’s interpretative regulations of the ADA, which do not exclude obesity as a disability, and to the EEOC guidance on the ADAAA, which includes “severe obesity” as a disability. ([ADAAA interpretative regulations](#), at 29 C.F.R. pt. 1630.3; EEOC’s *Section 902 Definition of Disability*, § 902.2, subd. (c)(5)(ii).) The

Commission, however, would welcome further public comment on whether “obesity” should be excluded as a “disability.”

**Section 7293.7** provides guidance on how to establish disability discrimination. The Commission amended this section to conform to the California Supreme Court’s decision in [\*Green v. State of California\*](#) (2007) 42 Cal. 4th 254 that shifted the burden of proving that the applicant or employee was “qualified” for the position held or desired from the employer to the applicant or employee.

**Section 7293.8** provides affirmative defenses to employment discrimination because of disability or medical condition. The Commission renumbered the subdivisions to accommodate rescinding the “Inability to Perform” affirmative defense from section 7292.8, subdivision (b) in light of the California Supreme Court’s decision in [\*Green v. State of California\*](#) (2007) 42 Cal. 4th 254.

**Section 7293.8, subdivision (a)**, provides a cross-reference to the affirmative defenses to employment discrimination. The Commission amended the cross-reference to specify that these are set forth in California Code of Regulations, title 2, section 7286.7.

**Section 7293.8, subdivision (b)**, provides the “Health of Safety to the Individual with a Disability” affirmative defense. The Commission amended this subdivision to conform to Government Code section 12926.1, subdivision (e), by specifying that fulfillment of the interactive process duties is an essential element of this affirmative defense.

**Section 7293.8, subdivision (c)**, provides the “Health of Safety to Others” affirmative defense. The Commission amended this subdivision to conform to Government Code section 12926.1, subdivision (e), by specifying that fulfillment of the interactive process duties is an essential element of this affirmative defense.

**Section 7293.8, subdivision (d)**, provides the “Future Risk” affirmative defense. The Commission amended this subdivision by eliminating the element “...and the individual is able to safely perform the job over a reasonable length of time.” The Commission found this provision confusing.

**Section 7293.8, subdivision (e)**, provides a non-exhaustive list of factors for consideration for these affirmative defenses in subparts (1) – (4).

**Section 7293.8, subdivision (e)(1)**, includes limitations of the disability as a factor.

**Section 7293.8, subdivision (e)(2)**, includes the length of the training period for the position compared with the employee’s anticipated tenure as a factor.

**Section 7293.8, subdivision (e)(3)**, includes time spent performing the job as a factor.

**Section 7293.8, subdivision (e)(4)**, includes normal workforce turnover as a factor.

**Section 7293.8, subdivision (f)**, provides a definition of “essential functions.”

**Section 7293.8, subdivision (f)(1)**, provides the factors for consideration of whether a function is “essential.”

**Section 7293.8, subdivision (f)(1)(A)**, includes the reason the position exists is to perform the function as a factor.

**Section 7293.8, subdivision (f)(1)(B)**, includes the limited number of employees to assume the function as a factor.

**Section 7293.8, subdivision (f)(1)(C)**, includes the need for highly specialized expertise to perform the function as a factor.

**Section 7293.8, subdivision (f)(2)**, provides a non-exhaustive list of evidence that may be used to show whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(A)**, includes the covered entity’s judgment as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(B)**, includes the job description as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(C)**, includes the time spent doing the function as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(D)**, includes the consequences of non-performance of the function as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(E)**, includes the collective bargaining agreement terms as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(F)**, includes the past incumbents’ experience in the job as evidence of whether a function is “essential.” The Commission would welcome public comments whether this subpart has been interpreted as meaning *any* past work experiences of past incumbents, rather than only those experienced while performing the job at issue.

**Section 7293.8, subdivision (f)(2)(G)**, includes the current incumbents’ experience in similar jobs as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(2)(H)**, includes references to the function in prior performance reviews as evidence of whether a function is “essential.”

**Section 7293.8, subdivision (f)(3)**, provides a definition of “marginal functions.”

**Section 7293.9** provides guidance on reasonable accommodation.

**Section 7293.9, subdivision (a)**, requires an employer, other covered entity, to provide reasonable accommodation for an applicant's or employee's known disability unless doing so would impose an undue hardship.

**Section 7293.9, subdivision (b)**, provides measurement standards for determining whether a provision is effective, and thus constitutes an "accommodation," expanded in subparts (1) – (3) for clarity and ease of reference.

**Section 7293.9, subdivision (b)(1)**, includes modifications that enable an applicant to compete equitably for a job as an accommodation.

**Section 7293.9, subdivision (b)(2)**, includes modifications that enable an employee to perform the essential functions of the job held or desired as an accommodation.

**Section 7293.9, subdivision (b)(3)**, includes modifications that enable an employee to enjoy equal benefits and privileges of employment as an accommodation.

**Section 7293.9, subdivision (c)**, clarifies that an employer, or other covered entity, does not need to lower its production standards, but requires an employer, or other covered entity, to provide accommodation that enables an employee to meet its production standards.

**Section 7293.9, subdivision (d)**, provides a non-exhaustive list of examples of types of accommodation.

**Section 7293.9, subdivision (d)(1)**, includes accessibility measures as an accommodation.

**Section 7293.9, subdivision (d)(1)(A)**, includes accessible non-work station spaces at work as an accessibility measure.

**Section 7293.9, subdivision (d)(1)(B)**, includes modifying furniture, equipment, or devices as accessibility measures.

**Section 7293.9, subdivision (d)(1)(C)**, includes allowing assistive animals at work as an accessibility measure.

**Section 7293.9, subdivision (d)(1)(D)**, includes transfer to an accessible worksite as an accessibility measure.

**Section 7293.9, subdivision (d)(1)(E)**, includes providing qualified readers or interpreters as an accessibility measure.

**Section 7293.9, subdivision (d)(2)**, includes job restructuring measures as an accommodation.

**Section 7293.9, subdivision (d)(2)(A)**, includes redistribution of non-essential job functions as a job restructuring measure.

**Section 7293.9, subdivision (d)(2)(B)**, includes part-time or modified work schedules as a job restructuring measure.

**Section 7293.9, subdivision (d)(2)(C)**, includes altering when and how an essential function is performed as a job restructuring measure.

**Section 7293.9, subdivision (d)(2)(D)**, includes modifying tests, training materials, or policies as a job restructuring measure.

**Section 7293.9, subdivision (d)(2)(E)**, includes other similar actions as a job restructuring measure.

**Section 7293.9, subdivision (d)(2)(F)**, excludes excusing performance of an essential job function or permanent job restructuring as job restructuring measures.

**Section 7293.9, subdivision (d)(3)**, includes paid or unpaid leave as an accommodation.

**Section 7293.9, subdivision (d)(4)**, includes reassignment to a suitable, vacant position as an accommodation under the circumstances listed in subparts (A) – (H).

**Section 7293.9, subdivision (d)(4)(A)**, requires reassignment if the employee cannot perform his or her own position with accommodation.

**Section 7293.9, subdivision (d)(4)(B)**, requires reassignment if accommodating the employee in his or her own position creates an undue hardship.

**Section 7293.9, subdivision (d)(4)(C)**, requires reassignment if the employee requests it to gain access to medical treatment for his or her disability.

**Section 7293.9, subdivision (d)(4)(D)**, permits reassignment to a lower paid position if no comparable position is available.

**Section 7293.9, subdivision (d)(4)(E)**, permits an employee to accept or reject temporary reassignment to a temporary position during the interactive process without affecting the employee's right to an actual accommodation.

**Section 7293.9, subdivision (d)(4)(F)**, requires non-competitive placement of the employee in the reassigned position.

**Section 7293.9, subdivision (d)(4)(G)**, clarifies that reassignment as an accommodation does not require the employer to create a new position.

**Section 7293.9, subdivision (d)(4)(G)**, clarifies that, absent special circumstances, reassignment as an accommodation does not require the employer to ignore its seniority system.

**Section 7293.9, subdivision (d)(5)**, requires the employer to consider first any requested accommodations, then any and all other accommodations, before selecting the most appropriate, reasonable accommodation.

**Section 7293.9, subdivision (e)**, requires an employer, other covered entity, to provide reasonable accommodation, such as leave to attend monitoring medical appointments, for a past disability with no current limitations.

**Section 7293.9, subdivision (e)**, provides accessibility standards.

**Section 7294.0** provides guidance on the undue hardship affirmative defense.

**Section 7294.0, subdivision (a)**, provides that an employer, other covered entity, is excused from providing reasonable accommodation to an applicant or employee if the employer or other covered entity proves that providing the accommodation would create an undue hardship.

**Section 7294.0, subdivision (b)**, provides a definition of undue hardship.

**Section 7294.0, subdivision (b)(1)**, includes the accommodation's cost as an undue hardship factor.

**Section 7294.0, subdivision (b)(2)**, includes the facility's resources as an undue hardship factor.

**Section 7294.0, subdivision (b)(3)**, includes the employer's resources as an undue hardship factor.

**Section 7294.0, subdivision (b)(4)**, includes the type of operation as an undue hardship factor.

**Section 7294.0, subdivision (b)(5)**, includes the location and relationship of any and all facilities as an undue hardship factor.

**Section 7294.1** provides guidance on the interactive process.

**Section 7294.1, subdivision (a)**, requires an employer, other covered entity, to engage in a timely, good faith, interactive process with the applicant or employee with a known disability to determine whether accommodation is needed, and if so, then what accommodation, if any, is reasonable.

**Section 7294.1, subdivision (b)**, provides that an employer, other covered entity, must initiate the interactive process under the circumstances listed in subparts 1-3.

**Section 7294.1, subdivision (b)(1)**, provides that an employer, other covered entity, must initiate the interactive process when an applicant or employee requests accommodation for a limitation.

**Section 7294.1, subdivision (b)(2)**, provides that an employer, other covered entity, must initiate the interactive process when the employer, or other covered entity, becomes aware of an applicant's or employee's possible need for accommodation.

**Section 7294.1, subdivision (b)(3)**, provides that an employer, or other covered entity, must initiate the interactive process when the employer, or other covered entity, becomes aware of the possible need for accommodation after the employee has exhausted other leave provisions, yet has requested further accommodation. This subpart clarifies that, under these circumstances, an offer to engage in the interactive process does not violate California Code of Regulations, Title 2, section 7297.4, subdivision (b)(1) & (b)(2)(A)(1), prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a "serious medical condition."

**Section 7294.1, subdivision (c)**, provides the employer's, or other covered entity's, duties during the interactive process, as listed in subparts (1) – (8).

**Section 7294.1, subdivision (c)(1)**, requires an employer, other covered entity, to grant an accommodation request immediately or to initiate the interactive process.

**Section 7294.1, subdivision (c)(2)**, requires an employer, other covered entity, to ask the applicant or employee to produce a list of any limitations that need accommodation if the applicant or employee fails to do so.

**Section 7294.1, subdivision (c)(3)**, prohibits an employer, other covered entity, from asking about the underlying cause of the disability, and cross-references section 7294.3 that provides the scope of medical information that the employer, or other covered entity, may require the applicant or employee to produce.

**Section 7294.1, subdivision (c)(4)**, requires an employer, other covered entity, to specify any clarifications or additional information needed, and allow the applicant or employee a reasonable time to produce this supplemental documentation.

**Section 7294.1, subdivision (c)(5)**, requires an employer, other covered entity, to determine the essential functions of the job held or desired.

**Section 7294.1, subdivision (c)(6)**, requires an employer, other covered entity, in consultation with the employee, to identify potential reasonable accommodations and assess the effectiveness of each.

**Section 7294.1, subdivision (c)(7)**, requires an employer, other covered entity, to consider any requested accommodations before selecting and implementing the most appropriate, reasonable accommodation.

**Section 7294.1, subdivision (c)(8)**, clarifies that, if reassignment is considered as an accommodation, then the employer may ask the employee to produce a resume to help find a suitable position.

**Section 7294.1, subdivision (d)**, requires the applicant or employee to cooperate in good faith with the employer during the interactive process, as stated in subparts (1) - (10).

**Section 7294.1, subdivision (d)(1)**, requires an applicant or employee requesting accommodation to produce “required medical information” to the employer, or other covered entity, on demand.

**Section 7294.1, subdivision (d)(2)**, requires an employee requesting reassignment as an accommodation to produce a copy of his or her resume to the employer, or other covered entity, to help the employer, or other covered entity, to search for a suitable, alternate position.

**Section 7294.1, subdivision (d)(3)**, clarifies that an applicant’s or employee’s mental or physical inability to engage in the interactive process does not constitute a breakdown of the process.

**Section 7294.1, subdivision (d)(4)**, encourages, but does not require, an applicant or employee to communicate directly with the employer, or other covered entity, during the interactive process.

**Section 7294.1, subdivision (d)(5)**, provides the scope of the medical information that an employer, other covered entity, may require an applicant or employee to produce if the need for accommodation is not obvious.

**Section 7294.1, subdivision (d)(5)(A)**, includes the name, medical credentials, and any specialty of the applicant’s or employee’s health care provider as “required medical information.”

**Section 7294.1, subdivision (d)(5)(B)**, includes the health care provider’s opinion that the applicant or employee has a disability, any limitations, and how each limitation affects an applicant’s ability to compete fairly for a job or an employee’s ability to perform the essential functions of the job held or desired as “required medical information.” It also prohibits an employer, other covered entity, from asking for an applicant’s or employee’s complete medical records.

**Section 7294.1, subdivision (d)(5)(C)**, requires the employer to specify any deficiencies in the medical information that the employee produced, and allow the employee a reasonable time to produce supplemental documentation, before requiring the employee to visit a company-provided doctor. This subpart also encourages, but does not require, an employer, other covered entity, to consult with the employee’s health care provider (with the employee’s narrowly tailored written consent) before resorting to company-ordered medical examination.

**Section 7294.1, subdivision (d)(5)(C)(1)**, clarifies that medical documentation is insufficient if it fails to describe the functional limitations due to the disability.

**Section 7294.1, subdivision (d)(5)(C)(2)**, provides other factors that might make the medical documentation insufficient.

**Section 7294.1, subdivision (d)(6)**, excuses an employer, other covered entity, from providing accommodation unless or until the applicant or employee provides sufficient medical documentation.

**Section 7294.1, subdivision (d)(7)**, requires a company-ordered medical examination to be “job-related” and “consistent with business necessity,” and provides definitions of these terms.

**Section 7294.1, subdivision (d)(8)**, requires an employer, other covered entity, to pay all costs and wages associated with a company-ordered medical examination.

**Section 7294.1, subdivision (d)(9)**, requires an employee, who requests intermittent or reduced schedule leave for planned medical treatment as an accommodation, to produce medical documentation establishing the medical necessity for the leave and the estimated frequency and duration of the episodes of incapacity.

**Section 7294.1, subdivision (d)(10)**, requires an employee, who requests intermittent or reduced schedule leave for a disability that may result in unforeseeable episodes of incapacity as an accommodation, to produce medical documentation establishing the medical necessity for the leave and the estimated frequency and duration of the episodes of incapacity.

**Section 7294.1, subdivision (e)**, requires an individualized assessment of an employee’s ability to perform the essential functions of the job held or desired, and prohibits 100% healed policies.

**Section 7294.1, subdivision (f)**, provides guidance on the documentation that an employer, other covered entity, may require the employee to produce when the employee requests permission to bring an assistive animal into the workplace.

**Section 7294.1, subdivision (f)(1)**, includes medical documentation specifying any limitations that require the presence of an assistive animal in the workplace as a permitted requirement.

**Section 7294.1, subdivision (f)(2)**, includes certification by one or more professional animal trainers that the animal is well-behaved and performs each required assistive task as trained as a permitted requirement.

**Section 7294.2** provides guidance on pre-employment practices.

**Section 7294.2, subdivision (a)**, provides guidance on recruitment and advertising.

**Section 7294.2, subdivision (a)(1)**, prohibits employers, and other covered entities, from discriminating against an applicant with a disability during recruiting, unless such discrimination is excused by a permissible defense.

**Section 7294.2, subdivision (a)(1)**, prohibits advertising or publicizing an employment benefit that discourages, or is designed to discourage, an applicant with a disability.

**Section 7294.2, subdivision (b)**, provides guidance regarding the application process.

**Section 7294.2, subdivision (b)(1)**, prohibits an employer, other covered entity, or other covered entity from discriminating against an applicant with a disability.

**Section 7294.2, subdivision (b)(2)**, prohibits inquiries on a disability or designed to elicit information on a disability during the application process, and provides examples of prohibited inquiries in subparts (A) – (E).

**Section 7294.2, subdivision (b)(3)**, permits inquiries as to whether the applicant can perform the essential job functions and as to whether the applicant requires reasonable accommodation.

**Section 7294.2, subdivision (c)**, requires an employer, or other covered entity, to provide reasonable accommodation to an applicant with a disability.

**Section 7294.3** provides guidance on medical examinations.

**Section 7294.3, subdivision (a)**, prohibits pre-offer medical examinations.

**Section 7294.3, subdivision (b)**, permits job-related post-offer medical examinations under the conditions listed in subparts (1) – (3).

**Section 7294.3, subdivision (b)(1)**, includes subjecting all entering employees to a medical examination as a condition for permitting medical examinations.

**Section 7294.3, subdivision (b)(2)**, includes allowing a medically rejected entering employee to submit independent medical opinions before determining whether to disqualify the entering employee as a condition for permitting medical examinations.

**Section 7294.3, subdivision (c)**, provides that an employer may withdraw an offer of employment based on medical examination results only if it is determined that the applicant cannot perform the essential job functions or endangers the health or safety of the applicant or of others.

**Section 7294.3, subdivision (d)**, provides guidance on medical examination and disability inquiries during employment.

**Section 7294.3, subdivision (d)(1)**, permits disability-related inquiries and medical examinations that are job-related and consistent with business necessity.

**Section 7294.3, subdivision (d)(1)(A)**, defines “job-related.”

**Section 7294.3, subdivision (d)(1)(B)**, defines “consistent with business necessity.”

**Section 7294.3, subdivision (d)(1)(C)**, places the burden of proof that a medical examination was both “job-related” and “consistent with business necessity” on the employer, or other covered entity.

**Section 7294.3, subdivision (d)(2)**, requires an employer, other covered entity, to ensure that a fitness for duty examination is limited to the employee's ability to perform the essential job functions.

**Section 7294.3, subdivision (d)(3)**, permits an employer, other covered entity, to conduct tests to enforce anti-drug and anti-alcohol work rules if the employer has a reasonable belief that the employee is under the influence of drug or alcohol at work.

**Section 7294.3, subdivision (d)(3)(A)**, permits inquiries about an employee's current use of medical marijuana or illegal drugs.

**Section 7294.3, subdivision (d)(3)(B)**, prohibits inquiries about an employee's past addiction to illegal drugs.

**Section 7294.3, subdivision (d)(4)**, provides further guidance on permissible disability-related inquiries and medical examinations of employees in subparts (A) – (C).

**Section 7294.3, subdivision (d)(4)(A)**, provides guidance on Employee Assistance Programs.

**Section 7294.3, subdivision (d)(4)(B)**, permits disability-related inquiries and medical examinations mandated by state or federal law, and provides some clarifying examples.

**Section 7294.3, subdivision (d)(4)(C)**, provides guidance on Voluntary Wellness Programs.

**Section 7294.3, subdivision (d)(5)**, requires medical information to be maintained on separate forms in a separate file, and kept confidential, except for the permitted disclosures stated in subparts (A)-(B).

**Section 7294.3, subdivision (d)(5)(A)**, permits an employer, other covered entity, to inform supervisors and managers of an employee's job-related limitations and accommodations.

**Section 7294.3, subdivision (d)(5)(B)**, permits an employer, other covered entity, to inform first aid and safety personnel of an employee's condition that might require emergency treatment.

**Section 7294.4**, regulates employee selection.

**Section 7294.4, subdivision (a)**, prohibits an employer, or other covered entity, from discriminating against an applicant or employee based on a prospective need for reasonable accommodation of a disability.

**Section 7294.4, subdivision (b)**, provides guidance on qualification standards, tests, or other selection criteria.

**Section 7294.4, subdivision (b)(1)**, prohibits an employer, other covered entity, from using qualifications, tests, or other selection criteria to screen out applicants with a disability, unless these are job-related and consistent with business necessity.

**Section 7294.4, subdivision (b)(2)**, prohibits an employer, other covered entity, from using qualifications, tests, or other selection criteria based on an applicant's uncorrected vision, unless these are job-related and consistent with business necessity.

**Section 7294.4, subdivision (b)(3)**, prohibits an employer, other covered entity, from using qualifications, tests, or other selection criteria based on an applicant's uncorrected hearing, unless these are job-related and consistent with business necessity.

**Section 7294.4, subdivision (b)(4)**, prohibits an employer, other covered entity, from using any testing criterion that discriminates against applicants or employees with disabilities, except under both conditions listed in subparts (A) – (B).

**Section 7294.4, subdivision (b)(4)(A)**, the test score or other selection criterion used is shown to be job-related for the position in question; and

**Section 7294.4, subdivision (b)(4)(B)**, non-discriminatory job-related testing criterion is unavailable.

**Section 7294.4, subdivision (b)(5)**, prohibits non-job-related tests of physical ability and strength.

**Section 7294.4, subdivision (b)(6)**, requires an employer, other covered entity, to provide reasonable accommodation to an applicant or employee with a disability undertaking employment testing, and provides clarifying examples in subparts (A) – (G).

**Section 7294.4, subdivision (b)(6)(A)**, requires the test site to be accessible.

**Section 7294.4, subdivision (b)(6)(B)**, provides examples of accommodations for blind or visually impaired applicants or employees.

**Section 7294.4, subdivision (b)(6)(C)**, provides examples of accommodations for applicants or employees who are quadriplegic or have spinal cord injuries.

**Section 7294.4, subdivision (b)(6)(D)**, provides examples of accommodations for hearing impaired applicants or employees.

**Section 7294.4, subdivision (b)(6)(E)**, provides an example of accommodations for applicants or employees who have disabilities that impair their ability to read, process, or communicate.

**Section 7294.4, subdivision (b)(6)(F)**, clarifies that alternate tests may be appropriate, but cautions the employer to seek competent advice about the validity of the test.

**Section 7294.4, subdivision (b)(6)(G)**, provides that permitting the use of readers, interpreters, or similar supportive persons or instruments might be a reasonable accommodation.

**Section 7294.4, subdivision (c)**, prohibits testing for genetic characteristics, unless job-related or required by state or federal law.

**Section 7294.5** prohibits disability discrimination by conditioning an employment benefit on a waiver of any fringe benefit.

#### DISCLOSURES REGARDING THE PROPOSED ACTION

*The Commission has made the following initial determinations:*

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or businesses: 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:

All businesses with five or more employees are covered by these regulations. This would be **382,383** businesses in California. Provisions regarding persons characterized as disabled do not differ substantially from those found to be covered under the ADAAA, and thus applicants and employees with disabilities are 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>4</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

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

10-14 employees, or 4.9%, then 11.7% (6.8% plus 4.9%) of California's employees would be covered under the FEHA (employers with 5-14 employees) but not the ADAAA, 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 times 11.7%) employees with disabilities now covered by the FEHA but not the ADAAA.

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>5</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>6</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>7</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 and the DFEH 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

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<sup>5</sup> [EEOC Final Disability Regulations](#), page 16992, included in Fiscal Impact Statement, as Exhibit 3.

<sup>6</sup> [EEOC Final Disability Regulations](#), page 16992, included in Fiscal Impact Statement, as 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>7</sup> [EEOC Final Disability Regulations](#), page 16994, included in Fiscal Impact Statement, as Exhibit 3.

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>8</sup>

The Commission assumes that increased clarity in the law and its regulations will result in benefits which cancel out costs including a simplified reasonable accommodation process for employers, litigation efficiencies, and fuller employment, non-discrimination and other intrinsic benefits for persons with disabilities,.

The proposed regulations do not impose any additional costs beyond the statute.

Adoption of these regulations will not:

- (1) create or eliminate jobs within California.
- (2) create new businesses or eliminate existing businesses within California; or
- (3) affect the expansion of businesses currently doing business within California.

The benefits of these regulations are listed below.

Significant effect on housing costs: None.

#### *Small Business Determination*

The Commission has determined that the proposed regulations will affect all businesses with five or more employees, including, potentially, 331,668 businesses with 5 to 50 employees.<sup>9</sup>

#### RESULTS OF ECONOMIC IMPACT ASSESSMENT

To summarize, the average cost to a business to comply with these regulations would be \$150 per accommodation, for a **\$1,698,300** per year cost, or a lifetime cost of **\$8,491,500**. The benefits of the regulations, as detailed more fully below, would be increased clarity in the law regarding disability discrimination and the interactive process, simplifying the reasonable accommodation process for employers, litigation efficiencies, fuller employment for persons with disabilities, and increasing diversity, understanding, and fairness in the workplace.

#### CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Commission, for each revision, must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying

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<sup>8</sup> Pie Chart Showing 2010 Employment Accusations Filed by DFEH by Protected Basis, included in Fiscal Impact Statement as Exhibit 6.

<sup>9</sup> Table 1 from [California Employment Development Department](#) (last checked on 11/4/11), included in Fiscal Impact Statement, as Exhibit 2.

out the purpose for which the action is proposed or 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 has discussed alternatives it considered, and why it chose the proposed revisions it selected, in its Initial Statement of Reasons.

In these regulations, in considering all alternatives, the Commission consistently opted for regulations which were consistent with the ADAAA, where possible with California law. The Commission invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

#### BENEFITS OF PROPOSED REGULATIONS:

As required by Government code section 11346.5, subdivision (a)(3)(D), the Commission has evaluated the specific benefits anticipated by the proposed regulations including the nonmonetary benefits such as the prevention of discrimination against persons with disabilities or perceived disabilities.

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>	<b>%</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>10</sup>

<sup>10</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>), included in Fiscal

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 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>11</sup>

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Impact Statement as Exhibit 7.

<sup>11</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), included in Fiscal Impact Statement as Exhibit 8.

It should be noted that BLS defines a "person with a disability" as someone who "has at least one of the

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>12</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.

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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.”

<sup>12</sup> [EEOC Final Disability Regulations](#), pages 16997-8, 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), included in Fiscal Impact Statement as Exhibit 9.

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 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.

#### EVALUATION OF WHETHER THESE REGULATIONS ARE INCONSISTENT OR INCOMPATIBLE WITH EXISTING STATE REGULATIONS

As required by Government Code section 11346.5, subdivision (a)(3)(D), the Commission considered these disability regulations in relationship to its proposed revised pregnancy regulations, and to the California Family Rights Act (CFRA) (Gov. Code §§ 12945.1 & 12945.2) and the existing CFRA regulations (Cal. Code Regs., tit. 2, § 7297.0, et seq.) to evaluate the disability regulations for inconsistency or incompatibility. As a result, the Commission:

- Conformed its definition of a “health care provider” in both these disability regulations (§ 7293.6(h)) and in its proposed, revised pregnancy regulations (§ 7291.2(m)).
- Conformed requirements that medical certifications for reasonable accommodations for disabilities are discretionary (§ 7294.1(d)(5)) for internal consistency with similar requirements under the new proposed pregnancy regulations (proposed § 7291.7(c)) or to take a California Family Rights Act leave (Cal. Code Regs., tit. 2, § 7297.4(b)).
- Conformed the requirement that the employer affirmatively notify the employee of job openings (§ 7293.9(d)(4)) with a similar requirement in the proposed revised pregnancy regulations (proposed § 7291.10(c)(2)(A)).
- Conformed language in these regulations stating that “direct notice” to the employer from the employee rather than from a third party regarding the employee’s need for reasonable accommodation, transfer, or pregnancy disability leave is preferred, but not required (§ 7294.1(d)(4)) with comparable provisions in the proposed pregnancy regulations (proposed § 7291.17(a)(7)).

#### CONTACT PERSON

Inquiries concerning the proposed administrative action may be directed to:

Ann M. Noel, Executive and Legal Affairs Secretary or  
Caroline L. Hunt, Administrative Law Judge  
Fair Employment and Housing Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102  
Telephone: (415) 557-2325  
Facsimile: (415) 557-0855  
[disability.regs@fehc.ca.gov](mailto:disability.regs@fehc.ca.gov)

Please direct requests for copies of the proposed text (the “express terms”) of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Noel at the above address.

#### AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Commission will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons, and the economic impact analysis document. Copies may be obtained by contacting Ann M. Noel at the address or phone number listed above, or by downloading copies from the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov). In compliance with the spirit of AB 410, Swanson (Stats. 2011, ch. 495), the Commission has attempted to make all documents accessible, where at all possible, by reading software used by the visually impaired in this rulemaking action.

#### AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearings and considering all timely and relevant comments received, the Commission may adopt the proposed regulations substantially as described in this Notice. If the Commission makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Commission adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Ann M. Noel at the address indicated above. The modified text will also be available on the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov). The Commission will accept written comments on the modified regulations for 15 days after the date on which they are made available.

#### AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Noel at the above address or on the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov).

#### AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action including all exhibits, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at [www.fehc.ca.gov](http://www.fehc.ca.gov).

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