39TH ANNUAL
LABOR & EMPLOYMENT LAW SYMPOSIUM

Understanding and Using FEHA Regulations in Your Practice

Speakers:

María G. Díaz, Allred Moroko Goldberg
Ryan Derry, Paul Hastings LLP
Kevin Kish, California Department of Fair Employment and Housing
Ryan Derry is a partner in the Employment Law practice of the firm’s San Francisco office. Mr. Derry’s practice is focused on employment litigation, including employment discrimination, retaliation, harassment, and wage and hour issues. He has represented employers in multiple jurisdictions in state and federal courts as well as in California administrative proceedings against individual and class claims. Mr. Derry’s clients span all industries, with a focus in technology, retail, and transportation companies.

In addition to litigation, Mr. Derry has an active employment law counseling practice, assisting employers prepare, review, and revise legally-compliant employment policies and procedures.

Mr. Derry has been named as a California Super Lawyer Rising Star for multiple years. He is admitted to practice law in California.

Experience

- Successfully defended clients in both trial and arbitration forums against single-plaintiff, multi-plaintiff, and class action claims of disability, gender, and religious discrimination, breach of contract, retaliation, and wage and hour violations.
- Handled putative class action wage and hour litigation from inception and factual investigation through favorable resolution and class settlement.
- Conducted various wage and hour audits across industry, including areas of exempt-status classification and compliance with requirements under the California Labor Code.
- Coordinated client responses to California and Federal administrative and law enforcement agencies.
- Enforced and compelled arbitration under various agreements.
- Served as outside employment counsel for clients, providing advice and counseling regarding personnel and policy decisions and corresponding risk.

Education

Mr. Derry received his B.S. in Resource Economics, summa cum laude, from the University of Massachusetts Amherst in 2003. Mr. Derry received his J.D. from The George Washington University Law School, with honors, in 2006 where he served as Senior Managing Editor of the Public Contract Law Journal and as a Dean’s Fellow.
Ms. Díaz is the founder of THE DIAZ LAW FIRM and serves as Of Counsel to the law firm of Allred, Maroko & Goldberg. Ms. Díaz has dedicated her legal career to representing workers in a range of employment matters including sexual harassment, discrimination, retaliation, defamation, and wrongful termination.

Ms. Díaz litigates in state court, federal court and arbitral forums. She has obtained millions for her clients in a multitude of matters against a wide range of private companies, public entities, and individuals. Her last trial resulted in a jury verdict of $1.325 million in a wrongful termination case. The Plaintiff was a part-time worker earning minimum wage at a storage facility when she was unlawfully fired. Ms. Díaz further prevailed in opposing the employer’s appeal of the verdict. The California Court of Appeal affirmed the verdict and the California Supreme Court denied review on February 21, 2018.

Ms. Díaz has received numerous awards for her legal work including being named a Super Lawyer in Northern and Southern California several times. She also has received, among others, the Wiley W. Manuel Award by the State Bar of California, an Outstanding Service Award from Senator Barbara Boxer, the Mary V. Orozco Award by the Latina Lawyers Bar Association, and an Outstanding Legal Services Award from the San Diego Volunteer Lawyer Program.

Ms. Díaz has published several articles in the California Labor & Employment Law Review, the Los Angeles Daily Journal and also appeared as a legal expert on The Cristina Show – the #1 rated Spanish talk show seen worldwide. She has served as a speaker for several legal organizations including the State Bar of California, the Los Angeles County Bar Association, the Latina Lawyers Bar Association of Los Angeles, the Mexican-American Bar Association, and the California Employment Lawyers Association. Ms. Díaz currently serves on the board of the California Employment Lawyers Association ("CELA") and previously served on the Editorial Board of the California Labor & Employment Law Review.

Ms. Díaz holds a degree in Quantitative Economics from Stanford University, a Master in Public Policy from Harvard University, and a J.D. from Stanford Law School. She also studied at Princeton as a Woodrow Wilson National Fellow.
Kevin Kish, Director

Kevin Kish is a noted civil rights attorney whose career has been dedicated to public service and advancing justice for disadvantaged communities. He was appointed by Governor Edmund G. Brown Jr. as Director of the California Department of Fair Employment and Housing (DFEH) in February 2015 and confirmed by the California Senate in January 2016. With 220 staff, DFEH is the largest state civil rights agency in the nation and is the institutional centerpiece of California’s commitment to protecting its residents from unlawful discrimination in employment, housing and public accommodations and from hate violence and human trafficking.

Prior to his appointment, Kish served as director of the Employment Rights Project at Bet Tzedek Legal Services, one of the nation’s premier public interest law firms. During his nine years at Bet Tzedek, Kish led the firm’s employment litigation, policy, and outreach initiatives. His cases focused on combating violations of minimum labor standards in low-wage industries and human trafficking for forced labor, and included individual and class-action lawsuits on behalf of workers in the garment, warehouse, carwash, trucking, restaurant, and janitorial industries, among others. He led trial and appellate teams in employment and trafficking suits. Among other important civil rights achievements, in 2009 Kish prevailed in the first civil case to reach a jury verdict under the California Trafficking Victims Protection Act.

Kish has been recognized for a creative approach to advocacy that complements legal strategies with innovative collaborations involving non-profit organizations, law schools, public agencies, industry leaders, and organizing campaigns. He has frequently been named to top-lawyer lists including California Lawyer’s “Super Lawyers” and the Daily Journal’s “Top 75 Labor and Employment Lawyers.” In 2016, Kish was a recipient of the California Lawyer’s Clay “Attorney of the Year” Award.

Kish developed and taught an employment-law clinic at Loyola Law School. A graduate of Swarthmore College and Yale Law School, he began his legal career as a Skadden Fellow and as a law clerk for Judge Myron Thompson of the United States District Court for the Middle District of Alabama.
Understanding & Using FEHA Regulations
In Your Practice
- Ryan Derry, Paul Hastings LLP
- Maria Diaz, Allred, Maroko & Goldberg

Modifications To Definitions;
Harassment and Discrimination Prevention;
Correction and Training

Government Code § 12926:
Modifications to Definition of Employer
(d) “Employer” includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

“Employer” does not include a religious association or corporation not organized for private profit.
2 CCR § 11008(d): Modifications to Definition of Employer

“Regularly Employing” means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing an average or normal complement of five or more employees on a regular basis.

2 CCR § 11008(d): Modifications to Definition of Employer

(A) “Regular Basis” is a business that is recurring rather than constant or intermittent.

(B) Who is “Counted”?
   - Presence on Payroll
   - Part-Time Employees
   - Employees on any employer-approved leave

(C) Employees located inside and outside California

2 CCR § 11008(d): Modifications to Definition of Employer

- Method of Counting Five Employees Also Applies to:
  - Government Code §12945.2
  - Government Code § 12945.6
  - Government Code §12950.1
Government Code § 12950.1(a):
Definition of Employer – Impact

• By January 1, 2020
• Employers with 5 or more employees
• Supervisors = 2 hours classroom or interactive training
• Non-supervisory employees = 1 hour classroom or interactive training
• Within 6 months of hire date, and once every 2 years thereafter
• If provide training after January 1, 2019, not required to provide training and education under 2 years

Government Code § 12950.1(c):
Harassment Prevention Training

An employer shall also provide training inclusive of harassment based on gender identity, gender expression, and sexual orientation as a component of the training and education specified in subdivision (a). The training and education shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas.

2 CCR § 11023:
Prevention and Correction

(b) Adds employer requirement of distributing to employees a written harassment, discrimination, and retaliation prevention policy.

(d) Adds employer requirement of posting in the workplace a DFEH poster on transgender rights.
2 CCR § 11024: Training and Education

(a)(1) Modifies Definition of “Contractor”
   - Consistent with Section 12940(j)(5)
   - Applies Section 11008(d) for each working day in 20 consecutive weeks

(3) “Employee” defined as:
   - Interns
   - Unpaid volunteers
   - Persons providing services pursuant to a contract

(5) Expands definition of “Harassment” under this section to include harassment on the bases of sex, gender identity, gender expression and sexual orientation.

(6) “Having 50 or more Employees” means employing or engaging 50 or more employees/contractors as described in section 11008(d).

(10) “Trainers” or “Trainers or educators” must have ability to provide training about abusive conduct, sex harassment, gender identity, gender expression sexual orientation, and the definitions of the other bases enumerated in the FEHA. Can use multiple trainers who in combination meet all of the qualifications required.
Regulations on National Origin Discrimination

2 CCR § 11027.1 (effective July 1, 2018): Definition of “National Origin”

“National origin” includes the individual’s or ancestors’ actual or perceived:

1. physical, cultural, or linguistic characteristics associated with a national origin group;
2. marriage to or association with persons of a national origin group;
3. tribal affiliation;
4. membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
5. attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and
6. name that is associated with a national origin group.

(b) “National origin groups” include:
- Ethnic groups
- Geographic places of origin
- Countries that are not presently in existence
2 CCR § 11028 (effective July 1, 2018):
Prohibition of English-Only Rule

(a) Language Restrictions.
(1) Unlawful to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including 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) "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) Burden on the employer to prove English-only rule is valid. English-only rules never lawful during employee’s non-work time, e.g., breaks, lunch, unpaid employer-sponsored events, etc.
2 CCR § 11028 (effective July 1, 2018):
Prohibition of English-Only Rule

(b) Unlawful to discriminate based on an accent unless the employer proves that the individual’s accent interferes materially with the ability to perform the job.

(c) Unlawful to discriminate based on English-Proficiency unless proficiency is justified by business necessity.

(d) **NOT unlawful** to request information regarding an applicant or employee's ability to speak, read, write, or understand any language if justified by business necessity.

2 CCR § 11028 (effective July 1, 2018):
Specific Employment Practices

(e) Retaliation includes:

(1) Threatening/contacting immigration authorities or a law enforcement agency about the employee, former employee, applicant, or a family member;

(2) Taking adverse action because the employee updates/attempts to update personal information re: name, SSN, or employment documents

2 CCR § 11028 (effective July 1, 2018):
Specific Employment Practices

(f) Immigration-related Practices.

(1) Applies to undocumented applicants and employees. Immigration status is irrelevant during the liability phase of any proceeding to enforce the Act.

(2) Discovery/inquiry regarding immigration status not allowed unless clear and convincing evidence that it's necessary to comply with federal immigration law.

(3) **Unlawful to discriminate** because of immigration status unless clear and convincing evidence that it is required to comply with federal immigration law.

(4) Unlawful to retaliate.
2 CCR § 11028 (effective July 1, 2018):
Prohibition of Height/Weight Requirements

(k) Height and/or weight requirements may create a disparate impact on the basis of national origin.

• If an adverse impact is established, Height/Weight requirements are unlawful unless the employer can demonstrate that they are job related and justified by business necessity.

• If a Height/Weight requirement is job related and justified by business necessity, still unlawful if applicant/employee can prove that the purpose of requirement can be achieved as effectively through less discriminatory means.

Regulations Regarding Consideration of Criminal History in Employment Decisions

2 CCR § 11017.1 (effective July 1, 2017):
Consideration of Criminal History

(b) Employers prohibited from using following criminal records and information in employment decisions:

1. Arrest or detention that did not result in conviction (Labor Code section 432.7);
2. Referral to or participation in pretrial or post-trial diversion program (Id.);
3. Conviction 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) (Id.);
4. 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 (Id.); and
5. A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).
2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

(c) Additional Criminal History Limitations, Irrespective of Adverse Impact.

(1) State or local agency employers prohibited from asking applicants about conviction history until determined that applicant meets minimum employment qualifications, as posted (Labor Code section 432.9).

(2) Local laws or city ordinances still apply

(3) Employers that obtain investigative consumer reports -- subject to requirements of Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act

2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

(d) Consideration of other criminal convictions may have adverse impact on individuals on a basis protected by the Act (e.g., gender, race, and national origin).

• Applicant/employee bears burden of demonstrating that the policy of considering criminal convictions has an adverse impact.
• Adverse impact may be established through the use of conviction statistics or other evidence. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient.
• Presumption rebuttable by showing a reason to expect a markedly different result after accounting for any particularized circumstances (e.g., geographic area encompassed by the applicant or employee pool, particular types of convictions being considered, or the particular job at issue).

2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

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

(1) If adverse impact in considering criminal history, the burden shifts to the employer to establish that the policy/practice is justifiable because it is job-related and consistent with business necessity.

• Criminal conviction consideration policy/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.
• To establish job-relatedness and business necessity, employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:
  • The nature and gravity of the offense or conduct;
  • The time that has passed since the offense or conduct and/or completion of the sentence; and
  • The nature of the job held or sought.
2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

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

A policy/practice of considering a conviction is appropriately tailored to the job if an employer either:
- Demonstrates that:
  - Any “bright-line” conviction disqualification properly distinguishes between persons that do and do not pose an unacceptable level of risk; and
  - Convictions being used have direct and specific negative bearing on person’s ability to perform duties necessarily related to position (Conviction-related info. that is 7+ years old = rebuttable presumption); or
- Conduct an individualized assessment:
  - Give notice to the adversely impacted that they have been screened out because of a criminal conviction;
  - Give a reasonable opportunity for the individual to demonstrate that the exclusion should not be applied due to their particular circumstances; and
  - Consider whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception.

2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

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

Regardless of whether employer uses a bright line policy or individualized assessments, employer must give impacted individual notice of disqualifying conviction and reasonable opportunity to present evidence that information is factually inaccurate.

- If applicant/employee establishes record is factually inaccurate – cannot be considered in employment decision.

2 CCR § 11017.1 (effective July 1, 2017): Consideration of Criminal History

(f) Employers are subject to 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 use before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7, 432.9).

- 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.
2 CCR § 11017.1 (effective July 1, 2017):
Consideration of Criminal History

(g) Less Discriminatory Alternatives
• If an employer demonstrates that its policy/practice of considering conviction history is job-related and consistent with business necessity...
• Adversely impacted employees/applicants may still prevail if they can demonstrate that:
  ▫ There is a less discriminatory policy/practice
  ▫ That serves the employer’s goals as effectively as the challenged policy/practice

Regulations Regarding Gender Identity and Expression

2 CCR § 11030 (effective July 1, 2017):
Revised Definitions

(a) “Gender expression” means
  ▫ A person’s gender-related appearance or behavior; or the perception of such appearance or behavior, whether or not stereotypically associated with the person’s sex assigned at birth.

(b) “Gender identity” means
  Each person’s internal understanding of their gender, or the perception of a person’s gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex assigned at birth, or transgender.
2 CCR § 11030 (effective July 1, 2017): Revised Definitions

(f) “Transitioning” is a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.

2 CCR § 11034 (effective July 1, 2017): Working Conditions

• (e) Working Conditions – Access to facilities
  • Employers shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression.
  • Employers with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral,” “All Gender Restroom,” etc.
  • To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains. However, an employer may not require an employee to use a particular facility.

  (D) Employees shall not be required to undergo, or provide proof of, any medical treatment/procedure, or provide any identity document, to use facilities designated for use by a particular gender.

  (E) Nothing shall preclude an employer from making a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.
2 CCR § 11034 (effective July 1, 2017):
Additional Rights

(i) Additional Rights

(1) Unlawful for employers/covered entities to inquire about or require documentation or proof of an individual’s sex, gender, gender identity, or gender expression as a condition of employment:

(B) Does not preclude employer and employee from communicating about employee’s sex, gender, gender identity, or gender expression when employee initiates communication with employer regarding employee’s working conditions.
Understanding and Using FEHA Regulations in Your Practice

The Department of Fair Employment and Housing is California’s Civil Rights Agency

SB 1038 (2012) created the Fair Employment and Housing Council
Where do regulations come from?

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

FAIR EMPLOYMENT AND HOUSING ACT
Government Code §§ 12940-12951, 12955-12956.2 protect individuals from housing and employment discrimination and harassment on the basis of protected characteristics

UNRUH CIVIL RIGHTS ACT
Civil Code § 51 – protects individuals from discrimination/harassment by business establishments (e.g., stores, restaurants, housing accommodations) on the basis of protected characteristics. The Unruh Act incorporates the Americans with Disabilities Act at Civil Code § 51(f).

RALPH CIVIL RIGHTS ACT
Civil Code § 51.7 - protects individuals from hate violence or threats of violence on the basis of protected characteristics

DISABLED PERSON’S ACT
Civil Code § 54, et seq. - gives individuals with disabilities or medical conditions the same right as the general public to the full and free use of all public places (e.g., streets, highways, sidewalks, public buildings, hospitals, etc.)
**HUMAN TRAFFICKING**

Civil Code § 52.5 – protects individuals against the deprivation or violation of their personal liberty by a person seeking to obtain forced labor or services, including sex

**RECIPIENTS OF STATE FUNDING**

Government Code § 11135, et seq. – protects individuals from discrimination by recipients of state funding or state financial assistance

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**RESOURCES**

- Frequently Asked Questions (FAQs): https://www.dfeh.ca.gov/resources/frequently-asked-questions/housing-faqs/
- California Laws: http://leginfo.legislature.ca.gov/
- Department of Fair Employment and Housing Website: http://www.dfeh.ca.gov
- Fair Employment and Housing Council: http://www.dfeh.ca.gov/fehcouncil/
THANK YOU!

For more information, please contact DFEH:

www.dfeh.ca.gov
contact.center@dfeh.ca.gov
(800) 884-1684 or California Relay Service 711
(800) 700-2320 TTY
Fair Employment & Housing Council
Further Modifications to Employment Regulations Regarding Definitions; Harassment and Discrimination Prevention and Correction; and Training

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
Article 1. General Matters; Article 2. Particular Employment Practices

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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) “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) “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.

(c) “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) “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 an average or normal complement of five or more employees on a regular basis each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year regardless of whether the employee’s worksite is located within or outside of California. While employees located outside of California are counted in determining whether employers employ five or more individuals for coverage purposes, the employees located outside of California are not themselves covered by the protections of the Act if the wrongful conduct did not occur in California and it was not ratified by decision makers or participants located in California.

(A) “Regular basis” refers to the nature of a business that is recurring, rather than constant or intermittent. 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) For purposes of “counting,” an employee’s relationship may be established by their presence on the payroll or by other means. 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 CFRA, parenting, and 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 section 12945.2, 12945.6, and 12950.1. For purposes of “counting” the (five or more) employees, the individuals employed need not be employees as defined above; nor must any of them be full-time employees. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(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) “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) “Employment Agency.” Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(g) “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) “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) “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) “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) “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.


Article 2. Particular Employment Practices

§ 11023. Harassment and Discrimination Prevention and Correction.

(a) Employers have an affirmative duty to take reasonable steps to prevent and promptly correct
discriminatory and harassing conduct. (Gov. Code, § 12940(k).)

(1) A determination as to whether an employer has complied with Government Code section 12940(k) includes an individualized assessment, depending upon numerous factors sometimes unique to the particular employer including, but not limited to, its workforce size, budget, and nature of its business, as well as upon the facts of a particular case.

(2) There is no stand-alone, private cause of action under Government Code section 12940(k). In order for a private claimant to establish an actionable claim under Government Code section 12940(k), the private claimant must also plead and prevail on the underlying claim of discrimination, harassment, or retaliation.

(3) However, in an exercise of its police powers, the Department may independently seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not the Department prevails on an underlying claim of discrimination, harassment, or retaliation.

(b) Employers have an affirmative duty to create a workplace environment that is free from employment practices prohibited by the Act. In addition to distributing the Department’s DFH-185 brochure on sexual harassment, a publication on harassment or an alternative writing that complies with Government Code section 12950, an employer shall develop and distribute to its employees a harassment, discrimination, and retaliation prevention policy that:

(1) Is in writing;

(2) Lists all current protected categories covered under the Act;

(3) Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, with whom the employee comes into contact from engaging in conduct prohibited by the Act;

(4) Creates a complaint process to ensure that complaints receive:

(A) An employer’s designation of confidentiality, to the extent possible;

(B) A timely response;

(C) Impartial and timely investigations by qualified personnel;

(D) Documentation and tracking for reasonable progress;

(E) Appropriate options for remedial actions and resolutions; and

(F) Timely closures.

(5) Provides a complaint mechanism that does not require an employee to complain directly
to his or her immediate supervisor, including, but not limited to, the following:

(A) Direct communication, either orally or in writing, with a designated company representative, such as a human resources manager, EEO officer, or other supervisor; and/or

(B) A complaint hotline; and/or

(C) Access to an ombudsperson; and/or

(D) Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints.

(6) Instructs supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so the company can try to resolve the claim internally. Employers with 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training, pursuant to section 11024 of these regulations.

(7) Indicates that when an employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.

(8) States that confidentiality will be kept by the employer to the extent possible, but not indicate that the investigation will be completely confidential.

(9) Indicates that if at the end of the investigation misconduct is found, appropriate remedial measures shall be taken.

(10) Makes clear that employees shall not be exposed to retaliation as a result of lodging a complaint or participating in any workplace investigation.

(c) Dissemination of the policy shall include one or more of the following methods:

(1) Printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;

(2) Sending the policy via e-mail with an acknowledgment return form;

(3) Posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;

(4) Discussing policies upon hire and/or during a new hire orientation session; and/or

(5) Any other way that ensures employees receive and understand the policies.

(d) In addition to the actions described above, every employer shall post a poster developed by the
Department regarding transgender rights in a prominent and accessible location in the workplace.

(e) Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their spoken language shall translate the policy into every language that is spoken by at least 10 percent of the workforce.


§ 11024. Sexual Harassment—Required Training and Education Regarding Harassment Based on Sex, Gender Identity, Gender Expression, and Sexual Orientation.

(a) Definitions. For purposes of this section, including determining whether an employer must provide the mandated training and education and whether the training and education are legally compliant, the following definitions apply:

(1) “Contractor” is a person performing services pursuant to a contract with an employer, meeting the criteria specified by Government Code section 12940(j)(5), under the means described in section 11008(d) for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year.

(2) “Effective interactive training” includes any of the following:

(A) “Classroom” training is in-person, trainer-instruction, whose content is created by a trainer and provided to a supervisor by a trainer, in a setting removed from the supervisor’s daily duties.

(B) “E-learning” training is individualized, interactive, computer-based training created by a trainer and an instructional designer. An e-learning training shall provide a link or directions on how to contact a trainer who shall be available to answer questions and to provide guidance and assistance about the training within a reasonable period of time after the supervisor asks the question, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response.

(C) “Webinar” training is an internet-based seminar whose content is created and taught by a trainer and transmitted over the internet or intranet in real time. An employer utilizing a webinar for its supervisors must document and demonstrate that each supervisor who was not physically present in the same room as the trainer nonetheless attended the entire training and actively participated with the training’s interactive content, discussion questions, hypothetical scenarios, polls, quizzes or tests, and activities. The webinar must provide the supervisors an opportunity to ask questions, to have them answered and otherwise to seek guidance and assistance. For a period of two years after the date of the webinar, the employer shall maintain
a copy of the webinar, all written materials used by the trainer and all written questions submitted during the webinar, and document all written responses or guidance the trainer provided during the webinar.

(D) Other “effective interactive training” and education includes the use of audio, video or computer technology in conjunction with classroom, webinar and/or e-learning training. These, however, are supplemental tools that cannot, by themselves, fulfill the requirements of this subdivision.

(E) For any of the above training methods, the instruction shall include questions that assess learning, skill-building activities that assess the supervisor’s application and understanding of content learned, and numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training. Examples include pre- or post-training quizzes or tests, small group discussion questions, discussion questions that accompany hypothetical fact scenarios, use of brief scenarios discussed in small groups or by the entire group, or any other learning activity geared towards ensuring interactive participation as well as the ability to apply what is learned to the supervisor’s work environment.

(3) “Employee” includes full time, part time, and temporary workers. For purposes of this section only, the term “employee” is used to include interns, and unpaid volunteers, and persons providing services pursuant to a contract.

(4) “Employer” means any of the following:

(A) any person engaged in any business or enterprise in California, who employs 50 or more employees to perform services for a wage or salary or contractors or any person acting as an agent of an employer, directly or indirectly.

(B) the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. For the purposes of this section, governmental and quasi-governmental entities such as boards, commissions, local agencies and special districts are considered “political subdivisions of the state.”

(5) “Harassment” under this section refers to harassment on the bases of sex, gender identity, gender expression, and sexual orientation.

(6) “Having 50 or more employees” means employing or engaging 50 or more employees or contractors under the means described in section 11008(d) for each working day in any 20 consecutive weeks in the current calendar year or preceding calendar year. There is no requirement that the 50 employees or contractors work at the same location or all work or reside in California.

(7) “Instructional Designer” under this section is an individual with expertise in current instructional best practices, and who develops the training content based upon material provided by a trainer.
(78) “New” supervisory employees are employees promoted or hired to a supervisory position after the date the employer last provided sexual harassment prevention training.

(89) “Supervisory employees” or “supervisors” under this section are supervisors located in California, defined under Government Code section 12926. Attending training does not create an inference that an employee is a supervisor or that a contractor is an employee or a supervisor.

(910) “Trainers” or “Trainors or educators” qualified to provide training under this section are individuals who, through a combination of training and experience, knowledge, and expertise, have the ability to provide training supervisors about the following: 1) the definitions of abusive conduct, sexual harassment, gender identity, gender expression, sexual orientation, and the definitions of the other bases enumerated in the FEHA; 2) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 3) what steps to take when harassing behavior occurs in the workplace; 4) how to report harassment complaints; 5) supervisors’ obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 6) how to respond to a harassment complaint; 7) the employer’s obligation to conduct a workplace investigation of a harassment complaint; 8) what constitutes retaliation and how to prevent it; 9) essential components of an anti-harassment policy; and 10) the effect of harassment on harassed employees, co-workers, harassers and employers; and 11) practical examples in the prevention of harassment, discrimination, and retaliation based on sex, gender identity, gender expression, sexual orientation, and the prevention of abusive conduct. Nothing in this section shall preclude an employer from utilizing multiple trainers who, in combination, meet all of the qualifications required by this subsection.

(A) A trainer also shall be one or more of the following:

1. “Attorneys” admitted for two or more years to the bar of any state in the United States and whose practice includes employment law under the Fair Employment and Housing Act and/or Title VII of the federal Civil Rights Act of 1964, or

2. “Human resource professionals,” or “harassment prevention consultants,” or peer-to-peer trainers working as employees or independent contractors with a minimum of two or more years of practical experience in one or more of the following: a) designing or conducting discrimination, retaliation and sexual harassment prevention training; b) responding to sexual-harassment complaints or other discrimination complaints; c) conducting investigations of sexual-harassment complaints; or d) advising employers or employees regarding discrimination, retaliation and sexual harassment prevention, or

3. “Professors or instructors” in law schools, colleges or universities who have a post-graduate degree or California teaching credential and either 20 instruction hours or two or more years of experience in a law school, college or university teaching about employment law under the Fair Employment and Housing Act and/or Title VII of the
federal Civil Rights Act of 1964.

(B) Individuals who do not meet the qualifications of a trainer as an attorney, human resource professional, harassment prevention consultant, peer-to-peer trainer, professor or instructor because they lack the requisite years of experience may team teach with a trainer, in accordance with subsections (A)1. through (A)3., immediately above, in classroom or webinar trainings provided that the trainer supervises these individuals and the trainer is available throughout the training to answer questions from training attendees.

(4011) “Training,” as used in this section, is effective interactive training as defined at section 11023(a)(2).

(4112) “Two hours” of training is two hours of classroom training or two hours of webinar training or, in the case of an e-learning training, a program that takes the supervisor no less than two hours to complete.

(b) Training.

(1) Frequency of Training. An employer shall provide two hours of training, in the content specified in section 11023(c), once every two years, and may use either of the following methods or a combination of the two methods to track compliance.

(A) “Individual” Tracking. An employer may track its training requirement for each supervisory employee, measured two years from the date of completion of the last training of the individual supervisor.

(B) “Training year” tracking. An employer may designate a “training year” in which it trains some or all of its supervisory employees and thereafter must again retrain these supervisors by the end of the next “training year,” two years later. Thus, for example, supervisors trained in training year 2005 shall be retrained in 2007. For newly hired or promoted supervisors who receive training within six months of assuming their supervisory positions and that training falls in a different training year, the employer may include them in the next group training year, even if that occurs sooner than two years. An employer shall not extend the training year for the new supervisors beyond the initial two year training year. Thus, with this method, assume that an employer trained all of its supervisors in 2005 and sets 2007 as the next training year. If a new supervisor is trained in 2006 and the employer wants to include the new supervisor in its training year, the new supervisor would need to be trained in 2007 with the employer’s other supervisors.

(2) Documentation of Training. To track compliance, an employer shall keep documentation of the training it has provided its employees under this section for a minimum of two years, including but not limited to the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider.
(3) Training at New Businesses. Businesses created after January 1, 2006, must provide training to supervisors within six months of their establishment and thereafter biennially. Businesses that expand to 50 employees and/or contractors, and thus become eligible under these regulations, must provide training to supervisors within six months of their eligibility and thereafter biennially.

(4) Training for New Supervisors. New supervisors shall be trained within six months of assuming their supervisory position and thereafter shall be trained once every two years, measured either from the individual or training year tracking method.

(5) Duplicate Training. A supervisor who has received training in compliance with this section within the prior two years either from a current, a prior, an alternate or a joint employer need only be given, be required to read and to acknowledge receipt of, the employer’s anti-harassment policy within six months of assuming the supervisor’s new supervisory position or within six months of the employer’s eligibility. That supervisor shall otherwise be put on a two year tracking schedule based on the supervisor’s last training. The burden of establishing that the prior training was legally compliant with this section shall be on the current employer.

(6) Duration of Training. The training required by this section does not need to be completed in two consecutive hours. For classroom training or webinars, the minimum duration of a training segment shall be no less than half an hour. E-learning courses may include bookmarking features, which allow a supervisor to pause his or her individual training so long as the actual e-learning program is two hours.

(c) Objectives and Content.

(1) The learning objectives of the training mandated by Government Code section 12950.1 shall be: 1) to assist California employers in changing or modifying workplace behaviors that create or contribute to “sexual harassment, harassment based on “sex,” “gender identity,” “gender expression,” and “sexual orientation” as that term those terms are is defined in California and federal law, where applicable; 2) to provide trainees with information related to the negative effects of abusive conduct (as defined in Government Code section 12950.1(j)(2)) in the workplace; and 3) to develop, foster, and encourage a set of values in supervisory employees who complete mandated training that will assist them in preventing, effectively responding to incidents of sexual harassment, and implementing mechanisms to promptly address and correct wrongful behavior.

(2) Towards that end, the training mandated by Government Code section 12950.1 shall include, but is not limited to:

(A) Definitions of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the federal Civil Rights Act of 1964, where applicable. In addition to a definition of defining sexual harassment covered by this section, an employer may provide a definition of and train about other forms of unlawful harassment on other bases covered by enumerated in the FEHA, as specified at Government Code section 12940(j), and may discuss how harassment of an employee may cover encompass more than one basis.
(B) FEHA and Title VII statutory provisions and case law principles concerning the prohibition against and the prevention of unlawful sexual harassment, discrimination and retaliation in employment.

(C) The types of conduct that constitutes sexual harassment.

(D) Remedies available for sexual harassment victims in civil actions; potential employer/individual exposure/liability.

(E) Strategies to prevent sexual harassment in the workplace.

(F) Supervisors’ obligation to report sexual harassment, discrimination, and retaliation of which they become aware.

(G) Practical examples, such as factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate sexual harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions.

(H) The limited confidentiality of the complaint process.

(I) Resources for victims of unlawful sexual harassment, such as to whom they should report any alleged sexual harassment.

(J) In addition to discussing strategies to prevent harassment, the training should also cover the steps necessary to take appropriate remedial measures to correct harassing behavior, which includes an employer’s obligation to conduct an effective workplace investigation of a harassment complaint.

(K) Training on what to do if the supervisor is personally accused of harassment.

(L) The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed. Either the employer’s policy or a sample policy shall be provided to the supervisors. Regardless of whether the employer’s policy is used as part of the training, the employer shall give each supervisor a copy of its anti-harassment policy and require each supervisor to read and to acknowledge receipt of that policy.

(M) A review of the definition of “abusive conduct” as used in this context (and as defined by Government Code section 12950.1(gh)(2)). The training should explain the negative effects that abusive conduct has on the victim of the conduct as well as others in the workplace. The discussion should also include information about the detrimental consequences of this conduct on employers - including a reduction in productivity and morale. The training should specifically discuss the elements of “abusive conduct,” including conduct undertaken with malice that a reasonable person would find hostile or offensive and that is not related to an employer’s legitimate business interests (including performance standards). Examples of
abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. Finally, the training should emphasize that a single act shall not constitute abusive conduct, unless the act is especially severe or egregious. While there is not a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.

(d) Remedies. A court may issue an order finding an employer failed to comply with Government Code section 12950.1 and order such compliance.

(e) Compliance with section 12950.1 prior to effective date of Council regulations. An employer who has made a substantial, good faith effort to comply with section 12950.1 by completing training of its supervisors prior to the effective date of these regulations shall be deemed to be in compliance with section 12950.1 regarding training as though it had been done under these regulations.

Fair Employment & Housing Council
Regulations Regarding National Origin Discrimination

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
Article 4. National Origin

TEXT

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§ 11027.1. Definitions.

(a) “National origin” includes, but is not limited to, the individual’s or ancestors’ actual or perceived:

(1) physical, cultural, or linguistic characteristics associated with a national origin group;

(2) marriage to or association with persons of a national origin group;

(3) tribal affiliation;

(4) membership in or association with an organization identified with or seeking to promote the interests of a national origin group;

(5) attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and

(6) name that is associated with a national origin group.

(b) “National origin groups” include, but are not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence.

(c) “Undocumented applicant or employee” means an applicant or employee who lacks legal authorization under federal law to be present and/or to work in the United States.


§ 11028. Specific Employment Practices.

(a)-(c) (Reserved)
(d) An employer may have a rule requiring that employees speak only in English at certain times, so long as the employer can show that the rule is justified by business necessity (See section 11010(b)) and the employer has effectively notified its employees of the circumstances and time when speaking only in English is required and of the consequences of violating the rule.

(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.

(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.

(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 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.

(eg) 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) 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) Nothing in this subsection shall alter an employer’s or other covered entity’s rights or obligations under federal immigration law.

(fh) 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.

(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.

(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.
Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, and
12940 and 12951, Government Code.
Fair Employment & Housing Council
Regulations Regarding Transgender Identity and Expression

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
Article 5. Sex Discrimination

TEXT

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§ 11030. Definitions.

(a) “Gender expression” means a person’s gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person’s sex assigned at birth.

(b) “Gender identity” means each person’s identification as internal understanding of their gender, or the perception of a person’s gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex assigned at birth, or transgender.

(c) “Sex” has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender; gender identity; and gender expression, or perception by a third party of any of the aforementioned.

(d) “Sex Stereotype” means includes, but is not limited to, an assumption about a person’s appearance or behavior, gender roles, gender expression, or gender identity, or about an individual’s ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual’s sex.

(e) “Transgender” is a general term that refers to a person whose gender identity differs from the person’s sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth. A transgender person may or may not identify as “transsexual.”

(f) “Transitioning” is a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in
employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.


§ 11031. Defenses.

Once employment discrimination on the basis of sex has been established, an employer or other covered entity may prove one or more appropriate affirmative defenses as generally set forth in section 11010, including, but not limited to, the defense of Bona Fide Occupational Qualification (BFOQ).

(a) Among situations that will not justify the application of the BFOQ defense are the following:

(1) A correlation between individuals of one sex and physical agility or strength;

(2) A correlation between individuals of one sex and height;

(3) Customer preference for employees of one sex;

(4) The necessity for providing separate facilities for one sex; or

(5) The fact that an individual is transgender or gender non-conforming, or that the individual’s sex assigned at birth is different from the sex required for the job; or

(6) The fact that members of one sex have traditionally been hired to perform the particular type of job.

(b) Personal privacy considerations may justify a BFOQ only where:

(1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and

(2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and

(3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(c) Employers or other covered entities shall assign job duties and make other reasonable accommodations so as to minimize the number of jobs for which sex is a BFOQ.

(d) It is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire.
(e) Employers shall permit employees to perform jobs or duties that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth.


§ 11034. Terms, Conditions, and Privileges of Employment.

(a) Compensation.

(1) Except as otherwise required or permitted by regulation, an employer or other covered entity shall not base the amount of compensation paid to an employee, in whole or in part, on the employee's sex.

(2) Equal Compensation for Comparable Work. (Reserved.)

(b) Fringe Benefits.

(1) It is unlawful for an employer to condition the availability of fringe benefits upon an employee's sex, including gender identity and gender expression.

(2) Insofar as an employment practice discriminates against one sex, an employer or other covered entity shall not condition the availability of fringe benefits upon whether an employee is a head of household, principal wage earner, secondary wage earner, or of other similar status.

(3) Except as otherwise required by state law, an employer or other covered entity shall not require unequal employee contributions by similarly situated male and female employees to fringe benefit plans based on the sex of the employee, nor shall different amounts of basic benefits be established under fringe benefit plans for similarly situated male and female employees.

(4) It shall be unlawful for an employer or other covered entity to have a pension or retirement plan that establishes different optional or compulsory retirement ages based on the sex of the employee.

(c) Lines of Progression.

(1) It is unlawful for an employer or other covered entity to designate classify a job exclusively for one sex as male or female or to maintain separate lines of progression or separate seniority lists based on sex unless it is justified by a permissible defense. For example, a line of progression or seniority system is unlawful that:

(A) Prohibits an individual from applying for a job labeled “male” or “female,” or for a job in a “male” or “female” line of progression, and vice versa; or
(B) Prohibits an employee scheduled for layoff from displacing a less senior employee on a “male” or “female” seniority list, and vice versa.

(2) An employer or other covered entity shall provide equal opportunities to all employees for upward mobility, promotion, and entrance into all jobs for which they are qualified. However, nothing herein shall prevent an employer or other covered entity from implementing mobility programs to accelerate the promotion of underrepresented groups.

(d) Dangers to Health, Safety, or Reproductive Functions.

(1) If working conditions pose a greater danger to the health, safety, or reproductive functions of applicants or employees of one sex than to individuals of the other sex working under the same conditions, the employer or other covered entity shall make reasonable accommodation to:

(A) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education; or

(B) Upon the request of an employee of the more endangered sex, transfer the employee to a less hazardous or strenuous position for the duration of the greater danger, unless it can be demonstrated that the transfer would impose an undue hardship on the employer; or

(B) Alter the working conditions so as to eliminate the greater danger, unless it can be demonstrated that the modification would impose an undue hardship on the employer. Alteration of working conditions includes, but is not limited to, acquisition or modification of equipment or devices and extension of training or education.

(2) An employer or other covered entity may require an applicant or employee to provide a physician's certification that the individual is endangered by the working conditions.

(3) The existence of a greater risk for employees of one sex than the other sex shall not justify a BFOQ defense.

(4) An employer may not discriminate against members based on one sex because of the prospective application of this subsection.

(5) With regard to protections due on account of pregnancy, childbirth, or related medical conditions, see section 11035.
(6) Nothing in this subsection shall be construed to limit the rights or obligations set forth in Labor Code section 6300 et seq.

(e) Working Conditions.

(1) Where rest periods are provided, equal rest periods must be provided to employees without regard to the sex of the employee of both sexes.

(2) Equal access to comparable, safe, and adequate toilet facilities shall be provided to employees without regard to the sex of the employee of both sexes. This requirement shall not be used to justify any discriminatory employment decision.

(A) Employers shall permit employees to use facilities that correspond to the employee’s gender identity or gender expression, regardless of the employee’s assigned sex at birth.

(B) Employers and other covered entities with single-occupancy facilities under their control shall use gender-neutral signage for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral,” “All Gender Restroom,” etc.

(C) To respect the privacy interests of all employees, employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains, or other feasible methods of ensuring privacy. However, an employer or other covered entity may not require an employee to use a particular facility.

(D) Employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender.

(E) Notwithstanding subsection (i)(1)(B) of this section, nothing shall preclude an employer from making a reasonable and confidential inquiry of an employee for the sole purpose of ensuring access to comparable, safe, and adequate multi-user facilities.

(3) Support services and facilities, such as clerical assistance and office space, shall be provided to employees without regard to the employee’s sex.

(4) Job duties shall not be assigned according to sex stereotypes.

(5) It is unlawful for an employer or other covered entity to refuse to hire, employ or promote, or to transfer, discharge, dismiss, reduce, suspend, or demote an individual of one sex and not the other on the grounds that the individual is not sterilized or refuses to undergo sterilization.

(6) It shall be lawful for an employer or labor organization to provide or make financial provision for childcare services of a custodial nature for its employees or members who are responsible for the care of their minor children.
(f) Sexual Harassment. Sexual harassment is unlawful as defined in section 11019(b), and includes verbal, physical, and visual harassment, as well as unwanted sexual advances. An employer may be liable for sexual harassment even when the harassing conduct was not motivated by sexual desire. A person alleging sexual harassment is not required to sustain a loss of tangible job benefits in order to establish harassment. Sexually harassing conduct may be either “quid pro quo” or “hostile work environment” sexual harassment:

1. “Quid pro quo” (Latin for “this for that”) sexual harassment is characterized by explicit or implicit conditioning of a job or promotion on an applicant or employee's submission to sexual advances or other conduct based on sex.

2. Hostile work environment sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with an employee’s work performance or create an intimidating, hostile, or offensive work environment.

(A) The harassment must be severe or pervasive such that it alters the conditions of the victim’s employment and creates an abusive working environment. A single, unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. To be unlawful, the harassment must be both subjectively and objectively offensive.

(B) An employer or other covered entity may be liable for sexual harassment even though the offensive conduct has not been directed at the person alleging sexual harassment, regardless of the sex, gender, gender identity, gender expression, or sexual orientation of the perpetrator.

(C) An employer or other covered entity may be liable for sexual harassment committed by a supervisor, coworker, or third party.

1. An employer or other covered entity is strictly liable for the harassing conduct of its agents or supervisors, regardless of whether the employer or other covered entity knew or should have known of the harassment.

2. An employer or other covered entity is liable for harassment of an employee, applicant, or independent contractor, perpetrated by an employee other than an agent or supervisor, if the entity or its agents or supervisors knows or should have known of the harassment and fails to take immediate and appropriate corrective action.

3. An employer or other covered entity is liable for the sexually harassing conduct of nonemployees towards its own employees where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

4. An employee who harasses a co-employee is personally liable for the harassment,
regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action.

(g) Physical Appearance, Grooming, and Dress Standards. It is lawful for an employer or other covered entity to impose upon an applicant or employee physical appearance, grooming or dress standards. However, if such a standard discriminates on the basis of sex and if it also significantly burdens the individual in his or her employment, it is unlawful. It is unlawful to impose upon an applicant or employee any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity (section 11010).

(h) Recording of Gender and Name. As provided in sections 11016(b)(1) and 11032(b)(2) of these regulations, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are unlawful unless the employer establishes a permissible defense (section 11010). For recordkeeping purposes in accordance with section 11013(b), an employer may request an applicant to provide this information solely on a voluntary basis.

1. An applicant’s designation on an application form of a gender that is inconsistent with the applicant’s assigned sex at birth or presumed gender may be considered fraudulent or a misrepresentation for the purpose of an adverse employment action based on the applicant’s designation only if the employer establishes a permissible defense (section 11010).

2. An employer shall not discriminate against an applicant based on the applicant’s failure to designate male or female on an application form.

3. If an employee requests to be identified with a preferred gender, name, and/or pronoun, including gender-neutral pronouns, an employer or other covered entity who fails to abide by the employee’s stated preference may be liable under the Act, except as noted in subsection (4) below.

4. An employer is permitted to use an employee’s gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with the employee’s gender identity and preferred name.

(i) Additional Rights.

1. It is unlawful for employers and other covered entities to inquire about or require documentation or proof of an individual’s sex, gender, gender identity, or gender expression as a condition of employment:

   A. Nothing in this subsection shall preclude an employer from asserting a BFOQ defense, as defined above.
(B) Nothing in this subsection shall preclude an employer and employee from communicating about the employee's sex, gender, gender identity, or gender expression when the employee initiates communication with the employer regarding the employee’s working conditions.

(2) It is unlawful to deny employment to an individual based wholly or in part on the individual’s sex, gender, gender identity, or gender expression.

(3) Nothing in these regulations shall prevent an applicant or employee from asserting rights under other provisions of the Act, including leave under the California Family Rights Act and rights afforded to individuals with mental or physical disabilities.

(4) It is unlawful to discriminate against an individual who is transitioning, has transitioned, or is perceived to be transitioning.

Fair Employment & Housing Council
Consideration of Criminal History in Employment Decisions Regulations

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
Article 2. Particular Employment Practices

TEXT

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Text proposed to be deleted is displayed in strikethrough type.

§ 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 (as 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 Except as otherwise provided by law (e.g., 12 U.S.C. § 1829; Labor Code section 432.7), it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning:

(A) Any arrest or detention that did not result in conviction;

(B) Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45); any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code section 1203.4; or

(C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5.

(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 or other means of selection that is facially neutral, but that has an adverse impact (as described 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 sufficiently related to an essential function of the job in question to warrant its use. (See section 11017(a) job-related and consistent with business necessity (business necessity is defined in section 11010(b)).


§ 11017.1. Consideration of Criminal History in Employment Decisions

(a) Introduction. Employers and other covered entities (“employers” for purposes of this section) in California are explicitly prohibited under other state laws from utilizing certain enumerated criminal records and information (hereinafter “criminal history”) in hiring, promotion, training, discipline, lay-off, termination, and other employment decisions as outlined in subsection (b) below. Employers are prohibited under the Act from utilizing other forms of criminal history in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the Act that the employer cannot prove is job-related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively.

(b) Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact. Except if otherwise specifically permitted by law, employers are prohibited from
considering the following types of criminal history, or seeking such history from the employee, applicant or a third party, when making employment decisions such as hiring, promotion, training, discipline, lay-off and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7);

(2) Referral to or participation in a pretrial or post-trial diversion program (Id.);

(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) (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 (Id.); and

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

(c) Additional Criminal History Limitations, Irrespective of Adverse Impact.

(1) State or local agency employers are prohibited from asking applicants for employment to disclose information concerning their conviction history, including on an employment application, until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for the position (Labor Code section 432.9).

(2) Employers may also be subject to local laws or city ordinances that provide additional limitations. For example, in addition to the criminal history outlined in subsection (b), San Francisco employers are prohibited from considering a conviction or any other determination or adjudication in the juvenile justice system; offenses other than a felony or misdemeanor, such as an infraction (other than driving record infractions if driving is more than a de minimis element of the job position); and convictions that are more than seven years old (unless the position being considered supervises minors, dependent adults, or persons 65 years or older) (Article 49, San Francisco Police Code).

(3) 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.).

(d) Consideration of Other Criminal Convictions and the Potential Adverse Impact. 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.

(e) 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 either:

(A) Demonstrate that any “bright-line” conviction disqualification or consideration (that is, one that does not consider individualized circumstances) can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify, or otherwise adversely impact the status of the employee or applicant, have a direct and specific negative bearing on the person’s ability to perform the duties or responsibilities necessarily related to the employment 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 subsection (f) below); or

(B) Conduct an individualized assessment of the circumstances and qualifications of the applicants or employees excluded by the conviction screen. An individualized assessment must involve notice to the adversely impacted employees or applicants (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 employees or applicants is not job-related and consistent with business necessity.

(3) Regardless of whether an employer utilizes a bright line policy or conducts individualized assessments, before an employer may take an adverse action such as declining to hire, 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.

(f) 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, 432.9). 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.

(g) 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.

(h) Disparate Treatment. As in other contexts, the Act prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history if the disparate treatment is substantially motivated by a basis enumerated in the Act.