FAIR EMPLOYMENT AND HOUSING COUNCIL
PROPOSED AMENDMENTS TO THE FAIR EMPLOYMENT AND HOUSING REGULATIONS

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapters 2 and 5. Discrimination in Employment; Contractor Nondiscrimination and Compliance
Articles 1, 2, 4, ~~6~~5, 6~~A~~, 8, 9, 10; 1, 2, 3, 4, 5

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets, and makes specific the employment and nondiscrimination in state contracting provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in Davis on December 8, 2014. The Council further solicited public comment on three modified texts at three subsequent meetings: May 4, 2015, in Los Angeles; July 20, 2015, in Santa Clara; and August 26, 2015, in Oakland. The following list summarizes the Council's notable changes to the originally proposed text:
- refining how to count employees as it relates to employee worksite, out-of-state employees, and leaves in order to determine if one is a covered employer;
- adding the definition of "[p]erson performing services pursuant to a contract";
- clarifying the rights of unpaid interns and volunteers;
- clarifying the standard of establishing harassment as per *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203;
- clarifying employers' responsibilities in preventing and correcting harassment and discrimination as it relates to how to provide a complaint mechanism;
- clarifying sexual harassment prevention trainers' obligations as they relate to incorporating "abusive conduct" into their training as per AB 2053 (2014);
- clarifying the standard for hostile work environment sexual harassment;

- reinstating the pre-existing standard for calculating the length of pregnancy disability leave;
- adding in transgender individuals to the pregnancy disability leave section (Article 6);
- clarifying employers' reasonable accommodation duties as it relates to religious creed and disability;
- making dozens of non-substantive grammatical and technical revisions (e.g. renumbering subdivisions and creating uniform spacing conventions); and
- correcting case law citations and the list on this final statement of reasons of articles being amended.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations duplicate or overlap a state or federal statute or regulation which is cited as "authority" or "reference" for the proposed regulations and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code Section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Subchapter 2. Discrimination in Employment.

Article 1. General Matters.

Section 10500 – Department of Fair Employment and Housing - Conflict of Interest Code.
Comment: For clarity, the Council should revise the final sentence of the first paragraph of this section as follows: "This regulation, and the attached Appendices establishing various levels of disclosure and designating the level of disclosure required for various positions, . . ."

Council Response: While the Department of Fair Employment and Housing's current conflict of interest code is located within the Council's regulations, it belongs in the Department's procedural regulations (2 CCR 10000 et seq.) and is only in the 11000 series because the Council's predecessor entity, the Fair Employment and Housing Commission, adopted this code as a favor to the Department who at that time did not have regulations of its own. Moreover, the current language is borrowed from other departments' conflict of interest codes and has been approved by the Fair Political Practices Commission. Finally, this comment is not responsive to any proposed changes made by the Council. Ultimately, the Department will promulgate its own conflict of interest code once the Council properly renumbers it to the Department's part of the California Code of Regulations.

Comment: In Disclosure Categories 2 and 3, it appears likely the comma between "sources" and "of the type" is an erroneous splice.

Council Response: While the Department of Fair Employment and Housing's current conflict of interest code is located within the Council's regulations, it belongs in the Department's procedural regulations (2 CCR 10000 et seq.) and is only in the 11000 series because the Council's predecessor entity, the Fair Employment and Housing Commission, adopted this code as a favor to the Department who at that time did not have regulations of its own. The Department will promulgate its own conflict of interest code once the Council properly renumbers it to the Department's part of the California Code of Regulations. Also, this comment is not responsive to any proposed changes made by the Council.

Section 11006 – Statement of Policy and Purpose.
Comment: The Council's clarification that the anti-discrimination provisions of the FEHA also apply to employees with a military and veteran status, in accordance with AB 556 (Stats. 2013, ch. 691) is appreciated. It is recommended that the Council further amend the language of the existing section so that "without discrimination" reads "without discrimination or harassment," in accordance with the statute. Cal. Gov't Code § 12940.

Council Response: The Council disagrees with this comment as it is nonresponsive to any proposed changes made by the Council and this statement is a broad statement of policy and purpose, not recap of the specific law it regulates. As a result, no changes have been made.

Section 11008 – Definitions.
Comment: The definitions should be arranged in alphabetical order.

Council Response: The Council agrees that the definitions should be in alphabetical order; however, as proposed by the Council, the definitions were already in alphabetical order. As a result, no changes have been made.

Former Section 11008(c)(5) – Definition: "Employee."
Comment: The Council should change "may" to "shall" in the second line of the proposed regulation.

Council Response: The Council agrees and changed "may be considered" to "is" in order to succinctly implement the suggestion.

Comment: The Council should add the following language to the end of this subsection: "Nothing in this definition shall preclude a finding that an individual is an employee, jointly, of an employer contracting with a temporary service agency and the temporary service agency itself with regard to such terms, conditions and privileges of employment under the control of both entities."

Council Response: The Council believes the proposed addition is unnecessary and unclear. However, the Council added "also" to reiterate the point about joint employers.

Section 11008(d)(1) – Definition: "Regularly Employing."
Comment: The Council should add the following language at the end of this subsection: "regardless of whether the employee's worksite is located within or outside of California."

Council Response: The Council agrees with this comment and changes have been made accordingly.

Section 11008(d)(2) – Definition: "Counting."
Comment: The Council should amend this section as follows: "For purposes of "counting" (five or more) employees, the individuals employed need not be employees as defined ~~below; nor must any of them be full time employees~~ in section 11008, subd. (c); but shall include part-time employees, employees on leaves of absence, unpaid interns, and volunteers, and may include partners, shareholders, and directors, as set forth in the EEOC Guidelines. The employee numerosity requirement is an element of the claim rather than a jurisdictional requirement."

Council Response: While the Council found that this comment is nonresponsive to any noticed changes and believes that the proposal is unclear, the portion about employees on leave is a helpful clarification and accordingly the Council added the following: "employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted."

Section 11008(g) – Definition: "Employment Benefit."
Comment: For clarity, the Council should revise the final sentence of the first paragraph as follows: "provision of a ~~discrimination free~~ workplace free from employment practices prohibited by the Act, and any other favorable term, condition or privilege of employment."

Council Response: The Council found that this comment is nonresponsive to any noticed changes and believes that the proposal is unclear. As a result, no changes have been made.

Section 11008(g)(2): Definition: "Employment Benefit."
Comment: For clarity, the Council should revise this subsection as follows: "'Employment benefit' also includes the selection ~~or~~ and training of any person for, and the discharge of any person from, any apprenticeship training program or any other training program leading to employment or promotion."

Council Response: If the commenter means that discharge from employment is a benefit, then that is a misunderstanding of the law. Alternatively, the Council interpreted the comment to mean "freedom from termination" and accordingly made the relevant changes, also clarifying that an unpaid internship should be included in this subdivision.

Section 11008(g)(3): Definition: "Provision of a discrimination-free workplace."
Comment: If comment regarding § 11008(g) is accepted, then this section will become unnecessary, and thus the following language new language should be adopted in its place: "'Employment Benefit' also includes the selection and training of any person for, and the discharge of any person from, an unpaid internship or volunteer position."

Council Response: Although this comment is nonresponsive, changes made by the Council to section 11008(g)(2) should alleviate the concerns posed by this comment with regards to unpaid interns and volunteers. As a result, no changes have been made.

Section 11008(j) [later re-lettered to (k)]– Definition: "Unpaid interns and volunteers."
Comment: The Council should delete the parenthetical in the first sentence of this subsection. The language "(often a student or trainee)" provides no clarity, nor guidance for the reader and may be read as limiting. Moreover, for further clarity, the Council should amend the final two sentences of this subsection to read as follows: "Unpaid interns ~~may or may not be~~ are not "employees" as defined in section 11008, subdivision (c). However, when used elsewhere in these regulations, the term "employee" shall include any individual who is an unpaid intern or volunteer, and these individuals shall be afforded the protections of the Act."

Council Response: The Council disagrees with the first part of the comment because the parenthetical is necessary to give examples of persons who work without pay for an employer; it might not otherwise be apparent who is being contemplated because most people associate employers with PAID work and the parenthetical in no way exclusively defines who is an unpaid intern or volunteer. As to the second part, the Council declined to define "employee" within

the definition of "unpaid interns and volunteers" because "employee" is already defined in section 11008 and the proposed addition is not clear.

Comment: Government Code section 12935(a) only delegates the FEHC authority to implement regulations that interpret the actual provisions of FEHA. This section proposes to include "volunteers" and "unpaid interns" under all of the protections of FEHA. Nothing within FEHA provides the authority for such an expansive definition. AB 1443 (Skinner) only authorized the inclusion of unpaid interns and volunteers under limited sections of FEHA. Specifically, unpaid interns were included in Government Code section 12940(a) with regard to discrimination in hiring and 12840(k) with regard to harassment. Comparatively, volunteers were only included in section 12940(k). If the legislature had intended to include volunteers and unpaid interns under all of the protections and requirements of FEHA, the legislature would have done so. Limiting FEHA protections for these groups to only discrimination and harassment for unpaid interns and harassment for volunteers is good public policy. If volunteers were included within section 12940(a) they could be sued for discrimination. Similarly, there is no reason as to why an employer would need to engage in the interactive process for an unpaid intern or volunteer and seek out reasonable accommodations for a disability that may extend well beyond the anticipated internship/program.
Accordingly, there is no statutory authority to equate "volunteers" and "unpaid interns" as "employees" for all purposes of this Act, and therefore this section must be revised to specify only the two limited sections of FEHA that have been explicitly extended for unpaid interns and volunteers, as set forth in AB 1443 (Skinner).

Council Response: The Council agrees and changes have been made accordingly, particularly striking the final sentence that read "when used in these regulations, the term 'employee' shall include any individual who is an unpaid intern or volunteer."

Comment: For clarity, the Council should remove the second to last sentence in section (j) and the word "however" from the final sentence. The statement that "[u]npaid interns and volunteers may or may not be employees" is confusing, as it does not speak to in what context or under what statutes or regulations they may be considered employees.

Council Response: The Council believes that "<u>[u]npaid interns and volunteers may or may not be employees</u>" is both an accurate statement of the law and very straightforward. The definitions section is not an appropriate place to flesh out the entirety of the rule and the rest of the regulations, and even subdivision (c) of this section, elaborate. But the Council did, for reasons enumerated above, delete "however" (and what followed as it was inaccurate).

Comment: In order to clarify the mandate of AB 1443, the Council should add the following to the end of subsection (j): "Unpaid interns and volunteers are protected against discrimination and harassment under this Act." Cal. Gov't Code §§ 12940(c), (j), and (l).

Council Response: The Council did not incorporate this suggestion because it does not belong in the definitions section as it is not a definition. However the substance is valid and has been incorporated into substantive sections, namely sections 11009(e), 11019(b)(1), and 11059(d).

Section 11008 – References.
Comment: For completeness, the Council should add the following sections of the Government Code as "references" at the end of the section: §§ 12926, 12926.1, 12945, and 12945.2.

Council Response: Section 11008 does implement, interpret, and make specific Government Code section 12926, but not sections 12926.1, 12945, and 12945.2. Accordingly, only Government Code section 12926 was added as a reference.

Comment: It is necessary to add a citation to AB 1443 (Stats. 2014, ch. 302) OR add interns and volunteers to each section where "applicant" is mentioned.

Council Response: The Council disagrees that the suggested additions are necessary. AB 1443 amended Government Code section 12940, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act. Next, as far as adding interns and volunteers to each section where "applicant" is mentioned, the Council determined that those additions would be duplicative and would detract from the regulations' clarity. Instead, the definition of "unpaid interns and volunteers" has a global effect on the rest of the regulations, as does newly-added section 11009(e). As a result, no changes have been made.

Section 11009(c) – Principles of Employment Discrimination: Establishing Discrimination.
Comment: The application of a uniform standard for discrimination and retaliation is of paramount importance to all stakeholders. The Council should rewrite this section for clarity and accuracy in accordance with how the California Supreme Court has explained and applied the "substantial motivating factor" standard across various areas of law. (*See e.g., People v. Caldwell* (1984) 36 Cal.3d 210, 220; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978; *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79; *see also* CACI 430.). The Council Should also add language limiting the application of the standard to retaliation cases in particular circumstances. (*See Yanowitz v. L'Oreal* (2005) 36 Cal.4th 1028.). Thus, the Council should rewrite this section to read:
(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not ~~justified~~ excused by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply and ~~not~~

~~to~~ other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, ~~retaliation,~~ harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2.

(1) A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(2) Retaliation prohibited by Government Code section 12940, subdivision (h) may take many forms, including but not limited to, denial of an employment benefit or harassment. The substantial motivating reason standard shall apply when retaliation takes the form of denial of employment benefit. In circumstances where retaliation takes the form of harassment, the standard(s) articulated in Section 11019 of these regulations shall apply.

Council Response: Regarding section 11009(c), the Council largely agrees with the suggested changes, and has modified the text to substantially parallel the suggested text. The Council did not exchange "justified" for "excused" because a reader could misinterpret the change as substantive rather than just a preferred use of synonyms. Next, the Council agrees with the idea behind the suggested text for section 11009(c)(1), but for clarity, the Council has decided to attach the text to the end of section 11009(c). Lastly, the Council disagrees with the suggested addition of the text of proposed section 11009(c)(2) and finds the text to be unnecessary and likely to create confusion. As a result, the Council incorporated a majority of the suggestions.

Comment: The Council should strike the word retaliation within the last sentence as, under both case law and CACI 2505, the "substantial motivating factor" language also applies to claims of retaliation.

Council Response: The Council agrees and made the corresponding change.

Section 11009(d) – Principles of Employment Discrimination: Human Trafficking.
Comment: For clarity, the Council should add the following to the end of this section: "independent of and in addition to any claims that an individual may have under other California laws covering human trafficking."

Council Response: The Council agrees with the sentiment of this comment. The Council has modified the proposed text in a clearer, slightly different manner than that which the comment has suggested.

Section 11009 – Authority.
Comment: For completeness, the following sections of the Government Code should be added to the description of the authority from which the above definitions are drawn: §§ 12945 and 12945.2.

Council Response: Government Code section 12935(a) is the one and only authority for the Council's rulemaking powers. If the commenter meant to say that Government Code sections 12945 and 12945.2 should be added as references, then that is incorrect too because this section of the Code of Regulations does not implement, interpret, or make specific that part of the Government Code. As a result, no changes have been made.

Section 11009 – References.
Comment: The Council should add reference to Government Code sections 12926 and 12926.1, Civil Code sections 52.5 and 236.1, AB 1443 (2014) and "the human trafficking bill."

Council Response: The Council disagrees because section 11009 does not implement, interpret, or make specific Government Code sections 12926 and 12926.1 and Civil Code sections 52.5 (regarding human trafficking) and 236.1 – merely mentioning them is not tantamount to interpreting. Moreover, AB 1443 amended Government Code section 12940, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act. As a result, no changes have been made.

Article 2. Particular Employment Practices.

Section 11019(b)(3)[later renumbered to (4)] - Harassment.
Comment: For clarity, the Council should make the following revision to Subsection (b)(3): ". . . . knowledge shall be imputed unless the employer or other covered entity can establish prove by a preponderance of the evidence that it took. . ."

Council Response: The Council disagrees since that proposed amendment is neither necessary and nor clarifying, since the regulations for the most part do not contain burdens of proof. Also, this comment is nonresponsive to any proposed amendments. As a result, no changes have been made.

Section 11019(b)(5)[later renumbered to (6)] - Harassment.
Comment: For clarity, the Council should make the following revision to Subsection (b)(5): ". . . who harasses a co-employee ~~may~~ shall be ~~personally~~ individually liable for . . ."

Council Response: The Council disagrees with this comment. The proposed text tracks the Fair Employment and Housing Act and offers more clarity than the text suggested by this comment. However, this subdivision was rewritten to be even clearer: "An employee who engages in unlawful harassment of 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."

Comment: For clarity, the Council should amend the beginning of subsection (b)(5) as follows: "An employee, even where he or she lacks a managerial or supervisorial role, who harasses a co-employee may be personally liable […]."

Council Response: The Council disagrees with this comment and finds the suggested change to be unnecessary and likely to take away from what is already unambiguous and clearly written. As a result, no changes have been made, although the sentence was rewritten in response to the comments above.

Section 11019(d) – Reasonable Discipline.
Comment: This subsection is superfluous and has no root in the statute. It is a simple statement of the obvious, *i.e.*, that an act that is not unlawful is, in fact, not unlawful. There are myriad other equally as not unlawful acts which an employer could undertake, but those acts are not listed here. Highlighting this one not unlawful act serves to bestow unnecessary importance upon the act. This subsection adds nothing to the understanding or proper application of the Act and should be deleted.

Council Response: The Council disagrees with this comment. First, the comment is nonresponsive to any changes proposed by the Council. Second, this text has been in place for years and increases the section's clarity and completeness, particularly because that is a question that the Department is frequently asked by members of the public. As a result, no changes have been made.

Section 11019 – References.
Comment: It is necessary to add a citation to AB 1443 (Stats. 2014, ch. 302) and Government Code section 12926 and 12926.1.

Council Response: The Council disagrees because section 11019 does not implement, interpret, or make specific Government Code sections 12926 and 12926.1. Moreover, AB 1443 amended Government Code section 12940, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act. As a result, no changes have been made.

Section 11023 – Harassment and Discrimination Prevention and Correction
Comment: These sections are particularly onerous for employers and we disagree that these sections would not end up having a financial impact – contrary to the assertion in the Notice of

Proposed Rulemaking that declares the opposite. Consequently, the Council should only include **subsections (a)(1-3)**, and nothing more.

Council Response: The Council disagrees with this comment because Government Code 12950 already mandates distribution of the DFEH-185 and there is a general duty to create a workplace environment that is free from employment practices prohibited by the Act. However, the statute does not elaborate, leaving employers in confusion about how to comply. 2 CCR 11023 was written to give employers guidance based on consensus best practices that are easy to comply with and do not impose any new burdens for employers already in compliance.

Section 11023(a) – Employer's Affirmative Duty: Reasonable Care.
Comment: Subsection (a) should be revised as follows: "Employers have an affirmative duty to ~~under~~take reasonable ~~care~~ steps to prevent . . ."

Council Response: The Council agrees and changes have been made accordingly.

Comment: Subsections (a)(1) through (a)(3) oversimplify complex and multi-faceted legal standards related to specifics of burdens of proof and parameters of employer liability for various causes of action. Further, subsection (a)(1) could result in confusion, leading some covered employers to believe they are not required to take protective and corrective actions due to their size or finances. Because of the potential for this added confusion, because the regulations cannot possibly address all factors and how they affect the varying burdens, and because the role of the regulations is not to set out the requirements surrounding bringing various causes of action, especially where such requirements are not addressed in the statute, we recommend that proposed subsections (a)(1) through (a)(3) be removed in their entirety, while the principle set forth in the first sentence of section (a) (beginning with "Employers have an affirmative duty…") be retained.

Council Response: The Council agrees that (a)(1) is complicated and does not fully explain the concept. However, the Council disagrees that subdivision (a)(1) may be interpreted as releasing any covered employers from their preventative duties; to the contrary, it highlights that the analysis is not one-size-fits-all in order to NOT oversimplify otherwise complex concepts. Subdivisions (a)(2) and (a)(3) are not complex and fully explain the proposition that they stand for in clear, concise terms. Accordingly, no changes have been made.

Section 11023(a)(1) – Employer's Affirmative Duty: Reasonable Care.
Comment: The Council should remove the word "budget" as this will potentially cause unnecessary and improper discovery requests by plaintiffs.

Council Response: The Council disagrees with this comment and could not find precedent or mention in the Evidence Code or Code of Civil Procedure suggesting any impropriety. The proposed text adds clarity and is unlikely to lead to "unnecessary and improper" discovery

requests, especially considering that individualized assessments are a crux of the law and already entail looking at budgets. As a result, no changes have been made.

Section 11023(a)(2) – Employer's Affirmative Duty: Reasonable Care.
Comment: The Council should remove the word "retaliation" (in both places) as this is not included within Government Code section 12940(k).

Council Response: The Council disagrees with this comment and finds the proposed text to be clear and necessary to these regulations. Courts already read retaliation into discrimination and harassment and, as a matter of public policy, it would not make sense to only affirmatively prevent discrimination and harassment, but not retaliation. As a result, no changes have been made.

Section 11023(a)(3) – Employer's Affirmative Duty: Reasonable Care.
Comment: "12965 deputize private bar"

Council Response: The Council cannot interpret this comment. To the extent that it is requesting the Council to enable private attorneys to seek non-monetary preventative remedies for a violation of Government Code section 12940(k) whether or not they prevail on an underlying claim of discrimination, harassment, or retaliation, that would be outside of the Council's authority according to Government Code sections 12935 and 12965. Since the State seeks affirmative relies in its claims, this provision is uniquely geared toward the State in order to facilitate that aim, not further one's ability to solely seek affirmative relief and subsequently obtain attorney fees.

Section 11023(b) - Employer's Affirmative Duty: Workplace Environment.
Comment: Subsection (b) should be revised as follows: ". . . that is free from ~~discrimination and harassment~~ employment practices prohibited by the Act. . . . and employer shall develop a harassment, ~~and~~ discrimination, and retaliation prevention policy. . ."

Council Response: The Council agrees and changes have been made accordingly.

Comment: This section sets forth the issues that must be included in an employer's harassment and discrimination policy. The list of proposed mandatory provisions of an employer policy goes far beyond what is required in section 12950 and therefore is unlawful as it exceeds the requirements of the statute. *See* Government Code sections 11342.1 and 12935(a). Accordingly, we respectfully request the deletion of (b)(1)-(10).

Council Response: The Council disagrees with this comment. The proposed text is necessary to effectuate the purpose of these regulations, namely preventing and correcting harassment and discrimination, which are sparsely addressed in Government Code sections 12940, subdivision (k), and 12950, and is not excessively burdensome on employers in doing so. The text is general and flexible for employers and is consistent with precedent. Moreover, Government Code

section 12950 permits the Council to flesh out the rules because the statute mandates employers follow minimum requirements. As a result, no changes have been made.

Comment: Under the proposed language in subsection (b), in addition to distributing the DFEH 185 brochure (which is arguably sufficient under the statute), employers would now be required to develop policies (and rather onerous practices) based on the mandates delineated in subsection (b)(1-10). Subsections (1-10) should be deleted altogether, as these requirements are too burdensome for both large and small employers, may run afoul of the National Labor Relations Act according to recent National Labor Relations Board decisions, do not adequately define several terms, and goes far beyond what is required in section 12950. Alternatively, the Council should alter the language so as to make these guidelines, rather than mandates.

Council Response: The Council disagrees with this comment. The proposed text is necessary to effectuate the purpose of these regulations, namely preventing and correcting harassment and discrimination, which are sparsely addressed in Government Code sections 12940, subdivision (k), and 12950, and is not excessively burdensome on employers in doing so. The text is general and flexible for employers and is consistent with precedent. Moreover, Government Code section 12950 permits the Council to flesh out the rules because the statute mandates employers follow minimum requirements. As a result, no changes have been made.

Section 11023(b)(2) - Employer's Affirmative Duty: Workplace Environment.
Comment: We appreciate the language in subsection (b) clarifying that employers must protect from harassment and discrimination all classes protected under the Act and commend the Council for detailing the required contents of harassment policies and for including requirements surrounding the dissemination of such policies. In order to further clarify subsection (b)'s application to all forms of harassment (as opposed to only sexual harassment), and for ease of reference, it is recommended that the Council add to subsection (b)(2) a list of the protected categories as set out in Gov't Code sec. 12940(j) as amended by AB 556 ("race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.").

Council Response: The Council disagrees with the necessity of the proposed addition as the change would be unnecessarily lengthy and duplicative of what is already made clear by reference. As a result, no changes have been made.

Section 11023(b)(3) - Employer's Affirmative Duty: Workplace Environment.
Comment: Subsection (b)(3) should be revised as follows: ". . . engaging in ~~unlawful~~ conduct prohibited by the Act."

Council Response: The Council agrees and changes have been made accordingly.

Comment: "Unlawful conduct" in **subsection (b)(3)** is too vague. Perhaps change "unlawful conduct" to "discrimination or harassment."

Council Response: Changes made by the Council in response to other comments render the concerns of this comment moot. As a result, "unlawful" was removed and no additional changes have been made.

Comment: The Council should add a new (b)(3) prohibiting the harassing conduct with a cross reference to training in § 7288(c) and add definitions and examples/types of conduct and retaliation and why prohibited.

Council Response: The Council disagrees with this suggestion because a harassment, discrimination, and retaliation cannot effectively prohibit the proscribed conduct; rather, the policy's contents are geared toward that end. Next, the commenter invoked section 7288(c), but that is an old citation to what is now 11023(c), which should not be cited as it immediately follows this subdivision. Finally, there are already definitions throughout the regulations, particularly section 11008 and giving examples of prohibited behavior would not add to the regulation's clarity since there are an almost infinite number of discriminatory, harassing, and retaliatory behaviors and to sample just a few would be haphazard. Accordingly, no changes have been made.

Sections 11023(b)(4)(A) and (b)(8) - Employer's Affirmative Duty: Workplace Environment.
Comment: This requires an employer to set forth in the policy that any complaints will be designated as confidential and that to the extent possible, statements made by witnesses will be kept confidential. While the employer may be able to maintain confidentiality, asking any other employee or supervisor to maintain confidentiality could constitute a violation of the National Labor Relations Act, as indicated by the National Labor Relations Board's decision in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (2012), wherein the Board held that an employer may not prohibit employees from discussing internal investigations regarding employee misconduct. A blanket prohibition likely violates Section 7 of the NLRA and the right for employees to engage in concerted activities, regardless of whether the employee belongs to a union. Therefore, requiring an employer to include in its policy that it will maintain confidentiality throughout the investigation may subject an employer to liability under the NLRA. Accordingly, the Council should include language in these sections that state the employer may specify in its policy that nothing within the employer policy is meant to prevent an employee from exercising its rights under the NLRA, or simply delete these two requirements.

Council Response: The Council agrees that a blanket prohibition may be in contravention of the National Labor Relations Act. However, because the regulations state "to the extent possible," there is not a blanket prohibition and only general guidance that does not implicate the National Labor Relations Act. Moreover, the regulatory language refers to a promise of confidentiality made by the company (the investigator or company representative making a promise that he/she will keep the information disclosed in the complaint or investigation interview confidential). This section is not addressing the issue of a company requiring employees to keep information confidential. In other words, the commenter did not provide an

accurate rendering of the state of the law – the NLRB ruling prohibits employers from telling employees to keep information confidential because doing so might constitute interference with open discussion of terms and conditions of employment. This section, however, does not implicate that ruling and only addresses the limited promise employers make that they and their representatives will keep information confidential (to the extent possible).

Comment: The confidentiality sections included within **subsections (b)(4)(A)** and **(b)(8)** may run afoul of recent NLRB decisions. (See e.g., *Banner Health System*, 358 NLRB No. 93.)"

Council Response: The Council agrees that a blanket prohibition may be in contravention of the National Labor Relations Act. However, because the regulations state "to the extent possible," there is not a blanket prohibition and only general guidance that does not implicate the National Labor Relations Act.

Section 11023(b)(4)(C) - Employer's Affirmative Duty: Workplace Environment.
Comment: **Subsection (b)(4)(C)** does not adequately define "qualified personnel." Instead, the Council should use the language used to describe "Trainer" within **Section 11024(a)(9)(A)**.

Council Response: The Council disagrees with this comment and is confident in its word choice. The plain meaning of "qualified personnel" is clear, and the suggested alternative is not descriptive of what is intended by this section and would in fact be more burdensome to employers. It is not the intent of the Council that a "trainer" be part of the complaint process described in this section. As a result, no changes have been made.

Section 11023(b)(4)(D) - Employer's Affirmative Duty: Workplace Environment.
Comment: This states that complaints receive "documentation and tracking for reasonable progress." This provision is ambiguous as it is unclear as to what documentation is necessary, how to track the progress of a complaint, and what is considered reasonable. The Council should delete this provision or, in the alternative, should provide more specific standards as to what is required.

Council Response: The Council did not accept the action recommended by this comment because the lack of specificity benefits employers. If absolute requirements were given, many employers would have to implement new systems. As written, the regulation is permissive and reiterates the common sense notion that complaints should be taken seriously by, amongst other things, being documented and tracked so that they are buttressed by sufficient evidence and not forgotten about.

Section 11023(b)(4)(E) - Employer's Affirmative Duty: Workplace Environment.
Comment: This states a complaint process must ensure that complaints receive "appropriate options for remedial actions and resolutions." Again, this provision is ambiguous as it is unclear as to what is deemed appropriate, and what specific options, actions, or resolutions the Council is referencing that must be included in an employer policy. The Council should delete this provision or, in the alternative, should provide more specific standards as to what is required.

Council Response: The Council did not accept the action recommended by this comment because the lack of specificity benefits employers. If absolute requirements were given, many employers would be limited in crafting solutions to reduce discrimination and harassment. As written, the regulation is permissive and reiterates the common sense notion that complaints should be taken seriously by, amongst other things, being handled in a way that would proactively remedy and resolve the matter, as opposed to just passively being accepted but not acted upon.

Sections 11023(b)(4)(D) and (E) - Employer's Affirmative Duty: Workplace Environment.
Comment: Subsections (b)(4)(D-E) are too vague. For example, what documentation and for how long? Also, do the potential remedial actions and resolutions all need to be included in the policy? This is far too open ended.

Council Response: While it is true that specific options for (D) Documentation and tracking for reasonable progress and (E) appropriate options for remedial actions and resolutions are not enumerated, doing so would be too restrictive for employers. Based on the character of the workplace (size, number of employers, industry, etc.), this rule gives employers discretion to craft their own policies while outlining the broad goals for a complaint process. To be more specific would create a possibly burdensome mandate and therefore the Council has not made any changes in response to this comment.

Section 11023(b)(5) - Employer's Affirmative Duty: Workplace Environment.
Comment: This requires an employer to provide a complaint mechanism "free of obligation" to complain directly to the employee's supervisor. It is unclear as to what "free of obligation" is referencing. The Council should delete this term and instead simply state that the employer must have an alternative complaint mechanism.

Council Response: The Council agrees and changes to the language have been made accordingly.

Section 11023(b)(5)(A) - Employer's Affirmative Duty: Workplace Environment.
Comment: This requires an alternative complaint mechanism to have direct communication with a human resource manager or EEO officer. Such a requirement is unrealistic, especially for small employers who may have neither a human resource manager nor EEO officer. Accordingly, the Council should delete this provision.

Council Response: The Council agrees and added "and/or" so that there are multiple practical options for a complaint mechanism. At a minimum, the final option listed ("Identification of the Department and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints") is both inexpensive and easy to implement.

Section 11023(b)(5)(A-D) - Employer's Affirmative Duty: Workplace Environment.

Comment: **Subsection (b)(5)(A-D)** is not workable for smaller employers in that they do not always have human resources personnel or EEO officers or have the resources to create a hotline. Further the and/or language in **subsection (b)(5)(C)** does not make clear whether the four listed complaint mechanisms are necessary, as the language uses "and/or." Consequently, the Council should use "or" rather than "and/or".

Council Response: The Council agrees and added "and/or" after (A), (B), and (C) to convey the sentiment expressed by the commenter.

Sections 11023(b)(5)(B) and (C) - Employer's Affirmative Duty: Workplace Environment.
Comment: This requires an alternative complaint mechanism to have a complaint hotline and access to an ombudsperson. Such a requirement is unrealistic, especially for small employers who may not have the ability to create a hotline or designate an ombudsperson. Accordingly, the Council should delete these provisions.

Council Response: The Council agrees and changes to the language have been made accordingly. "And/or" was added to clarify that each mechanism is not required.

Section 11023(b)(7) - Employer's Affirmative Duty: Workplace Environment.
Comment: The Council should change "valid" to "good faith."

Council Response: The Council agrees that "valid" is not clear, but adjudicating "good faith" is equally difficult. Instead the Council rewrote this subdivision as follows to ensure maximum clarity and fairness: 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.

Comment: This requires the policy to indicate that when a "valid" complaint is lodged, the employer will conduct a fair, timely, and thorough investigation that provides all parties with appropriate "due process". It is unclear as to what the Council considers a "valid" complaint. Moreover, the term "due process" is a legal requirement applicable to government, not necessarily an employer. An employer may or may not understand what the Council considers "due process" with regard to conducting an investigation, and therefore this provision should be deleted, or further specificity required.

Council Response: The Council agrees that "valid" is unclear and deleted that term. However, the Council disagrees about the complexity of the term "due process" and believes that it is tantamount to fairness and applies more broadly than just to the government. Ultimately, a process should be in place that is fair, including procedurally (i.e. via due process).

Section 11023(b)(10) - Employer's Affirmative Duty: Workplace Environment.
Comment: Subsection (b)(10) should be revised as follows: "~~Makes clear that employees shall not be exposed to~~ States that retaliation as a . . . investigation shall not be tolerated."

Council Response: The Council believes that the proposed revision would make the text less clear because the concept of "tolerance" is much more imprecise than "exposure." Accordingly, no changes were made.

Section 11023(d) – Employer's Harassment and Discrimination Policy: Translations.
Comment: The specific requirements for harassment and discrimination policies in this section are helpful in that they clarify the mandatory components of such policies for employers. The various mechanisms for distribution of the policy provided in the section ensure employers have various options for reaching employees regardless of the structure of the workplace. The requirement of translation of the harassment and discrimination policies when 10% or more of the workforce speaks a language other than English is particular helpful for limited English proficient employees who might otherwise not have sufficient access to information regarding the discrimination and harassment complaint policy and as a result may not be aware of how to make a complaint. However, the proposed regulations fail to require employers to provide at least oral interpretation of the policy for employees who have limited English proficiency below the 10% threshold. At (c)(1)-(5) employers are required to disseminate the policy in one of five ways, none of which would be effective at communicating the content of the policy unless the policy was provided in the primary language of the employee. Part (d) should be amended to include a requirement that the employer provide oral interpretation of the policy in lieu of written translation for any employee with limited English proficiency when fewer than 10% of the workforce speaks that employee's primary language.

Council Response: The Council did not mandate oral translation because these subdivisions apply to *written* notices, employees are always free to ask what a notice says, and it would be impracticable to both require every covered employer to keep track of who has already been told what a notice says and translate notices that regard complex laws. Similarly, it would be excessively burdensome for employers to translate notices for employees whose spoken language constitute less than 10% of the workforce because large companies would probably need to translate into every language; this would cause the regulations to have a potentially large fiscal impact.

Comment: "Spoken language" should instead be "primary language" so as to mirror other regulations regarding language and concerning employees' understanding of the law.

Council Response: The Council disagrees with this comment. Section 11049(d) uses "spoken language," which was chosen to emphasize that the language actually spoken by employees would be most useful to convey the contents of a harassment, discrimination, and retaliation prevention policy and minimize the fact that "primary language" is imprecise and not a term of art.

Section 11023 – Authority and Reference.
Comment: The Council should add *Flait v. City of Oakland to Authority* for the "valid" versus "good faith" reasoning.

Council Response: Because the Council disagreed with the commenter on adding "good faith," this comment is rendered moot since that proposition does not need to be supported.

Comment: The Council should add Government Code sections 12926 and 12926.1 to the reference section.

Council Response: The Council disagrees because section 11023 does not implement, interpret, or make specific Government Code sections 12926 and 12926.1

Section 11024 – Sexual Harassment Training and Education.
Comment: The Council should consider including a section that exempts defined trainers from needing to attend harassment training themselves. Although it makes sense that these individuals would not need to attend training since they themselves are qualified to train, there is nothing within the current regulation that elucidates this.

Council Response: The Council disagrees with this recommendation. Nothing in Government Code section 12950.1 indicates that the legislature intended trainers to be exempt and in fact, a regulation exempting trainers may be in contravention of the statute. Moreover, trainers can benefit from seeing another trainer conduct his or her course because they can incorporate the good elements of the other trainer's curriculum into their own. And of course, training and being trained are very different and an exemption would interfere with the statute's mandate that "all" supervisory receive training. Therefore, an exemption for trainers was not added.

Comment: We are pleased to see the inclusion of rigorous tracking and accountability standards for trainers addressing workplace harassment and discrimination in §§ 11024 et seq.

Council Response: No response required.

Section 11024(a)(1) – Sexual Harassment Training and Education – Definitions: "Contractor."
Comment: The Council should amend this section to read: "to a contract ~~to~~ with an employer…"

Council Response: The Council agrees and made the suggested revision.

Sections 11024(a)(1)(B) and (C).
Comment: The Council should increase the two-year maintenance of records requirement in these sections to four-years.

Council Response: The Council disagrees with this recommendation since sexual harassment training is a biennial requirement. Moreover, the recommendation is unsupported and other commenters do not want a maintenance of records requirement at all. Therefore, no changes have been made.

Section 11024(a)(2)(B) – Sexual Harassment Training and Education – Definitions: "E-learning."

Comment: Requiring the trainer to maintain all written questions and responses will likely discourage open discussion during training such that the Council should strike the last sentence of this subsection.

Council Response: The Council does not think maintaining written questions and responses will discourage open discussion, particularly because the written record can be anonymous and most students do not know the duties of trainers anyway. On the contrary, maintaining the record would enable presenters to craft more effective presentations by addressing common areas of concern and enable employers to focus their subsequent training where there might be a deficit in knowledge. Therefore, no changes have been made.

Comment: This section seeks to require an E-learning trainer to maintain all written questions received and all responses or guidance provided for a two year period after the date of the response. This requirement exceeds the statute with regard to E-learning training and therefore is unlawful. See Government Code sections 11342.1, 12935(a), and 12950.1. Accordingly, the Council should revoke the proposed amendment.

Council Response: Nothing in the statute forbids the Council from promulgating this rule. The statute is silent on the specific issue of maintaining questions and answers and the Council's charge is to effectuate the statute, which in this case means clarifying an issue that the legislature did not address.

<u>Section 11024(a)(2)(C) – Sexual Harassment Training and Education – Definitions: "Webinar."</u>
Comment: It is far too onerous to require an employer to maintain copies of webinars, written materials used by trainers, written questions submitted during the webinar, including responses and guidance, particularly as this puts the burden on the employer (who may or may not even have access to the materials themselves), rather than the trainer. In addition, trainers who develop their own materials will likely be unwilling to provide employers with copies of the presentation as such materials would be proprietary to them and of great value. As such, the trainer would likely charge a large additional fee to allow the employer to retain a copy of the material, which an employer could then use to develop its own in-house training program. Accordingly, placing the burden on the employer to obtain all of this information and then retain it for a period of two years is unreasonable.

Council Response: The Council maintains the retention of these records because it would help to educate and prevent sexual harassment by enabling attendees to refer to the materials and it is common practice for trainers to distribute their materials anyway. Therefore, it is not a burden on employers to maintain these records and in fact it behooves them to do so in order to prevent sexual harassment and the dignitary, financial, and reputational consequences of it. This rule would not make it easier for employers to develop in-house programs because IF they already have someone in house who is qualified to train, then they already have the wherewithal to institute their own program.

Comment: This section seeks to require ***an employer*** to keep a copy of the webinar, all written materials used by the trainer, all written questions submitted during the webinar, and all written responses or guidance provided by the trainer during the webinar. This proposal is unreasonable, as the employer will not likely have possession of any of this documentation or information. The webinar trainer or provider is the one who will have possession of all written materials, questions, and guidance – not the employer. Accordingly, placing the burden on the employer to obtain all of this information and then retain it for a period of two years is unreasonable.

Moreover, this requirement exceeds the statute with regard to webinar training, especially the expansion of employer retention responsibilities, and therefore is unlawful. *See* Government Code sections 11342.1, 12935(a), and 12950.1. Accordingly, we respectfully request the deletion of this amendment.

Council Response: The Council maintains the retention of these records because it would help to educate and prevent sexual harassment by enabling attendees to refer to the materials and it is common practice for trainers to distribute their materials anyway. Therefore, it is not a burden on employers to maintain these records and in fact it behooves them to do so in order to prevent sexual harassment and the dignitary, financial, and reputational consequences of it. And as above, nothing in the statute forbids the Council from promulgating this rule. The statute is silent on the specific issue of maintaining records and the Council's charge is to effectuate the statute, which in this case means clarifying an issue that the legislature did not address.

<u>Section 11024(a)(2)(E) – Sexual Harassment Training and Education – Definitions.</u>
Comment: This section provides a list of examples that E-learning, classroom, or webinar training shall include, such as pre or post training quizzes or tests, and small group discussions and questions. First, the statute does not require nor authorize pre or post training quizzes or tests. Even if pre or post quizzes were authorized and required, does this time count towards the overall two hour requirement? Additionally, small group discussions are not necessarily conducive for E-learning or webinar training. Accordingly, the Council should delete these "examples," as they will create confusion as to what is required as a part of the training methods and if such methods are a part of the overall two hour requirement.

Council Response: The Council did not modify this section because the commenter is confusing discretionary examples with mandates. The methods listed MAY be used and are listed to guide employers and trainers on best practices to reduce sexual harassment without creating any additional affirmative obligations. Moreover, the statute is silent on the specific issue of what training methods must be used and the Council's charge is to effectuate the statute, which in this case means clarifying an issue that the legislature did not address.

<u>Section 11024(a)(9) – Sexual Harassment Training and Education – Definitions: "Trainers."</u>
Comment: This section seeks to strike (1) under the training and experience of an trainer or educator, that would require a trainer to train supervisors on "what are unlawful harassment,

discrimination, and retaliation under both California and federal law," and instead replace it with "how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law." We disagree with this proposed deletion and amendment. A supervisor needs to know what specific conduct constitutes unlawful harassment, discrimination, and retaliation, not what behavior may be considered unlawful harassment discrimination, or retaliation. Behavior that "may" be considered unlawful is too subjective and will require supervisors to independently determine what actions may be harassment, discrimination or retaliation. Accordingly, the Council should keep the current language and reject the proposed amendment.

Council Response: Because the assessment of whether an act is harassment, discrimination, or retaliation is fact-intensive, it is impossible to delineate exactly what would or would not qualify and thus create a bright line. Due to this factual ambiguity, it is more precise to say "behavior that may constitute unlawful harassment, discrimination, and/or retaliation" because that language acknowledges the inherent ambiguity in making the assessment and the necessity of supervisors to deeply scrutinize every situation to make their finding, as opposed to applying any absolute tests. Accordingly, the proposed change has been left intact.

Section 11024(a)(9)(B) – Sexual Harassment Training and Education – Definitions: "Trainers."
Comment: This section inserts the term "fully qualified" to modify the word "trainer." The term "fully qualified" is not defined in the regulations and it is unclear as to how a "fully qualified trainer" differs from a "trainer or educator" as defined in section 11024(9). Accordingly, the Council should delete the term "fully qualified" or in the alternative, further clarification as to what is a "fully qualified trainer."

Council Response: The Council agrees and changes have been made accordingly.

Section 11024(b)(2) – Sexual Harassment Training and Education – Documentation of Training.
Comment: This section seeks to require an employer to keep for two years the sign-in sheet as well as a copy of all recorded materials that comprise the training. This proposal is unreasonable, as the employer will not likely have possession of any of this documentation or information. The trainer who conducts the training, especially through E-learning or a webinar will have possession of all written materials, training questions, and guidance – not the employer. Accordingly, placing the burden on the employer to obtain all of this information and then retain it for a period of two years is overly burdensome. Moreover, this requirement exceeds the statute with regard training and documentation, especially the expansion of proposed retention responsibilities of an employer, and therefore is unlawful. See Government Code sections 11342.1, 12935(a), and 12950.1. Accordingly, the Council should delete the proposed amendment.

Council Response: The Council maintains the retention of these records because it would help to educate and prevent sexual harassment letting employers know who is in compliance who the training requirements, particularly if a complaint or lawsuit is filed. Therefore, it is not a burden on employers to maintain these records and in fact it behooves them to do so in order

to prevent sexual harassment and the dignitary, financial, and reputational consequences of it. And as above, nothing in the statute forbids the Council from promulgating this rule. The statute is silent on the specific issue of maintaining records and the Council's charge is to effectuate the statute, which in this case means clarifying an issue that the legislature did not address.

Section 11024(b)(5) – Sexual Harassment Training and Education – Duplicate Training.
Comment: This section seeks to delete the opportunity for a supervisor who had been previously trained by his or her prior employer within two years of accepting a supervisor position with a new employer, from having to re-train with the new employer. This proposed deletion will unnecessarily increase the burden on a supervisor employee as well as employers. Moreover, such a proposal is also unsupported by statute, which only requires a supervisor to be trained every two years. Accordingly, the Council should revert to back to the original language.

Council Response: The Council agrees and changes have been made accordingly.

Section 11024(c)(1) – Sexual Harassment Training and Education – Objectives and Content.
Comment: This section sets forth the objectives for the mandated sexual harassment training and abusive conduct training. The last sentence of this section states "responding to incidents of harassment, *and implementing mechanisms to promptly address and correct wrongful conduct*." (emphasis added). AB 2053 (Gonzalez) did not render "abusive conduct" wrongful or unlawful. As set forth above, AB 2053 which only amended sections 12950.1 (b) and (g)(2), simply to include prevention of abusive conduct within existing training requirements for harassment. Notably, AB 2053 did not amend section 12940 to include "abusive conduct" as an unlawful practice such as discrimination or harassment. As such, referencing "wrongful behavior" in this section, suggests that "abusive conduct" is an unlawful practice, which it is not, and therefore must be deleted. To the extent "wrongful behavior" is simply referencing unlawful harassment; it is duplicative and unnecessary given that "harassment" is already specifically identified in the preceding language of the sentence. *See* Government Code section 11349(f).

Council Response: "Wrongful behavior" and "abusive conduct" are two entirely separate ideas and the Council's amendment involves "implementing mechanisms to promptly address and correct" the former, which is not referenced elsewhere in that sentence. This sentence does not involve AB 2053.

Section 11024(c)(2)(M) – Sexual Harassment Training and Education – Abusive Conduct.
Comment: This section sets forth the training requirements for "abusive conduct," and states that the "emphasis should be on explaining 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." Nothing within AB 2053 (Gonzalez), which amended section 12950.1(g)(2), requires an employer to explain the negative effects of abusive conduct

on a victim or the detrimental consequences of abusive conduct on employers. Rather, AB 2053 simply requires an employer to train on "prevention of abusive conduct. Accordingly, this proposed section goes well beyond the statutory requirement and is unlawful. *See* Government Code sections 11342.1 and 12935(a). The Council should delete the following language from this section: "emphasis should be on explaining 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."

Council Response: Nothing in the statute forbids the Council from promulgating this rule. The statute is silent on the specific issue of what is "abusive conduct" and the Council's charge is to effectuate the statute, which in this case means elaborating on how to incorporate "abusive conduct" into the sexual harassment prevention training, which is another topic for which the Council already has jurisdiction. The Council further gave examples of "abusive conduct" to give meaning to an otherwise ambiguous term. This serves to clarify an issue that the legislature did not address, which is why the legislature created the Council in the first place (Government Code section 12935).

Comment: California has a golden opportunity to meaningfully impact respect in the workplace through adopting regulations that effectively implements AB 2053. As written, the current regulatory language simply and sadly perpetuates the likelihood that employers will continue to expend their time and energy in determining whether a distressful behavior fits into the legislative definition of *abusive conduct.* The proposed regulations do nothing to advance the presumed legislative intent of prevention and intervention to create behavioral change and a culture of respect in the workplace; the training required provides no guidance to employers regarding how to prevent, address or redress behaviors before they reach the level of abusive conduct. The proposed regulations essentially require only two things: instruction about the negative impact and detrimental consequences of abusive workplace conduct upon employees and employers, and instruction on the definition and elements of abusive conduct - which, unfortunately, include that someone must determine malicious intent: a dead-end for meaningful prevention or intervention, and totally superfluous where there is no accountability through cause-of-action. But that's the legislative language, which could be ameliorated through strong regulatory focus on the legislative mandate of *prevention.*

Council Response: AB 2053 (2014) added abusive conduct to the pre-existing mandate for sexual harassment prevention training in Government Code section 12950.1:
"An employer shall also include prevention of abusive conduct as a component of the training and education… 'abusive conduct' means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and 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. A single act shall not constitute abusive conduct, unless especially severe and egregious."

The Council does not infer any "presumed legislative intent" and in fact, according to Government Code section 12935, can only implement, interpret, or make specific the laws that were passed, not the presumed intent behind them. The Council unfortunately cannot single-handedly create behavioral change and a culture of respect in the workplace and instead interpreted the statute toward that end to the broadest extent of their statutory mandate. Furthermore, regarding the statement that "someone must determine malicious intent," that is the nature of our legal system and ultimately judges and juries already serve that purpose – as factfinders. Fortunately, Government Code section 12950.1(b) already mandates the prevention of abusive conduct in the sexual harassment prevention training. Teaching about what constitutes abusive conduct would serve to demonstrate how pernicious it is and therefore prevent it.

Comment: How is it that numerous training companies already advertise training programs in compliance with AB 2053, although the regulations have not yet been adopted?

Council Response: This comment is not responsive to any regulation proposed by the Council. However, as a general matter, statutes become effective on January 1 following the year that they were signed into law and do not require regulations to implement them unless expressly mandated by the legislature. So then AB 2053 (2014) became effective on January 1, 2015, and the Council used its authority to interpret the law further, not inaugurate it.

Comment: What about a regulatory requirement that training actually focus on the legislative mandate – prevention of abusive conduct in the workplace? This intention could be met by adding the regulatory requirement that training must include viable how-to strategies, skills, actions, techniques, and tools for both prevention and early intervention.

Council Response: The Council declined to follow this suggestion because it would be too burdensome for employers and trainers. Since trainers have the expertise and pedagogical skills to best convey the legislative mandate that the prevention of abusive conduct must be a component of sexual harassment prevention training, forcing them to incorporate certain themes into their training would be antithetical to giving them the discretion to best convey the perniciousness of abusive conduct in the workplace. Many of the suggestions are likely inherent to abusive conduct training anyway.

<u>Section 11024(f) – Sexual Harassment Training and Education – Objectives and Content.</u>
Comment: This section states that the requirement to train on prevention of "abusive conduct" does not create a private right of action by an employee for "abusive conduct" that is not based on a recognized protected category (as enumerated in Government Code section 12940). This is inaccurate and completely unsupported by AB 2053 (Gonzalez), which amended Government Code sections 12950.1 (b) and (g)(2) and provided the authority for training on abusive conduct. Specifically, the only requirement of AB 2053 was to include a portion within the existing sexual harassment training on "abusive conduct." Nothing within AB 2053 created any private right of action for "abusive conduct," *even if such conduct is based upon a protected category under section 12940.* Government Code section 12940 only authorizes a private right

of action for discrimination or harassment that is based upon an enumerated protected category – nothing more. Accordingly, unless the alleged "abusive conduct" amounts to harassment or discrimination, and such a claim is alleged, it is not actionable and cannot be the basis for any private right of action. Therefore, the Council should delete the following language from this section "that is not based on a recognized protected category (as enumerated in Government Code section 12940)".

Council Response: The Council agrees and struck subdivision (f).

Section 11024 – Authority and Reference.
Comment: The Council should add AB 2053 (Stats. 2014, ch. 306) to the reference section.

Council Response: AB 2053 amended Government Code section 12950.1, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act.

Article 4. National Origin and Ancestry Discrimination.

Section 11028(e) – Discrimination against someone issued a driver's license under section 12801.9 of the Vehicle Code.
Comment: I have concern regarding the the proposed the revision to Section 11028 to include discrimination based upon the driver's license issued pursuant to CA Vehicle Code 12801.9. A copy of VC 12801.9 subsection b is below:
b) The department shall adopt emergency regulations to carry out the purposes of this section, including, but not limited to, procedures for (1) identifying documents acceptable for the purposes of proving identity and California residency, (2) procedures for verifying the authenticity of the documents, (3) issuance of a temporary license pending verification of any document's authenticity, and (4) hearings to appeal a denial of a license or temporary license. A temporary license is issued "pending verification" of documents submitted. This by definition means that a person has yet established they have the right to work. As a result it appears an employer could be required to hire a fraud under your proposed revision. Identify and immigration fraud is rampant and this revision would only compound this problem if employers are forced to hire individuals who have only received a temporary license per VC 12801.9. This proposed amendment should not include these temporary licenses.

Council Response: The Council disagrees with the interpretation of section 11028. An employer is NOT required to hire anyone; they are required NOT to discriminate on certain bases, including possession of a driver's license under section 12801.9 of the Vehicle Code. Similarly, the Council cannot and did not promulgate regulations regarding section 12801.9 of the Vehicle

Code; the Council is merely effectuating section 12926(v) of the Government Code, which reads "'[n]ational origin' discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code."

Comment: We are pleased to see clarification that it is unlawful for an employer to discriminate based upon an employee having obtained a driver's license issued under section 12801.9 of the California Vehicle Code. § 11028(e), as barriers to obtaining accurate identification is a serious issue faced by many transgender Californians, including undocumented immigrants.

Council Response: No response required.

Section 11028(e)(1)(B) – Possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law.
Comment: This section is superfluous and should be stricken.

Council Response: The Council found that the contents of subdivision (B) cannot be found anywhere else in the regulations and is needed to effectuate AB 1660 (2014), which, *inter alia*, prohibits the government from discriminating against an individual because he or she holds or presents a license issued pursuant to the licensing scheme for non-citizens.

Section 11028 – Authority and Reference.
Comment: The Council should add AB 1660 (Stats. 2014, ch. 452) to the reference section.

Council Response: Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act. However, since AB 1660 amended Government Code section 12926 and to ensure maximum clarity, the subcommittee made a nonsubstantive change pre-submission by adding Government Code section 12926 to the reference section.

Article 5. Sex Discrimination.

Section 11029(a) – Statutory Source
Comment: The Council should add Government Code section 12926 as a reference.

Council Response: The Council disagrees because section 11029 does not implement, interpret, or make specific Government Code section 12926. However, the subcommittee made a nonsubstantive change pre-submission by adding Government Code section 12943 to the reference section since it is explicitly listed as a statutory source in subdivision (a).

Section 11029(b) – General Prohibition against Discrimination on the Basis of Sex: Statement of Purpose.

Comment: Subsection (b) should be revised to delete the verbiage "have historically been" and replace it with "are" and to further delete the verbiage "in the future." This language is obsolete given the expansion of the view of "sex" under the FEHA. In particular, men are fully protected by the Act's prohibition against sex discrimination, but they have not been considered to "have historically been relegated to inferior jobs," etc. Thus, the temporal language of "historically" and "in the future" are confusing and detract from the clarity of the regulation.

Council Response: The Council agrees that "are" should replace "have historically been." However, "in the future" does not necessarily allude to the distant future and merely means that sex equality is an *immediate* goal as outlined in this purposefully broad statement of purpose.

Comment: This section sets forth the basis for discrimination based upon sex and includes the following description: "treated differently… subjected to conduct of a sexual nature, subjected to hostile work environments…" These categories may already serve as the basis for a sexual harassment claim. Moreover, subjecting an individual to sexual conduct, creating a hostile work environment, or treating them different is harassing conduct, but does not involve an adverse employment action for purposes of discrimination. *See* Title 2, C.C.R. Section 11034 (f) (referencing that harassment does not require a loss of tangible job benefits). Accordingly, the Council should delete these categories from this section as such conduct is already covered under harassment and is not an act of discrimination.

Council Response: The Council agrees with this comment and changes have been made accordingly. Since subdivision (b) is a general statement of purpose rather than a precise restatement of the law, the Council added "and harassment" to clarify that this general statement is about harassment too, in addition to the pre-existing text regarding discrimination.

Comment: We are pleased to see the inclusion of language stating that sex discrimination includes adverse actions "based on sex stereotyping" in § 11029(b).

Council Response: No response required.

<u>Sections 11030 – Definitions.</u>

Comment: Our organization strongly supports the addition of additional definitions intended to clarify that the protections in the Act extend to an employee who may be subject to discrimination on the basis of gender because of the employee's gender expression or because the employee is a transgender person. We have observed in the representation of transgender employees and other employees whose appearance does not match the stereotype of their birth sex, that many employers are unaware that discrimination on the basis of gender expression is unlawful. The specific inclusion of these definitions may begin to change this common misconception regarding the law and improve employers' understanding of their obligations.

Council Response: No response required.

Section 11030(d) – Definitions: "Sex Stereotype."
Comment: Subsection (d) should be revised as follows: ". . . ability or inability or willingness to perform. . ."

Council Response: The Council did not implement this unsubstantiated suggestion because it is too subjective. While some may stereotype about one's willingness to perform a job, there are many others characteristics upon which stereotypes may be based and it is not feasible to list them all. Moreover, if one has the ability to complete a task, they are almost certainly willing to do it, making the proposal duplicative.

Section 11030(e) – Definitions: "Transgender."
Comment: Within Article V, we suggest clarification of §11030(e) as follows:
"Transgender" is a general term that refers to a person whose gender identity differs from the person' sex at birth. A transgender person may or may not ~~express a gender~~ **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." The reasons for this change are the need to provide additional clarity and to maintain consistency of terms within the section; that is, "gender" is not defined in § 11030, while "gender expression" is in § 11030(a).

Council Response: The Council agrees and incorporated the suggestion.

Section 11030 – References.
Comment: The Council should add citations to SB 559 (Stats. 2011, ch. 261) and AB 887 (Stats. 2011, ch. 719).

Council Response: The Council disagrees that the suggested additions are necessary. Those bills were technical and impacted many sections, including Government Code section 12940 most importantly and substantively, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act.

Section 11031 – Defenses.
Comment: The introductory paragraph in this section should be revised as follows: ". . . covered entity may prove by a preponderance of the evidence one or more . . ."

Council Response: The Council did not implement this unsubstantiated suggestion because it is non-responsive to any proposed amendments and the regulations for the most part do not contain burdens of proof.

Section 11031 – References.

Comment: The council should add a citation to Government Code section 12926 as a result of SB 292 (Stats. 2013, ch. 88).

Council Response: The Council disagrees that the suggested additions are necessary. SB 292 amended Government Code section 12940 (not 12926), which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act.

Section 11034(f)(2)(A) – Terms, Conditions, and Privileges of Employment: Sexual Harassment.
Comment: The Council should revise subsection (f)(2)(A) as follows: ". . . A single, unwelcomed act of harassment, if severe in the extreme, may create an unlawful hostile work environment. A single, less severe unwelcomed act of harassment may create an unlawful hostile work environment when committed by a supervisor. To be unlawful . . ." The concept relayed by the suggested additional sentence is required in order to relay the full current state of the law as applied by California courts. (*See Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 36; *Herberg v. Calif. Institute of the Arts* (2002) 101 Cal.App.4th 142, 151-53.)

Council Response: The Council found the proposed addition to be unnecessary. "Severe" is defined in terms of what constitutes an "abusive work environment." An unwanted act of harassment is inherently more abusive if perpetrated by a supervisor than if the same act were perpetrate by a co-worker. Moreover, section 11034(f)(2)(C) discusses strict liability for agents and supervisors. Therefore, no changes were made in response to this comment.

Comment: This Section states that "a single unwelcomed act of harassment may be sufficiently severe so as to create an unlawful hostile work environment," but fails to include the other side of the law, also supported by case law. Namely, that occasional, isolated, sporadic or trivial acts do not constitute harassment. (See e.g., *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191, 198; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121.) Accordingly, the Council should either strike the single instance language, or include language regarding occasional, isolated, sporadic or trivial acts not constituting harassment.

Council Response: The Council found the proposed addition to be unnecessary. By specifying the rule in the affirmative, the regulation makes clear that the converse – a single or occasional, "non-severe" acts – will not create a hostile work environment. The next sentence further this idea because an isolated, sporadic, or trivial act would not be "both subjectively and objectively offensive." Therefore, no changes were made in response to this comment.

Comment: We appreciate the addition of subsection (f), which clearly sets out the various types of sexual harassment and their elements as well as clarifying that sexual harassment need not be motivated by sexual desire. In accordance with the legal standard for sexual harassment, the Council should change the last sentence to read: "To be unlawful, the harassment must be both subjectively and objectively offensive," rather than "subjectively and objectively severe or pervasive."

Council Response: The Council agrees and made the suggested revision.

Section 11034(f)(2)(B) – Terms, Conditions, and Privileges of Employment: Sexual Harassment.
Comment: We appreciate the Council's inclusion of (f)(2)(B); however, the Council should change the language from "A person may allege harassment even though the offensive conduct has not been directed at him or her, regardless of the gender or sexual orientation of the perpetrator," to "An employer may be liable for harassment even though the offensive conduct has not been directed at the person alleging harassment, regardless of the gender or sexual orientation of the perpetrator."

Council Response: The Council agrees and made the suggested revision.

Section 11034(f)(2)(C) – Terms, Conditions, and Privileges of Employment: Sexual Harassment.
Comment: For clarity, Subsection (f)(2)(C)3. should be revised as follows: ". . . conduct of nonemployees towards its own employees where the . . ."

Council Response: The Council agrees and changes have been made accordingly.

Comment: Subsections (f)(2)(c)(1-3) use the language "supervisor and manager" and "agents or supervisors" interchangeably. In line with Government Code section 12940 itself, the Council should use "agents or supervisors" rather than "supervisor or manager".

Council Response: The Council agrees and changes have been made accordingly.

Comment: With regard to subsection (f)(2)(C)(1), the Council should add the following definition for purposes of clarity: "A 'supervisor' or 'manager' is defined as an employee who has the ability to exercise significant direction over another's work."

Council Response: The Council disagrees with this comment because it oversimplifies case law, particularly because "significant direction" is not conceptualized and is subjective. Also, pursuant to the comment immediately above, "agents or supervisors" is the proper terminology, and agency is canonical in employment law.

Sections 11031(d) and 11034(f).
Comment: We support the additions to these sections as they also serve to clarify existing law in a way that will encourage employer compliance and encourage employers to monitor their workplaces more closely to ensure that all harassment based upon sex is prevented or

immediately corrected when it does occur. These additions make it clear to employers that they are obligated not only to monitor situations wherein an employee may harass another employee because of sexual interest, but also where harassment occurs that is due to or involves a victim employee's sex, but may not be related in any way to sexual interest by the harasser.

Council Response: No response required.

Section 11034 – References.
Comment: The Council should add citations to AB 1443, SB 559, AB 887, and *Johnson Controls*.

Council Response: The Council disagrees that the suggested additions are necessary. AB 1443 amended Government Code section 12940, which is already listed. The other two bills were technical and impacted many sections, including Government Code section 12940 most importantly and substantively, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act. Finally, United Automobile Workers v. Johnson Controls, Inc. 499 U.S. 187 (1991) was not why any provisions were added, deleted, or amended, so it is not cited as a reference.

Article 6. Pregnancy, Childbirth, or Related Medical Conditions.

Article 6 – Generally.
Comment: Within Article VI, we suggest clarification that FEHA's protections with regard to pregnancy discrimination pertain to *all* individuals who are pregnant, regardless of gender. That is, it should be clarified that these protections apply to transgender men who may become pregnant. Accordingly, the use of the terms "woman", "female", "she", and "her" in this Article should either (1) be changed throughout to "an individual" or "an employee" and "they" and "their," or (2) a section should be added as a preface clarifying that the pronouns "she" and "her" in this section shall be read as inclusive of all individuals who are pregnant, not just women.

Council Response: The Council initially rejected this proposal since it is commonsense and clear from the text that one cannot be discriminated against due to pregnancy. Also, the proposed additions are extremely numerous and would make the text much longer and more difficult to read. However, after the first 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11035(a) – Definitions: "Affected by Pregnancy."

Comment: The draft revised regulations delete the definition of "four months" in subsection (a). We previously joined in a letter dated September 26, 2013 with Equal Rights Advocates and California Employment Lawyers Association on this issue. As we explained in that letter, which is attached hereto, the current definition of four months as the number of days the employee would normally work within four calendar months, or one third of a year equaling 17 1/3 weeks, provides the necessary clarity for employees and employers regarding how to calculate the four months of pregnancy disability leave.
The current definition also ensures that employees will not receive different entitlements based on when in the year they take leave. For example, under the proposed revised regulation, an employee whose leave falls during the month of February would receive fewer days of leave than an employee whose leave falls later in the year. (See proposed subsection (a)(3)(A) ["[A]n employee who commences pregnancy disability leave on January 1 would be expected to return to work on May 1."].) For these reasons, the 17 1/3 weeks (or one-third of a year) definition of four months should be retained.
Alternatively, if the Council prefers to avoid defining four months as 17 1/3 weeks, it should simply define it by the number of hours an employee normally works in a four-month period (or in one-third of a year). This concept is contained in the proposed subsection (a)(4)(C) regarding intermittent leave: "For example for a full-time employee who works 40 hours per week, 'four months' means 693 hours …, based on 40 hours per week times 17 1/3 weeks." Another option is to define four months as the number of days an employee normally works during a four-month period, or one-third of a year. For example, for an employee who works five days per week, four months means 87 days, based on five days per week times 17 1/3 weeks (rounding up to the nearest whole number of days).

Council Response: The Council agrees and changes have been made accordingly.

Section 11035(f) – Definition: "disabled by pregnancy."
Comment: This subdivision should read as follows: A ~~woman~~ **person** is disabled by pregnancy if, in the opinion of ~~her~~ their health care provider, ~~she is~~ **they are** unable because of pregnancy to perform any one or more of the essential functions of ~~her~~ **their** job or to perform any of these functions without undue risk to ~~her~~ **themselves**, to ~~her~~ **their** pregnancy's successful completion, or to other persons. An employee may also be considered disabled by pregnancy if, in the opinion of ~~her~~ **their** health care provider, ~~she is~~ **they are** suffering from severe morning sickness or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth. The preceding list of conditions is intended to be non-exclusive and illustrative only.

Council Response: The Council initially rejected this proposal since it is commonsense and clear from the text that one cannot be discriminated against due to pregnancy. Also, the proposed additions are extremely numerous and would make the text much longer and more difficult to read. However, after the first 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11035(g) – Definition: "eligible female employee."
Comment: This subdivision should read as follows: An "eligible ~~female~~ employee" is an employee who qualifies for coverage under her **their** employer's group health plan. An employee's pregnancy, childbirth or related medical conditions are not lawful bases to make an employee ineligible for coverage.

Council Response: The Council initially rejected this proposal since it is commonsense and clear from the text that one cannot be discriminated against due to pregnancy. Also, the proposed additions would make the text more difficult to read. However, after the first 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11035(l) – Definition: "Four months."
Comment: This section seeks to define the definition of four months for purposes of Pregnancy Disability Leave (PDL). In order to eliminate any confusion or conflict, the Council should conform this definition to that provided in Title 2, C.C.R. Section 7291.2(l) of the PDL regulations which provides the following: "Four months" means the number of days the employee would normally work within four calendar months (one-third of a year equaling 17⅓ weeks), if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee's normal work month." These regulations were just finalized and approved by the Council in December 2012.

Council Response: This commenter does not realize that changes without regulatory effect (OAL File No. 2013-0822-02 N) renumbered section 7291.2 to section 11035. However, for the substantive reasons discussed by the other commenter, the Council agrees with the commenter's conclusion and reverted the text back to its December 2012 form.

Comment: The regulations at issue specify that the "four months" of pregnancy disability leave to which employees are entitled means 17 1/3 weeks (or 693 hours for those working 40-hour work-weeks).
We believe that omitting these provisions that define "four months" would be detrimental to both employers and employees. Defining "four months" is necessary to provide employers and employees meaningful guidance in how to calculate the amount of pregnancy disability leave an employee is entitled to take under the FEHA. This is especially true where an employee needs to take intermittent pregnancy disability leave (which our experience shows is very common). For example, if an employee were to take pregnancy disability leave during two-week blocks of time for every month, she would need to know how many weeks make up "four months" to determine the amount of pregnancy disability leave to which she is entitled. The most logical answer would be 17 1/3 weeks, 2 which is the average amount of weeks in a four month period, and which is the current definition under the regulations.

Moreover, failing to prescribe a uniform system of determining how many weeks (or days or hours) make up "four months" of pregnancy disability leave would result in unequal entitlements to pregnancy disability leave depending on the time of the year the leave is taken. For example, an employee who needs to take a disability leave beginning on February 1 would be entitled to less leave than an employee who needs to take a disability leave beginning on October 1, simply because there happens to be fewer days in the month of February than in October. We do not believe that the California Legislature intended this result.
Our organizations hear from hundreds of women in California each year about issues they face at work when they become pregnant. Since the amended regulations went into effect in December 2012, we have not heard of any problem regarding the new definition of "four months." As organizations that provide legal advice and counseling to women who plan to or have taken pregnancy disability leave, we know that women benefit from knowing exactly how much pregnancy disability leave they are entitled to take, so they can plan their leave time and doctor's appointments accordingly. We also have relied on the FEHA regulations in helping the women we serve to determine when they would be entitled to job-protected pregnancy disability leave. We believe that omitting the current definition of "four months" would hinder our ability to provide the information and clarity that working women need to plan their lives when they are starting new families.

Council Response: The Council agrees and reverted the revisions regarding calculating pregnancy disability leave back to their pre-existing state after receiving timely comments that stated the same sentiment.

Section 11036 – Prohibition against Harassment.
Comment: The Council should change the phrase "pregnancy or perceived pregnancy" in this section to "pregnancy, perceived pregnancy, childbirth, conditions related to pregnancy and childbirth, breastfeeding, perceived breastfeeding, or conditions related to breastfeeding" to match the definitions in Government Code Section 12926(r)(1)(A)-(C).

Council Response: The Council agrees and made the changes in a more concise manner.

Section 11042 – Pregnancy Disability Leave.
Comment: The changes in this section that clarify the availability of intermittent leave due to pregnancy-related disability are helpful in that they provide greater guidance to employees and employers regarding the applicability of pregnancy leave rights to particular situations. The changes also specifically address employees with irregular work schedules, whose leave rights have been more difficult to determine. The clarifications included in this section will help employers meet their obligations to employees disabled by pregnancy-related conditions and may enhance economic stability for those women. We support these changes.

Council Response: No response required.

Comment: As discussed with regard to Section 11035, it is recommended that the current definition of "four months," as previously adopted by the Council, be retained. Likewise, the

Council should retain the examples in subsection (a)(2) demonstrating how to calculate four months of leave. The "four months" definition should be uniform for both continuous and intermittent leave, both to avoid confusion and ensure equity in leave entitlements regardless of when an employee chooses to begin her leave.

Council Response: The Council agrees and changes have been made accordingly.

Section 11042(a)(3)(B) – Pregnancy Disability Leave: Four-Month Leave Requirement for all Employers.

Comment: This section seeks to define the calculation of the four month period for an employee who has a varied schedule. The proposed amendment significantly changes the existing definition and requirement, which requires an employer to calculate and average the employee's hours over the prior four months, to calculating an employee's hours over the prior twelve months. This is huge increase in the burden on an employer and simply unnecessary. Moreover, it conflicts with the four month averaging calculation set forth in the PDL regulations, Title 2, C.C.R. Section 7291.2(l), which the Council just amended and adopted in December 2012. Accordingly, we respectfully request conformity with the PDL regulations in order to avoid any confusion or conflict, and maintain the four month calculation for averaging an employee's hours of work.

Council Response: This commenter does not realize that changes without regulatory effect (OAL File No. 2013-0822-02 N) renumbered section 7291.2 to section 11035. However, for the substantive reasons discussed by other commenters, the Council agrees with the commenter's conclusion and reverted the text back to its December 2012 form.

Section 11042(a)(4)(D) – Pregnancy Disability Leave: Intermittent leave or a reduced-work-schedule leave.

Comment: The proposed provision in subsection (a)(4)(D), requiring that an employee who needs pregnancy disability leave intermittently or on a reduced leave schedule for planned medical treatment "must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations," should be stricken, as it places an unnecessary burden on workers who have a medical need for intermittent or reduced schedule leave due to pregnancy-related disability.

Council Response: The Council agrees and changes have been made accordingly.

Section 11042(c) – Pregnancy Disability Leave: Denial of Leave is an Unlawful Employment Practice.

Comment: The stricken language should be reinstated since it makes the regulations less user-friendly.

Council Response: The Council agrees and reinstated the originally stricken language.

Section 11044(c) – Continuation of Group Health Coverage.

Comment: The Council should add "group health" before the word "coverage" for purposes of clarity.

Council Response: The Council agrees and changes have been made accordingly.

Section 11046 – Relationship between CFRA and Pregnancy Leaves
Comment: For the reasons discussed with regard to Sections 11035 and 11042, the Council should retain the 17 1/3 weeks definition of four months in describing the maximum entitlement to leave in subsection (d).

Council Response: The Council agrees and changes have been made accordingly.

Comment: The term "electronically in a conspicuous place" is confusing.

Council Response: The regulations already used the term conspicuous and this just adds to that framework that electronic is acceptable, e.g. on a company intranet or homepage that everyone views. Therefore, the Council did not change this language.

Section 11051 – Employer Notices.
Comment: For the reasons discussed above with regard to Sections 11035, 11042, and 11046, we recommend that the Council retain the 17 1/3 weeks definition of four months in describing the maximum entitlement to leave in subsection (d).

Council Response: The Council agrees that the 17 1/3 weeks definition of four months should be retained and made that change throughout the regulations. However, section 11051 does not have a subdivision (d), so it appears that this comment was submitted in error and meant for another section, which would incorporate the change anyway.

Section 11051(a) – Employer Notices: Notice A.
Comment: The third bullet point under "Your employer has an obligation to: "states that an employer must provide an employee with PDL of up to four moths (or 17 1/3 weeks if leave is taken incrementally) and then proposes to delete the following "(the working days you normally would work in one third of a year or 17 1/3 weeks)." The Council should add this language back into the notice or similar language as proposed under section Title 2 C.C.R section 11042 (a)(1) as follows "(the time off for the number of days or hours the employee would normally work within four calendar months or 17 1/3 weeks)." This language clarifies that an employee may only be provided PDL for the normal time the employee would work during the four month period, not necessarily an entire four months of leave. This provides clarity to both the employee and employer and will prevent any misunderstandings.

Council Response: The Council agrees and changes have been made accordingly.

Comment: Further, although most workers contribute to the fully-employee-funded State Disability Insurance fund, many are unaware that State Disability Insurance and Paid Family

Leave benefits are available to them while disabled due to pregnancy and childbirth or while bonding with a new child or caring for a family member.
Therefore, with regard to Notice A, it is recommended that the following language to the section of the notice that begins with "For pregnancy Disability Leave": "You may be entitled to receive state disability insurance for a pregnancy or childbirth-related disability and may contact the California Employment Development Department for more information."

Council Response: The Council believes this proposal is unnecessary because the notice already says "Your leave will be paid or unpaid depending on your employer's policy for other medical leaves. You may also be eligible for state disability insurance or Paid Family Leave (PFL), administered by the California Employment Development Department." Moreover, the notice pertains to Pregnancy Disability Leave, not state disability. Therefore, this proposal was not incorporated.

Section 11051(b) – Employer Notices: Notice B.
Comment: Under the fourth paragraph of this section, it seeks to delete the phrase "comparable position" from reinstatement after PDL, thereby stating that an employer must reinstate an employee to the same position. This is inconsistent with section 11043(c) that sets forth the permissible defenses under which an employer may reinstate an employee to a "comparable position" upon return from PDL. Accordingly, the Council should keep the phrase "comparable position" in this section of the notice in order to recognize the existing conditions under which an employee may actually be lawfully returned to a comparable position after PDL.

Council Response: The Council agrees; however, because a joint family care and medical leave and pregnancy disability leave notice already exists in section 11095, having a second, non-identical notice here is superfluous and confusing. Therefore, the Council struck section (b), with the long-term goal of having two distinct notices – one for employers covered by PDL and another for those covered by CFRA, the family care and medical leave law (they are of course not mutually exclusive).

Comment: With regard to Notice B, it is recommended that the following language be inserted immediately prior to the paragraph beginning "If possible, you must provide at least 30 days advance notice […]": "You may be entitled to receive wage replacement through the Paid Family Leave Program while taking time off to care for the serious health condition of a family member or to bond with a new child. Contact the California Employment Development Department for more information."
Finally, the last sentence of the first paragraph under notice be should be changed from "that of your child, parent or spouse" to "that of your child, parent, spouse or registered domestic partners" so that it is in accordance with the statute.

Council Response: The Council agrees; however, because a joint family care and medical leave and pregnancy disability leave notice already exists in section 11095, having a second, non-identical notice here is superfluous and confusing. Therefore, the Council struck section (b), with the long-term goal of having two distinct notices – one for employers covered by PDL and

another for those covered by CFRA, the family care and medical leave law (they are of course not mutually exclusive).

Article 8. Religious Creed Discrimination.

Section 11059(b) – General Prohibition against Religious Creed Discrimination: Statement of Purpose.

Comment: Since this section was adopted, there has been a significant shift in the language of religious freedom. Today, the phrase "freedom to worship" or ''freedom of worship" is politically charged. Many view the phrase as a diminution of the principle of ''free exercise" which protects both actions and beliefs. Hence, this Statement of Purpose is due to be updated: "(b) Statement of Purpose. Religious freedom is a basic human right. It includes not only the freedom to believe, but to participate fully in society, including the workplace, without being coerced to alter one's religious beliefs, practices or appearance. California is a religiously diverse community, and people of all faiths have a right to obtain employment without suffering discrimination on account of their religious beliefs, practices or appearance. Conflicts over religion in the workplace often arise in complex and emotionally charged situations; therefore, each case must be reviewed on an individual basis."

Council Response: On June 17, 2015, President Obama said "[t]he diversity and patriotism of America's religious communities give strength to all of us, and our freedom to worship reminds us of the values we share." STATEMENT BY THE PRESIDENT ON THE OCCASION OF RAMADAN, 2015 WL 3759328, at *1. Briefly, the phrases "freedom to worship" and "freedom of worship" are not out-of-date and have been reiterated in many recent court decisions. Moreover, this comment is not responsive to anything proposed by the Council. Therefore, no changes have been made.

Section 11060 – Establishing Religious Creed Discrimination.

Comment: There is considerable confusion about whether a religious practice or belief must be compulsory in order to be protected. The 9th Circuit US. Court of Appeals has followed the Supreme Court in adopting the sincerity test, rather than the centrality test, i.e., a religious belief need not be "central" or "compulsory," rather, it must be sincerely held in order to be protected. It would be well for the regulation to incorporate this principle, to assist employers in understanding the scope of the legal obligation.

Proposed Language:

"Religious creed" is defined broadly to include "all aspects of religious belief, observance and practice." It is not restricted to traditional or recognized religions, but also includes beliefs, observances or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. In order to be protected, a religious practice need not be "compulsory" or "mandatory," but the practice must be pursuant to a sincerely held religious belief. Religious creed discrimination may be established by showing:

Religious creed discrimination takes many forms, including intentional discrimination, i.e., disparate treatment, retaliation, harassment and failure to provide accommodation.

Council Response: The proposed language is written more like a treatise than a regulation, does not enhance clarity, and does not fully explain the state of the law. Since tone and length are important considerations, the Council did not incorporate the proposal; however, the Council did succinctly add the important concept that "[r]eligious creed is a protected category under the Act, and the examples of unlawful conduct provided in this section are non-exclusive" as subdivision (c).

Section 11060 – References.
Comment: The Council should add AB 1964 (Stats. 2012, ch. 287) to the reference section.

Council Response: AB 1964 most substantively amended Government Code section 12940, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act.

Section 11062 – Reasonable Accomodation.
Comment: The statutory revisions require considerable revision of the language here regarding religious dress and appearance. Government Code 12940 was amended to clarify that the undue hardship definition in 12926 (t) applies to religion as well as disability, hence, it would be well to reference that definition here. Further, there is much confusion over the term "reasonable" in this context. To many employers, a "reasonable" accommodation would be to permit an employee who has a weekly religious obligation to have two weekends off every month to participate in religious activities. It would be unreasonable, in the minds of many managers, for an employee to insist on having every Sabbath or Sunday off to attend church. The authority is provided below for the "elimination" standard, defining a reasonable accommodation as one that "eliminates" the conflict between work and religious obligations. If an employer is unable to eliminate the conflict, it should be able to demonstrate that eliminating the conflict would result in an undue hardship.
The revision below also more clearly spells out the employee's obligation to provide notice to the employer.

Proposed Language:
1) Reasonable Accommodation:

a) *Once an employee has notified an employer or other covered entity, or they are otherwise aware, that he or she has a sincerely held religious belief that conflicts with a work requirement, the employer has a duty to provide reasonable accommodation, unless doing so would result in an undue hardship, which is defined by statute as a "significant difficulty or expense."*

b) *A reasonable accommodation is one that eliminates the conflict between the religious practice and the job requirement.*

c) *Employees are not required to give notice of the need for accommodation of a potential conflict with a work rule if the employer or other covered entity has not previously made the conflicting work rule known to its employees.*

Council Response: The proposed language as a whole is not clear, is duplicative of current statutory and regulatory language, and may inadvertently create an affirmative duty on employers to know about their employees' religious practices. It also does not take into account a Ninth Circuit case, Balint v. Carson City, Nev. (9th Cir. 1999) 180 F.3d 1047, which held that (1) if an employer can show that no accommodation of an employee's religious belief was possible without undue hardship, the employer need not negotiate with the employee regarding reasonable accommodation and (2) an undue hardship may be present when accommodation would cause more than a *de minimis* impact on co-workers, such as depriving co-workers of seniority rights or causing co-workers to shoulder plaintiff's share of potentially hazardous work. Also, the new statutory language alluded to by the commenter, AB 1964 (2012), is fully addressed in subdivision (c)(2). However, defining a "reasonable accommodation" as "one that eliminates the conflict between the religious practice and the job requirement" is a clarifying addition that the Council incorporated. Also, the Council added a reference to demonstrate that the commenter's sentiments are already both in the regulations and case law (*Opuku-Boateng v. State of Cal.* (9th Cir. 1996) 95 F.3d 1461, 1467 as amended (Nov. 19, 1996)).

Section 11062(d).
Comment: The following section should be added, based on Government Code 12940(l)(2):
Proposed Language:
d) It is not a reasonable accommodation to segregate a worker from customers, clients or other coworkers on account of religious dress or appearance.

Council Response: In subdivision (a), the Council already included the following: "Unless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public." Therefore, the proposed addition would be duplicative and add no clarity; no additional changes were made.

Section 11062(e).
Comment: The following section should be added, to codify the 9th Circuit holding in *Balint v. Carson City, Nev.*, 180 F.3d 1047 (9th Cir. 1999). Employers too often take no action to provide religious accommodation, relying on the mere existence of a seniority system, and/ailing to grasp that the seniority system, itself, does not relieve them of the duty to provide religious accommodation.
Proposed Language:

e) *A neutral system of scheduling workers, whether or not pursuant to a bona fide seniority system, is not, by itself, a reasonable accommodation, and does not relieve the employer or other covered entity from taking affirmative steps to provide religious accommodation.*

Council Response: The Council did not incorporate the proposed language because it is nonresponsive to any noticed changes, and is a partial, selective reading (see above) of *Balint*. While the proposal is well-intentioned, the regulations cannot comprehensively enumerate every practice and circumstance that may or may not be a reasonable accommodation or affirmative defense since, as *Balint* held, what constitutes undue hardship, for purposes of an employer's duty to reasonably accommodate the religious beliefs of its employees, must be determined within the particular factual context of each case.

Sections 11062(f)
Comment: The following language should be added to this section:
Proposed Language:
f) *Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.*

Council Response: The Council did not incorporate the proposed language because it is nonresponsive to any noticed changes and is duplicative of federal law (29 CFR §1605.2 (c)(2)(ii)). While the proposal is well-intentioned, the regulations cannot comprehensively enumerate every practice and circumstance that may or may not be a reasonable accommodation or affirmative defense since, as *Balint* held, what constitutes undue hardship, for purposes of an employer's duty to reasonably accommodate the religious beliefs of its employees, must be determined within the particular factual context of each case.

Section 11062(g).
Comment: The following proposal is borrowed from the EEOC regulations, but it also reflects language specific to the California statute and should be added to this section:
Proposed Language:
g) *A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.*

Council Response: The Council did not incorporate the proposed language because it is nonresponsive to any noticed changes and is duplicative of federal law (29 CFR §1605.2 (c)(1)). While the proposal is well-intentioned, the regulations cannot comprehensively enumerate every practice and circumstance that may or may not be a reasonable accommodation or

affirmative defense since, as *Balint* held, what constitutes undue hardship, for purposes of an employer's duty to reasonably accommodate the religious beliefs of its employees, must be determined within the particular factual context of each case.

Section 11062.
Comment: The Council should add the following language to this section:
3) Retaliation.
The request by an employee for religious accommodation shall be considered a protected activity within the meaning of this statute, equally with the filing of a charge alleging discrimination with the DFEH or EEOC.

Council Response: This proposal has been mooted by AB 987 (2015), which Governor Brown recently signed into law, which states that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to…retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted." The Council may later file the rulemaking action known as Changes without Regulatory Effect to incorporate recent legislative updates. Nevertheless, the commenter's concerns were mostly addressed in proposed subdivision (d), which states that "[i]t is unlawful to discriminate or retaliate against a person for requesting reasonable accommodation based on religion, regardless of whether the employer granted the request." Finally, this proposal is nonresponsive to any noticed changes. Therefore, the Council did not incorporate the proposal beyond subdivision (d).

Comment: The Council should add the following language to this section:
4) *Harassment.*
Harassment of employees on account of their religious beliefs and/or practices is unlawful. Both quid pro quo and hostile work environment theories of harassment apply to claims of religious harassment. Requiring an employee to alter or amend his or her religious beliefs or practices as a condition of retaining employment or promotion may constitute quid pro quo harassment, as well as giving rise to other claims of discrimination, such as the failure to accommodate.

Council Response: Since section 11019(b) of the regulations discuss harassment in depth, this proposed addition would be duplicative and detract from the regulations' clarity since each Article that is based on a protected basis does NOT reiterate that harassment is unlawful. Moreover, this proposal is nonresponsive to any noticed changes. Therefore, the Council did not incorporate the proposal.

Section 11062 – References.
Comment: The Council should add AB 1964 (Stats. 2012, ch. 287) to the reference section.

Council Response: AB 1964 most substantively amended Government Code section 12940, which is already in the reference section. Since all Code sections were added by bills, the bill along with the Code section a regulation implements, interprets, or makes specific would be listed throughout the California Code of Regulations if this suggestion were an accurate

mandate. Instead, legislation is rarely listed as a reference unless something important in its legislative history was omitted from the rest of the bill. An OAL reference attorney confirmed this understanding of the Administrative Procedures Act.

Section 11063.
Comment: It is only in theory that it is unlawful to ask questions in the employment application process that screen out applicants on account of their regular religious observances. In practice, this problem has reached epidemic proportions. Employers routinely ask about schedule availability, and screen out those who do not agree to open availability. The Church State Council screens dozens of such cases each year. We have even seen online applications that terminate the application process when an applicant answers "no" to open availability! The present language is ineffective.
Employers must be required to clearly communicate to applicants that they need not disclose their unavailability, if it is due to religious observances.
Proposed Language:
Pre-employment inquiries regarding "open availability" or availability to work specific days or shifts are often the basis for denying employment to those who pa1ticipate in regular religious services. Such inquiries shall be presumed to be unlawful, unless the employment application and/or interview clearly inquire as to the ability of the applicant to meet the scheduling needs of the business, with or without a religious accommodation.

a) Employment applications, whether in writing or online, shall clearly inform applicants that they do not need to disclose their need for religious accommodation until or unless they are hired, and the need for such accommodation becomes known to the applicant.

Council Response: The Council did not incorporate the suggestion because it is nonresponsive to any proposed amendments – section 11063 was not noticed to the public so a reasonable member of the public could not have determined that the proposed change could have resulted. Moreover, the proposal is duplicative of the existing section 11063 and further sets out an affirmative duty upon employers that may be cumbersome and expensive to implement – the information that employers would be mandated to convey is just a restatement of the law and other restatements of the law do not need to be affirmatively conveyed. Therefore, no changes have been made.

Article 9. Disability Discrimination.

Section 11065(a) – Definitions: “Assistive animal.”
Comment: The Council should revise the first sentence of section (a) as follows: “(a) “Assistive animal” means an animal, including a dog, necessary as a reasonable accommodation for a person with a disability and either trained to provide assistance for, or to otherwise meet the needs associated with, a person’s disability.”

Council Response: The Council agrees that the word “trained” should not be in the definition of “assistive animal” and accordingly removed it. However, “otherwise meet the needs associated

with" is too vague and subjective, particularly because "assistive animal" is further refined through specific definitions of "guide dog," "signal dog," "service dog," "support dog," and "support animal."

Section 11065(a)(1)(D) – Definitions: "Support dog."
Comment: Subsection (a)(1)(D) should be revised to restore the deletion of "support" from the first line.

Council Response: The Council agrees and changes have been made accordingly.

Comment: The Council should reinstate the phrase "or other support." Especially given the addition of subsection (a)(3), acknowledging that the determination of whether a "support animal" constitutes a "reasonable accommodation" is subject to an individualized analysis (as are all accommodation requests), it seems unnecessary to then limit the type of support that an individual with a disability may need as an accommodation. This determination should be individualized and dealt with through the interactive process between the employer and employee.

Council Response: The Council agrees and added the modifier "similar" to emphasize that the support is emotional/cognitive, not something like retrieving items or providing security.

Section 11065(a)(2)(C) – Minimum standards for assistive animals.
Comment: For consistency, we also recommend a similar amendment to subsection (a)(2)(C), so that the language reads "is trained to provide assistance for, or otherwise meet the needs associated with, a person's disability.

Council Response: The Council disagrees because it is unclear and circular to say that assistive animals provide assistance. In fact, the Council removed (a)(2)(C) because it did not add anything and was duplicative in light of the addition of "support animal" immediately below it.

Section 11065(a)(3) – "Support animal."
Comment: It is recommend that the Council amend subsection (a)(3) by changing the phrase "emotional support" to "emotional or other support." It is also recommend the Council add the following to the end of the last sentence, so that it reads "individualized analysis reached through the interactive process."

Council Response: The Council agrees and added both suggestions. The Council also added the modifier "similar" to emphasize that the support is emotional/cognitive, not something like retrieving items or providing security.

Comment: It is suggested that the Council delete the entirety of the proposed Subsection (a)(3). The concept of permitting assistive animals in the worksite as a reasonable accommodation is covered by Subsection (p)(2)(B). Thus, the inclusion of proposed Subsection (a)(3) is superfluous and creates more confusion than clarity.

Council Response: The Council disagrees with the suggestion. Subsection (p)(2)(B) merely states that a reasonable accommodation may include "[a]llowing applicants or employees to bring assistive animals to the work site." This language, while true and pre-existing, is very sparse and the Department frequently fields questions about this topic. The proposed language serves as a more thorough restatement of the law and pre-emptively answers what might be the most commonly ask question of the Department.

Sections 11066(a) and (b) – Establishing Disability Discrimination.
Comment: These sections set forth the basis and burden of proof an employee or applicant must satisfy for disability discrimination, and seeks to delete subdivision (b). It is requested that the Council to reinstate subdivision (b) to make it consistent with section 11009(c) and the California Supreme Court's decision in *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013). Specifically, subdivision (b) should still identify that the employee or applicant must prove by a preponderance of the evidence that there is a casual connection between a qualified individual's disability and a denial of an employment benefit. Further, subdivision (b) should state that the qualified individual's disability does not have to be the sole cause of the employment benefit denial, but at least a substantial motivating factor for the employment benefit denial, as set forth in proposed section Title 2 section 11009(c). The *Harris* opinion did not eliminate an employee's burden to prove a causal connection; it simply defined the causal connection required. Deleting subdivision (b) entirely will create confusion regarding the burden of proof an employee needs to satisfy for disability discrimination.

Council Response: The Council agrees with the commenter that new section 11009(c) correctly states the standard for establishing discrimination, for disability or otherwise. Accordingly, the Council deleted the provision that was specific to just disability since it wrongly gives the impression that establishing disability discrimination is somehow different than establishing other kinds of discrimination and instead gave a cross-reference to the proper standard at section 11009(c).

Article 10. Age Discrimination.

Section 11075(a) – Definitions: "Age based stereotypes."
Comment: The Council should add the following verbiage to the newly proposed Subsection (a): ". . . health, work habits, appearance, demeanor, and productivity . . ."

Council Response: The Council did not implement this unsubstantiated suggestion because it is too subjective. While some may stereotype about one's appearance or demeanor, there are many other characteristics upon which stereotypes may be based and it is not feasible to list them all. Moreover, appearance and demeanor are often components of health.

Section 11076 – Establishing Age Discrimination.
Comment: The Council did not propose making any changes to this section. However, we believe this section is in need of substantial revision and amendment. To begin, this section

does not articulate or provide any guidance related to the provisions found in Government Code § 12941. In sum, those provisions prohibit use of economic factors to impose adverse employment actions if such imposition has an adverse impact on employees in the age-protected class. This provision is different from federal law under the Age Discrimination in Employment Act (*see Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 611) and should be set out in these regulations in order to ensure the proper application of California law. We propose adding a new subsection, to be designated as Subsection (a)(1), as follows:
Denial of an employment benefit to an employee over 40 based on economic factors such as paying another employee a lower rate of pay to perform the same job or in order to reduce health insurance premiums is an indication of discrimination on the basis of age.

Council Response: The Council did not incorporate the suggestion because it is nonresponsive to any proposed amendments – section 11076 was not noticed to the public so a reasonable member of the public could not have determined that the proposed change could have resulted. Moreover, the proposal is duplicative or Government Code section 12941. Therefore, no changes have been made.

Other Comments.

Comment: The phrase "in this chapter" is inappropriate throughout these regulations.

Council Response: The Council disagrees because its express authority from Government Code 12935 is to implement, interpret, and make specific Chapter 5 of Division 4.1 of Title 2 of the California Code of Regulations. Moreover, this comment is unresponsive to any proposed change and that language has been present in the regulations for decades.

COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

<u>Section 11008(d)(1) – Definition: "Regularly Employing."</u>
Comment: This section seeks to modify the definition of "employer" by clarifying that for purposes of "regularly employing" five or more employees, it does not matter "whether the employee's worksite is located within or outside of California." While we do not disagree with this statement, we believe further clarification needs to be made to specify that FEHA may not apply to an employee who resides out of state and who does not have a sufficient nexus with California for purposes of triggering FEHA protections. *See Campbell v. Arco Marine Inc*., 42 Cal.App.4th 1850, 1860 (1996) (stating that FEHA "should not be construed to apply to nonresidents employed outside the state when the tortious conduct did not occur in California."); and *Gonsalves v. Infosys Technologies Ltd*., 2010 WL 1854146 (2010) (dismissing FEHA cause of action without leave to amend due to out-of-state plaintiff's failure to sufficiently allege in-state conduct that would trigger FEHA protections). Although an employer may be covered if it has five or more employees in other states, FEHA protections may not cover those out of state employees. Accordingly, we respectfully request the Council to clarify this issue.

Council Response: The Council agrees and in response added the following: "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."

Section 11023(b) - Employer's Affirmative Duty: Workplace Environment.

Comment: Government Code section 12940 (k) states it is an unlawful employment practice "[f]or an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Moreover, Section 12950 only references an obligation on behalf of an employer to ensure a workplace free of sexual harassment and to provide information regarding unlawful harassment.

Modified Section 11023(b) seeks to broaden an employer's responsibilities under Government Code Sections 12940(k) and 12950 by imposing an affirmative duty on an employer to ensure a workplace that is free "*from employment practices prohibited by the Act*," and to specifically distribute information pursuant to Section 12950 regarding not only harassment, but discrimination and retaliation as well. This requirement goes far beyond what is required or authorized by statute. Employment practices prohibited by the Act include harassment, discrimination, retaliation, requiring psychological or medical evaluations, failing to engage in the interactive process for accommodations, and genetic testing. Nothing within Sections 12940(k) or 12950 require such an expansive duty on employers, nor require an employer to distribute information regarding discrimination or retaliation. Accordingly, we respectfully request the Council delete the phrases "employment practices prohibited by the Act," and the "discrimination and retaliation" that precedes "prevention policy."

Council Response: The proposed text is necessary to effectuate the purpose of these regulations, namely preventing and correcting harassment and discrimination, which are sparsely addressed in Government Code sections 12940, subdivision (k), and 12950, and is not excessively burdensome on employers in doing so. The text is general and flexible for employers and is consistent with precedent. Moreover, Government Code section 12950 permits the Council to flesh out the rules because the statute mandates employers follow minimum requirements. As a result, no changes have been made.

Article 6 – Generally.

Comment: Within Article VI, we suggest clarification that FEHA's protections with regard to pregnancy discrimination pertain to *all* individuals who are pregnant, regardless of gender. That is, it should be clarified that these protections apply to transgender men who may become pregnant. Accordingly, the use of the terms "woman", "female", "she", and "her" in this Article should either (1) be changed throughout to "an individual" or "an employee" and "they" and "their," or (2) a section should be added as a preface clarifying that the pronouns "she" and "her" in this section shall be read as inclusive of all individuals who are pregnant, not just women.

Council Response: The Council initially rejected this proposal. However, after this 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11035(f) – Definition: "disabled by pregnancy."
Comment: This subdivision should read as follows: A ~~woman~~ **person** is disabled by pregnancy if, in the opinion of ~~her~~ their health care provider, ~~she is~~ **they are** unable because of pregnancy to perform any one or more of the essential functions of ~~her~~ **their** job or to perform any of these functions without undue risk to ~~her~~ **themselves**, to ~~her~~ **their** pregnancy's successful completion, or to other persons. An employee may also be considered disabled by pregnancy if, in the opinion of ~~her~~ **their** health care provider, ~~she is~~ **they are** suffering from severe morning sickness or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth. The preceding list of conditions is intended to be non-exclusive and illustrative only.

Council Response: The Council initially rejected this proposal. However, after this 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11035(g) – Definition: "eligible female employee."
Comment: This subdivision should read as follows: An "eligible ~~female~~ employee" is an employee who qualifies for coverage under her **their** employer's group health plan. An employee's pregnancy, childbirth or related medical conditions are not lawful bases to make an employee ineligible for coverage.

Council Response: The Council initially rejected this proposal. However, after this 15-day comment period, the Council was persuaded by the content of the proposal and made a clearer addition to the text in section 11035(g): "Eligible female employee" includes a transgender employee who is disabled by pregnancy.

Section 11044(c) – Continuation of Group Health Coverage.
Comment: This section seeks to require an employer to continue group health coverage for an employee on pregnancy disability leave for the duration of the leave, not to exceed four months "per pregnancy." Government Code Section 12945(a)(2)(A), however specifically states that an employer only needs to provided continue health coverage up to four months "over the course of a 12-month period." Accordingly, this proposed language is inconsistent with the statute and therefore we respectfully request the Council to delete the term "per pregnancy," and reinstate the term "12-month period."

Council Response: The Council acknowledges that the statute says "12-month period" and accordingly reinstated that language. However, case law universally holds that pregnancy disability leave may be taken for four months, and since it is possible to be pregnant more than once in a 12-month period, "per pregnancy" is a necessary addition to clarify an oft-misinterpreted rule.

Section 11049(d)(1) and Section 11051 – Distribution of Notices.
Comment: The proposed language requires an employer to include in its notice information "concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing." This is a new requirement on employers and it is unclear as to what information an employer must include, as there is no description or text in the Notice set forth in Section 11051 regarding "procedures for filing complaints of violations" with the Department. Accordingly, we request the Council to either delete this new requirement in Section 11049(d)(1) or include proposed language in the Notice set forth in Section 11051.

Council Response: The Council agrees, deleted the unclear language, and rewrote the second sentence of section 11049(d)(1) to read as follows: The notice shall explain the Act's provisions and provide information about how to contact the Department of Fair Employment and Housing to file a complaint and learn more about rights and obligations under the Act.

Section 11049(d)(4) – Distribution of Notices.
Comment: The proposed modification in this section seeks to delete the term "primary" from qualifying the spoken language in the workplace with regard to when a notice must be translated. Striking the term "primary" significantly expands an employer's translation obligation, as there could be numerous workplaces in which at least 10 percent of the workforce speaks the same secondary language, even though that language is not their "primary" language. An employer should not be required to translate the notice simply because 10 percent of the workplace speaks a secondary language. Accordingly, we request the Council to include the term "primary" in this section.

Council Response: The Council disagrees with the reasoning of this comment. "Primary" is an inexact term and is inapplicable to bilingual workers and, even if that was not true, employers would not have record of or be able to ascertain their employees' "primary" language. "Spoken" is better because it takes into account the practical reality of how workers communicate and is also easier for employers to ascertain. Moreover, 2 CCR 11095(c), regarding distribution of California Family Rights Act (Government Code section 12945.2) notices, was modified as follows: "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 ~~primary~~spoken language shall translate the notice into~~ the language or languages spoken by this group or these groups of employees~~ every language that is spoken by at least 10 percent of the workforce." This regulation became effective October 1, 2015, was heavily

vetted by the public, and should be parallel with section 11049 so employers can consistently post notices in the same manner. Therefore, no changes have been made.

Section 11059(d) – General Prohibition against Religious Creed Discrimination.
Comment: This section sets forth the prohibition against religious discrimination and duty to provide a reasonable accommodation for religious observance, and states that this prohibition/duty applies to apprenticeship programs, unpaid interns, employees, applicants, and "*others covered by this Act*."
Pursuant to AB 1443 (Skinner), volunteers were only included in section 12940(k) with regard to harassment. If the legislature had intended to include volunteers under all of the protections and requirements of FEHA, the legislature would have done so. By strategically placing the term "volunteer" in this one section, it evidences the legislative intent to limit the FEHA protections for volunteers only to harassment.
Accordingly, even though volunteers are "covered by this Act," they are not included within the anti-discrimination provisions or an employer's duty to accommodate religious observances. Therefore, we respectfully request the Council to delete the phrase" others covered by this Act" or clarify it to specify that volunteers are not included.

Council Response: The Council agrees and clarified by adding "others covered by section 12940(l) of the Act" in order to account for the limitations mentioned by this commenter.

Other Comments.

Comment: One commenter appreciated the revisions to the following sections: 11008(j), 11024(a)(9)(B), 11024(b)(5), 11024(c)(2)(M), 11029(b), 11035(l), 11042(a)(3)(B), 11051(a), 11051(b), 11066(a), and 11066(b).

Council Response: No response required.

Comment: One commenter incorporated by reference her comments submitted during the 45-day comment period. These comments are about the following sections: 11023(b), 11024(a)(2)(B), 11024(a)(2)(C), 11024(a)(2)(E), 11024(a)(9), 11024(b)(2), 11024(c)(1), 11024(C)(2)(M), and 11024(f).

Council Response: These comments are not responsive to the text noticed for the 15-day comment period and are addressed above. No further response is required as per Government Code section 11346.9(a)(3).

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11023(b) - Employer's Affirmative Duty: Workplace Environment.
Comment: References to "misconduct" within these subsections are confusing and inaccurate.

DFEH's jurisdiction covers discrimination complaints and not general complaints of misconduct, which can cover many other areas.
Subsection (b) refers to "employment practices prohibited by the Act" and distribution of a policy for "harassment, discrimination, and retaliation prevention." DWR suggests that the following strikeouts and new language (shown in bold) be considered, to provide consistency with prior terminology used in this section.
1. 11 023(b)(6): "Instructs supervisors to report any complaints ~~of misconduct~~ to a designated company representative...."
2. 11023(b)(7): "Indicates that when an employer receives ~~allegations of misconduct~~ **a complaint**, it... .will conduct a fair, timely, and thorough investigation...."
3. 11 023(b)(9): "Indicates that if at the end of the investigation ~~misconduct,~~ **discrimination, harassment and/or retaliation** is found, appropriate...."

Council Response: The Council disagrees that the word "misconduct" is confusing and inaccurate. Because it is being used in the Fair Employment and Housing Act regulations and indeed is in a subdivision that explicitly referenced "employment practices prohibited by the Act", the behavior contemplated is clear. Similarly, if "complaints of misconduct" was replaced with just "complaints," it would be unclear if that means a civil complaint or just an informal allegation. Therefore, no changes have been made.

Section 11024(a)(1)(C) – Sexual Harassment Training and Education.
Comment: On page 13, there is an incomplete sentence inserted at the end of the text. This appears to be an inadvertent error. DWR suggests the following additional strikeouts and text insertions (bold): 'the trainer provided during the webinar~~. —No,~~ **with no** changes."

Council Response: The Council agrees that the "no changes" left in the text was an inadvertent error. Staff made that comment in-text and forgot to subsequently delete it, which the Council did in response to this comment. The language proposed by the commenter would alter the meaning of the text in a way that would detract from it clarity; just deleting "no changes" is easier, more accurate, and consistent with the original meaning.

Section 11049(d)(1) – Distribution of Notices
Comment: On page 41, changes proposed for this subsection created an improper noun and verb agreement. DWR suggests the following strikeouts and text insertions (bold) to remedy This: "….The notice shall explain the Act's provisions and ~~providing~~ **provide** information about how to contact the Department of Fair Employment and Housing...."

Council Response: The Council agrees and changed "providing" to "provide."

Sections 11062(d) – Discriminate or Retaliate against a Person who Requests Reasonable Accommodation Based on Religion.

Comment: We similarly support the modification to subsection (d). However, we would propose a bit of wordsmithing to this subsection. This modification appropriately fills the need

to have language incorporating the provisions of AB 987 (Levine) which was signed into law by Governor Brown just last month. The language of that bill specifically provides that it is unlawful "to retaliate or otherwise discriminate against a person *for requesting* reasonable accommodation . . ." (emphasis added). The proposed modification provides it is unlawful to discriminate or retaliate against a person "*who requests* reasonable accommodation. . ." (emphasis added). It is unclear the purpose of the different wording in the regulations versus the statute, but we are concerned that courts may take issue with the regulation for not tracking the language of the statute. The bill was worded in a way to ensure that the request for accommodation is "protected activity" and that taking adverse actions against employees for engaging in such activity is unlawful. Perhaps we are putting too fine a point on it, however, we suggest the regulation more completely track the statute on this point.

Council Response: The Council agrees and changes have been made accordingly.

Sections 11068(k) – Discriminate or Retaliate against a Person who Requests Reasonable Accommodation Based on Disability.

Comment: Subsection (k) of Section 11068 is identical to subsection (d) of Section 11062. Our comments in regard to the wording of this section are the same as above.

Council Response: The Council agrees and changes have been made accordingly.

Other Comments.

Comment: One commenter supported the revisions to the following sections: 11008(d)(1), 11035(f), 11035(g), and 11062.

Council Response: No response required.

PUBLIC HEARING COMMENTS MADE DECEMBER 8, 2014 [Government Code Section 11346.9(a){3}].

Noah Lebowitz and Joan Herrington both commented on the text originally noticed to the public. They both submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE MAY 4, 2015 [Government Code Section 11346.9(a){3}].

Alan Reinach was the only person to orally comment on the text from the first 15-day comment period. He appreciated the Council's opting for the 17 1/3 weeks method of calculating pregnancy disability leave, which does not require a response. He further requested that the Council provide additional guidance to employers on (1) how to handle and what constitutes religious discrimination and (2) pre-employment inquiries. The former request is duplicative of

his written comments from the 45-day comment period, which are addressed in depth above. The latter request is nonresponsive to anything in the noticed text.

PUBLIC HEARING COMMENTS MADE JULY 20, 2015 [Government Code Section 11346.9(a){3}].

No oral comments were made at this meeting.

PUBLIC HEARING COMMENTS MADE AUGUST 26, 2015 [Government Code Section 11346.9(a){3}].

Noah Lebowitz, on behalf of the California Employment Lawyers Association, was the only person to comment at this meeting. He thanked the Council for its hard work and appreciated the Council's forethought in incorporating the recently signed AB 987 into the regulations. In the future, Mr. Lebowitz would like to see further regulations regarding age discrimination, Government Code section 12941, and pre-employment inquiries as they relate to religious discrimination. However, no responsive, substantive comments were made about the text being discussed at the meeting.

There is not a notice of modifications or another 15-day comment public comment period because all of the changes presented at this meeting were non-substantive and the Council unanimously voted to submit this draft to OAL as the final version of the regulations. These non-substantive amendments appear on pages 14, 42, 55, and 68 of the third modified text.