

CALIFORNIA EMPLOYMENT DISCRIMINATION REGULATIONS *AN ATTORNEY REFERENCE GUIDE* (CURRENT AS OF 2026)

California Code of Regulations, Title 2, Division 4.1, Chapter 5 (Civil Rights Council)
Subchapter 2 — Discrimination in Employment | Articles 1–11 (§§ 11007–11097)

Organized by legal concept · Pinpoint subsection citations · Practice Pointer & Cross-Reference callouts
Current through Register 2026, Nos. 27–28



A professional portrait of Noah D. Lebowitz, a middle-aged man with short, graying hair, wearing a dark gray suit, a light blue shirt, and an orange patterned tie. He is looking directly at the camera with a slight smile. The background is a dark, textured wall.

ABOUT THE EDITOR

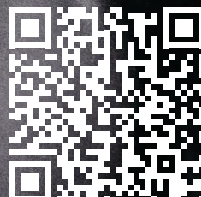
NOAH D. LEBOWITZ

Noah brings nearly three decades of concentrated employment-law experience to his work as a mediator, arbitrator, and discovery referee. His career has been spent in the substance of workplace law, litigating FEHA matters and developing deep familiarity with the discrimination, harassment, retaliation, accommodation, leave, hiring, and other issues that drive employment disputes.

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That depth creates distinctive value in the resolution process. Noah understands employment cases not simply as a neutral learning the issues presented by counsel, but as an employment lawyer who has spent decades working with the statutes, regulations, factual patterns, evidentiary questions, and litigation dynamics at their core. He can engage counsel at a sophisticated level, quickly identify the issues that matter, and probe the strengths, vulnerabilities, and practical consequences of each side's position. For parties and counsel, that means less time explaining the fundamentals and more time focused on what can actually move a difficult employment dispute toward resolution.

Contact Noah's case administrator, **Emma Pasarow**, at 510.721.3953, or email epasarow@signatureresolution.com to inquire regarding your next dispute.



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Editor's Note [↑ TOC](#)

This Guide presents a curated selection of California's Fair Employment and Housing Act (FEHA) employment regulations, drawn from the full body of regulations promulgated under the Act. The selection reflects the editor's professional judgment—developed over nearly three decades of litigating FEHA employment matters and 13-year service as Chair of the California Employment Lawyers Association's FEHA Employment Regulations Committee—regarding which regulations are most frequently invoked and most consequential in practice.

This Guide is not, and is not intended to be, an exhaustive digest of every FEHA employment regulation. Regulations addressing narrower factual scenarios, less commonly litigated issues, or provisions duplicative of the statute itself may not appear here, notwithstanding their continuing validity and enforceability. The omission of any regulation from this Guide carries no implication as to its importance, applicability, or current legal effect.

Practitioners should treat this Guide as a starting point for analysis, not a substitute for it. Before relying on any provision discussed herein, users should:

- Consult the full, current text of the regulation in the California Code of Regulations, Title 2;
- Confirm that no subsequent amendment, repeal, or judicial interpretation has altered the regulation since this Guide was prepared;
- Review the underlying statutory text of FEHA (Cal. Gov. Code § [12900](#) et seq.) and any implementing guidance from the Civil Rights Council (formerly Fair Employment and Housing Council);
- Independently research case law construing the regulation, as regulatory text alone often does not capture the gloss courts have placed on its application.

This Guide reflects the editor's analysis and interpretation and does not constitute legal advice. It is offered as a practical reference tool for practitioners already versed in employment law, not as a comprehensive statement of California employment regulation or a substitute for independent legal research and judgment in any particular matter.

The regulations discussed in this Guide appear at California Code of Regulations, Title 2, Division 4.1, Chapter 5 (Civil Rights Council), Subchapter 2 — Discrimination in Employment, Articles 1–11 (§§ [11007](#)–[11097](#)). The official, currently operative text of Title 2 is maintained by the California Office of Administrative Law and is available at <https://oal.ca.gov>. Each regulation-section link in this Guide opens that section in the official California Code of Regulations published through OAL (hosted by Thomson Reuters Westlaw at govt.westlaw.com/calregs); links to sections outside this Guide's 64 (§§ 11011, 11013, 11066) open the table of contents for the relevant article. The regulations are likewise available through commercial services such as Westlaw and Lexis. Because the Register is amended on a rolling basis (this Guide is current through Register 2026, Nos. 27–28), users should confirm the operative date of any provision against the source before relying on it; for instance, as of the publication of this edition of the Guide, the set of regulations available on the Cornell Legal Information Institute has not been updated to include the 2025 addition of the Automated Decision Systems provisions.

How to Use This Guide [↑ TOC](#)

This guide reorganizes the 64 attached regulation sections — Title 2, Division 4.1, Chapter 5 (Civil Rights Council), Subchapter 2 (Discrimination in Employment) — away from their native numerical/article sequence and into eleven concept-based Parts that track how these issues actually arise in practice (e.g., hiring and screening; leave administration; harassment prevention).

Citation format. Every point is cited at the subsection level using the official reporter format, e.g., 2 CCR § [11069](#)(b)(1)–(3), not merely “§ [11069](#).” Where a discussion draws on an entire section without meaningful subsection breakdown (e.g., a short definitions section), the bare section number is used. Pull the primary source before relying on any citation in an opinion, filing, or advice to a client — this guide omits each section’s authority/reference citations and full amendment history, which remain available on the Civil Rights Department’s website

(<https://civildiscrimination.ca.gov>).

Callouts. Two recurring boxes appear throughout:

PRACTICE POINT

A Practice Point flags a drafting trap, a burden-of-proof nuance, a compliance deadline, or another point of direct operational relevance.

CROSS-REFERENCE

A Cross-Reference points to a related discussion elsewhere in this guide — most often the general defenses in [Part 1](#) or the automated-decision-system overlay in [Part 2](#), both of which are incorporated by reference into nearly every other Part.

Numbering. Each Part is divided into numbered subsections (e.g., [§6.6](#)) referenced by Cross-Reference callouts and by the Quick-Reference Index at the end of this Guide, and by topic in the [Keyword Index](#). This guide’s own section numbers ([§6.6](#)) are distinct from the regulations’ own section numbers (2 CCR § [11068](#)) — the latter always carries the “2 CCR §” prefix or an explicit “§[11068](#)” regulation reference to avoid confusion.

Guide Map: The 64 Sections at a Glance [↑ TOC](#)

Part	Coverage
Part 1	General Framework, Definitions & Affirmative Defenses — 2 CCR §§ 11007–11010
Part 2	Automated-Decision Systems / AI in Employment — 2 CCR § 11008.1 plus provisions embedded across nearly every article
Part 3	Recruitment, Hiring & Pre-Employment Screening — 2 CCR §§ 11016 , 11017 , 11032 , 11056 , 11063 , 11070 , 11078 , 11079
Part 4	Criminal History in Employment (Fair Chance Act) — 2 CCR § 11017.1
Part 5	Harassment Prevention, Retaliation & Training — 2 CCR §§ 11019(b) , 11021 , 11023 , 11024
Part 6	Disability Discrimination & Reasonable Accommodation — 2 CCR §§ 11064 , 11065 , 11067–11073
Part 7	Pregnancy, Childbirth & Related Medical Conditions (PDL) — 2 CCR §§ 11035 , 11038–11047 , 11049–11051
Part 8	California Family Rights Act (CFRA) Leave — 2 CCR §§ 11087–11095 , 11097
Part 9	Sex, Gender Identity & Gender Expression Discrimination — 2 CCR §§ 11029–11034
Part 10	Religious Creed Discrimination & Accommodation — 2 CCR §§ 11059 , 11060 , 11062 , 11063
Part 11	Marital Status, National Origin/Ancestry & Age Discrimination — 2 CCR §§ 11053 , 11054 , 11056 , 11057 , 11028 , 11076 , 11078–11080

Keyword Index [↑ TOC](#)

Keywords and defined terms drawn from the substantive discussion in Parts 1–11, cross-referenced to the Guide subsection(s) where each is discussed. Use this index to locate a concept when the exact regulation section is not already known; use the Quick-Reference Index when the regulation section number is already known.

Keyword / Term	Guide Reference
Accent discrimination	§2.2 , §11.2
Affected by pregnancy (defined)	§7.1
Affirmative action plans	§1.5
Age discrimination — 40-and-older presumption	§11.3
Agent (defined)	§1.2
Algorithm (defined)	§2.1
Applicant (defined)	§1.2
Applications (pre-employment)	§3.1 , §3.3 , §9.2 , §11.3
Artificial intelligence (defined)	§2.1
Assistive animals	§6.2
Automated-decision system (ADS)	§1.3 , §2.1 , §2.2
Bona fide occupational qualification (BFOQ)	§1.5 , §9.3 , §11.3
Business necessity (defined; disability-related examinations)	§6.2
Business necessity defense (general standard)	§1.5 , §2.2 , §3.2 , §11.3
Business necessity defense — criminal history	§4.4
Business necessity defense — disability and medical examinations	§6.4 , §6.5 , §6.7 , §6.8 , §8.3
Business necessity defense — grooming standards (gender identity/expression)	§9.4
Business necessity defense — language, English proficiency, height/weight	§11.2
Certification of Health Care Provider	§7.8 , §8.2 , §8.3
Comparable position (CFRA)	§8.1 , §8.5
Comparable position (PDL)	§7.1 , §7.6
Criminal history — adverse impact; seven-year presumption	§4.4
Criminal history — categorical prohibitions	§4.2
Criminal history — individualized assessment	§4.3
Designated person (CFRA)	§8.1
Disability (defined)	§6.2
Disabled by pregnancy (defined)	§7.1
Driver's license discrimination	§11.2
Eligible employee (CFRA)	§8.1
Employee (defined)	§1.2
Employer (defined; five-or-more rule)	§1.2
Employment agency (defined)	§1.2
Employment benefit (defined)	§1.2
English-only rules	§11.2
Fair Chance Act	Part 4 , §4.5
Family care leave (CFRA)	§8.1
Four months (PDL; defined)	§7.1 , §7.4
Gender expression (defined)	§9.1
Gender identity (defined)	§9.1
Genetic-information testing	§6.7 , §8.2
Grooming and appearance standards	§5.1 , §9.4 , §10.2 , §10.3
Harassment — duty to prevent; written policy	§5.2
Harassment — hostile work environment	§9.4 , §11.2
Harassment — liability standard	§5.1
Harassment-prevention training	§5.3
Health and safety defenses (disability)	§6.8

Keyword / Term	Guide Reference
Health benefits during leave (PDL and CFRA)	§7.5 , §8.7
Immigration status	§11.2
Interactive process (disability)	§6.5
Intermittent leave	§7.1 , §8.6
Interviews	§3.1 , §6.3
Job-related (defined; disability)	§6.2
Job-relatedness defense (general standard)	§1.5 , §3.2 , §11.3
Job-relatedness defense — criminal history	§4.4
Job-relatedness defense — disability inquiries, examinations, and qualification standards	§3.3 , §6.3 , §6.4 , §6.5 , §6.7 , §8.3
Language restrictions	§11.2
Machine learning (defined)	§2.1
Major life activities (defined)	§6.2
Marital status (defined)	§11.1
Medical and psychological examinations	§6.4
National origin discrimination	§11.2
Notice of CFRA rights	§8.9
Perceived pregnancy (defined)	§7.1
Permissible selection devices	§3.2
Pre-employment inquiries	§3.1 , §3.3 , §6.3 , §9.2 , §10.4 , §11.3
Pregnancy — reasonable accommodation and transfer	§7.3
Pregnancy disability leave (PDL) — duration	§7.4
Pregnancy disability leave (PDL) — interaction with CFRA and FMLA	§7.7 , §8.10
Promotion and transfer	§3.2
Proxy (defined)	§1.2
Reasonable accommodation (disability)	§6.6
Reasonable accommodation (religious creed)	§10.3
Reassignment to a vacant position	§6.6
Recruitment	§3.1 , §6.3 , §9.2
Reinstatement — CFRA	§8.5
Reinstatement — pregnancy disability leave	§7.6
Related medical condition (pregnancy; defined)	§7.1
Religious creed (defined)	§10.2
Retaliation — CFRA	§8.8
Retaliation — general FEHA rule	§5.4
Serious health condition (CFRA)	§8.2
Sex stereotype (defined)	§9.1
Sex stereotype — job assignments	§9.4
Substantial motivating factor standard	§1.4 , §6.9
Testing accommodations (disability)	§6.7
Transgender / transitioning	§9.1
Twelve-workweek entitlement (CFRA) — computation	§8.6
Undue hardship (defined)	§6.2
Undue hardship — religious creed	§10.3
Unpaid interns and volunteers	§1.2
Work Opportunity Tax Credit (WOTC)	§4.5

Part 1 — General Framework, Definitions & Affirmative Defenses [↑ TOC](#)

These provisions are Article 1 (General Matters) of Subchapter 2 and apply throughout Subchapter 2. The sex, religious creed, and disability articles expressly incorporate Articles 1 and 2 (2 CCR §§ [11029\(c\)](#), [11059\(c\)](#), [11064\(c\)](#)), and the § [11010](#) defenses are expressly cross-referenced in the sex, pregnancy, and disability articles (2 CCR §§ [11031](#), [11039\(b\)](#), [11067\(a\)](#)). Treat this Part as the baseline vocabulary and defense structure for every other Part in this guide.

1.1 — Source of Authority [↑ TOC](#)

- **2 CCR § [11007](#)** — The Civil Rights Council (CRC) issues these regulations under Government Code § [12935\(a\)](#) — an exercise of delegated FEHA rulemaking authority, relevant to any argument about the regulations’ validity or scope.

1.2 — Core Definitions [↑ TOC](#)

2 CCR § [11008](#) defines the terms used throughout Subchapter 2 “unless the context otherwise requires.” Key definitions relied on repeatedly elsewhere in this guide:

- **2 CCR § [11008\(a\)](#) — “Agent”** — Any person acting on behalf of an employer to exercise a function traditionally exercised by the employer (recruitment, screening, hiring, promotion, pay/benefits/leave decisions), including when conducted through an automated-decision system. An agent is itself an “employer” for FEHA purposes.
- **2 CCR § [11008\(b\)](#) — “Applicant”** — Anyone who files a written application, or otherwise indicates a specific desire to be considered for employment; includes a person who can prove they were deterred from applying by a discriminatory practice. Excludes someone who withdraws an application without coercion before interview/testing/hire.
- **2 CCR § [11008\(c\)](#) — “Apprenticeship Training Program”** — Any apprenticeship program, including local or state joint apprenticeship committees, subject to Labor Code Chapter 4, Division 3, [§ 3070](#) et seq.
- **2 CCR § [11008\(d\)\(1\)–\(5\)](#) — “Employee”** — Any individual under the direction and control of an employer under any appointment or contract of hire, express or implied. Excludes independent contractors (Lab. Code § [3353](#)), family members employed by a parent/spouse/child, and certain non-profit sheltered-workshop workers. Temporary-agency workers are employees of both the agency and the client for their respective terms/conditions of control.
- **2 CCR § [11008\(e\)\(1\)\(A\)–\(6\)](#) — “Employer” (five-or-more counting rules)** — Any person/entity “regularly employing” five or more individuals. Seasonal employers can be “regular” without year-round staffing (e)(1)(A); part-time employees count the same as full-time (e)(1)(B); employees on any form of leave — including CFRA and pregnancy leave — are counted (e)(1)(B); both in-state and out-of-state employees are counted toward the five-employee threshold, though out-of-state employees are protected only if the unlawful conduct occurred in, or was ratified from, California (e)(1)(C); the State and its political subdivisions are covered regardless of headcount (e)(4); and religious associations/corporations not organized for profit are presumptively excluded, except for taxable unrelated-business portions employing five or more (e)(5).
- **2 CCR § [11008\(f\)](#) — “Employer or Other Covered Entity”** — Any employer, employment agency, labor organization, or apprenticeship training program as defined in this section and subject to the provisions of the Act.

- **2 CCR § 11008(g) — “Employment Agency”** — Includes agencies procuring applicants/employees through an automated-decision system.
- **2 CCR § 11008(h)(1)–(3) — “Employment Benefit”** — Broadly defined to include hiring, promotion, training selection, freedom from discharge, compensation, and “provision of a discrimination-free workplace” (defined by reference to the harassment definition at 2 CCR § 11019(b)).
- **2 CCR § 11008(i) — “Employment Practice”** — Any act, omission, policy, or decision of an employer or other covered entity affecting any of an individual’s employment benefits or consideration for an employment benefit.
- **2 CCR § 11008(j) — “Labor Organization”** — Any organization existing and constituted, in whole or in part, for the purpose of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.
- **2 CCR § 11008(k) — “Person performing services pursuant to a contract”** — A three-part test (control over performance/manner, independently established business, control over time/place/tools) relevant to whether a nominal independent contractor is nonetheless covered.
- **2 CCR § 11008(l) — “Proxy”** — A characteristic or category closely correlated with a protected basis — a term that recurs throughout [Part 2](#) wherever a regulation prohibits use of a “qualification standard, employment test, or proxy” that discriminates.
- **2 CCR § 11008(m) — “Unpaid interns and volunteers”** — Expressly covered individuals for purposes of the Act, though they may or may not be “employees.”

1.3 — Automated-Decision Systems [↑ TOC](#)

Defined at 2 CCR § [11008.1](#) and digested separately in [Part 2](#) given its cross-cutting importance.

1.4 — Principles of Employment Discrimination [↑ TOC](#)

- **2 CCR § 11009(a)** — A finding of an unlawful employment practice does not depend on a showing of individual back pay or other compensable loss; individual relief (hiring, reinstatement, back pay, etc.) may be established separately.
- **2 CCR § 11009(b)** — Codifies respondeat superior ([Civ. Code § 2338](#)): an employer is liable for the discriminatory acts of its supervisors, managers, or agents acting within the scope of employment, or for its employees’ acts as defined by the harassment provision at 2 CCR § [11019\(b\)](#), where the applicant/employee suffered a loss of an employment benefit.
- **2 CCR § 11009(c) — “Substantial motivating factor” standard** — Discrimination is established by a preponderance of the evidence that a protected basis was a substantial motivating factor in the denial of an employment benefit, and the denial is not justified by a permissible defense. Scope limit: this standard applies only to discrimination claims under Gov. Code § [12940\(a\)](#) and retaliation claims under § [12940\(h\)](#) — it does not apply to harassment, denial of reasonable accommodation, failure to engage in the interactive process, or denial of pregnancy/CFRA leave, each of which has its own standard (see [Parts 5–8](#)).
- **2 CCR § 11009(d)** — Human trafficking victims ([Civ. Code § 52.5](#); [Pen. Code § 236.1](#)) may have a separate FEHA right of action for discrimination on a protected basis, without displacing other anti-trafficking claims.
- **2 CCR § 11009(e)** — Unpaid interns/volunteers are protected against discrimination in selection, termination, training, and treatment on any protected basis.
- **2 CCR § 11009(f)** — General prohibition on using an automated-decision system or other selection criteria (qualification standard, employment test, or proxy) that discriminates on a protected basis; evidence of anti-bias

testing (or its absence) — including the testing’s quality, recency, and scope, and the response to results — is relevant to liability and to any available defense.

1.5 — Affirmative Defenses — the Master Defense List [↑ TOC](#)

2 CCR § [11010](#) is the central defense provision incorporated by reference throughout every other article. Where discrimination is otherwise established, it is nonetheless lawful if a proper affirmative defense is proved and no less-discriminatory alternative is shown to be available:

- **2 CCR § [11010\(a\)](#) — Bona Fide Occupational Qualification (BFOQ)** — Available only where a facially exclusionary practice is justified because all or substantially all of the excluded group is unable to safely and efficiently perform the job, and the essence of the business would otherwise be undermined. ([Part 9](#) digests the sex-discrimination-specific limits on this defense at 2 CCR § [11031](#).)
- **2 CCR § [11010\(b\)](#) — Business Necessity** — For a facially neutral practice with adverse impact: the employer must prove an overriding legitimate business purpose necessary to safe/efficient operation and that the practice effectively fulfills that purpose. The practice may still be impermissible where it is shown that an alternative practice would accomplish the business purpose equally well with a lesser discriminatory impact; this is a rebuttal showing, not part of the employer’s burden. This is the operative definition cross-referenced by nearly every article in this guide (e.g., 2 CCR § [11076\(a\)](#) for age; 2 CCR § [11017\(a\)](#), (e) for employee selection). Note that 2 CCR § [11028\(a\)\(2\)](#) and 2 CCR § [11065\(b\)](#) supply their own business-necessity definitions — for language restrictions and for disability-related inquiries and medical/psychological examinations, respectively — rather than cross-referencing § [11010\(b\)](#).
- **2 CCR § [11010\(c\)](#) — Job-Relatedness** — Cross-references 2 CCR § [11017\(e\)](#) (employee selection).
- **2 CCR § [11010\(d\)](#) — Security Regulations** — Conformance with applicable federal/state security regulations is a defense notwithstanding a discrimination showing.
- **2 CCR § [11010\(e\)\(1\)–\(3\)](#) — Non-Discrimination / Affirmative Action Plans** — A bona fide voluntary affirmative action plan (2 CCR § [11011](#)), a non-discrimination plan under Gov. Code § [12990](#), or a state/federal court or agency order is a defense.
- **2 CCR § [11010\(f\)](#) — Otherwise Required by Law** — An employment practice required by state or federal law or court order is lawful notwithstanding a discrimination showing.

PRACTICE POINT

2 CCR § [11010](#) is the analytical starting point for any affirmative-defense argument in this body of regulations. Article-specific defenses — 2 CCR § [11031](#) for sex (§9.3), 2 CCR § [11067](#) for disability (§6.8) — supplement rather than replace it. When drafting a defense section of a position statement, cite § [11010](#) first, then layer the article-specific defense on top.

Part 2 — Automated-Decision Systems / AI in Employment [↑ TOC](#)

This is the newest and most cross-cutting concept in the package — added by the 6-27-2025 rulemaking package (operative 10-1-2025, Register 2025, No. 26). Rather than being confined to a single article, the automated-decision-system (ADS) provisions are woven into nearly every substantive article as a qualifier on existing prohibitions. This Part consolidates them.

2.1 — Core Definitions [↑ TOC](#)

- **2 CCR § 11008.1(a)–(a)(1) — “Automated-Decision System”** — A computational process that makes a decision or facilitates human decision-making regarding an employment benefit (as defined at 2 CCR § 11008(h); the regulation’s own text cross-references “section 11008(i),” a stale reference, since in the codified text “Employment Benefit” is § 11008(h) and § 11008(i) is “Employment Practice”); may be derived from or use AI, machine learning, algorithms, statistics, or other data-processing techniques. Example tasks at (a)(1)(A)–(E): computer-based assessments/tests (predictive assessments, measuring skills/dexterity/reaction time, measuring personality/aptitude/attitude/cultural fit, screening/categorizing/recommending candidates); targeted job-ad placement; resume screening for terms/patterns; analyzing facial expression/word choice/voice in online interviews; and analyzing applicant/employee data acquired from third parties.
- **2 CCR § 11008.1(a)(2) — Exclusions** — Word processing, spreadsheets, map navigation, web hosting, domain registration, networking, caching, data storage, firewalls, anti-virus/anti-malware, spam/robocall filtering, spellcheck, calculators, and similar technologies are excluded — provided they do not themselves make a decision regarding an employment benefit.
- **2 CCR § 11008.1(b)–(e)** — Defines “Algorithm” (b), “Artificial Intelligence” (c), “Automated-Decision System Data” (d), and “Machine Learning” (e) — useful boilerplate for pleadings and discovery requests.

2.2 — Where ADS Prohibitions Appear Throughout the Regulations [↑ TOC](#)

The ADS language takes three drafting forms: (1) “including but not limited to” insertions into existing prohibitions (e.g., §§ 11016, 11070, 11072, 11076, 11079(b)); (2) a tag sentence providing that a prohibition “also applies where such discrimination resulted, in whole or in part, from” use of an ADS or selection criteria (throughout § 11028); and (3) standalone subdivisions making it unlawful to use an ADS or selection criteria that discriminates on a protected basis, paired with an anti-bias-testing evidence clause (§§ 11009(f), 11028(m), 11032(b)(4), 11033(f), 11038(b), 11039(a)(1)(J), 11063(b)). Attorneys litigating or advising on AI hiring tools should review each of the following:

- **2 CCR § 11016(a)(2), (b)(1), (c)(3)(A), (c)(5), (d)(1) — General recruitment/hiring (§3.1)** — Prohibits discriminatory recruitment (a)(2) and pre-employment inquiries (b)(1), including via ADS. Online application technology that limits, screens out, ranks, or prioritizes applicants by schedule, where it has an adverse impact, is unlawful unless it is job-related and consistent with business necessity and includes a mechanism for the applicant to request accommodation; the mechanism is an element of the defense, not a freestanding mandate (c)(3)(A). Subsections (c)(5) (ADS that measures skill, dexterity, reaction time, or other abilities) and (d)(1) (ADS that analyzes tone of voice, facial expressions, or other physical characteristics or behavior) are cautionary: such tools “may discriminate,” and the employer “may need to provide reasonable accommodation” under Article 8 or 9.
- **2 CCR § 11017(e) — Employee selection (§3.2)** — A facially neutral testing device or ADS with adverse impact is permissible only on a business-necessity showing (cross-referencing 2 CCR § 11010(b)).
- **2 CCR § 11017.1(a)(1) — Criminal history screening (Part 4)** — Pre-conditional-offer prohibition on inquiring into criminal history expressly includes inquiries made via ADS.
- **2 CCR § 11028(b), (c), (f)(3), (g), (h), (k), (m) — National origin/ancestry (§11.2)** — Extends the prohibitions on accent-, English-proficiency-, immigration-status-, driver’s-license (Veh. Code § 12801.9)-, citizenship-requirement-, and height/weight-based discrimination to ADS-driven decisions through a tag sentence (the prohibition “also applies where such discrimination resulted, in whole or in part, from” use of an ADS or selection criteria). Subsection (m) is a standalone prohibition on ADS or selection criteria that discriminate on the basis of national origin or a proxy of national origin, with the anti-bias-testing evidence clause.

- **2 CCR § 11032(b)(4), 11033(f) — Sex (§9.2)** — Standalone prohibitions on ADS or selection criteria that discriminate on the basis of sex (§ 11032(b)(4)); § 11033(f) also reaches ADS use that discriminates on any basis prohibited in § 11033(a)–(e) (physical agility/strength tests, height/weight standards, childbearing age, disregard of unpaid/volunteer experience, sex stereotypes). “Sex” carries its Gov. Code § 12926 meaning, which includes gender identity and gender expression (2 CCR § 11030(c)).
- **2 CCR § 11038(b), 11039(a)(1)(J) — Pregnancy (§7.2)** — Extends the pregnancy/perceived-pregnancy discrimination prohibition to ADS-driven selection criteria.
- **2 CCR § 11056(a) — Marital status (§11.1)** — Marital-status pre-employment inquiries made via ADS are unlawful absent a permissible defense.
- **2 CCR § 11063(b) — Religious creed (§10.4)** — Adds a new standalone prohibition on ADS or selection criteria that discriminate on the basis of religion, with the anti-bias-testing evidence clause.
- **2 CCR § 11070–11072 — Disability (§6.4, §6.7)** — 2 CCR § 11070(a)(2) and (b)(2) extend the disability advertising and pre-offer inquiry prohibitions to ADS. 2 CCR § 11071(e) is notable: it expressly defines a “medical or psychological examination” or disability-related inquiry to include one administered via ADS (e.g., a test, question, puzzle, or game likely to elicit disability information). 2 CCR § 11072(b) prohibits ADS-administered qualification standards/tests that screen out on disability or uncorrected vision/hearing unless job-related, consistent with business necessity, and no less discriminatory standard, test, or selection criterion serves the employer’s goals as effectively ((b)(1)–(2)); (b)(3)–(5) likewise extend the testing-criterion, physical-agility, and test-administration rules to ADS-administered tests, and 2 CCR § 11072(b)(5)(F) specifically states that use of an ADS, without more, does not constitute the individualized assessment that may be necessary where test modification is inappropriate.
- **2 CCR § 11076(a), 11079(b), (c)(1) — Age (§11.3)** — The presumption of age discrimination extends to facially neutral practices “including but not limited to the use of an automated-decision system” with adverse impact on applicants/employees 40+; ADS-driven pre-employment inquiries and online applications with age-based cutoffs or algorithmic screening are separately addressed.

PRACTICE POINT

Whichever of the three drafting forms is used, the underlying substantive prohibition (age, disability, sex, national origin, etc.) governs the merits — the ADS reference confirms that using a vendor tool or algorithm is not a defense to, or a different standard from, the underlying discrimination rule. Anti-bias testing evidence under 2 CCR § 11009(f) and its article-specific counterparts (§§ 11028(m), 11032(b)(4), 11033(f), 11038(b), 11039(a)(1)(J), 11063(b)) is likely to be central in any ADS matter; because evidence “or the lack of evidence” of such testing is relevant to any claim or defense, it can cut for either side, so request or preserve vendor bias-audit documentation early in any AI-hiring-tool matter.

Part 3 — Recruitment, Hiring & Pre-Employment Screening [↑ TOC](#)

General, cross-basis pre-employment rules live in Article 2 (2 CCR §§ 11016–11017); each protected-basis article then layers its own pre-employment-practice section on top. This Part gathers the general rule and each article-specific overlay so the full picture is visible in one place.

3.1 — General Recruitment & Application Rules [↑ TOC](#)

- **2 CCR § 11016(a)(1)–(2) — Recruitment** — Duty not to discriminate in recruitment; affirmative efforts to attract underrepresented protected-class members are expressly permitted. Prohibited recruitment practices (including via ADS) include restricting/excluding/classifying on a protected basis, expressing a preference, or using advertising methods that discriminate.
- **2 CCR § 11016(b)(1)–(2) — Pre-employment inquiries** — Only non-discriminatory inquiries are permitted. (b)(1)(B) provides that schedule-availability inquiries may not be used to ferret out religion/disability/medical-condition information and must clearly communicate that protected-basis scheduling restrictions need not be disclosed, offering example (“such as”) language (“Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?”).
- **2 CCR § 11016(c)(2), (4)–(5) — Applications** — (c)(2) bars requiring photographs absent a permissible defense; (c)(4) bars coding/separating applications to identify protected-basis status absent a defense or recordkeeping/statistical purpose; (c)(5) flags ADS tools measuring skill/dexterity/reaction time as a potential source of disability-based discrimination requiring accommodation under the religion (Art. 8) or disability (Art. 9) provisions.
- **2 CCR § 11016(d)–(d)(1) — Interviews/screening** — The entire interview/screening process is subject to review for discrimination regardless of internal safeguards; ADS analysis of voice/facial expression/behavior is flagged as a potential source of race, national origin, gender, or disability discrimination.

3.2 — Employee Selection, Testing & Placement [↑ TOC](#)

- **2 CCR § 11017(a) — Selection & testing** — Any policy/practice with adverse impact on a protected basis is unlawful unless job-related and consistent with business necessity; the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. pt. [1607](#)) are expressly adopted.
- **2 CCR § 11017(b) — Placement** — Less-desirable placements (location, hours, conditions) that segregate/discriminate are unlawful; “protective” labeling of an assignment does not cure discrimination absent a permissible defense.
- **2 CCR § 11017(c)(1)–(3) — Promotion & transfer** — Restricting information on promotion/transfer opportunities, discriminatory handling of transfer/promotion requests, discriminatory access to eligibility training, and no-transfer policies perpetuating past segregation are each separately unlawful.
- **2 CCR § 11017(d)(1)–(3) — Specific practices** — (d)(1) cross-references criminal-history rules at 2 CCR § [11017.1 \(Part 4\)](#); (d)(2)–(3) separately prohibit discriminatory height and weight standards absent a permissible defense.
- **2 CCR § 11017(e) — Permissible selection devices** — A facially neutral ADS or testing device with adverse impact is permitted only on a business-necessity showing.

3.3 — Article-Specific Pre-Employment Overlays [↑ TOC](#)

Each protected-basis article restates and tailors the general pre-employment rules above. Check the general rule (2 CCR §§ [11016–11017](#)) and every applicable overlay below:

- **2 CCR § 11032(a)(2), (b)(2)–(3) — Sex** — Recruiting/advertising must not segregate by sex (no male/female job-opening classifications); asking sex on an application is unlawful absent a defense or recordkeeping purpose; questions about childbearing, pregnancy, birth control, or family responsibilities are unlawful unless tied to specific, relevant working conditions.

- **2 CCR § 11056(a)–(c) — Marital status** — Marital-status disclosure requests are unlawful absent a defense; asking whether the applicant has ever used another name, for business reasons other than ascertaining marital status (e.g., verifying past work records) is permitted; asking whether an applicant’s spouse is presently employed by the same employer is lawful to ask but may not be used as a basis for the employment decision “except as stated below” (which refers to the spousal-employment criteria in § 11057(a)).
- **2 CCR § 11063(a) — Religious creed** — Weekend/evening availability inquiries may not be used to ascertain religion or to evade the reasonable-accommodation duty, though such inquiries are permitted where reasonably related to normal business requirements.
- **2 CCR § 11070(a)–(c) — Disability** — Recruiting must treat applicants with/without disabilities equally; general disability-related inquiries are prohibited pre-offer ((b)(2) lists eight example prohibited questions, e.g., “Have you ever been hospitalized?”, “What prescription medications are you taking?”); job-related inquiries into ability to perform essential functions remain permissible under (b)(3), and limited accommodation-related inquiries are allowed once an obvious disability or accommodation request is in play; required interview accommodations are addressed at (c).
- **2 CCR § 11078(a), 11079(a)–(c) — Age** — Detailed rules on age-neutral recruitment and prohibited advertisements/inquiries/applications — fully digested in [Part 11.3](#).

3.4 — Criminal-History Screening [↑ TOC](#)

CROSS-REFERENCE

Governed comprehensively by 2 CCR § 11017.1 — see [Part 4](#), which is broken out separately given its length and complexity.

Part 4 — Criminal History in Employment Decisions (Fair Chance Act) [↑ TOC](#)

2 CCR § [11017.1](#) is the single longest and most procedurally detailed section in the package. It implements the Fair Chance Act (Gov. Code § [12952](#)) and operates as a self-contained sequential compliance framework. It appears in Article 2 (Particular Employment Practices).

4.1 — Pre-Conditional-Offer Prohibition [↑ TOC](#)

- **2 CCR § 11017.1(a)(1)–(3)** — Employers may not inquire into, consider, distribute, or disseminate an applicant’s criminal history (via application, background check, internet search, or ADS) until after a conditional offer of employment has been made. “No Felons”/“Must Have Clean Record” language in job postings is separately prohibited (a)(2). An employer that violates the pre-offer prohibition may not later use the applicant’s pre-offer non-disclosure as a factor in the hiring decision (a)(3).
- **2 CCR § 11017.1(a)(4)(A)–(D) — Narrow exemptions** — The pre-offer prohibition does not apply where: (A) the employer is a state/local agency otherwise required by law to run a background check; (B) the position is with a criminal justice agency (Pen. Code § [13101](#)); (C) the position is a Farm Labor Contractor (Lab. Code § [1685](#)); or (D) any state, federal, or local law requires the criminal background check or restricts employment based on criminal history (including SRO rules under the Securities Exchange Act). Under (a)(5), the (A) and (D) exemptions apply only where the employer or its agent is itself legally required to conduct the check; a

requirement imposed on another entity, such as an occupational licensing board, does not exempt the employer. Even where exempted from the pre-offer timing rule, the substantive limits in (b) and (d)–(g) still apply.

- **2 CCR § 11017.1(a)(6)** — If an applicant volunteers criminal history before a conditional offer, the employer still may not consider information barred under (b), and may not consider any other conviction history until after a conditional offer (absent an (a)(4) exemption).

4.2 — Categorically Prohibited Criminal History [↑ TOC](#)

Under 2 CCR § 11017.1(b)(1)–(5), regardless of timing, employers may never inquire into, consider, distribute, or disseminate:

- (b)(1) Arrests/detentions that did not result in conviction (Lab. Code § 432.7; Gov. Code § 12952), subject to narrow bail/health-facility exceptions.
- (b)(2)(A)–(B) Referral to or participation in a pretrial or post-trial diversion program — though after a conditional offer, diversion may be considered as evidence of rehabilitation or mitigating circumstances if offered by the applicant, and the underlying conviction/charges may still be considered until the diversion program is completed and the record dismissed/sealed.
- (b)(3) A conviction that has been judicially dismissed, sealed, expunged, or statutorily eradicated, or for which a full pardon or certificate of rehabilitation has issued.
- (b)(4) Juvenile court history (arrest, detention, processing, diversion, adjudication, disposition).
- (b)(5) A non-felony marijuana-possession conviction two or more years old (Lab. Code § 432.8).

Employers using investigative consumer reports remain independently subject to the federal Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act (2 CCR § 11017.1(b)(6)), and to any stricter local ordinance ((b)(7)).

4.3 — The Individualized Assessment Sequence [↑ TOC](#)

Before denying a conditionally offered position based on conviction history, the employer must follow this sequence under 2 CCR § 11017.1(c):

Step 1 — Initial individualized assessment (§ 11017.1(c)(1))

A reasoned, evidence-based determination whether the conviction history has a direct and adverse relationship with the specific duties of the job. Must consider, at minimum: (c)(1)(B)(i) the nature/gravity of the offense (with eight enumerated sub-factors including disability, trauma/domestic violence/trafficking connection, and age at the time of conduct); (c)(1)(B)(ii) time elapsed since the offense/sentence completion; and (c)(1)(B)(iii) the nature of the job. Voluntarily offered rehabilitation evidence must be considered at this stage under (c)(1)(C).

Step 2 — Preliminary-decision notice (§ 11017.1(c)(2))

If the employer preliminarily decides to rescind the offer, written notice under (c)(2)(A)–(F) must identify the disqualifying conviction(s), include a copy of any conviction-history report relied upon, explain the right to respond (including with rehabilitation/mitigating-circumstances evidence — ten enumerated categories at (c)(2)(D)(i) — and documentary evidence — five enumerated categories at (c)(2)(D)(ii)), and set a response deadline of at least five business days (extended by (c)(2)(E)(ii)–(iii) for mailed/emailed notice receipt, and extended again under (c)(2)(F) if the applicant disputes accuracy and is gathering evidence).

Step 3 — Reassessment (§ 11017.1(c)(3))

The employer must consider any information the applicant submits, including incarceration-era conduct, post-conviction employment history, community service, and other rehabilitative efforts, before making a final decision.

Step 4 — Final decision (§ 11017.1(c)(4))

Written notice of the final denial, including any internal appeal/reconsideration procedure and the right to file a complaint with the Civil Rights Department.

4.4 — Job-Relatedness / Business-Necessity Defense [↑ TOC](#)

- **2 CCR § 11017.1(f)(1)–(3)** — The applicant/employee bears the burden of showing adverse impact on a protected basis (state/national conviction-record statistics showing a substantial disparity are presumptively sufficient, rebuttable by particularized circumstances).
- **2 CCR § 11017.1(f)(4)(A)–(D)** — If adverse impact is shown, the employer must prove the policy is job-related and consistent with business necessity, tailored using the same nature/gravity, time-elapsed, and job-nature factors as the individualized assessment. A bright-line policy considering convictions seven or more years old is subject to a rebuttable presumption that it is NOT sufficiently tailored (absent a (g) legal-compliance justification).
- **2 CCR § 11017.1(f)(5) — Less discriminatory alternative** — Even where business necessity is shown, the employer can still be liable if a less discriminatory policy/practice would serve its goals equally well.
- **2 CCR § 11017.1(g) — Legal/licensing compliance defense** — Compliance with federal or state law/regulation that mandates a particular criminal-history screening process, or that a position require an occupational license contingent on criminal history, is a rebuttable defense to an adverse-impact claim.

4.5 — Special Applications [↑ TOC](#)

- **2 CCR § 11017.1(d)(1)–(4) — Labor contractors, union hiring halls, client employers** — All governed the same way as other employers; pool/availability-list exclusion decisions require the same individualized assessment; a client employer may only inquire after a conditional offer and may not instruct a labor contractor/hiring hall to refer only workers without conviction records.
- **2 CCR § 11017.1(i)(1)–(3) — Work Opportunity Tax Credit (WOTC)** — Employers seeking the WOTC are not exempted from § 11017.1 or Gov. Code § 12952; IRS Form 8850 and DOL Form 9061 information may only be used for WOTC purposes (Form 8850 may be required before a conditional offer, but Form 9061 only after a conditional offer, per (i)(1)–(2)) and must be kept in confidential files separate from the general personnel file.
- **2 CCR § 11017.1(h) — Fair Chance Act claims** are subject to the Article 1, Chapter 7 procedures (Gov. Code § 12965) — right to Department investigation or an immediate right-to-sue notice.

PRACTICE POINT

Build a standing checklist off Steps 1–4 of the Individualized Assessment Sequence and confirm that documentation actually shows each of the (c)(1)(B) factors was considered — not merely that a background-check vendor flagged a hit. The seven-year rebuttable presumption at (f)(4)(C) is an easy trap for bright-line policies that were never updated after the Fair Chance Act's adoption.

Part 5 — Harassment Prevention, Retaliation & Mandatory Training [↑ TOC](#)

5.1 — Harassment Definition and Employer Liability [↑ TOC](#)

- **2 CCR § 11019(b)(1)–(2)** — “Employee,” for harassment purposes, includes unpaid interns, volunteers, and contract personnel (b)(1). Harassment includes verbal (epithets, slurs), physical (assault, blocking movement), visual (derogatory posters/cartoons), and sexual-favors harassment (conditioning a benefit on sexual favors) under (b)(2)(A)–(D). Free-speech/association rights are to be accommodated consistent with the provision’s intent under (b)(2)(E).
- **2 CCR § 11019(b)(3)–(4) — Liability standard** — Harassment by the employer/agents/supervisors is unlawful outright (strict liability, consistent with the sex-harassment liability rule at 2 CCR § 11034(f)(2)(C)). Harassment by a co-employee is unlawful where the employer/agents/supervisors knew or should have known and failed to take immediate, appropriate corrective action; constructive knowledge is imputed unless the employer shows it took reasonable preventive steps (affirmatively raising the subject, expressing disapproval, developing sanctions, informing employees how to raise complaints, sensitization efforts).
- **2 CCR § 11019(b)(5) — Employee notice not required** — An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the aggrievement; however, an employee’s failure to give such notice is not an affirmative defense.
- **2 CCR § 11019(b)(6) — Individual liability** — An employee who personally engages in unlawful harassment of a co-employee is personally liable, regardless of the employer’s knowledge or corrective action.
- **2 CCR § 11019(c)–(d) — Appearance/grooming standards; discipline** — Physical appearance, grooming, and dress standards are lawful unless they discriminate on a protected basis AND significantly burden the individual. Reasonable, non-discriminatory disciplinary measures are unaffected.

5.2 — Affirmative Duty to Prevent and Correct [↑ TOC](#)

- **2 CCR § 11023(a)(1)–(3)** — Employers have an affirmative duty under Gov. Code § 12940(k) to take reasonable steps to prevent and promptly correct harassing/discriminatory conduct — an individualized inquiry based on workforce size, budget, business nature, and case facts (a)(1). There is no stand-alone private cause of action for a § 12940(k) violation alone (a)(2) — the claimant must also prevail on an underlying discrimination/harassment/retaliation claim — but the Department may independently pursue non-monetary preventive remedies regardless of the underlying claim’s outcome (a)(3).
- **2 CCR § 11023(b)(1)–(11) — Required written policy elements** — Employers must adopt and distribute a written harassment/discrimination/retaliation prevention policy that: lists all protected categories (b)(2); states the law covers coworkers/third parties as well as supervisors (b)(3); establishes a complaint process — confidentiality designation, timely response, impartial/timely investigation, documentation/tracking, appropriate remedies, timely closure (b)(4); provides a complaint channel that bypasses the employee’s immediate supervisor (b)(5); requires supervisors to report misconduct internally (b)(6); commits to a fair, timely, thorough investigation with due process (b)(7); discloses that confidentiality will be maintained “to the extent possible”, not guaranteed (b)(8); commits to remedial action if misconduct is found (b)(9); prohibits retaliation for complaints/participation (b)(10); and links to the Department’s online sexual-harassment training courses (b)(11).
- **2 CCR § 11023(c)–(e) — Dissemination and posting** — Policy must be disseminated by at least one specified method under (c)(1)–(5) (signed acknowledgment, tracked e-mail, tracked intranet posting, new-hire

orientation, or an equivalent method); a Department-developed transgender-rights poster must be posted (d); and where 10% or more of the workforce at any facility speaks a language other than English, the policy must be translated into every language spoken by at least 10% of the workforce (e).

5.3 — Mandatory Sexual Harassment Prevention Training [↑ TOC](#)

- 2 CCR § 11024(a)(2), (4), (6), (10) — Definitions** — Defines “effective interactive training” at (a)(2) (classroom, e-learning with a two-business-day trainer response guarantee, webinar with documented attendance/participation, or the Department’s online courses); “employer” at (a)(4), (6) (5+ employees/contractors, including out-of-state); “trainer” qualifications at (a)(10)(A)–(B) (attorneys admitted to the bar for 2+ years whose practice includes FEHA and/or Title VII employment law; HR professionals/harassment-prevention consultants/peer trainers with 2+ years relevant practical experience; or law-school/college instructors with 20 hours or 2+ years teaching employment law) and the 11 subject areas a qualified trainer must be able to teach (a)(10) (the required course content itself is set out at (c)(2)(A)–(M)).
- 2 CCR § 11024(b)(1)–(6) — Frequency and tracking** — One hour of training for non-supervisory employees, two hours for supervisory employees, once every two years, tracked either per-individual or by a designated “training year” (b)(1)(A)–(B). New employees/new supervisors must be trained within six months of hire/promotion (b)(4)–(5). Newly formed businesses (post-1/1/2021) must train within six months of formation (b)(3). Documentation (names, dates, sign-in sheets, certificates, materials, trainer identity) must be retained for a minimum of two years (b)(2). Training received from a prior/joint employer within the prior two years, or via a Labor Commissioner work permit requiring equivalent training, need not be repeated, but the employer must give the employee its anti-harassment policy to read and acknowledge within six months of assuming the new position, and the current employer bears the burden of establishing that the prior training was legally compliant (b)(6).
- 2 CCR § 11024(b)(7) — Duration/segmenting of training** — Training may be completed in segments so long as the combined segments meet or exceed the applicable hourly requirement; for classroom or webinar training, no segment may be shorter than half an hour. E-learning courses may include bookmarking so the employee can pause, provided the total program time is one hour (non-supervisory) or two hours (supervisory).
- 2 CCR § 11024(b)(9) — Seasonal/temporary employees** — Employees hired to work less than six months must be trained within 30 calendar days of hire or within 100 hours worked, whichever comes first (using the first day of work as the “hire date” if the employee has not worked within 30 days of being hired); employees hired for less than 30 calendar days AND less than 100 hours are not required to be trained. For temporary-services employees, the temporary services employer — not the client — must provide the training and both entities’ anti-harassment policies.
- 2 CCR § 11024(c)(1)–(2) — Objectives and content** — Training must be designed to change/modify workplace behaviors contributing to harassment, inform trainees of the negative effects of “abusive conduct,” and foster values that prevent and correct misconduct (c)(1). Required content topics at (c)(2)(A)–(M) include FEHA/Title VII definitions and case law, types of harassing conduct, available remedies, prevention strategies, supervisors’ reporting obligations, practical/scenario-based examples, the limited confidentiality of the complaint process, resources for victims, remedial-measures training, guidance for a supervisor who is personally accused, and the essential elements of — and how to use — the employer’s anti-harassment policy (which must be distributed to, read, and acknowledged by each employee) (c)(2)(L). A detailed “abusive conduct” discussion is separately required at (c)(2)(M).

5.4 — Retaliation [↑ TOC](#)

- **2 CCR § 11021(a)** — Unlawful to demote, suspend, reduce, fail to hire/consider, fail to give equal consideration, give a negative reference, adversely affect working conditions, or otherwise deny an employment benefit because the individual opposed a prohibited practice or filed/participated in a Council or Department complaint, investigation, proceeding, or hearing.
- **2 CCR § 11021(a)(1)(A)–(E), (a)(2)(A)–(B)** — “Opposition” broadly includes seeking Department/Council advice (regardless of whether a complaint is filed or sustained), assisting others in doing so, opposing what the individual reasonably believes to be a violation, being perceived as opposing discrimination (regardless of actual intent), and contacting/participating with a local human/civil rights agency. “Assistance/participation” includes good-faith contact with the Department/Council and being a potential witness the employer perceives as participating in an investigation.
- **2 CCR § 11021(b) — Discipline exception** — Reasonable, non-discriminatory disciplinary policies and legitimate business-interest determinations (e.g., that conduct was disruptive or detrimental) are unaffected.

CROSS-REFERENCE

The Article-11-specific retaliation rule for CFRA leave appears at 2 CCR § 11094 (Part 8.8), and is “in addition to,” not a substitute for, the general retaliation rule digested here.

PRACTICE POINT

Sections 5.2 and 5.3 are useful tools for designing the framework for compliance and training programs for employers to meet statutory obligations.

Part 6 — Disability Discrimination & Reasonable Accommodation [↑ TOC](#)

Article 9 (2 CCR §§ 11064–11073). This is the most granular substantive article in the package and should be read together with the disability-related ADS provisions in [Part 2](#) and the general defenses in [Part 1](#).

6.1 — Purpose, Scope, and Broad Construction [↑ TOC](#)

- **2 CCR § 11064(b)** — Regulations are to be “broadly construed” to protect against actual or perceived physical/mental disability or medical condition discrimination; the primary focus of FEHA disability cases should be on reasonable accommodation, the interactive process, and whether discrimination occurred — not on an extensive analysis of whether the disability definition is technically met.
- **2 CCR § 11064(c)** — Incorporates Articles 1 and 2 (General Matters and Particular Employment Practices) unless specifically modified.

6.2 — Key Definitions [↑ TOC](#)

- **2 CCR § 11065(a)(1)–(3) — Assistive animals** — Covers guide dogs, signal dogs, service dogs, and “support dogs”/other animals providing emotional or cognitive support (e.g., for traumatic brain injury or major

depression); minimum behavioral standards (odor/waste control, no danger to health/safety) may be required by the employer under (a)(2).

- **2 CCR § 11065(b) — “Business Necessity”** — As used in this article regarding medical or psychological examinations, means that the need for the disability inquiry or medical examination is vital to the business.
- **2 CCR § 11065(d)(1)–(9) — “Disability” (broadly construed)** — Covers mental disability at (d)(1) (including autism spectrum disorders, schizophrenia, clinical depression, bipolar disorder, PTSD, OCD), physical disability at (d)(2) (affecting an enumerated list of body systems and limiting a major life activity — includes HIV/AIDS, epilepsy, diabetes, multiple sclerosis), “special education” disability at (d)(3), “record or history of” disability at (d)(4), and “perceived” disability at (d)(5)–(6) (regarded/treated as having a disability, including based on taking medication). “Medical condition” is separately defined at (d)(7) to mean either a cancer-related physical or mental health impairment (from a diagnosis, record, or history of cancer) or a statutorily defined “genetic characteristic.” The ADA and its 2008 Amendments apply where they provide broader protection than FEHA and are incorporated by reference to that extent under (d)(8). Excluded under (d)(9)(A)–(B): compulsive gambling, kleptomania, pyromania, current unlawful controlled-substance use disorders, “sexual behavior disorders” (defined at (q) as pedophilia, exhibitionism, and voyeurism), and mild/non-limiting conditions with little residual effect (common cold, minor sprains, non-migraine headaches).
- **2 CCR § 11065(e)(1)–(3) — “Essential job functions”** — The fundamental job duties the applicant or employee with a disability holds or desires; a function may be essential because the position exists to perform it, because too few employees are available to distribute the duty among, or because it is highly specialized (e)(1)(A)–(C). Evidence includes the employer’s judgment, written job descriptions, time spent on the function, the consequences of not requiring it, CBA job descriptions, and past/current incumbents’ experience (e)(2)(A)–(H). Marginal functions — those that could be eliminated, reassigned, or performed differently without eliminating the job — are excluded (e)(3).
- **2 CCR § 11065(i)(1)–(3) — “Health care provider”** — A licensed medical or osteopathic doctor, physician, or surgeon who directly treats or supervises treatment (i)(1); or a licensed marriage and family therapist, acupuncturist, or other FMLA-recognized provider, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners/midwives, clinical social workers, and physician assistants (i)(2); or any provider whose certification an employer, other covered entity, or group health plan will accept to substantiate a benefits claim (i)(3).
- **2 CCR § 11065(k) — “Job-related”** — As used in 2 CCR §§ 11070, 11071, and 11072, means tailored to assess the employee’s ability to carry out the essential functions of the job or to determine whether the employee poses a danger to the employee or others due to disability.
- **2 CCR § 11065(l)(1)–(3) — “Major life activities”** — Broadly defined at (l)(1)–(2) to include caring for oneself, manual tasks, sensory functions, sleeping, working, and communicating, plus major bodily functions (immune, digestive, neurological, respiratory, endocrine, etc.). “Limits” means makes achievement “difficult” under (l)(3)(A) — an individualized inquiry determined without regard to mitigating measures (with narrow exceptions) per (l)(3)(C), and episodic/remission conditions still qualify if they would limit a major life activity when active per (l)(3)(E).
- **2 CCR § 11065(m) — “Medical or psychological examination”** — A procedure or test performed by a health care provider that seeks or obtains information about an individual’s physical or mental disabilities or health.
- **2 CCR § 11065(n)(1)–(7) — “Mitigating measure”** — A treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability, including medications, medical supplies/equipment, low-vision devices, prosthetics, hearing aids/cochlear implants, mobility devices, oxygen equipment, and assistive animals (n)(1); assistive technology such as wheelchairs, braces, and canes (n)(2); auxiliary aids and services such as interpreters, readers, and equipment modification (n)(3); learned behavioral or adaptive neurological

modifications (n)(4); surgical interventions except those that permanently eliminate a disability (n)(5); psychotherapy, behavioral therapy, or physical therapy (n)(6); and reasonable accommodations themselves (n)(7).

- **2 CCR § 11065(o) — “Qualified individual”** — For purposes of disability discrimination, an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the position’s essential functions.
- **2 CCR § 11065(p)(1)–(2) — “Reasonable accommodation”** — Modifications effective in providing an equal opportunity to be considered for a job, to perform essential functions, or to enjoy equivalent benefits/privileges. (p)(2) lists 15 illustrative categories (A)–(O), including accessible facilities, assistive animals, worksite transfer, assistive aids/interpreters, job restructuring, modified schedules, altered timing/method of performing a function, policy modification, additional training, telework, paid/unpaid leave (cross-referencing 2 CCR § 11068(c)), and reassignment to a vacant position (cross-referencing 2 CCR § 11068(d)).
- **2 CCR § 11065(r)(1)–(5) — “Undue hardship”** — A significant-difficulty-or-expense standard assessed under the totality of the circumstances, considering net accommodation cost net of tax credits/outside funding (r)(1), the facility’s (r)(2) and the broader entity’s (r)(3) overall financial resources and size, operational type/structure (r)(4), and geographic/administrative/fiscal separateness of facilities (r)(5).

PRACTICE POINT

Take special note of the specific applications of the terms “business necessity” and “job related” in the context of medical examinations, including fitness for duty evaluations.

6.3 — Pre-Employment Practices & Recruiting [↑ TOC](#)

- **2 CCR § 11070(a)–(c)** — Equal recruitment consideration regardless of disability (a); prohibited discouraging advertising, including via ADS (a)(2); a detailed list of prohibited general/likely-to-elicitor-disability-information inquiries pre-offer at (b)(2)(A)–(H) (eight examples given, e.g., “Have you ever been hospitalized?”, “What prescription medications are you taking?”); permissible job-related inquiries about ability to perform essential functions remain available under (b)(3), and limited accommodation-focused inquiries are allowed once accommodation is requested or an obvious disability triggers a reasonable belief that accommodation is needed; required interview accommodations (interpreters, accessible rooms) appear at (c).

6.4 — Medical/Psychological Examinations & Inquiries [↑ TOC](#)

- **2 CCR § 11071 (general structure)** — Regulates when an employer may conduct disability-related inquiries or medical/psychological examinations at each stage of employment (pre-offer, post-offer/pre-start, and during employment), subject to job-relatedness/business-necessity, and recognizes exceptions including compliance with other federal/state safety-regulation-mandated exams (e.g., DOT interstate driver physicals every two years, airline pilot medical requirements) at (d)(3)(B) and voluntary wellness programs at (d)(3)(C) (which may include disability-related questions/exams without a job-relatedness showing, provided participation is not required or penalized and records are kept confidential and separate from personnel files).
- **2 CCR § 11071(d)(4) & (e)** — Employers must keep medical/psychological information confidential per 2 CCR § 11069(g) (d)(4); and a “medical or psychological examination” or disability-related inquiry expressly includes one administered through an ADS — a test, question, puzzle, game, or other challenge likely to elicit disability information (e).

6.5 — The Interactive Process [↑ TOC](#)

- **2 CCR § 11069(a)–(b) — Trigger** — A timely, good-faith interactive process is required whenever needed to identify/implement effective accommodation (a); it is triggered by an applicant/employee request, employer awareness through a third party or observation, or employer awareness of a possible need arising from exhaustion of workers’-compensation, CFRA/FMLA, or other leave where further accommodation appears necessary (b)(1)–(3). An employer’s offer to engage in the interactive process in this last scenario does not itself violate the medical-privacy limits of 2 CCR § 11091(b).
- **2 CCR § 11069(c)(1)–(9) — Employer obligations** — Nine enumerated obligations, including: grant or reject (with alternatives discussion) the requested accommodation after due consideration (c)(1); require reasonable medical documentation only where the disability/need is not obvious and not already documented (c)(2); not inquire into the underlying medical cause once reasonable documentation is received (c)(3); identify what clarification is needed and give reasonable time to supply it (c)(4); analyze the essential job functions and consult experts as needed (c)(5)–(6); and, for reassignment, ask about qualifications/experience consistent with 2 CCR § 11068(d) (c)(9).
- **2 CCR § 11069(d)(1)–(6) — Applicant/employee obligations** — Cooperate in good faith, including providing reasonable medical documentation (without disclosing the nature of the disability) where not obvious (d)(1); provide reassignment-relevant qualifications information (d)(2); an inability to engage due to the disability itself does not constitute a breach by either side (d)(3). (d)(5) details what “required medical information” an employer may demand (provider’s name/credentials, a description of the limiting condition and accommodation need, without requesting unrelated documentation such as complete medical records) and the cure process for insufficient documentation. (d)(6): even where documentation is insufficient, the employer must still provide accommodation to the extent supported by whatever documentation has been provided to date.
- **2 CCR § 11069(d)(7)–(10) — Examinations and documentation** — Any medical examination by the employer’s chosen provider must be job-related and consistent with business necessity, limited to the functional limitation(s) requiring accommodation (d)(7); if the employer requires the applicant/employee to see a provider of the employer’s choice, the employer must pay all costs and allow time off for the visit, for which the employee may use sick leave (d)(8); for intermittent or reduced-schedule leave for planned medical treatment, reasonable medical documentation must establish medical necessity and an estimated schedule/duration (d)(9); and for leave addressing unforeseeable episodes of incapacity (e.g., migraines, seizures), reasonable medical documentation must establish medical necessity and an estimated frequency/duration of episodes (d)(10).
- **2 CCR § 11069(e) — Assistive animals** — Before allowing an assistive animal into the workplace as a reasonable accommodation, the employer may require a letter from the employee’s health care provider explaining the disability and why the animal is necessary, plus confirmation that the animal meets the standards of 2 CCR § 11065(a)(2); the employer may challenge that the animal meets those standards within the first two weeks based on objective evidence of offensive or disruptive behavior, and may require annual recertification of the continued need.
- **2 CCR § 11069(f) — Accommodations extending beyond one year** — For reasonable accommodations extending beyond one year, employers may request medical documentation substantiating the continued need on a yearly basis.
- **2 CCR § 11069(g)(1)–(3) — Confidentiality of medical files** — Medical information/records obtained during the interactive process must be kept in separate, confidential medical files apart from the personnel file, except that supervisors/managers may be told of work restrictions and necessary accommodations (g)(1), first-aid/safety personnel may be told a condition may require emergency treatment (g)(2), and government officials investigating compliance must be given relevant information on request (g)(3).

PRACTICE POINT

§§ 11069(c) and (d) provide parties with important guidance regarding each party's rights and obligations during the interactive process, and can be integrated into policies, trainings, and compliance programs.

PRACTICE POINT

While forms and documentation are important, parties should understand that these rules reflect the components of a larger conversation that the interactive process is designed to foster. Parties should be sure to take a holistic view of the communications in order to fulfill their obligation to engage in the process in good faith.

PRACTICE POINT

The interactive process is the most frequently litigated aspect of FEHA disability cases. Oftentimes whoever is found to have caused the breakdown of the interactive process loses the case.

6.6 — Reasonable Accommodation Obligations [↑ TOC](#)

- **2 CCR § 11068(a) — Affirmative duty** — An employer must accommodate a known disability unless it can show, after the interactive process, that accommodation would be an undue hardship.
- **2 CCR § 11068(b)** — No requirement to lower an essential quality/quantity standard, though accommodation to help the employee meet the standard may be required.
- **2 CCR § 11068(c) — Leave as accommodation** — Holding a job open, or extending CFRA/FMLA/other leave, can be a reasonable accommodation if likely to be effective and not an undue hardship; an employer may not require leave where another accommodation would let the employee work; indefinite leave is not required.
- **2 CCR § 11068(d)(1)–(5) — Reassignment to a vacant position** — Required in four enumerated circumstances at (d)(1)(A)–(D) (can no longer perform own job even with accommodation; accommodation of own job is an undue hardship; both parties agree reassignment is preferable; or employee needs reassignment for access to medical treatment); may include reassignment to a lower-graded/paid position if no comparable vacancy exists per (d)(2); temporary reassignment is not itself a required accommodation but may be offered per (d)(3); no obligation to create a new position per (d)(4); the disabled employee gets preferential consideration for a vacancy over other applicants, but a bona fide seniority system need not ordinarily be overridden absent special circumstances per (d)(5).
- **2 CCR § 11068(e)–(k)** — Employer must consider all reasonable accommodations of which it is aware, but may select among effective options (e); an employee cannot be forced to accept an accommodation, and cannot be retaliated against for declining one, though may be told that declining could render them unable to perform essential functions (f); residual-effects accommodation may be owed to someone with a record of disability (g); accessibility standards reference Title 24 of the State Building Code (h); a “100% healed”/“fully healed” policy is prohibited absent individualized assessment (i); undue hardship is a permissible defense to a failure-to-accommodate claim (j); and retaliation for requesting accommodation is unlawful regardless of whether the request was granted (k).

6.7 — Qualification Standards, Testing & Employee Selection [↑ TOC](#)

- **2 CCR § 11072(a)** — No denial of an employment benefit based on the prospective need for future accommodation.
- **2 CCR § 11072(b)(1)–(4)** — Qualification standards/tests/ADS that screen out on disability, or on uncorrected vision/hearing, are unlawful unless job-related, consistent with business necessity, and no less-discriminatory alternative exists (b)(1)–(2); physical agility/strength tests must be job-related (b)(4).
- **2 CCR § 11072(b)(5)(A)–(G)** — Detailed testing-accommodation obligations: accessible test sites; Braille/enlarged print/screen readers/oral presentation for visually impaired candidates; writing assistance or voice-recognition software for quadriplegic/spinal-cord-injured candidates; interpreter services for hearing-impaired candidates; additional time for candidates whose disability affects reading/processing/communication; and, notably, (b)(5)(F): an ADS alone, without additional process, does NOT constitute the individualized assessment required where test modification is inappropriate.
- **2 CCR § 11072(c)** — No genetic-information testing absent GINA-authorized purposes.

6.8 — Defenses Specific to Disability [↑ TOC](#)

- **2 CCR § 11067(b)–(d) — Health/safety defenses** — After the interactive process, an employer may show no reasonable accommodation exists that avoids an imminent and substantial risk to the disabled individual’s own health/safety (b), or to others’ (c) — but a mere future-risk condition that does not presently interfere with safe job performance is not a defense (d).
- **2 CCR § 11067(e)(1)–(5) — Factors** — Duration of risk, nature/severity of potential harm, likelihood and imminence of harm, and the individual’s past work history.

CROSS-REFERENCE

2 CCR § 11067(a) also incorporates every Article 1 defense ([Part 1.5](#)), including business necessity and BFOQ.

6.9 — Fringe Benefits [↑ TOC](#)

- **2 CCR § 11073(a)** — Unlawful to condition any employment decision regarding a disabled applicant/employee on waiver of a fringe benefit.

PRACTICE POINT

“Denial-of-accommodation” and “failure-to-engage-in-the-interactive-process” claims are analyzed differently than ordinary disparate-treatment discrimination — the “substantial motivating factor” standard of 2 CCR § 11009(c) (§1.4) does NOT apply to them. Build a separate proof outline for accommodation/interactive-process claims keyed to 2 CCR §§ 11068–11069 rather than importing the general discrimination burden-shifting framework.

PRACTICE POINT

Consider using regulatory language in this part as a source for crafting special jury instructions at trial where standard jury instructions — e.g., CACI — fall short.

Part 7 — Pregnancy, Childbirth & Related Medical Conditions (PDL) [↑ TOC](#)

Article 6 (2 CCR §§ [11035](#), [11038–11047](#), [11049–11051](#)). Governs Pregnancy Disability Leave (PDL) under Government Code § [12945](#), separately from (but often interacting with) CFRA leave ([Part 8](#)).

7.1 — Key Definitions [↑ TOC](#)

- **2 CCR § 11035(a) — “Affected by pregnancy”** — Means that because of pregnancy, childbirth, or a related medical condition — as set forth in Gov. Code § [12945](#) — it is medically advisable for an employee to transfer or otherwise be reasonably accommodated by her employer.
- **2 CCR § 11035(d) — “Condition related to pregnancy, childbirth”** — Includes lactation; lactation without medical complications is generally not a disabling condition requiring PDL, though it may support a transfer or other accommodation.
- **2 CCR § 11035(f) — “Disabled by pregnancy”** — A health-care-provider determination that the employee cannot perform one or more essential job functions, or cannot do so without undue risk to herself, the pregnancy, or others; expressly includes severe morning sickness, prenatal/postnatal care, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, childbirth, and loss/end of pregnancy or recovery therefrom (non-exclusive, illustrative list); expressly includes a transgender individual disabled by pregnancy.
- **2 CCR § 11035(i) — “Employment in the same position”** — Employment in, or reinstatement to, the position the employee held prior to reasonable accommodation, transfer, or disability leave because of pregnancy.
- **2 CCR § 11035(j) — “Employment in a comparable position”** — Employment in a position virtually identical to the employee’s prior position in pay, benefits, and working conditions — including privileges, perquisites, and status — involving the same or substantially similar duties/responsibilities requiring substantially equivalent skill, effort, responsibility, and authority, at the same or a geographically proximate worksite, ordinarily with the same or an equivalent shift/schedule.
- **2 CCR § 11035(l) — “Four months”** — The number of days the employee would normally work within four calendar months (one-third of a year, or 17½ weeks) if the leave is taken continuously; for an employee with a varying schedule, a monthly average of hours worked over the prior four months is used to calculate the normal work month.
- **2 CCR § 11035(n)(1)–(3) — “Health care provider”** — A licensed medical or osteopathic doctor, physician, or surgeon who directly treats or supervises treatment of the pregnancy/childbirth/related condition (n)(1); or a licensed marriage and family therapist, acupuncturist, or other FMLA-recognized provider — including nurse practitioners/midwives, licensed midwives, clinical psychologists/social workers, chiropractors, and physician assistants (n)(2); or any provider whose certification an employer or group health plan will accept to substantiate a benefits claim (n)(3).
- **2 CCR § 11035(o) — “Intermittent leave”** — Leave taken in separate periods of time because of pregnancy rather than for one continuous period — e.g., occasional medical appointments, or several days at a time over a period of months.
- **2 CCR § 11035(p) — “Medical certification”** — A written communication, as specified in 2 CCR § [11050](#)(b)(6) and (b)(7), from the employee’s health care provider stating that the employee is disabled because of pregnancy or that it is medically advisable for the employee to be transferred to a less strenuous/hazardous position or otherwise reasonably accommodated.

- **2 CCR § 11035(q) — “Perceived pregnancy”** — Being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition.
- **2 CCR § 11035(r) — “Pregnancy disability leave”** — Any leave, paid or unpaid, taken by an employee for any period(s) up to a total of four months during which she is disabled by pregnancy.
- **2 CCR § 11035(s)(1)–(5) — “Reasonable accommodation” of pregnancy** — Includes modifying work practices/policies/duties/schedules, providing furniture (stools/chairs) or equipment, and providing lactation break time/space per the Labor Code.
- **2 CCR § 11035(u) — “Related medical condition”** — Mastitis, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, and loss/end of pregnancy or its recovery.

7.2 — Employer & Other Covered Entity Obligations [↑ TOC](#)

- **2 CCR § 11038(a)–(b)** — For covered entities other than employers, pregnancy/perceived-pregnancy discrimination is treated as sex discrimination under Gov. Code §§ [12926](#), [12940](#), [12943–44](#) (a); ADS-driven discrimination on this basis is separately prohibited (b).
- **2 CCR § 11039(a)(1)(A)–(K)** — Comprehensive list of prohibited employer conduct absent a permissible defense: refusal to hire/select for training/promote because of pregnancy or perceived pregnancy; barring/discharging on that basis; discriminatory terms/conditions; harassment; involuntary transfer over the employee’s objection (except as permitted at 2 CCR § [11041](#)(c), and subject to the employer’s right to transfer for legitimate, unrelated operational needs); forcing unrequested leave; retaliation for opposition/participation in a FEHA proceeding; and ADS/selection-criteria discrimination.
- **2 CCR § 11039(a)(2)(A)–(F)** — Separately prohibits, absent a permissible defense: refusal to provide equivalent employee benefits for pregnancy as set forth at 2 CCR § [11044](#) (A); refusal to maintain and pay for group health coverage during PDL as set forth at 2 CCR § [11044](#) (B); refusal to provide reasonable accommodation as set forth at 2 CCR § [11040](#) (C); refusal to transfer as set forth at 2 CCR § [11041](#) (D); refusal to grant pregnancy disability leave as set forth at 2 CCR § [11042](#) (E); and any denial, interference, or retaliation regarding these rights (F).

7.3 — Reasonable Accommodation and Transfer [↑ TOC](#)

- **2 CCR § 11040(a)–(c)** — An employer may not deny a reasonable accommodation requested on a health-care provider’s advice where the requested accommodation is itself reasonable — a case-by-case totality-of-circumstances determination per (a)(2)(A); accommodation (e.g., job restructuring) does not itself reduce the separate four-month PDL entitlement, UNLESS the accommodation itself reduces hours worked (e.g., reduced schedule/intermittent leave), in which case those hours may be deducted from the four-month entitlement per (b); medical certification may be required but is not mandatory per (c).
- **2 CCR § 11041(a)–(d)** — Where an employer has a policy/CBA for transferring temporarily disabled employees to less strenuous/hazardous duties, it must apply that policy to pregnancy-disabled employees who request it (a)(1); a transfer request otherwise must be granted where medically advisable and can be reasonably accommodated (no obligation to create a position, discharge another employee, violate a CBA, bump a more senior employee, or promote/transfer an unqualified employee) per (a)(2) — the employer may, but need not, require medical certification substantiating the need for transfer as set forth in 2 CCR §§ [11049](#)(a)–(b) and [11050](#)(b) per (a)(2)(C); the employer bears the burden of proving the transfer cannot be reasonably accommodated per (b); and where a medically certified need for intermittent/reduced-schedule leave exists, the employer MAY require a temporary transfer to an available alternative position with equivalent pay/benefits that better accommodates the schedule (need not have equivalent duties) per (c). Reinstatement rights on ending a transfer are governed by 2 CCR § [11043](#) per (d).

PRACTICE POINT

Take note the statute and regulation contain no “undue hardship” defense to reasonable accommodation for pregnancy.

7.4 — Pregnancy Disability Leave Itself [↑ TOC](#)

- **2 CCR § 11042(a)(1)–(2)** — All employers must provide up to four months of leave for actual periods of pregnancy disability — even employers whose general disability-leave policy is less generous. The entitlement is up to four months per pregnancy, not per year (a)(1). “Four months” = 17½ weeks, calculated on a pro-rata basis for part-time/variable schedules under (a)(2) (e.g., 693 hours for a 40-hour/week employee; 346.5 hours for a 20-hour/week employee); need not be taken continuously. Intermittent/reduced-schedule use is accounted for in increments no greater than one hour (or the employer’s shortest leave-accounting increment, whichever is smaller) per (a)(2)(B), and using intermittent leave during pregnancy proportionally reduces the hours available around childbirth per (a)(3) — illustrated with worked examples in the regulation for full-time versus part-time employees.
- **2 CCR § 11042(b)–(c)** — A more generous employer leave policy for other temporary disabilities must be extended to pregnancy (b); and denying PDL to an employee who gave reasonable notice and has a supporting health-care-provider opinion is a per se unlawful employment practice (c).

PRACTICE POINT

Always be sure to cross-check with leave as a reasonable accommodation as described in § 11068(c) for potential additional protected leave.

7.5 — Terms of Leave: Pay, Benefits, Seniority [↑ TOC](#)

- **2 CCR § 11044(a)–(b)** — PDL is unpaid unless the employer pays other temporary disability leaves (state disability insurance may separately be available) (a); the employer may require, or the employee may elect, use of accrued sick leave (b)(1), and the employee may elect to use vacation/PTO (b)(2), during the unpaid portion.
- **2 CCR § 11044(c)(1)–(3)** — Group health coverage must be maintained and paid for by the employer at the same level/conditions as if actively working, for the duration of PDL up to four months (longer if the employer chooses) per (c)(1); this obligation is SEPARATE from and does NOT count toward the employer’s separate 12-week CFRA group-health obligation, even where PDL is designated as FMLA leave, per (c)(2); premium recoupment from the employee is permitted under (c)(3) only if the employee fails to return for a reason other than taking CFRA leave, a continuing/recurring pregnancy-related condition, a non-pregnancy medical condition requiring further leave, or a circumstance beyond the employee’s control (including employer-caused failure to reinstate, or the need to care for a child born with a serious health condition).
- **2 CCR § 11044(d)–(e)** — Seniority accrues during PDL to the same extent as any other employer-granted unpaid disability leave (d); the employee returns with no less seniority than when the leave began and retains full “employee status” — no break in service for seniority/benefit-plan purposes (e); benefits resume at the same level with no new qualification period or physical exam.

7.6 — Reinstatement [↑ TOC](#)

- **2 CCR § 11043(a)–(c)(3)** — A pregnancy-disabled employee is guaranteed reinstatement to the same position (or, where excused under (c)(1), a comparable position), in writing on request (a); only one written guarantee is

required even for intermittent/reduced-schedule leave. Refusal-to-reinstate proof standards at (b)(1)–(2) mirror the CFRA framework ([Part 8](#)): a definite agreed date, or (absent agreement) reinstatement within two business days of the employee’s notice of readiness to return. Defenses at (c)(1)–(3): the employee would not otherwise have remained employed in the same position for legitimate, leave-unrelated business reasons (e.g., a plant-closure layoff), or — for a comparable position — no comparable position was or became available within 60 calendar days, subject to an employer’s affirmative duty to notify the employee of openings by a reasonably calculated method.

- **2 CCR § 11043(d)–(e)** — Equal-treatment principle: an employee who remains on some other form of leave after PDL ends must receive the same reinstatement rights as any other similarly situated employee under a comparable-length leave policy (d); and where an employee transitions from PDL directly into CFRA leave for the birth of the child, reinstatement is thereafter governed by CFRA (2 CCR § [11089](#)), not by (c)(1)–(2) (e).

7.7 — Interaction with CFRA and FMLA [↑ TOC](#)

- **2 CCR § 11045(a)–(b)** — A pregnancy-covered employer/employee may, up to 12 weeks, have PDL run concurrently with FMLA entitlement.
- **2 CCR § 11046(a)–(d)** — PDL and CFRA are separate, distinct entitlements (a) — an employee’s own pregnancy-related disability is NOT a “serious health condition” under CFRA (b); a CFRA-eligible employee may take up to 12 workweeks of CFRA leave for the birth of the child at the end of PDL (or four months, whichever comes first) with no requirement that the employee no longer be disabled (c)(1); combined maximum statutory entitlement (PDL + CFRA for the birth) is 29½ workweeks (d).
- **2 CCR § 11047 — Relationship between PDL and disability leave of absence** — The right to take pregnancy disability leave is separate and distinct from the right to a leave of absence as a reasonable accommodation for physical or mental disability under Gov. Code § [12940](#). At the end or depletion of PDL, an employee with a physical or mental disability (whether or not pregnancy-related) may be entitled to reasonable-accommodation leave under § [12940](#); entitlement is determined case-by-case under the disability-discrimination standards of Article 9 and is not diminished by the employee’s exercise of her PDL right.

CROSS-REFERENCE

The parallel, more detailed CFRA-side treatment of this interaction appears at 2 CCR § [11093](#) ([Part 8.10](#)) — read [§7.7](#) and [§8.10](#) together for the full PDL/CFRA sequencing picture.

7.8 — Notice and Certification [↑ TOC](#)

- **2 CCR § 11049(a)–(d)** — Employers must give reasonable advance notice of FEHA pregnancy rights/obligations — right to request accommodation/transfer/PDL, the employee’s own notice obligations under 2 CCR § [11050](#), and any medical-certification requirement (a)–(b); notice must be posted, and a copy given as soon as practicable after the employer learns of the pregnancy or an inquiry is made (d)(1)–(2); a 10%+ non-English-speaking workforce triggers translation obligations, and individualized notice in an employee’s primary language is required once the employer knows of both the pregnancy and the employee’s limited English proficiency (d)(4). Compliance with the notice requirements of (d) constitutes reasonable advance notice (c)(1); failure to provide reasonable advance notice precludes the employer from taking adverse action — including denying accommodation, transfer, or PDL — for the employee’s failure to give adequate advance notice (c)(2). An employer may offer a leave policy more generous than FEHA requires so long as it is provided to all similarly situated disabled employees, and may develop its own notice or use the model text at 2 CCR § [11051](#) unless it does not accurately reflect the employer’s own policy (e).

- **2 CCR § 11050(a)(1)–(7) — Employee notice obligations** — Timely oral/written notice of the need for accommodation/transfer/PDL, generally 30 days’ advance notice for foreseeable needs (mirroring the CFRA structure in [Part 8](#)), “as soon as practicable” for emergencies (a)(3), no denial for lack of advance notice in an emergency (a)(4), and an employer response deadline of 10 calendar days (a)(5) — longer than CFRA’s five-business-day standard (see [Part 8.3](#)).
- **2 CCR § 11050(b)(1)–(9) — Medical certification** — An employer must notify the employee of the certification requirement and provide any required form each time certification is needed (b)(1); Detailed content and timing requirements (generally at least 15 calendar days to provide certification per (b)(2)), the employer must request certification at the time notice is given or within two business days thereafter (or, for unforeseen leave, within two business days after the leave commences), and may request certification at a later date if it later has reason to question the appropriateness or duration of the accommodation, transfer, or leave (b)(3); the employer must advise the employee of the consequences of failing to provide adequate certification and give a reasonable opportunity to cure any deficiency (b)(4); and where the employer’s own sick/medical leave plan has less stringent certification requirements, only those less stringent requirements may be imposed if the employee/employer elects to substitute other leave for unpaid PDL (b)(5); including what makes a certification sufficient for accommodation/transfer per (b)(6) versus for a disability leave per (b)(7); the employer must accept a compliant certification and may not demand additional information beyond what these regulations allow per (b)(8).
- **2 CCR § 11050(c)(1)–(2) — Failure to provide medical certification** — For a foreseeable need, the employer may delay reasonable accommodation, transfer, or PDL until certification is provided, where the employer requested it (generally allowing 15 calendar days) (c)(1); where the need is unforeseeable, or for recertification, the employee must provide certification within the employer’s requested timeframe (at least 15 days) or as soon as reasonably possible — in a medical emergency, 15 days may not be practicable — and the employer may delay continuation of the accommodation, transfer, or leave if certification is not provided within a reasonable time (c)(2).
- **2 CCR § 11050(d)–(e)** — A return-to-work release may be required only if uniformly applied to similarly situated employees returning from non-pregnancy disability leave/transfer (d); (e) reproduces a model “Certification of Health Care Provider” form.
- **2 CCR § 11051** — Reproduces the required “Your Rights and Obligations as a Pregnant Employee” notice text in full — useful as a compliance-audit checklist against an employer’s actual posted/distributed notice.

Part 8 — California Family Rights Act (CFRA) Leave [↑ TOC](#)

Article 11 (2 CCR §§ [11087–11095](#), [11097](#)). CFRA leave is separate and distinct from PDL ([Part 7](#)) though the two frequently interact; also interacts with the federal FMLA, whose implementing regulations’ definitions (29 C.F.R. Part [825](#), effective 3-8-2013) also apply to Article 11 to the extent not inconsistent with the CFRA-specific definitions below (2 CCR § [11087](#), preamble).

8.1 — Key Definitions [↑ TOC](#)

- **2 CCR § 11087(a)(1)–(2) — “Certification”** — For family care leave, need not identify the underlying condition but must state the date of onset, probable duration, an estimate of caregiving time needed, and that the condition “warrants the participation of the employee” (which includes psychological comfort and arranging

third-party care, not only hands-on medical care) per (a)(1)(A)–(D). For an employee’s own medical leave, the certification need not (but may, at the employee’s option) identify the condition; “unable to perform the function of the employee’s position” means the employee is unable to perform any one or more of the position’s essential functions; the certification must state the date of onset (if known), the probable duration, and that the employee is unable to work at all or unable to perform one or more essential functions due to the serious health condition, per (a)(2)(A)–(C).

- **2 CCR § 11087(c) — “Child”** — A biological, adopted, or foster child, a stepchild, a legal ward, a child of the employee or the employee’s domestic partner, or a person to whom the employee stands in loco parentis (a biological or legal relationship is not required).
- **2 CCR § 11087(d)(1)–(3) — “Covered employer”** — Any person/entity directly employing five or more individuals (including successors in interest), whether at the same location or full-time, plus the state and its political subdivisions regardless of headcount; “directly employs” counts an aggregate of five or more part-/full-time employees on any part of the day the conduct occurred, or on a regular basis, including employees on paid or unpaid leave (d)(1); excludes independent contractors but includes commissioned workers (d)(2); and two or more businesses may be joint employers under CFRA based on the totality of the economic-realities relationship — e.g., shared/interchanged employees, or common control (d)(3)(A)–(C).
- **2 CCR § 11087(e) — “Designated person”** — Any individual related by blood, or whose association with the employee is the equivalent of a family relationship; the employee identifies this person at the time leave is requested; an employer may limit the employee to one designated person per 12-month period.
- **2 CCR § 11087(g)(1)(A)–(3) — “Eligible employee”** — 12+ months (52 weeks) of employment and 1,250+ hours worked in the preceding 12 months (with special air-carrier flight-crew eligibility rules at (g)(2)); (g)(1)(B) provides a 7-year break-in-service look-back rule; (g)(1)(C) provides that for an employee transitioning from PDL into CFRA for the birth of a child, the 1,250-hour look-back period runs from the start of the PDL leave, not the start of CFRA leave.
- **2 CCR § 11087(i) — “Employment in a comparable position”** — Virtually identical position in pay, benefits, working conditions, privileges/perquisites/status, same/substantially similar duties requiring substantially equivalent skill/effort/responsibility/authority, at the same or geographically proximate worksite, ordinarily the same shift/schedule — equivalent to the FMLA “equivalent position” concept.
- **2 CCR § 11087(j)(1)–(3) — “Family care leave”** — Up to 12 workweeks per 12-month period for: (1) birth/adoption/foster placement of a child; (2) caring for a family member with a serious health condition; or (3) a “qualifying exigency” related to a family member’s covered active military duty.
- **2 CCR § 11087(v)(1)–(3) — “Serious health condition”** — Illness/injury/impairment/condition involving inpatient care or continuing treatment (including substance-abuse treatment); the full 2 CCR § 11097 “Certification of Health Care Provider” form and accompanying definitions (§8.2 below) provide the six qualifying categories.

8.2 — What Qualifies as a “Serious Health Condition” [↑ TOC](#)

2 CCR § 11097 reproduces the Civil Rights Council’s model Certification of Health Care Provider form and the accompanying definitions used to evaluate whether a condition qualifies. Six categories of qualifying serious health condition (§ 11097, definitions numbered 1–6):

- (1) Hospital Care — inpatient care in a hospital, hospice, or residential facility, and any period of incapacity/subsequent treatment connected to it.
- (2)(a)(1)–(2) Absence Plus Treatment — incapacity of more than three consecutive calendar days involving either two or more provider treatments, or one treatment resulting in a continuing regimen of treatment.

- (3) Pregnancy — any period of incapacity due to pregnancy or prenatal care; a serious health condition under FMLA but expressly NOT under CFRA (see [§7.7](#) / [§8.10](#) cross-reference at 2 CCR § [11046](#)(b) / § [11093](#)(b)).
- (4)(1)–(3) Chronic Conditions Requiring Treatment — periodic provider visits, extending over time, with potentially episodic incapacity (e.g., asthma, diabetes, epilepsy).
- (5) Permanent/Long-Term Conditions Requiring Supervision — conditions where treatment may not be effective but continuing supervision is required (e.g., Alzheimer’s, severe stroke, terminal illness stages).
- (6) Multiple Treatments (Non-Chronic) — absences for multiple treatments/recovery for restorative surgery or a condition likely to cause incapacity of more than three days absent intervention (e.g., cancer chemotherapy/radiation, severe arthritis physical therapy, kidney dialysis).

2 CCR § [11097](#) also includes the CalGINA notice prohibiting requests for genetic information on the certification form itself — a useful compliance checkpoint when reviewing an employer’s actual certification paperwork.

8.3 — Requesting Leave: Notice and Certification [↑ TOC](#)

- **2 CCR § [11091](#)(a)(1)–(6)** — At least verbal notice sufficient to make the employer aware of the need, timing, and duration is required (a)(1); the employee need not invoke CFRA/FMLA by name but must state the reason; mere mention of “vacation” or resignation does not defeat notice if the underlying reason is CFRA-qualifying and communicated; the employer must designate leave as CFRA/CFRA-FMLA and notify the employee — no retroactive designation after return absent proper notice and no employee harm — per (a)(1)(A)–(B); 30 days’ advance notice may be required for foreseeable leave per (a)(2), “as soon as practicable” otherwise per (a)(3), with no denial for lack of advance notice in an emergency/unforeseeable circumstance per (a)(4); and the employer must respond within five business days of the request per (a)(6), retroactive to the first day of leave once approved.
- **2 CCR § [11091](#)(b)(1)–(3) — Medical certification** — Detailed rules on certification for a family member’s versus the employee’s own serious health condition (in either situation, the employer may not contact a health care provider for any reason other than to authenticate a certification), including a second/third opinion procedure at (b)(2)(A)–(C), available only for the employee’s own serious health condition and only where the employer has a good-faith, objective reason to doubt the certification’s validity (employer-paid second opinion from a provider not regularly employed by the employer; employer-paid third, jointly selected opinion if the second differs from the first, which is final and binding); a return-to-work release may be required only under a uniformly applied policy per (b)(2)(E), and not more than once every 30 days for intermittent/reduced-schedule absences absent reasonable safety concerns; a fitness-for-duty exam may not be required as a condition of return, and any fitness-for-duty exam after the employee returns must be job-related and consistent with business necessity per (b)(2)(F) (2 CCR § [11071](#)); the employer must allow at least 15 calendar days to provide certification, absent good-faith impracticability, per (b)(3), with denial of CFRA protection possible after that period if never produced.

8.4 — Right to Leave; Denial [↑ TOC](#)

- **2 CCR § [11088](#)(a)–(b)(2)** — Refusal to grant a reasonable CFRA leave request is an unlawful employment practice (a); “denial” is established under (b)(1) by a preponderance-of-the-evidence showing of covered-employer status, eligible-employee status, a CFRA-qualifying purpose, a reasonable request, and denial by the employer; a request is “reasonable” under (b)(2) if it complies with the notice/certification requirements of 2 CCR § [11091](#).

8.5 — Reinstatement [↑ TOC](#)

- **2 CCR § 11089(a)(1)–(2)(B), (b)** — Guarantee of reinstatement to the same or a comparable position (in writing on request), even if the employee has been replaced or the position restructured (a)(2)(A); if the employee is no longer qualified due to a lapsed course/license/flight-hours requirement caused by the leave, a reasonable opportunity to requalify must be given on return (a)(2)(B). “Comparable position” rights at (b) mirror 2 CCR § 11087(i) (pay, benefits, shift, schedule, geography, duties/skill/effort/responsibility/authority).
- **2 CCR § 11089(c)(1)–(2), (d)(1)–(2) — Refusal to reinstate; defenses** — Proof standards at (c)(1)–(2) mirror PDL (definite date vs. two-business-day standard); an employee has no greater reinstatement right than if continuously employed — the employer bears the burden that the employee would not otherwise have remained employed per (d)(1), a burden NOT satisfied merely because the position was filled or restructured; a layoff during CFRA leave for reasons unrelated to the leave ends the reinstatement/benefits-continuation obligation per (d)(1)(A); and an employee who fraudulently obtains or uses CFRA leave loses job-restoration and health-benefit protections per (d)(2), with the employer bearing the burden of proving fraud.

8.6 — Computation of the 12-Workweek Entitlement [↑ TOC](#)

- **2 CCR § 11090(a)–(b)** — CFRA leave need not be continuous and cannot exceed 12 workweeks total per 12-month period (a); where CFRA and FMLA run concurrently, the employer may select among the four FMLA 12-month-period measurement methods (calendar year; fixed leave year; forward-rolling from first leave date; or backward-rolling) per (b), applied consistently, with 60 days’ notice required to change methods (and the change may never disadvantage employees below their existing entitlement).
- **2 CCR § 11090(c)(1)–(2), (c)(3)–(5)** — Detailed worked examples for pro-rata calculation for part-time/variable-schedule employees at (c)(1), intermittent-leave hour-for-hour counting at (c)(2), holiday-week treatment at (c)(3), overtime-hour counting for CFRA-qualifying reduced-overtime scenarios at (c)(4) (but not voluntary unworked overtime), and treatment of permanent schedule changes made for reasons unrelated to CFRA at (c)(5).
- **2 CCR § 11090(d)–(e) — Minimum duration rules** — For birth/adoption/foster-care leave, the basic minimum increment is two weeks, though the employer must grant up to two occasions of leave shorter than two weeks (and may grant more), and all such leave must be concluded within one year of the birth or placement, per (d); for a serious health condition (self or family member), intermittent/reduced-schedule leave must be accounted for in increments no greater than one hour (matching the employer’s shortest leave-accounting increment for other leave types) per (e).
- **2 CCR § 11090(e)(1)–(4)** — For foreseeable intermittent/reduced-schedule leave, the employer may require temporary transfer to an equivalent-pay/benefit alternative position better suited to the intermittent schedule (need not have equivalent duties, and may not be used to discourage leave-taking) per (e)(1); instructional employees receive CFRA on the same terms as other employees per (e)(2); where mid-shift start/stop is physically impossible (e.g., flight crew, rail conductor, clean-room lab work), the full shift counts as CFRA leave, with credit given back for any portion the employee is able to work, per (e)(3); and exempt employees’ pay may be reduced for CFRA intermittent/reduced-schedule leave consistent with other applicable law per (e)(4).

8.7 — Terms of Leave: Pay and Health Benefits [↑ TOC](#)

- **2 CCR § 11092(a)–(b)(5)** — Terms must be consistent with ERISA and do not affect COBRA obligations (a); CFRA leave is unpaid except where the employee elects (or the employer requires) use of accrued vacation/PTO per (b)(1), and, for the employee’s own serious health condition (or any other reason if mutually agreed), accrued sick leave, per (b)(1); disability-plan benefits may be substituted for the employee’s own serious health

condition per (b)(2); an employee receiving disability payments or Paid Family Leave is NOT considered on “unpaid leave” and cannot be required to burn PTO/sick/vacation per (b)(2)–(3); paid leave may only be required where the leave is actually CFRA-qualifying, and the employer may not ask whether unreferenced PTO usage is for a CFRA-qualifying reason unless and until the employee volunteers that it is, per (b)(4)(A).

- **2 CCR § 11092(c)(1)–(2)** — Employer must maintain and pay for group health coverage at pre-leave levels for up to 12 workweeks per (c)(1)–(2); this 12-week CFRA obligation is separate from, and not satisfied by, the employer’s separate PDL group-health obligation (2 CCR § 11044(c)) — even where PDL is designated as FMLA leave.
- **2 CCR § 11092(c)(5)–(6) — Premium recovery and coverage duration** — The employer may recover the premium it paid for group health coverage during any unpaid part of CFRA leave if the employee fails to return after leave entitlement expires (deemed a failure to return if the employee works fewer than 30 days after returning) for a reason other than a serious-health-condition continuation/recurrence/onset or other circumstance beyond the employee’s control (c)(5)(A)–(B); and coverage must be maintained until the CFRA entitlement is exhausted, the employer shows the employee would have been laid off for lawful reasons during the leave period, or the employee gives unequivocal notice of intent not to return (c)(6)(A)–(C).
- **2 CCR § 11092(d)(1)–(2) — Employee premium payments** — The employer must give advance written notice of premium-payment terms; if leave is paid, the employee’s share is paid via the normal payroll-deduction method absent a voluntary agreement otherwise (d)(1); if leave is unpaid, the employer may require payment to itself or the insurer (no administrative surcharge) via payroll-deduction timing, COBRA-schedule timing, cafeteria-plan prepayment, the employer’s existing unpaid-leave payment rules (no advance prepayment before leave begins), or another voluntarily agreed system (d)(2)(A)–(E). Coverage may lapse if payment is more than 30 days late, with 15 days’ written notice required before dropping coverage (d)(3).
- **2 CCR § 11092(e)(1)–(2) — Other benefits and seniority** — Seniority accrues and the employee participates in life, short-/long-term disability, accident, pension/retirement, and supplemental unemployment benefit plans during CFRA leave to the same extent as any other employer-granted leave; unpaid CFRA leave for the employee’s own serious health condition is compared to other unpaid disability leaves, while unpaid CFRA leave for other purposes is compared to other unpaid personal leaves — CFRA leave itself does not break service for seniority purposes (e)(1); and the employer must give written notice if it changes health plans/benefits during an employee’s CFRA leave (e)(2).
- **2 CCR § 11092(f)(1)–(2) — Continuation of other benefits** — Where the employer has no other unpaid-leave policy providing benefit continuation, an employee on CFRA leave may continue participating in the employer’s health, pension/retirement, supplemental unemployment, and other welfare benefit plans on the plans’ own terms; the employer may require payment of group-rate premiums for continued coverage beyond the 12-week obligation, and nonpayment does not itself break service for seniority/benefit-plan purposes (f)(1); the employer need not make pension/retirement contributions or count unpaid leave toward plan-accrual time, but must allow the employee to continue making their own contributions (f)(2).
- **2 CCR § 11092(g) — Employee status** — The employee retains employee status during CFRA leave; the leave does not constitute a break in service for longevity/seniority purposes, and benefits must resume at reinstatement at the same level and manner as when the leave began, with no new qualification period, physical exam, or similar requirement.

8.8 — Retaliation and Interference [↑ TOC](#)

- **2 CCR § 11094(a)(1)–(3)** — Any CFRA violation constitutes interference; examples include refusing to authorize leave, discouraging use of leave, changing essential job functions to preclude leave-taking, reducing hours to avoid eligibility, or terminating in anticipation of a future CFRA request.

- **2 CCR § 11094(b)–(d)** — Prohibits retaliation for exercising or attempting to exercise CFRA rights, or for giving information/testimony in a CFRA-related proceeding, including regarding another person’s leave (b); employees cannot waive prospective CFRA rights, nor can employers induce a waiver (e.g., “trading off” leave rights for another benefit), though past-conduct claim settlements and voluntary light-duty acceptance do not constitute such a waiver (c); and ALL individuals (not only CFRA-eligible employees) are protected from retaliation for opposing conduct they reasonably believe violates CFRA (d).
- **2 CCR § 11094(e)** — CFRA retaliation protection is in addition to, not a substitute for, the general FEHA retaliation prohibition at Gov. Code § [12940](#) and 2 CCR § [11021](#) ([Part 5.4](#)).

8.9 — Notice of CFRA Rights [↑ TOC](#)

- **2 CCR § 11095(a)–(d)** — Posting requirement (conspicuous, legible, electronic posting permitted) (a); employee handbooks describing other leave types must include a CFRA description in the next published edition (a); 10%+ non-English-speaking workforce triggers translation obligations (c); and (d) reproduces the required model notice text, which may be combined with the PDL notice under 2 CCR § [11051](#) and covers both CFRA and PDL rights in a single document, including the combined maximum entitlement.

8.10 — Interaction with Pregnancy Disability Leave [↑ TOC](#)

- **2 CCR § 11093(a)–(c)** — CFRA and PDL are separate, distinct entitlements (a); an employee’s own pregnancy-related disability is not a CFRA “serious health condition”, though it is one under FMLA (b); a CFRA-eligible employee may take up to 12 weeks of CFRA leave for the birth of the child at the end of PDL (or four months, whichever is first) with no requirement of continuing disability (c).
- **2 CCR § 11093(d)–(e)** — Combined maximum entitlement is four months plus 12 workweeks (d); the employer may (but need not) allow CFRA leave to begin before the birth if medically necessary continuation is certified after four months of PDL, without expanding the total CFRA entitlement (c)(1); and where an employee’s serious health condition also constitutes a disability under Gov. Code § [12926](#) and the employee cannot return at the end of CFRA leave, the employer must engage in the interactive process to consider whether a leave extension is a reasonable accommodation under FEHA disability provisions (e) ([Part 6](#)).

PRACTICE POINT

Strict adherence to CFRA leave requirements is advised as intent is not an element of a claim for most CFRA violations.

PRACTICE POINT

Consider using regulatory language in this part as a source for crafting special jury instructions at trial where standard jury instructions – e.g., CACI – fall short.

Part 9 — Sex, Gender Identity & Gender Expression Discrimination [↑ TOC](#)

Article 5 (2 CCR §§ [11029](#)–[11034](#)).

9.1 — Purpose and Definitions [↑ TOC](#)

- **2 CCR § [11029\(b\)](#)** — States the purpose: eliminating differential treatment, pay disparity, stereotyping, sexual-nature conduct, hostile environments, and other adverse action based on sex, gender identity, or gender expression.
- **2 CCR § [11030\(a\)–\(f\)](#)** — “Gender expression” (a) — a person’s gender-related appearance/behavior (or perception of it), regardless of stereotypical association with sex assigned at birth. “Gender identity” (b) — internal understanding of one’s own gender (male, female, both, neither, or a gender different from sex assigned at birth, including transgender). “Sex” (c) (by reference to Gov. Code § [12926](#)) — includes pregnancy, childbirth, related medical conditions, gender, gender identity, and gender expression, or third-party perception of any of these. “Sex Stereotype” (d) — assumptions about appearance, behavior, gender roles, or work-ability based on myth/social expectation/generalization about sex. “Transgender” (e) and “Transitioning” (f) — defined broadly, with transitioning expressly including name/pronoun changes, facility usage, participation in employer activities, and hormone therapy/surgery/other medical procedures.

9.2 — Pre-Employment and Selection [↑ TOC](#)

- **2 CCR § [11032\(a\)\(1\)–\(2\), \(b\)\(1\)–\(4\)](#)** — Recruiting must target both sexes for all jobs absent a defense (a)(1); job listings may not be sex-segregated (a)(2); applications may not ask sex absent a defense/recordkeeping purpose (post-hire recording for non-discriminatory personnel purposes is fine) (b)(2); questions about childbearing/pregnancy/birth control/family responsibilities are unlawful unless tied to specific, relevant working conditions (b)(3); and ADS-driven sex discrimination in selection criteria is separately prohibited (b)(4).
- **2 CCR § [11033\(a\)–\(f\)](#)** — Physical agility/strength tests require a permissible defense and must allow the applicant/employee to demonstrate actual capability (a); height/weight standards, including sex-differentiated standards, require a defense (b)(1)–(2); refusing to hire a woman because she is of childbearing age is unlawful (c); prior UNPAID/volunteer work experience must be considered alongside paid experience where prior experience generally is considered (d); sex-stereotype-based criteria require a defense (e); and ADS/selection-criteria sex discrimination is separately prohibited (f).

9.3 — Available and Unavailable Defenses [↑ TOC](#)

- **2 CCR § [11031\(a\)\(1\)–\(6\)](#) — BFOQ NOT available for** — A correlation between one sex and physical agility/strength; a correlation between one sex and height; customer preference for one sex; the asserted need for separate facilities; the fact that an individual is transgender or gender non-conforming or that assigned sex differs from the job’s traditionally required sex; and the fact that one sex has traditionally held the job.
- **2 CCR § [11031\(b\)\(1\)–\(3\)](#) — Narrow BFOQ availability** — Personal-privacy-based BFOQ requires ALL THREE: the job requires observing others in a state of nudity or conducting body searches; it would offend prevailing social standards to have a different-sex individual present; and it would be detrimental to the observed/searched individuals’ mental or physical welfare to have a different-sex individual present.
- **2 CCR § [11031\(c\)–\(e\)](#)** — Employers must minimize the number of jobs for which sex is asserted as a BFOQ (c); it is no defense to sexual harassment that the conduct was not motivated by sexual desire (d); and employees

must be permitted to perform jobs/duties corresponding to their gender identity/expression regardless of sex assigned at birth (e).

9.4 — Terms, Conditions, and Privileges — the Substantive Core [↑ TOC](#)

- **2 CCR § 11034(a)–(c)** — Compensation may not be based on sex (a); fringe-benefit availability may not be conditioned on sex, gender identity/expression, or “head of household”/wage-earner status (b)(1)–(2); unequal contribution requirements or differing basic benefit amounts based on sex are unlawful, as are sex-differentiated mandatory/optional retirement ages (b)(3)–(4); and sex-exclusive job designations or separate seniority/progression lists are unlawful absent a permissible defense (c)(1), though accelerated-promotion mobility programs for underrepresented groups are expressly permitted (c)(2).
- **2 CCR § 11034(d)(1)–(6) — Health/safety/reproductive dangers** — Where working conditions pose a greater danger to one sex, the employer must alter conditions or, on request, transfer the more-endangered employee to a less hazardous position, unless undue hardship is shown, per (d)(1)(A)–(B); a physician’s certification of endangerment may be required per (d)(2); and — critically — a differential-risk showing does NOT itself support a BFOQ defense, per (d)(3).
- **2 CCR § 11034(e)(1)–(6) — Working conditions, restrooms, and facilities** — Equal rest periods and equal access to comparable, safe, adequate facilities regardless of sex (e)(1)–(2); employees must be permitted to use facilities corresponding to their gender identity/expression regardless of sex assigned at birth (e)(2)(A); single-occupancy facilities must use gender-neutral signage (e)(2)(B); employers must provide feasible privacy alternatives (locking stalls, staggered showering, curtains) but may NOT require an employee to use a particular facility (e)(2)(C); no medical proof/procedure or identity documentation may be demanded as a condition of using a gender-appropriate facility, though a confidential inquiry solely to ensure access to comparable multi-user facilities is permitted (e)(2)(D)–(E); job duties may not be assigned by sex stereotype (e)(4); sterilization status/refusal cannot be a basis for adverse action (e)(5); and childcare-services financial provision for employees/members with custodial responsibilities is expressly lawful (e)(6).
- **2 CCR § 11034(f)(1)–(2)(C) — Sexual harassment** — Defines quid pro quo (conditioning a benefit on submission to sexual advances/conduct) at (f)(1) and hostile-work-environment harassment (severe-or-pervasive unwelcome conduct altering employment conditions — subjectively and objectively offensive; a single sufficiently severe incident can suffice) at (f)(2)(A). Liability attaches regardless of whether the conduct was directed at the complainant, and regardless of the sex/gender/orientation of harasser or victim, per (f)(2)(B). Liability standards at (f)(2)(C)(1)–(4) mirror 2 CCR § 11019(b): strict liability for agent/supervisor harassment; knew-or-should-have-known-plus-failure-to-correct liability for coworker/nonemployee harassment; and personal liability for the harassing individual regardless of employer knowledge.
- **2 CCR § 11034(g)–(i)(4) — Grooming standards, gender/name recording, additional rights** — Dress/grooming/appearance standards inconsistent with gender identity/expression are unlawful absent business necessity (g); as provided in 2 CCR §§ 11016(b)(1) and 11032(b)(2), inquiries that directly or indirectly identify an individual on the basis of sex — including gender, gender identity, or gender expression — are unlawful unless the employer establishes a permissible defense under 2 CCR § 11010; recordkeeping-purpose gender/sex questions may only be asked on a voluntary basis (h); a name/gender designation inconsistent with assigned sex is NOT automatically treated as fraud/misrepresentation absent a permissible defense (h)(1); failure to honor a stated preferred gender/name/pronoun, including gender-neutral pronouns, can create liability, except where use of a government-ID-matching name/gender is necessary for a legally mandated purpose (h)(3)–(4); documentation/proof of sex/gender/gender identity/expression cannot be demanded as a condition of employment, subject to a BFOQ defense and to employee-initiated conversations about working conditions (i)(1)(A)–(B); denial of employment based wholly/partly on sex/gender/gender identity/expression is

unlawful (i)(2); and discrimination against someone who is transitioning, has transitioned, or is perceived to be transitioning is unlawful (i)(4).

Part 10 — Religious Creed Discrimination & Accommodation [↑ TOC](#)

Article 8 (2 CCR §§ [11059](#), [11060](#), [11062](#), [11063](#)).

10.1 — Purpose and Scope [↑ TOC](#)

- **2 CCR § [11059\(b\)](#)** — States the purpose: freedom to worship as one believes is a basic human right; religious pluralism accommodation is an important societal interest; and because religious-discrimination/accommodation questions often arise in complex, emotionally charged situations, each case is to be individually reviewed to balance competing social needs.
- **2 CCR § [11059\(c\)–\(d\)](#)** — Incorporates Articles 1 and 2 (General Matters and Particular Employment Practices) unless modified (c); expressly extends the anti-discrimination and reasonable-accommodation duties — including for religious dress/grooming — to apprenticeship program participants and unpaid interns/other unpaid-experience program participants (d).

10.2 — Establishing Religious Creed Discrimination [↑ TOC](#)

- **2 CCR § [11060](#) — Definition of “religious creed”** — Includes any traditionally recognized religion, plus any belief/observance/practice an individual sincerely holds that occupies a place of importance in the individual’s life parallel to traditionally recognized religions — encompassing religious dress and grooming practices (Gov. Code § [12926](#)).
- **2 CCR § [11060\(a\)–\(c\)](#)** — Established by showing an employment benefit was denied, in whole or part, because of religious creed or lack thereof (a), OR that the employer failed to reasonably accommodate a known or disclosed religious-creed need (b); the examples given are expressly non-exclusive (c).

10.3 — Reasonable Accommodation [↑ TOC](#)

- **2 CCR § [11062](#) — General duty** — Employer must accommodate a known religious creed unless it can demonstrate undue hardship; refusing to hire, or terminating, to avoid the need to accommodate a religious practice is itself religious-creed discrimination.
- **2 CCR § [11062\(a\)](#) — What counts as reasonable** — Includes job restructuring, reassignment, modified work practices, or time off equal to non-regularly-scheduled time already worked to offset a religious-observance conflict. Segregating the employee from customers/the public is NOT reasonable unless the employee expressly requests it.
- **2 CCR § [11062\(b\)\(1\)–\(7\)](#) — Undue-hardship factors** — Establishment/facility size (employee count, budget); overall entity size (employees, facilities, budget); type of operation/workforce structure at both the facility level (b)(3) and the employer/entity level (b)(4); nature and cost of the accommodation; reasonable notice given of the need; and availability of reasonable alternative accommodations.
- **2 CCR § [11062\(c\)\(1\)–\(3\)](#) — Specific applications** — Interview/examination scheduling must reasonably accommodate religious practices (c)(1); dress/grooming standards must account for religious dress/grooming practices per Gov. Code § [12926](#) (c)(2); and union-membership requirements must be waived/accommodated

for an applicant/employee whose religious creed prohibits membership, with accommodation extending to union dues obligations (c)(3).

- **2 CCR § 11062(d)** — Discrimination or retaliation for requesting religious accommodation is unlawful regardless of whether the request was granted (mirrors the disability-accommodation-request protection at 2 CCR § 11068(k), [Part 6.6](#)).

10.4 — Pre-Employment Practices [↑ TOC](#)

- **2 CCR § 11063(a)–(b)** — Weekend/evening availability inquiries may not be used to ascertain religious creed or to evade the accommodation duty, though such inquiries remain permissible where reasonably related to the job’s normal business requirements and made consistent with 2 CCR § 11016 (a); and ADS-driven or other selection-criteria discrimination on the basis of religion is separately prohibited, subject to a permissible defense and to the same anti-bias-testing evidentiary considerations discussed in [Part 2](#) (b).

Part 11 — Marital Status, National Origin/Ancestry & Age Discrimination [↑ TOC](#)

Three distinct, shorter articles grouped together here because each functions as a compact, largely self-contained set of rules (Article 7 — Marital Status; Article 4 — National Origin and Ancestry; Article 10 — Age).

11.1 — Marital Status Discrimination [↑ TOC](#)

- **2 CCR § 11053(a)–(b) — Definitions** — “Marital Status” (a) — an individual’s state of marriage, non-marriage, divorce/dissolution, separation, widowhood, annulment, or other marital state. “Spouse” (b) — a partner in marriage as defined in Family Code § 300.
- **2 CCR § 11054(a)–(c) — Establishing the claim** — Shown by denial of an employment benefit because the individual is unmarried (a), because of single/married status generally (b), or because of the employment or lack of employment of the applicant’s/employee’s spouse (c).
- **2 CCR § 11056(a)–(c) — Pre-employment practices** — Marital-status disclosure inquiries, including via ADS, are unlawful absent a permissible defense (a); asking whether an applicant has used another name is lawful for legitimate business reasons such as verifying a past work record (b); and asking whether an applicant’s spouse is presently employed by the same employer is lawful to ask, but that information may NOT be used as a basis for an employment decision “except as stated below” (c); the codified section contains no further text; the referenced criteria appear in § 11057(a), digested below.
- **2 CCR § 11057(a)–(b) — Employee selection; employment of spouses** — An employment decision may not be based on whether an individual has a spouse presently employed by the employer except under two criteria (a): for business reasons of supervision, safety, security, or morale, an employer may refuse to place one spouse under the direct supervision of the other spouse (a)(1); and for business reasons of supervision, security, or morale, an employer may refuse to place both spouses in the same department, division, or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons (a)(2). If co-employees marry, the employer must make reasonable efforts to assign job duties so as to minimize problems of supervision, safety, security, or morale (b).

PRACTICE POINT

It is important to remember that this section addresses an employee's status as married or unmarried, and does not encompass the identity of an individual to whom the employee is married, unless of course, an adverse decision is made because of the spouse's protected status raising the possibility of an associational discrimination theory pursuant to Government Code § 12926(o). Also note that 2 CCR § 11054(c) reaches denial of a benefit because of the employment or lack of employment of the applicant's or employee's spouse.

11.2 — National Origin & Ancestry Discrimination [↑ TOC](#)

2 CCR § [11028](#) is a single, comprehensive section covering an unusually broad range of practices — treat it as a checklist:

- **2 CCR § 11028(a)(1)(A)–(4) — Language restrictions / English-only rules** — Unlawful unless the employer proves (A) the restriction is justified by business necessity, (B) it is narrowly tailored, AND (C) employees have been effectively notified of when it applies and the consequences of violation. “Business necessity” under (a)(2)(A)–(C) requires the restriction be necessary to safe/efficient operation, effectively fulfill that purpose, and have no less-discriminatory alternative — mere business convenience or customer/coworker preference is NOT sufficient under (a)(3). English-only rules are NEVER lawful during non-work time (breaks, lunch, unpaid employer-sponsored events) under (a)(4).
- **2 CCR § 11028(b)–(c) — Accent and English-proficiency discrimination** — Accent-based discrimination is unlawful unless the accent materially interferes with job performance (b); English-proficiency requirements are unlawful unless justified by business necessity, considering the type of proficiency required (spoken/written/aural/reading), degree required, and job duties (c). Both extend to ADS-driven discrimination.
- **2 CCR § 11028(d)** — Employers may lawfully ask about ability to speak/read/write/understand any language, including non-English, if justified by business necessity.
- **2 CCR § 11028(e)(1)–(2) — Retaliation** — Unlawful to retaliate for opposing national-origin discrimination/harassment or participating in a related proceeding; explicitly includes threatening or actually contacting immigration or law enforcement authorities about the immigration status of the employee OR a listed family member (an unusually broad list at (e)(1): spouse, domestic partner, parent, sibling, child, aunt/uncle, niece/nephew, cousin, grandparent, great-grandparent, grandchild, great-grandchild, by blood/adoption/marriage/domestic partnership), and taking adverse action because an employee updates personal information following a legal name/SSN/document change (e)(2).
- **2 CCR § 11028(f)(1)–(4) — Immigration-related practices** — FEHA protections apply to undocumented workers to the same extent as any other worker, and immigration status is irrelevant to LIABILITY (f)(1); discovery into immigration status requires clear and convincing evidence it is necessary to comply with federal immigration law (f)(2); immigration-status discrimination itself requires the same clear-and-convincing federal-law-compliance showing to be lawful (f)(3); and retaliation as described in (e) is separately prohibited in this context (f)(4).
- **2 CCR § 11028(g)(1)–(3) — Driver's license discrimination** — Unlawful to discriminate based on possession/presentation of a driver's license issued under Vehicle Code § [12801.9](#) (available regardless of immigration status); a license requirement is lawful only if required by law or by the employer for legitimate business reasons uniformly applied, per (g)(1)(A)–(B).
- **2 CCR § 11028(h)–(i)** — Citizenship requirements that are pretextual or that have a discriminatory purpose/effect are unlawful absent a defense (h); force/fraud/coercion to compel or penalize employment on a national-origin basis is unlawful — human trafficking (i); national-origin-based harassment — epithets, deportation threats, accent/language mockery — is unlawful if severe or pervasive, and a single sufficiently

severe act can suffice, per 2 CCR § [11019\(b\)](#) generally and 2 CCR § [11034\(f\)\(2\)\(A\)](#) specifically (j); height/weight requirements with an adverse impact are unlawful unless the employer shows they are job related and justified by business necessity, and remain unlawful if the applicant or employee proves the purpose can be achieved as effectively through less discriminatory means (k); and national-origin-based recruitment/job-segregation practices are unlawful absent a defense (l).

- **2 CCR § [11028\(m\)](#)** — Closing ADS/selection-criteria catch-all discrimination prohibition, with the same anti-bias-testing evidentiary framework used throughout the regulations (see [Part 2](#)).

11.3 — Age Discrimination [↑ TOC](#)

- **2 CCR § [11076\(a\)](#) — Establishing discrimination (employers)** — Shown by showing an applicant’s/employee’s age of 40+ was considered in denying employment/a benefit; a presumption of discrimination arises from any facially neutral practice — including ADS use — with an adverse impact on the 40+ population, unless job-related and consistent with business necessity as defined at 2 CCR § [11010\(b\)](#) ([Part 1.5](#)). In layoff/salary-reduction contexts, an employer’s preference to retain lower-paid workers ALONE does not negate the presumption; even a job-related, business-necessity-justified practice remains impermissible if a less-discriminatory alternative would accomplish the purpose equally well.
- **2 CCR § [11076\(b\)](#)** — Extends the same analysis to employment agencies, labor organizations, and state-participating apprenticeship programs engaged in age-discriminatory recruitment/screening/advertising/training/referral/placement.
- **2 CCR § [11078\(a\)\(1\)–\(2\)](#) — Recruitment and advertising** — The provisions of 2 CCR § [11016\(a\)](#) are applicable and incorporated by reference. Unlawful to refuse to consider 40+ applicants during recruitment; example unlawful practices at (a)(1) include maximum-experience limitations, “digital native” requirements, and college-affiliated-email requirements; participation in high-school/college/trade-school recruitment programs and youth-directed temporary hiring programs remains lawful UNLESS used to evade the age-discrimination prohibition through exclusive screening/hiring from those sources; and advertising expressing a preference for or against a 40+ workforce is unlawful under (a)(2).
- **2 CCR § [11079\(a\)](#) — Advertisements** — Absent a BFOQ, ads that a reasonable person would interpret as deterring/limiting 40+ employment are unlawful — examples given: preferred age ranges, or terms like “young,” “college student,” “recent college graduate,” “boy,” “girl.”
- **2 CCR § [11079\(b\)](#) — Pre-employment inquiries** — Absent a BFOQ, inquiries — including via ADS — that directly/indirectly identify age are unlawful — examples: requests for age, date of birth, or graduation dates; applicable to oral, written, and interview settings; cross-references 2 CCR § [11016\(b\)](#) generally; carves out an exception for inquiries made for applicable reporting requirements or applicant-flow data consistent with 2 CCR § [11013\(b\)](#).
- **2 CCR § [11079\(c\)\(1\)](#) — Applications** — Absent a BFOQ, rejecting or failing to give equal consideration to an application because the applicant is 40+ is unlawful; (c)(1) specifically targets online application technology requiring age entry to access/complete an application, or drop-down menus with age-based cutoffs or ADS/algorithmic screening effects that screen out 40+ applicants.
- **2 CCR § [11080\(a\)–\(c\)](#) — Physical/medical examinations** — Requiring 40+ applicants/employees to undergo physical/medical exams is not itself a violation under (a)–(b), PROVIDED the requirement is uniformly and equally applied to all applicants/employees for the position regardless of age; it IS age discrimination under (c) to impose HIGHER physical/medical standards on 40+ individuals than on younger applicants/employees seeking or holding the same job.

PRACTICE POINT

The age-discrimination presumption at 2 CCR § 11076(a) is unusual among these articles in that it shifts the practical burden onto the employer once a facially neutral practice with an adverse impact on the 40+ population is shown — including where the practice is an algorithmic/ADS layoff or salary-reduction tool. In a reduction-in-force matter, request the underlying selection methodology and age distribution data early, since a facially neutral cost-saving rationale (e.g., “retain lower-paid staff”) does NOT by itself rebut the presumption.

Quick-Reference Index (All 64 Sections) [↑ TOC](#)

For rapid lookup once a specific section is at issue. Article groupings shown in parentheses; Guide Part/subsection reference shown last.

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2 CCR § 11009	Principles of Employment Discrimination (Art. 1) — §1.4
2 CCR § 11010	Affirmative Defenses (Art. 1) — §1.5
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2 CCR § 11035	Pregnancy — Definitions (Art. 6) — §7.1
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