**FAIR EMPLOYMENT AND HOUSING COUNCIL**
**REGULATIONS REGARDING HARASSMENT PREVENTION TRAINING**

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
Subchapter 2. Discrimination in Employment
Article 2. Particular Employment Practices

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

This rulemaking action clarifies, makes specific, and supplements existing state regulations interpreting the Fair Employment and Housing Act ("FEHA") set forth in Government Code section 12900 et seq. In compliance with the Administrative Procedure Act, the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The proposed regulations' overall objective is to incorporate and clarify new harassment prevention training requirements that come from four bills. This action has the specific benefit of clarifying potentially misunderstood areas of the law, in turn reducing litigation costs and court overcrowding. Ultimately, the proposed action furthers the mission of the Department of Fair Employment and Housing (DFEH) by protecting Californians from employment discrimination and harassment.

As it relates to harassment prevention training, SB 1343 (Stats. 2018, ch. 956) amended the Fair Employment and Housing Act to require that all employers of 5 or more employees provide training on the prevention of sexual harassment, harassment based on gender, and abusive conduct in the workplace – one hour of training every two years for non-managerial employees and two hours of training for managerial employees every two years. Previously, the law required training only of supervisors working for employers with 50 or more employees, which is what the regulations currently reflect. SB 778 (Stats. 2019, ch. 215) clarified when employees need to be trained, SB 530 (Stats. 2019, ch. 722) created an additional set of rules for workers subject to a multiemployer collective bargaining agreement in the construction industry, and AB 3369 (Stats. 2020, ch. 227) codified and amended the Council's existing regulation related to duplicate trainings.

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 this area of law.

The Council heard public comment on the originally proposed text at a public hearing held via teleconference on July 27, 2020, and solicited written public comment from June 12, 2020, to

July 27, 2020. The Council solicited public comment on one modified text at subsequent meetings held via teleconference on September 25, 2020 and October 26, 2020. The Council solicited written comment on the modified text from September 25, 2020 to October 13, 2020.

The following list summarizes the Council's notable amendments to the originally proposed text:

- In Sections 11024(a)(2)(A)-(B), substituted the word "employee" or "employees" for "supervisor" or "supervisors." These changes are necessary to effectuate SB 1343, which added a requirement that all employees, not just supervisors, must receive anti-harassment training.
- In Section 11024(b)(1)(B), clarified that an employer may elect to spread its training over both of the two years within the training window so long as the full training is completed within the window. This change is necessary to clarify that SB 1343 allows for training to be completed in shorter segments, as long as the total time meets the hourly requirement.
- Amended Section 11024(b)(6) to match the statutory language of AB 3369, which was enacted in September 2020 during this rulemaking, and clarified that the employer does not have to have been the actual provider of the training. These changes are necessary to harmonize DFEH's regulations with AB 3369's amendment to Government Code Section 12950.1, and to avoid confusion by the regulated community.
- In Section 11024(b)(8), provided that a parent may, but is not required to, attend a training with a minor between the ages of 14 to 17; provided that an employer may choose to utilize specifically tailored training materials for minors between the ages of 14 to 17; and made other non-substantive changes to this Section. These changes are necessary to provide employers greater flexibility to effectively train employees ages 14 to 17 than would have been allowed under the originally-proposed regulations.
- In Section 11024(b)(9), clarified that temporary employees hired to work for less than 30 days or 100 hours need not be trained; provided that for a temporary worker who does not work in the first 30 days after being hired, the "hire date" shall be the first day of work; and provided that a temporary services employer may coordinate with the client employer to have the client employer give the employee its own anti-harassment policy. The first two changes are necessary to address confusion among the regulated community regarding Government Code Section 12950.1's application, by clarifying the circumstances when a temporary employee does *not* need to be trained, as well as the deadline for training a temporary employee who is hired on one date but does not start until a later date. The third change is necessary to allow temporary services employers greater flexibility in ensuring that employees receive the anti-harassment policy of the client employer, while adhering to Government Code Section 12950.1's requirement that the temporary service employer is the responsible party.

***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 considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; the Council did not consider any specific alternatives prior to issuing the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. The Council has determined that no alternative considered by the Council would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, 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. The Council anticipates that the adoption of the proposed amendments will benefit the health and welfare of California residents and businesses by improving worker safety and clarifying and streamlining the operation of the law. The proposed regulations will make it easier for employees and employers to understand their rights and obligations, reducing litigation costs for businesses. These regulations would not affect the environment.

## *NONDUPLICATION STATEMENT [1 CCR 12].*

For the reasons stated below, the proposed regulations partially 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)].*

### Section 11024(a)(2)(A)-(B)

Comment: Within the definition of Webinar training, section 11024(a)(2)(C), and other sections, the FEHC substituted out the word supervisors for employees, presumably to account for the fact that all employees are receiving this training now, not just supervisors. However, the definitions of Classroom training and E-learning training, sections 11024(a)(2)(A)-(B), still refer only to supervisors as the intended audience of the training rather than employees. Because the regulations do not state that employees must receive only webinar training and cannot receive classroom or e-learning training, I believe that it would be more consistent to substitute in the word employees for supervisors throughout the definitions of types of interactive learning.

Council response: The Council agrees and substituted “employees” for “supervisors” in Sections 11024(a)(2)(A)-(B).

**Section 11024(b)(7)**

Comment: It would be more effective and efficient to interpret California’s regulations as allowing California employers to roll out a 60-minute harassment training program each year so they can have one consistent workforce initiative. We urge FEHC to issue regulations allowing one hour every year OR two hours every other year for sexual harassment prevention training.

Council response: Although this comment was received outside of a comment period, the Council notes that Section 11024(b)(7), as proposed, provides that “[t]he training required by this section may be completed in segments, so long as the combined segments meet or exceed the applicable hourly requirement.”

**§ 11024(b)(8)**

Comment: This section proposes to clarify how an employer can train a minor employee age 14-17 years old. While we generally agree with the overall intent of this section to ensure parent involvement, we are concerned with the requirement for parents to “accompany” a child during the training. Ensuring a parent is with the child during e-learning training or a webinar would be extremely difficult for an employer to monitor. Also, for in-person training, it would complicate the ability for an employer to timely complete the training if the employer had to accommodate parent availability. To address this issue but still maintain parent involvement, we would respectfully request the Council amend this language to state that a parent “may” accompany a minor during training, but it is not required. Instead, we think that an employer should provide notice of the training to a minor and the minor’s parent/guardian and obtain written consent from the parent/guardian for the minor to complete the training.

Council response: The Council agrees with the recommendation to make parental participation optional rather than mandatory and has amended Section 11024(b)(8) accordingly. The Council disagrees with the proposal of requiring written consent from a parent/guardian since the harassment prevention training is mandatory for all employees, including 14-17 years-old employees, and there is not an opt-out option contemplated by the statute.

Comment: Our concern with § 11024(b)(8) is the requirement that minors “receive the same training materials provided to other employees.” In our opinion, providing adult-oriented content to minors – particularly on the important topic of harassment prevention – would be at best ineffective and at worst counterproductive. We respectfully propose the following change to subsection 8:

> (8) Training of Employees That Are Minors. Minors that are between fourteen and seventeen years of age shall be trained in the same manner as other employees ~~and receive the same training materials provided to other employees~~ but receive training

> materials that are age-appropriate for 14-17 year old employees. They shall be accompanied by a parent or legal guardian for the training. Employers are not required to provide the training mandated by Government Code section 12950.1 to minors younger than fourteen. If, during the course of the minor's employment, the minor attains the age of fourteen, the employer is then required to provide the training to the minor and the minor's parent or legal guardian within six months of the minor employee's fourteenth birthday and every two years thereafter, measured either from the individual or training year tracking method.

Council response: While the Council does not agree that training directed at adult employees necessarily would be ineffective or inappropriate for employees ages 14-17, the Council amended Section 11024(b)(8) to state that employers may train minor employees either in the same manner as other employees or with trainings tailored to minors (so long as the trainings and materials comply with the subject matter content and format requirements set forth in Government Code Section 12950.1 and these regulations).

**§ 11024(b)(9)**

Comment: The law states that temporary employees hired to work less than 6 months must be trained within 30 calendar days from when they began working or 100 hours for work, whichever occurs first. (Ca. Code 12950.1(h)(1)). The law also makes it clear that temporary employees hired for a period longer than 6 months must be trained within 6 months. (Department of Fair Employment and Housing Sexual Harassment Prevention Training for Employees FAQ, May 26, 2020). However, the proposed amendments conflict with the law by requiring all temporary employees to be trained within 30 calendar days or 100 hours of work. Therefore, we ask that the language be amended to reflect that only temporary employees hired for more than six months must be trained within six months.

Council response: The Council disagrees the proposed regulations require all temporary employees to be trained within 30 calendar days or 100 hours of work. The first sentence of Section 11024(b)(9), by its terms, only applies to employees who are "hired to work for less than six months."

Comment: The term "hire date" in the statute and the draft regulations as it pertains to temporary workers is unclear and we respectfully request clarification. As explained below, in the context of background extras in the motion picture industry, the "hire date" does not equate to the extra' s first day of employment. We propose to clarify that for the motion picture industry governed by IWC's Wage Order 12, the term "hire date" in the statute and regulations means an extra's first day of work on a motion picture industry project for the employer.

Council response: The Council agrees with the recommendation and amended Section 11024(b)(9) to provide: "In those instances where a seasonal, temporary, or other employee is hired to work for less than six months, but has not worked in the 30 calendar days after being

hired, then the "hire date" shall mean the first day of work for purposes of identifying the required date of compliance with this provision."

Comment: The June 2020 Department of Fair Employment and Housing Sexual Harassment Prevention Training FAQ provides:

> "Employers are required to provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first, beginning January 1, 2021. **Employers are not required to train employees who are employed for fewer than 30 calendar days and work for fewer than 100 hours**. (emphasis added).

Nevertheless, the proposed amendments are silent on the fact that such short-term employees need not be trained. Because many temporary employees work on very short assignments, it is important for the proposed amendments to expressly reflect the law and specify that employees working for less than 30 days and 100 hours are not required to be trained.

Council response: That employees hired for less than thirty days or 100 hours do not need to be trained is the only logical inference from the statutory and regulatory requirements. Nonetheless, the Council amended Section 11024(b)(9) to provide: "Seasonal, temporary or other employees who are hired to work both for less than 30 calendar days and for less than one hundred hours of work are not required to be trained."

Comment: We think the following language creates ambiguity/confusion as to whether the temporary services employer would have an obligation to train an employee each time the employee was placed with a new client employer:

> "In the case of a temporary employee employed by a temporary services employer, as defined in Section 201.3 of the Labor Code, to perform services for clients, the training shall be provided by the temporary services employer, not the client. In such instances, the temporary services employer shall provide both their own anti-harassment policy and the anti-harassment policy of any client employer at whose worksite the employee is working at the time the training is provided." (emphasis added).

We respectfully request this language to be amended as follows: delete "In such instances," and state "The temporary services employer shall also provide both their own anti-harassment policy and the anti-harassment policy of any client employer at whose worksite the employee is working ~~at the time the training is provided~~."

Council response: The Council agrees with the recommendation and has amended Section 11024(b)(9) accordingly.

Comment: The Council received several comments regarding the burden on the temporary services employer to provide the anti-harassment policy of the client employer. One commenter stated: In some industries where numerous temporary employees are hired on a

daily or weekly basis, this requirement to provide the policy of the client employer can be quite challenging. We believe it is more appropriate for each employer to provide a copy of their own anti-harassment policy to its employees, but delete the obligation for one employer to provide the policy of another employer.

A second commenter stated: We agree that it is important for employees to receive a copy of their employer's harassment policy. However, in the context of extras working in the motion picture industry, the proposed rule that the temporary services employer distribute its clients policy is not workable. A requirement that a casting agency, like Central Casting, provides the client employer's anti-harassment policy to its extras is not workable in the world of background extras, while it would be easy and natural for Productions to hand out their own harassment policies along with all the other paperwork that they already give to extras on the set daily.

A third commenter stated: Due to the nature of the staffing industry, in many cases temporary employees will receive their training from a temporary services employer well before they are assigned to a client. Therefore, as a practical matter, the temporary services employer cannot provide the client's anti-harassment training policy at the time of the training, and the regulations should allow the temporary services employer to provide the client's anti-harassment policy at or before the time the temporary employee starts the assignment.

Council response: The Council amended Section 11024(b)(9) to provide greater flexibility to the temporary services employer: specifically, that the temporary services employer may coordinate with the client employer to have the client employer give the employee its own anti-harassment policy. However, pursuant to Government Code section 12950.1(f), the temporary services employer "remains responsible for any failure by the client employer to provide the policy."

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

**§ 11024(b)(9)**

Comment: The new draft of this section now provides that a temporary services employer may coordinate with the client employer to instead have the client employer provide the policy, but the burden ultimately still falls on the temporary services employer to ensure the employee actually receives a copy of that policy. We would like to again reiterate that the burden of one entity being responsible for providing the policy of another is exceedingly burdensome, especially where temporary service employers have a voluminous number of placements on a daily or weekly basis. These temporary service employers often have a small staff and it is difficult for them to comply with such a requirement. We again propose that the burden to provide the client employer's policy fall solely on the client employer itself.

Council response: The Council disagrees that the temporary service employer should not be responsible to ensure that the client employer provide the worker with their harassment policy. Government Code Section 12950.1(f) places compliance obligations on the temporary services employer instead of the client employer.

***PUBLIC HEARING COMMENTS MADE JULY 27, 2020 [Government Code Section 11346.9(a)(3)].***

No members of the public made comments during this hearing.

***PUBLIC HEARING COMMENTS MADE SEPTEMBER 25, 2020 [Government Code Section 11346.9(a)(3)].***

Comment: The first sentence in section 11024(b)(6) may be confusing because it could be read to require a training come directly from an employer instead of an employer utilizing an appropriate training provided by another entity, such as DFEH.

Council response: The Council agreed and voted during the hearing to change the language to the following:

> "An employee who has received training in compliance with this section within the prior two years ~~either from~~during employment with a current, a prior, or an alternate or a joint employer, or who received a valid work permit from the Labor Commissioner that required the employee to receive training in compliance with this section within the prior two years, shall be given, and required to read and to acknowledge receipt of, the employer's anti-harassment policy within six months of assuming the employee's new position."

Comment: The first sentence in section 11024(b)(6) could be clarified by utilizing the words "sponsored by."

Council response: The Council appreciates the suggestion but instead adopted the alternative stated above.

Kim Stone and Janine Yancey, on behalf Emtrain, thanked the Council for the work on the regulations and urged the Council to adopt the regulations as drafted. They commented that allowing training in smaller segments will help employers to comply with California's legal training requirements. Ms. Stone and Ms. Yancey also submitted comments outside of a comment period, which are summarized and responded to above.

Council response: The Council appreciates the feedback.

Comment: JT submitted a written comment thanking the Council for the work on the regulations.

Council response: The Council appreciates the feedback.

Comment: Brenda Lebsac submitted a comment regarding concerns about state law on gender identity.

Council response: This comment was not relevant to the rulemaking.

***PUBLIC HEARING COMMENTS MADE OCTOBER 26, 2020 [Government Code Section 11346.9(a)(3)].***

Comment: Mark Murray, on behalf of CTA, thanked the Council for including a minimum number of hours for volunteers to complete to require harassment training, as it makes it easier to recruit volunteers for one-time events.

Council response: The Council appreciates the feedback.

There is not a subsequent notice of modifications or another 15-day public comment period. The Council unanimously voted to submit this draft to the Office of Administrative Law as the final version of the regulations.