

**FAIR EMPLOYMENT & HOUSING COMMISSION
PREGNANCY REGULATIONS
INITIAL STATEMENT OF REASONS**

§ 7291.2 Definitions

The amended definitions in these proposed regulations interpret key terms or concepts used in Government Code sections 12926, 12940, 12943, 12944 and 12945 to provide clarity for employers and employees seeking to understand their rights and responsibilities under the Fair Employment and Housing Act's provisions covering pregnancy, childbirth or related medical conditions, including recent amendments to FEHA in 1999 (Stats. 1999, c. 591 ([A.B. 1670](#), § 9)), 2004 (Stats. 2004, c. 647 ([A.B. 2870](#), § 5)), and 2011 (Stats. 2011, c. 510 ([S.B. 299](#), § 1.5) & c. 678 ([A.B. 592](#), § 1.5)). The Commission anticipates that clarifying the meaning of these terms will decrease litigation.

§ 7291.2 (a) “Accrued leave” is a term that is no longer used in Government Code section 12945 after 2004 amendments, and thus, the Commission rescinded this definition from these amended regulations. (Stats. 2004, c. 647 ([A.B. 2870](#)), § 5.)

§ 7291.2 (b)(a) “Affected by pregnancy” now includes reasonable accommodation to comply with [A.B. 1670](#). (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission also amended this definition by non-substantive wordsmithing. For example, throughout these regulations, the Commission replaced the noun “woman” with “applicant” and/or “employee,” where applicable, for internal consistency. This substitution conforms to Government Code section 12940, subdivision (a), which covers applicants and employees who are pregnant or perceived to be pregnant, and Government Code section 12945, which covers female employees disabled by pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

§ 7291.2 (e)(b) “Because of pregnancy.” The Commission considered the alternative of keeping its old definition but eliminated the part of the definition which had included perceived pregnancy, at the request of the California Chamber of Commerce, which pointed out that the phrase “because of pregnancy” had been used to guarantee rights for a pregnant employee to be reasonably accommodated, transfer to a less strenuous or hazardous position or to take pregnancy disability leave. None of these rights are provided to an employee perceived to be pregnant.

§ 7291.2 (d) “Certification.” The Commission changed the definition for “certification” to “medical certification” to conform to the term used by the Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.) and its implementing regulations (29 C.F.R. § 825.100 et seq.). This allows interested parties to deal with familiar, consistent terms. The Commission then reorganized the amended definition into alphabetical order, now at § 7291.2 (o).

§ 7291.2 (e)(c) “CFRA.” The Commission added a reference to the CFRA regulations because eligible employees may use CFRA leave to bond with a newborn.

§ 7291.2 (f) (d) “Covered entity.” This definition is unchanged.

§ 7291.2 ~~(f)~~ (e) “Eligible female employee.” The Commission added the definition of this term to clarify its meaning as used repeatedly in section 7291.11, subdivision (c),¹ a new provision necessitated by [S.B. 299](#). (Stats. 2011 c. 510 ([S.B. 299](#), § 1.5).)

§ 7291.2 ~~(g)~~(f) “Disabled by pregnancy.” The Commission amended this definition by replacing the noun “woman” with “employee” to conform the terminology used in Government Code sections 12940 and 12945, and for internal consistency. The Commission added the phrase “any of” as a modifier of “these functions” to clarify that the pregnant employee’s inability to perform a single essential job function is a sufficient limitation to support a finding that the employee is “disabled by pregnancy.” The Commission received input from both employers and groups representing employees that clarifying examples of the types of conditions in which an employee could be disabled pre-and post-natal would be useful. Responsive to this input, the Commission added clarifying examples of “disabled by pregnancy,” such as pre-natal or post-natal medical care and post-partum depression.

§ 7291.2 ~~(h)~~ (g) “Employer.” The Commission amended this definition by rescinding two sentences: (1) ““Employer” includes “non-Title VII employers” and “Title VII employers,” as those terms are defined below” and (2) “The terms “all employers” and “any employer” refer to employers covered by the FEHA.” The Commission made these changes to conform to 2004 amendments to Government Code section 12945 (Stats. 2004, c. 647 ([A.B. 2870](#), § 5), which eliminated distinctions between “Title VII employers” (those employers with 15 or more employees who would be covered by the federal Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and “non-Title VII employers” (those employers with five to 14 employees, covered only by FEHA) (See Government Code section 12926, subdivision (d): “An employer includes any person regularly employing five or more persons. . . .”)

§ 7291.2 ~~(i)~~(h) “Employment in the same position.” The Commission amended this definition by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#), § 9.) The Commission also updated the language.

§ 7291.2 ~~(j)~~(i) “Employment in a comparable position.” The Commission amended this definition by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.)

§ 7291.2 ~~(k)~~(j) “FMLA.” The Commission amended this definition by spelling out “CFR” as “Code of Federal Regulations” for clarity and ease of reference. The Commission eliminated “issued January 6, 1995” as the Department of Labor has amended its regulations.

§ 7291.2 ~~(l)~~(k) “Four months” The Commission recognized that this is an ambiguous term, because months in the calendar do not have an even number of days. This is not a problem if the leave is taken in one continuous period of time. However, if leave is taken sporadically, it is more useful to know the number of days in four months to calculate an employee’s total leave

¹ All section references are to the California Code of Regulations, title 2, unless stated otherwise.

entitlement. Four months can be viewed as one-third of a calendar year, and one-third of 365 days is 122 days or 17.3 weeks (365 days ÷ 3 = 121.66 days, or 122 days; 52 weeks ÷ 3 = 17.3 weeks). The Commission amended the definition by adding these various ways in which the four months could be calculated.

§ 7291.2, subd. (l) “Group Health Plan,” The Commission added this definition to conform to the 2011 legislation requiring employers to continue group health plan coverage for employees taking pregnancy disability leave. (Stats. 2011, c. 510 ([S.B. 299](#)), § 1.5)

§ 7291.2 (~~m~~) (m) subds. (1)(2) & (3) “Health Care Provider.” The Commission considered either leaving its definition as is or amending them to be consistent with definitions used by the Family and Medical Leave Act of 1993 ([FMLA](#))(Pub. Law 103-3; 29 U.S.C. § 2601 et seq.) regulations (See [FMLA interpretative regulations](#) at 29 C.F.R. § 825.800, “health care provider.”) The Commission opted to standardize its definition with that used by FMLA as an employee taking California pregnancy disability leave will also qualify to take FMLA leave, running concurrently, and the Commission believed that the most consistent definition would save employers costs. This allows interested parties to deal with familiar, consistent terms.

§ 7291.2 (~~n~~) “Normal Pregnancy.” The Commission rescinded this definition because the 2004 amendments to section 12945 removed any reference to this term. (Stats. 2004, c. 647 ([A.B. 2870](#)), § 5.)

§ 7291.2 (n) “Intermittent Leave.” The current regulations use the term “intermittent leave” but do not define it. This definition follows FMLA’s “intermittent leave” definition (29 C.F.R. § 825.800), which states:

“Intermittent leave” means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

This allows interested parties to deal with familiar, consistent terms and saves employers costs of complying with conflicting definitions.

§ 7291.2 (o) “Medical certification.” This term was previously defined under “certification.” The Commission changed the definition for “certification” to “medical certification” to conform to the term used by the Family and Medical Leave Act of 1993 (29 U.S.C. 2601 et seq.) and its implementing regulations (29 C.F.R. § 825.100 et seq.). This allows interested parties to deal with familiar, consistent terms and saves employers costs of complying with conflicting definitions. The Commission reorganized the amended definition into alphabetical order.

§ 7291.2 (p) “Perceived pregnancy.” The Commission added the definition of this term to conform to Government Code sections 12926, subdivisions (n) and (q), and 12940, subdivision (a), and after receiving public input from employer groups that the current

regulations did not differentiate between the requirements to provide reasonable accommodation, transfer, and pregnancy disability leaves to pregnant employees, which would not be available to employees perceived to be pregnant and protect against discrimination on the basis of pregnancy, which would include perceived pregnancy. Public comments indicated a need to clarify that an applicant or employee is protected against discrimination based on “perceived pregnancy” under Government Code sections 12926, subdivisions (n) and (q), and 12940, subdivision (a).

§ 7291.2 ~~(o)~~ (q) “Pregnancy disability leave.” No changes.

§ 7291.2 (r) “Reasonable accommodation.” The Commission added this definition, as the right to be “reasonably accommodated” was added in 1999. (Stats. 1999, c. 591 ([A.B. 1670](#), § 9.) The definition for “reasonable accommodation” roughly follows the definition of “reasonable accommodation” for disability found at section 12926, subdivision (n), modified to provide clarifying examples of the kinds of reasonable accommodation needed by women disabled by pregnancy, childbirth, or related medical conditions. The Commission considered but ultimately rejected the alternative of including in this definition a defense that an employer can show that the accommodation was not reasonable because it would cause the employer “undue hardship.” The Commission did not include “undue hardship” in this definition because Government Code section 12945, subdivision (a)(3)(A), requiring an employer to reasonably accommodate for conditions related to pregnancy, childbirth or a related medical condition, makes no mention of undue hardship, and the legislative history adding this provision, [A.B. 1670](#), indicates that that Legislature contemplated that the types of accommodations required by pregnancy, more rest breaks, usage of stools or chairs, would be de minimus and for short durations.

§ 7291.2 (s) “Reduced leave schedule.” In the current regulations, this term is used but not defined. This definition follows FMLA’s “reduced leave schedule” definition (29 C.F.R. § 825.800), which states:

“Reduced leave schedule” means a leave schedule that reduces the usual number of hours per workweek, or hours per workday of an employee.

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

§ 7291.2 ~~(p)~~ (t) “Related medical condition.” The Commission modified this definition to provide more clarity by specifically naming conditions which would constitute a “related medical condition,” such as stillbirth and post-partum depression. The Commission rescinded the last sentence explaining that a “related medical condition” is different from a “medical condition” as defined in Government Code section 12926, subdivision (h), because the additional clarifying examples made this negative distinction unnecessary.

§ 7291.2 ~~(q)~~ (u) “Transfer.” The Commission substituted “reassigning temporarily” for “the transfer of” to eliminate the tautology defining “transfer” as “the transfer,” and to clarify the meaning of this term.

Reference: This reference section adds the bills which have altered requirements affecting pregnancy: Stats. 1999, c. 591 ([A.B. 1670](#)), Stats. 2004, c. 647 ([A.B. 2870](#)), Stats. 2011, c. 510 ([S.B. 299](#)) & c. 678 ([A.B. 592](#)).

§ 7291.3 Prohibition Against Harassment

The Commission updated the cross-references and language in this provision. No substantive changes are intended. The Commission considered consolidating this provision in section 7291.6, but decided to cross-reference it because harassment coverage requires only one employee while the other prohibited actions listed in section 7291.6 require five employees.

§ 7291.4 No Eligibility Requirements

The Commission added section 7291.4 to emphasize that, in contrast to the requirements to take a leave under the California Family Rights Act, there are no eligibility requirements to take a pregnancy disability leave under FEHA.

~~§ 7291.4~~ § 7291.5 Responsibilities of Covered Entities Other than Employers

The Commission amended this section by inserting “or perceived pregnancy” after “because of pregnancy” to conform to Government Code sections 12926, subdivisions (n) and (q), and 12940, subdivision (a). Also, public inquiries indicated a need to clarify that Government Code section 12940, subdivision (a), prohibits discrimination based on “perceived pregnancy.” Government Code section 12926, subdivision (q), includes “pregnancy” in the definition of “sex,” and Government Code section 12926, subdivision (n), extends coverage to the “perception” of any protected characteristic. The Commission updated the cross-references.

~~§ 7291.5~~ § 7291.6 Responsibilities of Employers

The Commission rescinded the prefatory language as unnecessary due to a major reorganization of this section. Subdivision (a)(1) now lists an employer’s responsibilities towards applicants and employees because of pregnancy or perceived pregnancy under Government Code section 12940, subdivisions (a) through (j). Subdivision (a)(2) lists an employer’s responsibilities towards employees because of pregnancy under Government Code section 12945. The Commission anticipates that this reorganization will clarify that although Government Code section 12940 covers “perceived pregnancy,” Government Code section 12945 does not. An employee must be “affected by pregnancy” to qualify for pregnancy disability leave, transfer or reasonable accommodation for pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

(a)(1) “perceived pregnancy.” Public inquiries indicated that some interested parties did not realize that “perceived pregnancy” is a protected basis under Government Code sections 12926, subdivisions (n) and (q), and 12940, subdivisions (a) through (j). To clarify this, the Commission inserted “or perceived pregnancy” after “because of pregnancy.”

(a)(1)(A) “refuse to hire” Unchanged, except for the renumbering necessitated by the Commission’s reorganization of this section.

(a)(2)(1)(B) “refuse to select” The Commission rescinded the exception for non-Title VII employers to conform to the 2004 legislative amendments to section 12945 (Stats. 2004, c. 647 (A.B. 2870, § 5), which eliminated distinctions between “Title VII employers” (those employers with 15 or more employees who would be covered by the federal Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and “non-Title VII employers” (those employers with five to 14 employees, covered only by FEHA).

(a)(3)(1)(C) “refuse to promote” Unchanged, except for the renumbering necessitated by the Commission’s reorganization of this section.

(a)(4)(1)(D) “bar or discharge” Unchanged, except for the renumbering necessitated by the Commission’s reorganization of this section.

~~**(a)(5)**~~ “refuse to provide health benefits for pregnancy” was eliminated in this subsection. The new mandates for employers to provide group health plan benefits is now provided at section 7291.6(a)(2)(B).

(a)(6)(1)(E) “discriminate against applicants and employees pregnancy” The Commission rescinded the exception for non-Title VII employers to conform to the 2004 legislative amendments to section 12945 (Stats. 2004, c. 647 ([A.B. 2870](#), § 5), which eliminated distinctions between “Title VII employers” (those employers with 15 or more employees who would be covered by the federal Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and “non-Title VII employers” (those employers with five to 14 employees, covered only by FEHA).

(a)(7)(1)(F) “harass” Unchanged, except for the renumbering necessitated by the Commission’s reorganization of this section.

(a)(8)(1)(G) “retaliate” The Commission amended this subdivision by eliminating the cross-reference to section 7291.14 that was rescinded during the reorganization of this section. The Commission inserted “or perceived pregnancy” to clarify that employees who are perceived to be pregnant are protected against retaliation as well as those who are actually pregnant. The Commission also added exercising the right to “reasonable accommodation” and “transfer” as protected activities that support a retaliation claim for internal consistency and to conform the 1999 legislation (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9), which codified the right to reasonable accommodation for pregnancy, childbirth, or a related medical condition.

~~**(a)(9)**~~ “refuse to accommodate” was relocated to 7291.6 (a)(2)(C) because the right to provide reasonable accommodation does not apply to an employee who is perceived to be pregnant. This provision applies only to an employee who is “affected” or “disabled” by pregnancy.

~~(a)(10)~~ “refuse to transfer” was relocated to 7291.6 (a)(2)(D) because the right to transfer does not apply to an employee who is perceived to be pregnant. This provision applies only to an employee who is “affected” or “disabled” by pregnancy.

(a)(1)(H) The current pregnancy regulations have no provisions regarding involuntary transfer and employee representatives requested that the Commission add a provision protecting a pregnant employee from involuntary transfer. The Commission struggled with many alternatives to balance an employee’s right not to be involuntarily transferred by her employer with an employer’s concern that it not allow its employees to work in dangerous situations for themselves.

Ultimately, after considerable research and discussion, the Commission added a provision on involuntary transfer consistent with the holding in the U.S. Supreme Court’s decision in *UAW v. Johnson Controls* (1991) 499 U.S. 187, which held that involuntary transfer of employees who might become pregnant to a less hazardous job constituted sexual discrimination, in violation of Title VII. This provision clarifies that involuntary transfer of an employee to a less strenuous or hazardous position because of her pregnancy or perceived pregnancy similarly violates Government Code section 12940, subdivision (a). The Commission added the last sentence to emphasize that transfers unrelated to pregnancy or perceived pregnancy are nonetheless permissible.

~~(a)(11)~~ “refuse to grant disability leave” The Commission relocated this provision to section 7291.6 (a)(2)(E) because the right to take disability leave does not apply to an employee who is perceived to be pregnant. That right applies only to an employee who is “affected” or “disabled” by pregnancy.

~~(a)(12)~~(1)(I) The Commission amended this provision by eliminating the out-of-date cross-references and by wordsmithing only. No substantive changes are intended.

(a)(2) The Commission added this subdivision to clarify an employer’s responsibilities towards an employee based her actual pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. The Commission anticipates that this provision will also clarify that Government Code section 12945 does not cover a “perception” of these characteristics. The employee must be “affected by pregnancy” to qualify for transfer or reasonable accommodation for pregnancy, childbirth, or a related medical condition. Similarly, the employee must be “disabled by pregnancy” to qualify for pregnancy disability leave.

(a)(2)(A) “provide employee benefits” Unchanged, except for the renumbering necessitated by the reorganization of this section.

(a)(2)(B) “refuse to maintain and pay for coverage under a group health plan” The Commission added this provision to conform to S.B. 299. (Stats. 2011 c. 510 ([S.B. 299](#)), § 1.5.)

(a)(2)(C) “refuse to provide reasonable accommodation” The Commission relocated this provision from former section 7291.5, subdivision (a)(9), during the reorganization of this section, and updated the cross-reference. The Commission substituted “affected by pregnancy”

for “temporarily disabled by pregnancy to the same extent that other temporarily disabled employees are accommodated under the employer’s policy, practice, or collective bargaining agreement” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#), § 9).) The Commission initially considered adding an “undue hardship” limitation on an employer’s duty to provide reasonable accommodation to an employee affected by pregnancy, but did not do so because current Government Code section 12945, subdivision (a)(3)(A), places no qualifier on an employer’s obligation to reasonably accommodate a pregnant employee.

(a)(2)(D) “refuse to transfer” The Commission relocated this provision from former section 7291.5, subdivision (a)(10), during the reorganization of this section, and updated the cross-reference.

(a)(2)(E) “refuse to grant pregnancy disability leave” The Commission relocated this provision from former section 7291.5, subdivision (a)(11), during the reorganization of this section, and updated the cross-reference.

(a)(2)(F) “interference” The Commission added this provision to conform to [A.B. 592](#), which clarified that existing law protected an employee against interference with, and restraint or denial of rights guaranteed by Government Code section 12945, or any attempt to do so. (Stats. 2011 c. 678 ([A.B. 592](#), § 1.5.)

(b) “Permissible defenses” The Commission relocated this provision from former section 7291.5, subdivision (b) during the reorganization of this section.

~~**(c)** “Training Programs Leading to Promotion.”~~ The Commission rescinded this exception for non-Title VII employers to conform to the 2004 legislative amendments to section 12945 (Stats. 2004, c. 647 ([A.B. 2870](#), § 5), which eliminated distinctions between “Title VII employers” (those employers with 15 or more employees who would be covered by the federal Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and “non-Title VII employers” (those employers with five to 14 employees, covered only by FEHA).

~~**(d)** “Provision of Medical Benefits.”~~ The Commission rescinded this exception for non-Title VII employers to conform to the 2004 legislative amendments to section 12945 (Stats. 2004, c. 647 ([A.B. 2870](#), § 5), which eliminated distinctions between “Title VII employers” (those employers with 15 or more employees who would be covered by the federal Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and “non-Title VII employers” (those employers with five to 14 employees, covered only by FEHA).

References: New legislative references added.

§ 7291.7 Reasonable Accommodation

This section is new, as prior to 1999, Government Code section 12945 did not explicitly require an employer to provide reasonable accommodation. (Stats. 1999, c. 591 ([A.B. 1670](#), § 9).) The Commission anticipates that the cost of providing reasonable accommodation for employees “affected by pregnancy” (estimated in the Commission’s Economic Impact Statement to be

approximately \$527 per pregnant employee for 9-12 pre-natal visits) will be offset by its benefits (reduced employee turnover costs, employee able to work longer, and lower unemployment insurance claims).

(a)(1) “employee’s request”: This requirement is specified at Government Code section 12945, subdivision (a)(3)(A).

(a)(2) “requested accommodation is reasonable”: This provision tracks reasonable accommodation for a disability under Government Code section 12940, subdivision (m), to allow interested person to deal with familiar, consistent provisions.

(b) “independent right to pregnancy disability leave”: This subdivision gives employers guidance that forms of reasonable accommodation that provide for time off from work, such as intermittent leave or a reduced work schedule would count towards an employee’s four months of leave entitlement.

(c) “medical certification discretionary” The Commission made medical certification requirements for pregnancy a discretionary requirement for internal consistency with medical certification requirements for reasonable accommodation for a disability (proposed §7294.1(d)(5)) or to take a California Family Rights Act leave (Cal. Code Regs., tit. 2, § 7297.4(b).). The Commission anticipates that the need for accommodation for employees affected by pregnancy will be so common, obvious, or de minimus (such as, allowing the employee to eat snacks to alleviate morning sickness, providing use of a chair during a rest break to relieve fatigue, allowing extra bathroom breaks, and excusing lifting of more than 20 pounds) that medical certification will be unnecessary in many cases.

References: New legislative references added

§ 7291.6 § 7291.8 Transfer

(a)(1) “employer with a transfer policy”: The Commission added this subdivision to conform to Government Code section 12945, subdivision (a)(3)(B).

(a)(2) “unlawful to deny the request to transfer” Unchanged.

(a)(1)(2)(A) “basis of employee’s request for transfer” The Commission substituted “advice” for “certification” to conform to S.B. 299 (Stats. 2011 c. 510 ([S.B. 299](#), § 1.), and for internal consistency with section 7291.7, subdivision (c), and 7291.9, subdivision (c)(2).

(a)(2)(B) “transfer can be reasonably effected”: Wordsmithing changes only.

(a)(2)(C) “medical certification discretionary” The Commission added this provision for internal consistency with section 7291.7, subdivision (c), and 7291.9, subdivision (c)(2).

(b) “Burden of Proof” Unchanged except for the updated cross-reference.

(c) “Transfer to Accommodate Intermittent Leave or a Reduced Work Schedule.” The Commission adopted the requirements for equivalent rate of pay, benefits, etc., from the identical provision of the FMLA regulations, at 29 C.F.R. § 825.204, subdivision (c), that would apply to a FMLA-eligible pregnant employee. Section 825.204 provides:

825.204: May an Employer Transfer an Employee to an “Alternative Position” in Order To Accommodate Intermittent Leave or a Reduced Leave Schedule?

....

(c) The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee’s regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary.

(d) “Right to Reinstatement After Transfer.” Wordsmithing only.

(e) “No Eligibility Requirement.” This is now covered at section 7291.4.

Reference: The reference to *DFEH v. Save Mart* (1992) FEHC Dec. No. 92-01 was deleted, as its holding that the FEHA did not require an employer to reasonably accommodate a pregnant employee was overturned by 1999 FEHA amendments which now require an employer to provide reasonable accommodation to a pregnant employee. (Stats. 1999, c. 591 ([A.B. 1670](#), § 9).)

§ ~~7291.7~~ 7291.9 Pregnancy Disability Leave

(a) “pregnancy disability leave required” The Commission substituted “an employee” for “woman” for internal consistency.

(a)(1) “four month leave”: These revisions give employers more guidance on what “four months” means.

(a)(2)(A) “examples of how to calculate four months” The Commission added clarifying examples of how to calculate four months pregnancy disability leave to provide more guidance to interested parties.

(a)(2)(B) Amount of leave if intermittent: The Commission amended this subdivision to give employers and employees more guidance on the effects of intermittent leave or a reduced work schedule for full-time and part-time employees. No substantive changes are intended.

(a)(2)(C) “Holidays” Unchanged.

(a)(3) “Intermittent Leave deducted from four months” The Commission added this subdivision to give employers and employees more guidance on the effects of intermittent leave on pregnancy disability leave. The Commission added clarifying examples in subparts A and B.

(a)(3)(4) “Minimum Duration” The Commission amended this provision by wordsmithing only, and by adding a cross-reference to section 7291.9, subdivision (a)(2)(B), for ease of reference.

(b) “Employers With More General Leave Policies.” Wordsmithing changes which do not require the reader to cross-reference another section of these regulations.

(e) “No Eligibility Requirement.” The Commission relocated this provision to section 7291.4.

(c) “Denial of Leave is Unlawful Employment Practice.” This provision replaces the old section 7291.8. The Commission updated the language and format for internal consistency, and to provide more clarity for interested parties seeking to understand their rights and responsibilities.

Reference: The Commission added new legislation and a United States Supreme Court case as references. In *Cal. Federal Sav. & Loan Ass’n v. Guerra* (1987) 479 U.S. 272, the United States Supreme Court upheld the constitutionality of California’s pregnancy leave statute granting women disabled by pregnancy a disability leave of up to four months. (479 U.S. at p. 289.)

~~§ 7291.8 Denial of Leave~~

This section is included now into sections 7291.9 above and 7291.10 below. The Commission reorganized this section for internal consistency and additional clarity.

~~§ 7291.9~~ § 7291.10 Right to Reinstatement from Pregnancy Disability Leave

(a) “Guarantee of Reinstatement”: Changes to the first two sentences are wordsmithing only. Changes to the last sentence clarify that employers are not required to give myriad guarantees of reinstatement for multiple leave periods.

(b)(1) “Definite Date of Reinstatement” The Commission inserted “by the date agreed upon” to eliminate any remaining ambiguities about the date of reinstatement.

(b)(2) “Change in Date of Reinstatement:” The change in language focuses on giving the employer guidance on what is required to do, rather than on how a plaintiff could prove a violation of the FEHA. The Commission anticipates that this change in focus will clarify an employer’s responsibilities, and thus, reduce litigation.

(c) “Permissible Defenses” The Commission added “Employment Would Have Ceased” to this heading to telegraph what kinds of defenses are permissible.

(c)(1) “Right to Reinstatement to the Same Position.” The additional sentence, “This is true even if the employer has given the employee a written guarantee of reinstatement.” clarifies that

a written reinstatement guarantee does not immunize an employee on pregnancy disability leave from non-pregnancy-related business reasons for her employer failing to return her to her job. Subparts A and B are unchanged.

(c)(2) “Right to Reinstatement to a Comparable Position” Unchanged.

(c)(2)(A) “If no comparable position available” The Commission considered keeping the existing 10 workind days requirement but ultimately substituted “60 calendar days” for “10 working days” to provide extended protection for the employee seeking reinstatement where a job opening is reasonably foreseeable. Employee representatives convinced the Commission that 60 calendar days was a more realistic time frame to ascertain whether comparable positions would be available. The Commission added the requirement that the employer affirmatively notify the employee of job openings to conform to *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, and for internal consistency with the disability regulations.

(c)(2)(B) “Undermine Business Operations” Unchanged.

(c)(3) Employee Laid Off: The Commission added this provision to track comparable language under the CFRA regulations at Cal. Code Regs., tit. 2, § 7297.2, subd. (c)(1)(A), which tracked FMLA regulations at 29 C.F.R. § 825.216, subd. (a)(1). Disability because of pregnancy is a “serious health condition” under FMLA.

(d) Right to Reinstatement to Job if Additional Leave Taken Following the End of Pregnancy Disability Leave; Equal Treatment: The Commission amended the language to clarify that pregnancy disability leave cannot extend beyond four months. The last sentence was added to clarify that employers and employees are always able to agree to more pregnancy disability leave and a later reinstatement.

(e) Right to Reinstatement if CFRA Leave Is Taken Following Pregnancy Disability Leave: Unchanged, except for updating the cross-reference.

Reference: New legislation and the year for the *Cal. Fed.* decision has been added.

~~§ 7291.10~~ This is now at section 7291.15.

§ 7291.11 Terms of Pregnancy Disability Leave

(a) Paid Leave: The first sentence adds the provision from current section 7291.11, subdivision (a)(1), below. The second sentence gives employees information that they may be entitled to state disability insurance and should check with EDD for details. The Commission receives many questions from employers and employees about this issue.

~~**(a)(1)**~~ Pay exceptions for non-Title VII employers: The Commission rescinded this subdivision because 2004 amendments eliminated the pay exceptions for non-Title VII employers. (Stats. 2004, c. 647 ([A.B. 2870](#)), § 5.)

(b) Accrued Time Off. Unchanged.

(b)(1) Sick Leave. Unchanged.

(b)(2) Vacation Time: Wordsmithing changes only.

(c) Continuation of Group Health Plan. The Commission added this subdivision to conform to S.B. 299. (Stats. 2011 c. 510 ([S.B. 299](#)), § 1.5.).

~~(e)~~(d) Other Benefits and Seniority Accrual: Wordsmithing changes only.

~~(e)~~(d)(1) Seniority Accrual: The Commission eliminated “consistent with the employer’s policy” as redundant.

~~(e)~~(d)(2) Seniority Upon Return: The Commission eliminated “for purposes of” clause as unnecessary.

~~(d)~~(e) Employee Status: The Commission substituted “other qualifying provisions” for “et cetera.” as more descriptive.

References: The Commission added new legislative references.

§ 7291.12 Relationship Between Pregnancy Leave and FMLA Leave

(a) Pregnancy Leave May Also Be a FMLA Leave. Unchanged.

(b) FMLA Coverage: This revision subsumes former subdivisions (b)-(d) into this cross-reference to FMLA’s regulations for guidance on taking a FMLA leave. This ensures that the appropriate federal agency interprets the federal law, rather than the Commission.

Reference: The Commission added new legislative references.

§ 7291.13 Relationship Between CFRA and Pregnancy Leaves.

(a) Separate and Distinct Entitlements The Commission updated the cross-reference and corrected the placement of the acronym “CFRA” No substantive changes are intended.

(b) “Serious Health Condition” –Pregnancy. Wordsmithing only.

(c) CFRA Leave After Pregnancy Disability Leave: The last two sentences were deleted and reorganized at (c)(1) as a separate subparagraph.

(c)(1) The last two sentences from 7291.13(c) were reorganized as this separate subparagraph.

~~(c)~~(1)(2) Pregnancy disability leave exceeded: These revised regulations attempt to minimize the need for cross-referencing other sections of the regulations. The Commission added “in

consultation with the employee” to conform to Government Code section 12940, subdivision (n), requiring employers to engage in an interactive process to determine effective reasonable accommodations.

(d) Maximum Entitlement: Wordsmithing changes and more specific calculation of the amount of time that a female employee may be off work.

(e) CFRA Coverage: Provisions about CFRA and whether eligible CFRA employees are the same as eligible FMLA employees are left to the CFRA regulations.

Reference: The Commission added new legislative references.

§ 7291.14 — Retaliation

The duty not to retaliate is now covered at section 7291.4, “Responsibilities of Employers.”

§ 7291.14 Relationship Between Pregnancy Disability Leave and Leave of Absence as Reasonable Accommodation for Physical or Mental Disability – Separate and Distinct Rights.

The Commission added this section because frequent public inquiries indicated a need for clarification.

Reference: The Commission added new legislative references.

§ 7291.15 Remedies

Unchanged, except for updating of the cross-references.

§ 7291.16 Notice of Right to Request Pregnancy Disability Leave or Transfer

§ 7291.16 Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, etc.

(a) Employers to Post Notice

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

The Commission rearranged and renumbered this section from the current sections 7291.10, subdivision (a)(5) and 7291.16. This revised consolidated section gives guidance to employers on their obligations to their employees regarding their rights and obligations for reasonable accommodation, to transfer or to take pregnancy disability leave. It conforms, where possible, with new proposed notice requirements used in the FMLA regulations. (See 29 C.F.R. § 825.300.)

(b) Employers to Give Notice See comment above.

(b) Content of Employer’s Reasonable Advance Notice: This provision gives employers guidance on what information should be given to employees for them to have “reasonable advance notice.”

~~(e) Non-English Speaking Workforce~~ This provision is now covered below at new section 7291.16, subdivision (d)(4).

(c) Consequences of Employer Notice Requirement: The Commission relocated this provision from former section 7291.10, subdivision (a)(5).

~~(d) “Notice A”~~ Renumbered below at 7291.16, subdivision (e).

(d)(1) Electronic posting: This follows proposed new FMLA regulations, at 29 C.F.R. § 825.300, subdivision (a)(1.)

(d)(2) Electronic distribution: This follows proposed new FMLA regulations, at 29 C.F.R. § 825.300, subd. (a)(3.)

(d)(3) Copy of notice: This requirement loosely follows 29 C.F.R. § 825.300, subdivision (b).).

(d)(4) Non-English Speaking Workforce: This requirement loosely follows 29 C.F.R. § 825.300, subdivision (a)(4).).

~~(d)~~ **(e)** “Notice A” Wordsmithing changes.

~~(e)~~ **(f)** “Notice B” Wordsmithing changes.

~~“Notice A”~~ The Commission has substantially rewritten its “Notice A,” as explained below, to reflect changes in these regulations.

“Notice A” This revised “Notice A” adds information about reasonable accommodation and spells out an employer’s obligation to give notice to employees about their rights to take leave, to transfer, or otherwise to be reasonably accommodated and tells employees about their obligation to give their employers reasonable notice of their need for leave/transfer/reasonable accommodation.

“Notice B” The revised “Notice B” follows clarifications given elsewhere in the regulations on the specific amount of time covered by four months and gives examples of specific medical conditions covered by pregnancy, childbirth and related medical conditions.

The revised “Notice B” references the newly created medical certification form, below at section 7291.17, subdivision (e).

The added last paragraph gives employees information on where they may seek more information from DFEH.

§ 7291.10 § 7291.17 Employee Requests for Reasonable Accommodation, Transfer or Pregnancy Disability Leave: Advance Notice; Medical Certification; Employer Response

The Commission added “request for reasonable accommodation” to the preamble language to conform to the 1999 amendments. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission placed “transfer” before “pregnancy disability leave” to reflect that the goal of a transfer is to allow the employee to work as long as possible before taking pregnancy disability leave. The Commission substituted “medical certification” for “certification” to conform to the term used by the Family and Medical Leave Act of 1993 (29 U.S.C. 2601, et seq.) and its implementing regulations (29 C.F.R. § 825.100, et seq.). This allows interested parties to deal with familiar, consistent terms.

(a) Adequate Advance Notice The Commission inserted “adequate” to more accurately reflect the guidance given in this subdivision.

(a)(1) “Where practicable, the anticipated timing and duration of the reasonable accommodation, transfer or pregnancy disability leave” language gives employers information which will make it easier to plan for the reasonable accommodation, transfer or pregnancy disability leave .

(a)(2) 30 Days Advance Notice: The Commission amended this provision by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission also clarified the provision through wordsmithing.

(a)(3) When 30 Days is Not Practicable: The Commission amended this provision by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) All other changes are wordsmithing only.

(a)(4) Prohibition Against Denial in Emergency or Unforeseen Circumstances. The Commission amended this provision by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission placed “transfer” before “pregnancy disability leave” to reflect the usual order of progression from the least restrictive accommodation to the most restrictive one. The goal of each of these forms of reasonable accommodation because of pregnancy is allow the employee to work as long as possible both prior to delivery and post-partum.

~~(a)(5) Employer Obligation to Inform Employees of Notice Requirement:~~ This provision is now included above at new section 7291.16, subdivision (b).

~~(a)(6)(5)~~ Employer Response to Reasonable Accommodation, Transfer, or Pregnancy Disability Leave Request. The Commission amended this provision by adding “reasonable accommodation” to conform to the 1999 legislation. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission also updated the language, which was wordsmithing only.

(a)(6) Consequences for Employee Who Fails to Give Her Employer Adequate Advance Notice of Her Need for Reasonable Accommodation or Transfer: This provision follows language from the FMLA proposed regulations, see 29 C.F.R. § 825.304, to allow interested parties to deal with familiar, consistent provisions.

(a)(7) Direct Notice The Commission added this provision to conform to *Claudio v. Regents of University of California* (2005) 134 Cal. App. 4th 224, and for internal consistency with the disability regulations.

(b) Medical Certification: Reasonable accommodation was added to conform to 1999 amendments. (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9.) The Commission also updated the language for additional clarity.

~~**(b)(1)**~~ Prohibition Against Further Medical Inquiries. The Commission relocated this provision to section 7291.17, subdivision (b)(8).

(b)(1) Employer's Duty to Notify Employee of Any Medical Certification Requirements. The Commission added this provision for internal consistency with the disability regulations.

~~**(b)(2)**~~ Preserving Confidentiality of Medical Information. The Commission relocated this provision to section 7291.17, subdivision (b)(9), during the reorganization of this section.

(b)(2) Foreseeable reasonable accommodation: The current regulations do not specify the consequences for the employee of failing to give her employer adequate advance notice for transfer or reasonable accommodation. This section follows language from the FMLA regulations at § 825.304, subsection (b), to allow interested parties to deal with familiar, consistent provisions.

(b)(3) Timing: The Commission added this provision to provide guidance on the time the employer should allow the employee to produce medical certification. This section follows language from the FMLA regulations at § 825.304, subsection (b). This allows interested parties to deal with familiar, consistent provisions.

(b)(4) Notice to Employee of Consequences of Failing to Provide Medical Certification. The Commission added this provision to be consistent with the interactive process provisions in the new disability regulations.

(b)(5) Compliance with Employer's Less Stringent Health Care Plan Medical Certification Sufficient. The Commission added this provision to ensure equal treatment for pregnancy disability leave medical certification requirements and the employer's other health care plan medical certification requirements.

(b)(6) Contents of Medical Certification Form For Reasonable Accommodation/Transfer: In response to frequent public inquiries about the adequacy of the medical certification the employee provided, the Commission added this provision, and expanded it into section 7291.17, subdivision (b)(6), subparts (A)-(C), for clarity and ease of reference.

(b)(7) Contents of Medical Certification Form for Pregnancy Disability Leave: In response to frequent public inquiries about the adequacy of the medical certification the employee provided, the Commission added this provision, and expanded it into section 7291.17, subdivision (b)(7), subparts (A)-(B) for clarity and ease of reference.

(b)(8) Prohibition Against Further Medical Inquiries. The Commission relocated this provision from former section 7291.17, subdivision (b)(1), during the major reorganization of this section.

(b)(9) Preserving Medical Privacy. The Commission relocated this provision from former section 7291.17, subdivision (b)(2), during the major reorganization of this section.

(c) Failure to Provide Medical Certification. In response to frequent public inquiries, the Commission added this description of the consequences if the employee fails to provide adequate medical certification on demand. This tracks similar provisions in the new disability regulations for internal consistency. The Commission expanded this provision into subparts (1)-(2) for clarity and ease of reference.

(e)-(d) Release to Return to Work: The Commission added the disjunctive “or” between “job” and “duties” to cover situations where the employee may be resuming performing more difficult duties, in addition to situations where the employee is returning to her original job.

(e) Medical Certification Form: The Commission added a medical certification form, similar to one used for CFRA leaves, to assist employers and employees to obtain relevant medical information from employees’ health care providers.

NECESSITY.

The Commission amended its regulations on pregnancy:

1. to conform to statutory changes to the Fair Employment and Housing Act enacted in 1999, 2004, and 2011. The 1999 amendments (Stats. 1999, c. 591 ([A.B. 1670](#)), § 9) added a requirement that employers reasonably accommodate their employees affected by pregnancy, childbirth or related medical conditions. (Gov. Code § 12945, subd. (b)(1).) The 2004 amendments (Stats. 2004, c. 647 ([A.B. 2870](#)), § 5) eliminated exceptions in requirements for employers with five to 14 employees. The 2011 amendments (Stats. 2011 c. 510 ([S.B. 299](#)), § 1.5.) added payment of health care plan benefits during pregnancy disability leave and prohibited interference with the exercise of rights guaranteed by Government Code section 12945. (Stats. 2011, c. 510 ([S.B. 299](#)), § 1.5 and c. 678 ([A.B. 592](#)), § 1.5.)
2. to provide greater clarity in the language and organization of the regulations.
3. to be as consistent as possible with the new interactive process provisions in the Commission’s revised disability regulations and the new FMLA regulations so that interested parties could deal with familiar, consistent provisions.

4. to give greater guidance to employers on notices to be given employees about their rights to transfer to less strenuous or hazardous jobs or duties or to take a pregnancy disability leave or to provide reasonable accommodation.
5. to give greater guidance to employees about their obligations to give employers notice of the need for reasonable accommodation, transfer or leave.
6. to provide an optional medical certification form to assist employers and employees to obtain necessary information from employees' health care providers while still protecting employees' privacy as required by California law.

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

The Commission relied upon the following documents, which are appended to its Notice of Proposed Rulemaking as exhibits as given below:

Exhibit No	Description
1	Stats. 1999, c. 591 (A.B. 1670), § 9
2	Assembly Committee on the Judiciary, May 11, 1999 hearing, A.B. 1670 analysis prepared by Drew Liebert, Assembly Judiciary Committee
3	Assembly Committee on Appropriations, May 26, 1999 hearing, A.B. 1670 analysis prepared by Chuck Nicol, Appropriations
4	Senate Judiciary Committee, August 17, 1999 hearing, A.B. 1670 analysis prepared by "DLM"
5	Senate Appropriations Committee, August 30, 1999 hearing, A.B. 1670 analysis prepared by Lisa Matocq
6	Stats. 2004, c. 647 (A.B. 2870), § 5
7	Assembly Committee on Labor and Employment, April 21, 2004 hearing, A.B. 2870 analysis prepared by Ben Ebbink, Labor & Employment Committee
8	Assembly Committee on Appropriations, May 5, 2004, A.B. 2870 analysis prepared by Stephen Shea, Appropriations
9	Senate Committee on Labor and Industrial Relations, June 23, 2004 hearing, A.B. 2870 analysis prepared by Frances Low
10	Stats. 2011, c. 510 (S.B. 299), § 1.5
11	Stats. 2011, c. 678 (A.B. 592), § 1.5
12	Stats. 2011, c. 261 (S.B. 559)
13	University of California Newsroom article, April 4, 2006: Few Women Take Pregnancy Leave in California, Study Finds
14	"Sex By Age By Employment Status for the Population 16 Years and Over," Universe: Population 16 years and older, Data Set Census 2000 Summary File 4 (SF 4) – Sample Data (2000) <i>available at</i> http://www.calmis.ca.gov/FILE/Census2000/LFbySexbyAge.xls
15	California Department of Public Health TABLE 2-2. General Fertility Rates, Total Fertility Rates, and Birth Rates by Age and Race/Ethnic Group of Mother, California, 2005 - 2009

Exhibit No.	Description
16	Guendelman, Pearl, Graham, Angulo and Kharrazi, "Utilization of Pay-in Antenatal Leave Among Working Women in Southern California," <i>Maternal and Child Health Journal</i> , Vol. 10, No. 1, January 2006, p. 63, 66. Abstract of Utilization of Pay-in Antenatal Leave Among Working Women in Southern California
17	California Department of Public Health, Table 2-9. Number and Percent of Live Births by Number of Prenatal Visits and Race/Ethnic Group of Mother, California, 2006
18	Rittenhouse, Marchi, Braveman, " Improvements in Prenatal Care Utilization and Insurance Coverage in California: An Unsung Public Health Victory? " ABSTR ACAD HEALTH SERV RES HEALTH POLICY MEET. 2002; 19: 23. Family and Community Medicine & Institute for Health Policy Studies, University of California, San Francisco
19	LEHD State of California County Reports - Quarterly Workforce Indicators, Third Quarter, 2010, Age Group 14-99, Gender, Female, available at http://www.labormarketinfo.edd.ca.gov/?pageid=127
20	Job Accommodation Network, " Workplace Accommodations: Los Cost, High Impact ", p. 2, last updated September 1, 2011
21	Employment Development Department, Labor Market Information Division, Table 3A, Number of Businesses, Number of Employees, and Third Quarter Payroll by Size of Business, State of California, Third Quarter, 2 010 available at http://www.calmis.ca.gov/file/indsize/2010sfcoru.xls
22	Hillmer, Hillmer, and McRoberts, (2004) "The Real Costs of Turnover: Lessons from a Call Center," <i>Human Resource Planning</i> , Vol. 27 Issue 3, p. 34
23	U.S. Chamber of Commerce, Institute for a Competitive Workforce, (2007) "Recruitment and Retention of the Frontline and Hourly Wage Worker: A Business Perspective." p. 2 <i>available at</i> http://www.uschamber.com/sites/default/files/reports/frontlinehourlywagepaper.pdf (last visited October 31, 2011)
24	U.S. Census Bureau, (2005) "Maternity Leave and Employment Patterns of First Time Mothers," p. 6, <i>available at</i> http://www.census.gov/prod/2005pubs/p70-103.pdf (last visited December 2, 2009)
25	National Business Group on Health, "Healthy Pregnancy and Healthy Children: Opportunities and Challenges for Employers: The Business Case for Promoting Healthy Pregnancy," pp. 10-13 <i>available at</i> http://www.businessgrouphealth.org/healthtopics/maternalchild/investing/docs/4_businesscasepregnancy.pdf (last visited February 17, 2012)

In addition, the Commission also relied on the Americans with Disabilities Amendments Act of 2008 ([ADAAA](#))² and the EEOC's recently revised [ADAAA interpretative regulations](#)³; the

² PL 110-325 (S. 3406), 42 U.S.C. § 12101, et seq.

³ 29 C.F.R. § 1630, et seq., eff. May 24, 2011.

California Family Rights Act ([CFRA](#)),⁴ and [CFRA interpretative regulations](#),⁵ and the Family and Medical Leave Act ([FMLA](#))⁶ and its [FMLA interpretative regulations](#), for definitions of “health care provider” and for notice requirements for employers and employees.⁷

The Commission also relied on the Economic Impact Assessment given below prepared pursuant to Government Code section 11346.3, subdivision (b).

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 reasonable 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 three year period would be **\$10,897,306**. The proposed regulations clarify sections 12926, 12940, 12943 and 12945 and impose no further costs. The Commission arrived at this figure with the following calculations, assumptions and estimates:

According to labor data obtained from the Employment Development Department, there are approximately 4,357,182 women between the ages of 16 and 44 that are employed in California.⁸

⁴ Gov. Code § 12945.1 & 12945.2.

⁵ California Code of Regulations, title 2, § 7297.0, et seq.

⁶ Pub. Law 103-3; 29 U.S.C. § 2601 et seq.

⁷ 29 C.F.R. Part 825.

⁸ **Exhibit 14:** “Sex By Age By Employment Status for the Population 16 Years and Over,” Universe: Population 16 years and older, Data Set Census 2000 Summary File 4 (SF 4) – Sample Data (2000) *available at*

General fertility rates for this population are 65.5 per thousand.⁹ Approximately 285,395 (4,357,182 x .0655) of these women are expected to become pregnant in any given year with 52% of those women, or 148,405 (285,395 x 52%) continuing to work until they deliver.¹⁰

Cost of average pregnancy reasonable accommodation: \$527

Department of Public Health statistics indicate that the average number of prenatal visits is 9-12 visits.¹¹ It is assumed that each prenatal care visit would require 1-2 hours of leave time from work, which would result in an impact of 24 hours per pregnant employee receiving prenatal care that an employer would have to cover for while the pregnant employee is absent or accept reduced productivity due to the absence. According to a National Institute of Health study,¹² 83.6% or 124,067 (148,405 x 83.6%) women in California receive prenatal care.

According to the latest EDD Quarterly Wage Information report,¹³ the average monthly wage for females in California for the three quarters leading up to, and including, the third quarter of 2010 was \$3,510.75. Assuming this compensation rate, the average impact to employers for employees receiving prenatal care is approximately \$527 per pregnant employee. ($\$3,510.75 \div 4 \text{ weeks} \div 40 \text{ hours} \times 24 \text{ hours} = \526.61 , rounding up to \$527.)

<http://www.calmis.ca.gov/FILE/Census2000/LFbySexbyAge.xls>. [This Excel table does not support a hyperlink. Cutting and pasting the url address above, however, will provide the Excel table with the cited data.]

⁹ **Exhibit 15.** California Department of Public Health TABLE 2-2. [General Fertility Rates, Total Fertility Rates, and Birth Rates by Age and Race/Ethnic Group of Mother, California, 2005 - 2009.](#)

¹⁰ **Exhibit 16:** Guendelman, Pearl, Graham, Angulo and Kharrazi, "Utilization of Pay-in Antenatal Leave Among Working Women in Southern California," *Maternal and Child Health Journal*, Vol. 10, No. 1, January 2006, p. 63, 66. [Abstract of Utilization of Pay-in Antenatal Leave Among Working Women in Southern California](#): full article unavailable online without paying subscription.

¹¹ **Exhibit 17:** California Department of Public Health, Table 2-9. [Number and Percent of Live Births by Number of Prenatal Visits and Race/Ethnic Group of Mother, California, 2006.](#)

¹² **Exhibit 18:** Rittenhouse, Marchi, Braveman, "[Improvements in Prenatal Care Utilization and Insurance Coverage in California: An Unsung Public Health Victory?](#)" ABSTR ACAD HEALTH SERV RES HEALTH POLICY MEET. 2002; 19: 23. Family and Community Medicine & Institute for Health Policy Studies, University of California, San Francisco.

¹³ **Exhibit 19:** LEHD State of California County Reports - Quarterly Workforce Indicators, Third Quarter, 2010, Age Group 14-99, Gender, Female, available at <http://www.labormarketinfo.edd.ca.gov/?pageid=127>. No more current data is available.

A study conducted by University of California Berkeley researchers¹⁴ reveals that one in three California women take advantage of pregnancy benefits prior to delivery. (124,067 ÷ 3 = 41,356). The overall cost to California businesses to accommodate pregnant employees is estimated to be approximately \$21,794,612 annually. (\$527 x 41,356.)

Assuming that approximately 50% of employers are already providing reasonable accommodations to pregnant employees and that half of the accommodations would result in employers allowing flexible scheduling to accommodate the increased time off,¹⁵ the net impact to state employers would be approximately \$10,897,306 (1/2 of \$21,794,612). Spread across the approximately 384,398 businesses that employ 5 or more employees in California within child bearing age, this estimate would result in an impact of \$28.35 for each business. (\$10,897,306 ÷ 384,398.)

Legislative analysis of [A.B. 1670](#) (the bill requiring “employers to provide reasonable and measured accommodations to pregnant employees”) indicates that the Legislature “intended to permit employers to allow pregnant employees to remain in their current positions for longer time periods without the need for transfer, while assuring that less costly and disruptive steps (such as simply permitting more frequent restroom breaks or rest periods) are taken for pregnant employees who do not want or need to be transferred from their current positions.”¹⁶ Therefore, the Legislature’s understanding was that the cost of most accommodations provided for by the statute would be de minimus.¹⁷

The Legislature’s assumption that minor accommodations for employees affected by pregnancy or related medical conditions short of transfer or leave would be of no or little cost to employees is consistent with research conducted by the Department of Labor, Office of Disability Policy Job Accommodation Network (JAN) about the types of accommodations needed for a broad spectrum of disabled employees in the work place.¹⁸ A JAN 2008-2009 survey of 559 employers

¹⁴ **Exhibit 13:** University of California Newsroom article, April 4, 2006: [Few Women Take Pregnancy Leave in California, Study Finds](#).

¹⁵ **Exhibit 20:** Job Accommodation Network, “[Workplace Accommodations: Los Cost, High Impact](#)”, p. 2, last updated September 1, 2011

¹⁶ **Exhibit 2:** [Assembly Committee on the Judiciary, May 11, 1999 hearing, analysis prepared by Drew Liebert, Assembly Judiciary Committee](#), page 11.

¹⁷ **Exhibit 2, Ibid.**

¹⁸ **Exhibit 20:** Source: Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” p. 3, last updated September 1, 2011 and *available at* <http://www.jan.wvu.edu/media/LowCostHighImpact.doc>.

found that 56% of all job accommodations for persons with disabilities resulted in no cost to the employer.¹⁹

In general, pregnancy accommodation can be expected to be less costly than average disability accommodations because no special equipment is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time. The Commission's proposed pregnancy regulations amendments follow legislative changes to permit employers to implement minor accommodations that are less costly than transferring an employee or requiring an employee to take a pregnancy disability leave: seven of the eight accommodations required by the proposed regulation will impose no additional cost on employers, as noted in the Commission's Form 399, Fiscal Impact Statement.

Initial cost for California employers to provide reasonable accommodations for 47,491 affected employees or \$0 - \$527 per employer. \$10,897,306

Cost over three years to provide reasonable accommodation \$10,897,306

The Commission estimated an initial cost for California employers by multiplying \$527 (the approximate cost for an individual employer whose employee takes 9-12 prenatal visits) by 41,356 (the number of women taking prenatal visits in any given year) to reach \$21,794,612 divided by two because the Commission assumed that half of California employers were already providing reasonable accommodations to employees and half of the accommodations would result in employers allowing flexible scheduling to accommodate the increased time off. The Commission assumed that a fertile employee would be pregnant once in three years, so that the cost over three years would not exceed the initial estimate.

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

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

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.

The 2004 amendments to the FEHA, [A.B. 2870](#), eliminated exceptions provided for small employers (with 5 to 14 employees and thus not covered by Title VII) to limit: 1) leave for

¹⁹ **Exhibit 20, *Id.*** at p. 4.

“normal” pregnancy; 2) training programs for pregnant employees under certain circumstances; and 3) medical benefits for pregnancy. Although eliminating these exceptions arguably placed a greater burden on small employers, the Legislature noted that these exceptions contradicted the general “sex” discrimination provisions of FEHA, which require that all employers with five or more employees treat their employees affected by pregnancy, childbirth or related medical conditions the same as other employees in hiring, firing, promotions, training, and in other terms and conditions of employment. In addition, these three exceptions also contradicted then Government Code section 12945, subdivision (d) [now Government Code section 12945, subdivision (b)], which provides that section 12945 “shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of this part, including subdivision (a) of Section 12940” (the general FEHA prohibition against “sex” discrimination, which includes discrimination on the basis of pregnancy). (Assem. Com. on Labor & Empl. on Assem. Bill No. 2870 (2003-2004), p. 4.)

Legislative analysis of [A.B. 1670](#) (the bill requiring employers to provide reasonable accommodations to pregnant employees) indicates that the Legislature “intended to permit employers to allow pregnant employees to remain in their current positions for longer time periods without the need for transfer, while assuring that less costly and disruptive steps (such as simply permitting more frequent restroom breaks or rest periods) are taken for pregnant employees who do not want or need to be transferred from their current positions.” (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1670 (1999-2000) as amended May 6, 1999, p. 10-11.) Therefore, the Legislature’s understanding was that the cost of accommodations provided for by the statute would be de minimus. The Commission’s regulations follow this guidance.

The number of small businesses affected by [S.B. 299](#) (Stats. 2011, c.510) is limited in several ways. [S.B. 299](#) (Stats. 2011, c.510) affects only those small businesses that provide health care benefits to its employees, and impacts those only for the short duration of pregnancy disability leave. Most pregnant employees want to work as much as possible, and only one in three takes leave prior to delivery.²⁰ Post-delivery, the California Family Rights Act already requires small businesses with 50 or more employees to pay the health care premium during bonding or medical leave.

[A.B. 592](#) (Stats. 2011, c. 678) codified existing law. (Id. at § 3) Thus, this 2011 legislation did not add any adverse impact on small businesses.

All provisions in the Fair Employment and Housing Act covering pregnancy, childbirth or related medical conditions now cover employers with five or more employees, except for harassment where an employer with one or more employees is covered. The Commission’s fiscal analysis of the costs to comply with the amended regulations adding a reasonable accommodation requirement found that the overall cost to a California business to accommodate a pregnant employee is estimated to be approximately \$527, covering the estimated leave time necessary for a pregnant employee to take an average of 9-12 prenatal visits per pregnancy. This

²⁰ University of California Newsroom article: Few Women Take Pregnancy Leave in California, Study Finds (available at: <http://www.universityofcalifornia.edu/new/article/8035>).

cost is offset by benefits which include, with reasonable accommodation, the ability of a pregnant woman to work longer through her pregnancy, reducing turnover costs, health care costs, and premature labor. Because the Commission's estimate of these expenses was minimal, it did not consider any other alternative.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS.

The Legislature's assumption that minor accommodations for employees affected by pregnancy or related medical conditions short of transfer or leave would be of no or little cost to employees is consistent with research conducted by the Department of Labor, Office of Disability Policy Job Accommodation Network (JAN) about the types of accommodations needed for a broad spectrum of disabled employees in the work place.²¹ A JAN 2004-2006 survey of 1,182 employers found that 46% of all job accommodations for persons with disabilities came at no cost to the employer.²² In general, pregnancy accommodations can be expected to be less costly than average disability accommodations because no special equipment (other than a stool) is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time. The Commission's proposed pregnancy regulations amendments follow legislative changes to permit employers to implement minor accommodations that are less costly than transferring an employee or requiring an employee to take a pregnancy disability leave.

The Commission also relied on the Economic Impact Assessment prepared pursuant to Government Code section 11346.3, subdivision (b).

²¹ Job Accommodation Network, "Workplace Accommodations: Low Cost, High Impact," p. 2 *available at* <http://www.jan.wvu.edu/media/LowCostHighImpact.pdf> (last updated September 1, 2011).

²² *Id.*