

Civil Rights Council
Proposed Modifications to Employment Regulations
Regarding Automated-Decision Systems

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment

TEXT

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Article 1. General Matters

§ 11008. Definitions.

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

(a) “Agent.” Any person acting on behalf of an employer, directly or indirectly, including but not limited to a third party that provides services related to making hiring or employment decisions, including but not limited to decisions regarding recruiting, applicant screening, hiring, payroll, benefit administration, evaluations and/or decision-making regarding requests for workplace leaves of absence or accommodations, or the administration of automated-decision systems for an employer’s use in making hiring or employment decisions that could result in the denial of employment or otherwise adversely affect the terms, conditions, benefits, or privileges of employment.

~~(a)~~(b) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

~~(b)~~(c) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(d) “Automated-Decision System.” A computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants.

(1) Employers may use Automated-Decision Systems to perform tasks including, but not limited to, the following:

(A) Directing job advertisements or other recruiting materials to targeted groups;

(B) Screening resumes for particular terms or patterns;

(C) Analyzing facial expressions, word choices, and voices in online interviews;

(D) Through the use of computer-based tests that include questions, puzzles, games, or other challenges, making predictive assessments about an employee or applicant, or measuring skills, abilities, and/or other characteristics including but not limited to dexterity, reaction-time, or other physical or mental abilities or characteristics; and/or

(E) Through the use of tests or questionnaires measuring personality traits, aptitudes, cognitive abilities, and/or cultural fit.

(2) “Algorithm” means a process or set of rules or instructions, typically used by a computer, to make a calculation, solve a problem, or render a decision.

(A) In the employment context, human resources software and applications use algorithms to allow employers process data to evaluate, rate, and make other decisions about job applicants and employees.

(B) Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

(i) “Software” means information technology programs or procedures that provide instructions to a computer on how to perform a given task or function.

(ii) “Application” means a type of software designed to perform or to help the user perform a specific task or tasks.

(3) “Artificial Intelligence” means a machine learning system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence may include machine learning.

(A) Using artificial intelligence in the employment context has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making employment decisions.

(4) “Automated-Decision System Data” means all data used in the process of developing and/or applying machine-learning, algorithms, and/or artificial intelligence that is utilized as part of an automated-decision system, including but not limited to the following:

(A) Datasets used to train a machine-learning algorithm utilized as part of an automated-decision system;

(B) Data provided by individual applicants or employees, or that includes information about individual applicants or employees that has been analyzed by an automated-decision system;

(C) Data produced from the application of an automated-decision system operation.

(5) “Machine Learning” means an application of Artificial Intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed.

~~(e)~~(e) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) "Employee" does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

~~(d)~~(f) "Employer." Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) "Regularly employing" means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) "Regular basis" refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season "regularly employs" the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) "Employer" includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

~~(e)~~(g) “Employer or Other Covered Entity.” Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

~~(f)~~(h) “Employment Agency.” Any person undertaking for compensation services including identifying, screening, and/or to procure job applicants, employees or opportunities to work. “Employment Agency” includes, but is not limited to, any person that provides automated-decision systems to an employer, provides services involving the administration or use of those systems on an employer’s behalf, or otherwise acts on the employer’s behalf using automated-decision systems.

~~(g)~~(i) “Employment Benefit.” Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment” or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, “employment benefit” includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) “Employment benefit” also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) “Provision of a discrimination-free workplace” is a provision of a workplace free of harassment, as defined in section 11019(b).

~~(h)~~(j) “Employment Practice.” Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual’s employment benefits or consideration for an employment benefit.

~~(i)~~(k) “Labor Organization.” Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

~~(j)~~(l) “Person performing services pursuant to a contract.” A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

~~(k)~~(m) “Proxy.” A facially-neutral characteristic that is correlated with having one or more characteristics protected by the Act.

~~(l)~~(n) “Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12925, 12926, 12940, 12941 and 12942, Government Code; *Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850; *Sims v. Worldpac Inc.* (N.D. Cal. Feb. 22, 2013) 2013 WL 663277.

§ 11009. Principles of Employment Discrimination.

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

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

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.

(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

(f) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of one or more characteristics protected by the Act, unless the qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12941, 12942 and 12961, Government Code; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

§ 11013. Recordkeeping.

Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent California Employer Information Report (CEIR) or appropriate substitute and applicant identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Council or Department.

(a) California Employer Information Report. All employers regularly employing one hundred or more employees, apprenticeship programs with five or more apprentices and at least one sponsoring employer with 25 or more employees and at least one sponsoring union, which operates a hiring hall or has 25 or more members, and labor organizations with 100 or more members shall prepare an annual CEIR in conformity with guidelines on reporting issued by the Department.

(1) Substituting Federal Reports. An employer or other covered entity may utilize an appropriate federal report in lieu of the CEIR. Appropriate federal reports include the EEOC's EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).

(2) Sample Forms and Guidelines. Appropriate copies of sample forms and applicable guidelines shall be available to any employer or other covered entity from the Department of Fair Employment and Housing.

(3) Special Reporting. If an employer or other covered entity is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be required. In such case, the employer or other covered entity should so advise the Department and submit a specific proposal for an alternative reporting system prior to the date on which the report should be prepared. If it is claimed that the preparation of the report would create undue hardship, an employer may apply to the Department for an exemption from the requirements of this section.

(4) Remedy for Failure to Prepare or Make Reports Available. Upon application by the FEHC or DFEH for judicial relief, any employer failing or refusing to prepare or to make available reports as required under this section may be compelled to do so by a Superior Court of California.

(5) Penalties for False Statements. The willful making of false statements on a CEIR or other required record is a violation of California Government Code section 12976, and is punishable by fine or imprisonment as set forth therein.

(b) Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.

(1) For recordkeeping purposes only, "applicant" means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall either retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be preserved for the time period set forth in subdivisions (c)(1) and (2) below.

(c) Preservation of Records. Any personnel or other employment records made or kept by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee (including all applications, personnel, membership or employment referral records or files and all machine-learning data) shall be preserved by the employer or other covered entity for a period of ~~two~~ four years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. ~~However, the State Personnel Board shall maintain such records and files for a period of one year.~~

(1) California Employment Information Report. Every employer subject to subsection (a) above shall preserve for a period of two years from the date of preparation of the CEIR such records as were necessary for completion of the CEIR.

(2) Applicant Identification Records. Every employer subject to subsection (b) above shall preserve applicant identification information for a period of two years from the date it was received.

(3) Separate Records on Sex, Race, and National Origin. Records as to the sex, race, or national origin of any individual accepted for employment shall be kept separately from the employee's main personnel file or other records available to those responsible for personnel decisions. For example, such records could be kept as part of an automatic data processing system in the payroll department.

(4) After Filing of Complaint. Upon notice of or knowledge that a complaint has been filed against it under the Act, any respondent, including the State Personnel Board, shall maintain and preserve any and all relevant records and files until such complaint is fully and finally disposed of and all appeals from related proceedings have concluded.

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

(B) The term "records and files relevant to the complaint" shall include, but is not limited to, personnel or employment records relating to the complaining party and to all other employees holding similar positions to that held or sought by the complainant at the facility or other relevant subdivision where the discriminatory practice allegedly occurred. The term also includes machine-learning data as well as applications, forms or test papers completed by the complainant and by all other candidates for the same position at that facility or other relevant subdivision where the employment practice occurred. All relevant records made or kept pursuant to subsections (a) and (b) above shall also be preserved.

(C) The term "fully and finally disposed of and all appeals from related proceedings have concluded" refers to the expiration of the statutory period within which a complainant or respondent may bring an action in Superior Court, or an agreement has been reached by the parties whereby no further judicial review is available to any of the parties, or a final order has been entered by a body of judicial review for which the time for filing a notice of appeal has expired.

(5) Any person who engages in the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, to an employer or other covered entity must maintain records of the assessment criteria used by the automated-decision system for each such employer or other covered entity to whom the automated-decision system is provided. The assessment criteria must be maintained for at least four years following the last date on which the automated-decision system was used by an employer or covered entity.

(d) Posting of Act. Every employer or other covered entity shall post in a conspicuous place or places on its premises a notice to be prepared and distributed by the Department, which sets forth excerpts of the Act and such relevant information the Department deems necessary to explain the Act. Such employers employing significant numbers, no less than 10% of their work force, of non-English-speaking persons (e.g., Chinese or Spanish speaking) at any facility or establishment must also post in the appropriate foreign language at each such facility or establishment. Such notices may be obtained from the Department.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12946, Government Code.

Article 2. Particular Employment Practices

§ 11015. Definitions.

(a) “Recruitment.” The practice of any employer or other covered entity that has the purpose or effect of informing any individual about an employment opportunity, or assisting an individual to apply for employment, an activity leading to employment, membership in a labor organization, acceptance in an apprenticeship training program, or referral by an employment agency.

(b) “Date of Determination to Hire.” The time at which an employer or other covered entity has made an offer of employment to the individual.

(c) “Pre-employment Inquiry.” Any oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment.

(d) “Application.” Except for recordkeeping purposes, any writing or other device, including but not limited to an automated-decision system, used by an employer or other covered entity to make a pre-employment inquiry or submitted to an employer or other covered entity for the purpose of seeking consideration for employment.

(e) “Placement.” Any status, category, rank, level, location, department, division, program, duty or group of duties, or any other similar classification or position for which an employee can be selected or to which an employee can be assigned by any employment practice. Employment practices that can determine placement in this way include, but are not limited to: hiring, discharge, promotion, transfer, callback, or other change of classification or position; inclusion in membership in any group or organization; any referral assignment to any place, unit, division, status or type of work.

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

§ 11016. Pre-Employment Practices

(a) Recruitment.

(1) Duty Not to Discriminate. Any employer or other covered entity engaged in recruitment activity shall recruit in a non-discriminatory manner. However, nothing in these regulations shall preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented protected class covered by the Act.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity, including but not limited to practices accomplished through the use of an automated-decision system, that:

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

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

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

(b) Pre-employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries, including but not limited to

inquiries made through the use of an automated-decision system, that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense.

(A) An employer may make, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations.

(B) Pre-employment inquiries regarding an applicant's availability for work on certain days and times shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Such inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds, in language such as: "Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?"

(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in section 11013(b) of these regulations or in other provisions of state and federal law.

(c) Applications.

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Schedule Information. An application's request for information related to schedule and availability for work shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Such requests must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds in language such as: "Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?" or "Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?"

(A) The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religious creed, disability, or medical condition. Such a practice is unlawful unless job-related and consistent with business necessity and the online application technology includes a mechanism for the applicant to request an accommodation.

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

(5) Automated-Decision Systems. The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on one or more characteristics protected by the Act, or proxies for one or more characteristics protected by the Act, may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that measures an applicant's reaction time may unlawfully screen out individuals with certain disabilities. Unless an affirmative defense applies (e.g., an employer demonstrates that a quick reaction time while using an electronic device is job-related and consistent with business necessity), actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.

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

(1) Automated-Decision Systems. The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on one or more characteristics protected by the Act or proxies for one or more characteristics protected by the Act, may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that analyzes an applicant's tone of voice, facial expressions or other physical characteristics or behavior may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics. Unless an affirmative defense applies, actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.

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

§ 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)). The Council herein adopts the Uniform Guidelines on Employee Selection Procedures promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) Placement. Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be "protective" of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under Title VII of the federal Civil Rights Act of 1964.)

(c) Promotion and Transfer. An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

(1) Requests for Transfer or Promotion. An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

(2) Training. Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.

(3) No-Transfer Policies. Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) Specific Practices.

(1) Criminal Records. See Section 11017.1.

(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device, automated-decision system, or other means of selection that is facially neutral, but that has an adverse impact (as defined in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)).

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

§ 11017.1. Consideration of Criminal History in Employment Decisions.

(a) Except in the circumstances addressed in subdivisions (a)(1) - (4) below, employers and other covered entities ("employers" for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check, ~~or~~ internet searches, or through the use of an automated-decision system, directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subdivisions (c) and (e) - (i) of this regulation):

(1) If the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check;

(2) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(3) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(4) If the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(b) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(1) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the

extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subdivision (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subdivisions (a) through (d), unless the specific position is exempted pursuant to subdivisions (a)(1)- (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subdivisions (a)(1) - (4).

(4) For purposes of section 11017.1 of these regulations only:

(A) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post-conditional offer review of the individual's criminal history.

(B) "Employer" includes a labor contractor and a client employer.

(C) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(D) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.

(E) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(F) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

(c) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history both after a conditional offer has been made and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or

her own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (c)(1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subdivision (g) of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity. The individualized assessment needs to include, at a minimum, consideration of the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) If, after conducting an individualized assessment, the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the

applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); ~~and~~

(C) If an employer's preliminary decision to withdraw the job conditionally offered involved the use of an automated-decision system, a copy or description of any report or information from the operation of the automated-decision system, related data, and assessment criteria used as part of an automated-decision system; and

~~(D)~~ (D) An explanation of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but are not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state, or local bonding program; successful completion, or compliance with the terms and conditions, of probation or parole; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no less than five additional business days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

(3) The employer shall consider any information submitted by the applicant before making a final decision regarding whether to rescind the conditional offer of employment. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in a writing that includes the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(4) The use of an automated-decision system, in the absence of additional processes or actions, does not constitute an individualized assessment.

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis enumerated in the Act.

(f) Consideration of Other Criminal Convictions and the Potential Adverse Impact. In addition to the types of criminal history addressed in subdivision (c) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin. An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis enumerated in the Act. For purposes of such a determination, adverse impact is defined at Sections 11017 and 11010 and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). The applicant(s) or employee(s) bears the burden of proving an adverse impact. An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(g) Establishing “Job-Related and Consistent with Business Necessity.”

(1) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subdivision (h) below). An individualized assessment must involve notice to the adversely impacted employee (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employee is not job related and consistent with business necessity.

(3) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence

that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.

(h) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(i) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940 and 12952, Government Code.

§ 11020. Aiding and Abetting.

(a) Prohibited Practices.

(1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination. Unlawful assistance under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(2) It is unlawful to solicit or encourage any person or individual to violate the Act, whether or not the Act is in fact violated. Unlawful solicitation or encouragement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(3) It is unlawful to coerce any person or individual to commit unlawful employment discrimination with offers of cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit.

(4) It is unlawful to conceal or destroy evidence relevant to investigations initiated by the Department or its staff.

(5) It is unlawful to advertise for employment on a basis prohibited in the Act. Unlawful advertisement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of such person or individual for

an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(b) Permissible Practices.

(1) It shall not be unlawful, without more, to have been present during the commission of acts amounting to unlawful discrimination or to fail to prevent or report such acts, unless it is the normal business duty of the person or individual to prevent or report such acts.

(2) It shall not be unlawful to maintain good faith lawful defenses or privileges to charges of discrimination.

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

Article 4. National Origin and Ancestry Discrimination

§ 11028. Specific Employment Practices.

(a) Language Restrictions.

(1) It is an unlawful employment practice for an employer or other covered entity to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, unless:

(A) The language restriction is justified by business necessity;

(B) The language restriction is narrowly tailored; and

(C) The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

(2) For purposes of this subsection, “business necessity” means an overriding legitimate business purpose, such that:

(A) The language restriction is necessary to the safe and efficient operation of the business;

(B) The language restriction effectively fulfills the business purpose it is supposed to serve; and

(C) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

(3) It is not sufficient that the employer’s language restriction merely promotes business convenience or is due to customer or co-worker preference.

(4) English-only rules violate the Act unless the employer can prove the elements listed in section 11028, subdivisions (a)(1)(A)-(C). English-only rules are never lawful during an employee’s non-work time, e.g., breaks, lunch, unpaid employer-sponsored events, etc.

(b) Employment discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question.

(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their accent, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(c) Discrimination based on an applicant's or employee's English proficiency is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) In determining business necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (e.g., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitute disparate treatment of an applicant or employee or a class of applicants or employees on the basis of English proficiency, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(d) It is not unlawful for an employer to request from an applicant or employee information regarding his or her ability to speak, read, write, or understand any language, including languages other than English, if justified by business necessity.

(e) Retaliation. It is an unlawful employment practice for an employer or other covered entity to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged. Retaliation may include, but is not limited to:

- (1) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (e.g., spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or
- (2) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

(f) Immigration-related Practices.

- (1) All provisions of the Act and these regulations apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee's or applicant's immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.
- (2) Discovery or other inquiry into an applicant's or employee's immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.
- (3) It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee's or applicant's immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law.

(4) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact

on or constitute disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their immigration status, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

~~(4)~~(5) It is an unlawful practice for an employer or other covered entity to retaliate, as described in subdivision (e), against an employee for engaging in activity protected by the Act.

(g) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under section 12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver's license is required by state or federal law; or

(B) Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law. An employer's or other covered entity's policy requiring applicants or employees to present or hold a driver's license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver's license is not needed in order to perform an essential function of the job).

~~(2)~~ It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees because the applicant(s) or employee(s) hold or presents a driver's licenses issued under section 12801.9 of the Vehicle Code, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

~~(2)~~(3) Nothing in this subsection shall limit or expand an employer's authority to require an applicant or employee to possess a driver's license.

~~(3)~~(4) Nothing in this subsection shall alter an employer's or other covered entity's rights or obligations under federal immigration law.

(h) Citizenship requirements. Citizenship requirements that are a pretext for discrimination or have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense.

~~(1)~~ It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their citizenship, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(i) Human Trafficking. It is an unlawful employment practice for an employer or other covered entity to use force, fraud, or coercion to compel the employment of, or subject to adverse treatment, applicants or employees on the basis of national origin.

(j) Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) The use of epithets, derogatory comments, slurs, or non-verbal conduct based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, or mockery of an accent or a language or its speakers may constitute harassment if the actions are severe or pervasive such that they alter the conditions of the employee's employment and create an abusive

working environment. A single unwelcome act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. (See generally section 11034(f)(2)(A).)

(k) Height and/or weight requirements. Such requirements may have the effect of creating a disparate impact on the basis of national origin. Where an adverse impact is established, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Where such a requirement is job related and justified by business necessity, it is still unlawful if the applicant or employee can prove that the purpose of the requirement can be achieved as effectively through less discriminatory means.

(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their height or weight, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(l) Recruitment and job segregation. It is an unlawful employment practice for an employer or other covered entity to seek, request, or refer applicants or employees based on national origin or to assign positions, facilities, or geographical areas of employment based on national origin, unless pursuant to a permissible defense.

(m) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their national origin or those characteristics which, when considered, may disparately impact applicants or employees on the basis of national origin, or any of the characteristics set forth in subsections (b) through (f) and (i) of this section, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940 and 12951, Government Code.

Article 5. Sex Discrimination

§ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see section 11015(a)) shall recruit individuals of both sexes for all jobs unless pursuant to a permissible defense.

(2) It is unlawful for any publication or other media to separate listings of job openings into male and female classifications.

(b) Pre-Employment Inquiries and Applications.

(1) For all employers or other covered entities who provide, accept and consider applications, it shall be unlawful to refuse to provide, accept and consider applications from individuals of one sex unless pursuant to a permissible defense.

(2) It is unlawful for an employer or other covered entity to ask the sex of the applicant on an application form or pre-employment questionnaire, unless the question is asked pursuant to a permissible defense or for recordkeeping purposes. After an individual is hired, the employer or other covered entity may record the employee's sex for non-discriminatory personnel purposes.

(3) It is unlawful for an employer or other covered entity to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question.

(4) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of sex, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

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

§ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. A test of physical agility or strength shall not be used unless the test is administered pursuant to a permissible defense. No applicant or employee shall be refused the opportunity to demonstrate that he or she has the requisite strength or agility to perform the job in question.

(b) Height and Weight Standards.

(1) Use of height or weight standards that discriminate against one sex or the other is unlawful unless pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless pursuant to a permissible defense.

(c) Hiring Applicants of Childbearing Age. It is unlawful to refuse to hire a female applicant because she is of childbearing age.

(d) Prior Work Experience. If an employer or other covered entity considers prior work experience in the selection or assignment of an employee, the employer or other covered entity shall also consider prior unpaid or volunteer work experience.

(e) Sex Stereotypes. Use of any criterion that is based exclusively or in part on a sex stereotype is unlawful unless pursuant to a permissible defense.

(f) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their sex or any of the characteristics set forth in (a) through (e) of this section, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

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

Article 6. Pregnancy, Childbirth or Related Medical Conditions

§ 11038. Responsibilities of Covered Entities Other than Employers.

(a) Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under Government Code sections 12926, 12940, 12943 and 12944.

(b) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944 and 12945, Government Code.

§ 11039. Responsibilities of Employers.

(a) Employer Obligations

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

(A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;

(B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(C) refuse to promote an employee because of pregnancy or perceived pregnancy;

(D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;

(F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c). Nothing in this section prevents an employer from transferring an employee for the employer's legitimate operational needs unrelated to the employee's pregnancy or perceived pregnancy;

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

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

(J) use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other

selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity; or

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

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

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

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

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 11040;

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

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

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

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

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

Article 7. Marital Status Discrimination

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her marital status as part of a pre-employment inquiry, including an inquiry made through the use of an automated-decision system, unless pursuant to a permissible defense.

(b) Request for Names. For business reasons other than ascertaining marital status, an applicant may be asked whether he or she has ever used another name, e.g., to enable an employer or other covered entity to check the applicant's past work record.

(c) Employment of Spouse. It is lawful to ask an applicant to state whether he or she has a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision except as stated below.

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

Article 8. Religious Creed Discrimination

§ 11063. Pre-Employment Practices.

(a) Pre-employment inquiries regarding an applicant's availability for work on weekends or evenings shall not be used to ascertain their religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question and in compliance with section 11016 of these regulations.

(b) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of religion, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

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

Article 9. Disability Discrimination

§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize, including but not limited to through the use of an automated-decision system, an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form, automated-decision system, or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) "Do you have any particular disabilities?"

(B) "Have you ever been treated for any of the following diseases or conditions?"

(C) "Are you now receiving or have you ever received workers' compensation?"

(D) "What prescription medications are you taking?"

(E) "Have you ever had a job-related injury or medical condition?"

(F) Have you ever left a job because of any physical or mental limitations?

(G) "Have you ever been hospitalized?"

(H) "Have you ever taken medical leave?"

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

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

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

§ 11071. Medical and Psychological Examinations and Inquiries.

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

(1) Personality-based questions, including but not limited to such questions included in an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure any of the following:

(A) optimism and/or positive attitudes;

(B) personal or emotional stability;

(C) extroversion or introversion; and/or

(D) intensity.

(2) Puzzles, games, or other challenges used in the hiring process that evaluate physical or mental abilities, including but not limited to gamified screens included in an automated-decision system, may constitute a medical or physical examination or inquiry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 11072. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or ~~another~~ covered entity to use qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the qualification standards, tests, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria based on an applicant's or employee's uncorrected vision or uncorrected hearing unless the qualification standards, tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion, including but not limited to through the use of an automated-decision system, that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related. Such tests include but are not limited to those administered as part of an automated-decision system.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant's or employee's disability, except when those skills affected by disability are the criteria that the tests purport to measure. Tests concerning employment include, but are not limited to, those administered as part of an automated-decision system. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital

format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected. The use of an automated-decision system, in the absence of additional process or actions, does not constitute an individualized assessment.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1 and 12940, Government Code; GINA, 42 U.S.C. §2000ff-1(b).

Article 10. Age Discrimination

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant's or employee's age of 40 or older was considered in the denial of employment or an employment benefit. There is a presumption of discrimination whenever a facially neutral practice, including but not limited to the use of an automated-decision system, has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on an employee(s) age 40 or older, an employer's preference to retain a lower paid worker(s), alone, is insufficient to negate the presumption. The practice may still be impermissible, even where it is job-related and consistent with business necessity, where it is shown that an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual(s) age 40 or older.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12926 and 12941, Government Code.

§ 11079. Advertisements, Pre-employment Inquiries, Interviews and Applications.

(a) Advertisements. Unless age is a bona fide occupational qualification for the position at issue, advertisements for employment that a reasonable person would interpret as deterring or limiting employment of people age 40 and older are unlawful. (See section 11010(a) for the definition of bona fide occupational qualification.) Where there is no bona fide occupational qualification, examples of prohibited advertisements include those that designate a preferred applicant age range or that include terms such as young, college student, recent college graduate, boy, girl, or other terms that imply a preference for employees under the age of 40.

(b) Pre-employment Inquiries. Unless age is a bona fide occupational qualification for the position at issue, pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age, including, but not limited to, inquiries made through the use of an automated-decision system, are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, except where age is a bona fide occupational qualification. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.) Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(c) Applications. Unless age is a bona fide occupational qualification for the position at issue, it is discrimination on the basis of age for an employer or other covered entity to reject or refuse to provide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because the individual is age 40 or older. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) Subsection (c) prohibits the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates or utilize automated selection criteria or algorithms that have the effect of screening out applicants age 40 and older. Use of online application technology or an automated-decision system that limits or screens out older applicants is discriminatory unless age is a bona fide occupational qualification. (See section 11010(a).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12941, Government Code.