

**TITLE 2, SECTIONS 7291.2 – 7291.16**  
**SEX DISCRIMINATION: PREGNANCY, CHILDBIRTH OR RELATED**  
**MEDICAL CONDITIONS**

Notice published April 16, 2010

NOTICE OF PROPOSED RULEMAKING

The California Fair Employment and Housing Commission (“Commission”) proposes to amend existing sections 7291.2 – 7291.16, “Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions,” after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARINGS

The Commission will hold two public hearings:

- In Los Angeles, starting at 10 a.m. on Tuesday, June 1, 2010, at the Ronald Reagan State Office Building Auditorium, 300 South Spring Street, ground floor, Los Angeles, California. The Auditorium is wheelchair accessible.
- In San Francisco, starting at 10 a.m. on Wednesday, June 2, 2010, at the Hiram Johnson State Building Auditorium at 455 Golden Gate Avenue, basement level, San Francisco, California. The Auditorium is wheelchair accessible.

At each hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Commission requests but does not require that persons who make oral comments at the hearing also submit an electronic or written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commission. The written comment period closes at **5 p.m. on June 2, 2010**. The Commission will consider only comments received at the Commission offices, delivered in person to Commission personnel at either public hearing referenced above, or through Commission email by that time. The Commission’s preference is to receive comments through email. Submit comments to:

[regs@fehca.gov](mailto:regs@fehca.gov)

or

Ann M. Noel  
Executive and Legal Affairs Secretary  
Fair Employment and Housing Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102

## AUTHORITY AND REFERENCE

Government Code section 12935, subdivision (a), authorizes the Commission to amend the proposed regulations, which would implement, interpret, or make specific sections 12926, 12940, 12943 and 12945 of the Government Code.

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Commission proposes to amend existing sections 7291.2—7291.16 in Title 2 of the California Code of Regulations (CCR) regarding Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions.

The purpose of the proposed amended regulations is to update the Commission’s regulations on pregnancy to conform to statutory changes to the Fair Employment and Housing Act passed in 1999 (Stats. 1999, c. 591 (A.B. 1670, § 9) and 2004 (Stats. 2004, c. 647 (A.B. 2870, § 5). The 1999 legislation amended Government Code section 12945, to require employers to reasonably accommodate female employees affected by pregnancy, childbirth or related medical conditions. (A.B. 1670) (Former Gov. Code § 12945, subd. (c)(1), now at Gov. Code § 12945, subd. (b)(1).) The 2004 legislation (A.B. 2870) amended Government Code section 12945 to eliminate distinctions between employers with 15 or more employees covered by Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (42 U.S.C. § 2000e, et seq.) and employers with 5 to 14 employees, covered only by the Fair Employment and Housing Act (FEHA)(Gov. Code § 12900, et seq.). Both of these changes were characterized as minor by the authors and by all legislative bill analysts, with no fiscal impact to employers.

These proposed amended regulations also provide more clarity and guidance to employers and employees regarding preventing discrimination based on pregnancy, childbirth or related medical conditions and reasonable accommodation, transfer and disability leave for woman affected by pregnancy, childbirth or related medical conditions, as mandated by Government Code sections 12940, 12943 and 12945.

**Government Code section 12926, subdivision (p)**, provides in relevant part that “sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

**Government Code section 12940, subdivision (a)**, prohibits, in relevant part, sex discrimination in hiring, employing, training, firing, or in terms or conditions of employment.

**Government Code section 12940, subdivision (b)**, prohibits, in relevant part, labor organizations from discriminating on the basis of sex in union membership.

**Government Code section 12940, subdivision (c)**, prohibits, in relevant part, sex discrimination in the selection or training of an individual in any apprenticeship training program or other program leading to employment.

**Government Code section 12940, subdivision (d)**, prohibits, in relevant part, sex discrimination in the advertising of jobs or in any other way in the employment process.

**Government Code section 12940, subdivision (h)**, prohibits, in relevant part, retaliation for opposing sex discrimination.

**Government Code section 12940, subdivision (i)**, makes unlawful, in relevant part, aiding, abetting, inciting, compelling, or coercing the doing of any of the acts forbidden by the FEHA, or to attempt to do so.

**Government Code section 12940, subdivision (j)**, forbids, in relevant part, harassment on the basis of sex.

**Government Code section 12940, subdivision (k)**, makes it an unlawful employment practice for employers, labor organizations, employment agencies, apprenticeship training programs, or any training program leading to employment to fail to take all reasonable steps to prevent discrimination and harassment from occurring.

**Government Code section 12943** prohibits school districts from discriminating against employees on the basis of pregnancy in hiring, training program selection, firing, or in terms, conditions or privileges of employment.

**Government Code section 12945** provides that in addition to the provisions governing pregnancy, childbirth or related medical conditions in sections 12926 and 12940, it is an unlawful employment practice unless based on a bona fide occupational qualification.

**Government Code section 12945, subdivision (a)**, for an employer to refuse to allow a female employee disabled by pregnancy, childbirth or related medical conditions to take a pregnancy disability leave of up to four months, for the period of time that the employee is disabled, and thereafter return to work. An employer may require an employee who plans to take a leave to give the employer reasonable notice of the beginning and duration of the leave.

**Government Code section 12945, subdivision (b)(1)**, for an employer to fail to reasonably accommodate an employee for conditions related to pregnancy, childbirth or related medical conditions, if she so requests, with the advice of her health care provider.

**Government Code section 12945, subdivision (b)(2)**, for an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

**Government Code section 12945, subdivision (b)(3)**, for an employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician,

where that transfer can be reasonably accommodated. The employer is not required to create additional employment that the employer would not have otherwise created, to discharge another employee, to transfer another employee with more seniority, or promote any employee who is not qualified to perform the job.

**Government Code section 12945, subdivision (c)**, states that section 12945 is not to be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth or medical conditions related to pregnancy or childbirth under any other provisions of the FEHA, including section 12940, subdivision (a).

**Government Code section 12935, subdivision (a)**, authorizes the Commission to adopt regulations to implement, interpret and make specific these requirements.

As amended, the Commission's regulations on pregnancy, childbirth or related medical conditions provide the following:

**Section 7291.2, subdivision (a)**, defines terms used in Government Code sections 12926, 12940, 12943 and 12945 and these regulations, including, inter alia: "affected by pregnancy," "because of pregnancy," "CFRA," "employee disabled by pregnancy," "employer," "employment in the same position," "employment in a comparable position," "FMLA," "four months," "health care provider," "intermittent leave," "medical certification," "pregnancy disability leave," "reasonable accommodation," "reduced work schedule," "related medical condition," and "transfer".

**Section 7291.3** provides that there is no eligibility requirement before an employee affected or disabled by pregnancy is eligible for reasonable accommodation, transfer or disability leave.

**Section 7291.4** provides that discrimination because of pregnancy by any covered entity constitutes discrimination because of sex.

**Section 7291.5** sets forth responsibilities of employers prohibiting discrimination because of pregnancy in hiring, training programs selection; promotion; firing; pregnancy health benefits; employment terms; harassment, retaliation; reasonable accommodation; transfer; pregnancy disability leave, or other discrimination.

**Section 7291.6** provides for reasonable accommodation for employees affected by pregnancy, childbirth or related medical conditions.

**Section 7291.7** provides for transfer for employees affected by pregnancy.

**Section 7291.8** provides for pregnancy disability leave for employees disabled by pregnancy.

**Section 7291.9** provides for reinstatement from pregnancy disability leave.

**Section 7291.10** provides for terms of pregnancy disability leave.

**Section 7291.11** covers the relationship between pregnancy disability leave and the federal Family and Medical Leave Act (FMLA).

**Section 7291.12** covers the relationship between pregnancy disability leave and the California Family Rights Act (CFRA).

**Section 7291.13** covers remedies for violating Government Code sections 12940, 12943 and 12945.

**Section 7291.14** provides the requirements for employers to give notice to their employees of their rights and obligations for reasonable accommodation, transfer and pregnancy disability leave.

**Section 7291.15** provides for employee requests for reasonable accommodation, transfer or pregnancy disability leave, advance notice, medical certification and employer response to these requests.

#### DISCLOSURES REGARDING THE PROPOSED ACTION

(All exhibits referenced in this document are available on the Commission's website at [www.fehc.ca.gov](http://www.fehc.ca.gov).)

*The Commission has made the following initial determinations:*

Legislative history for both 1999 legislation (Stats. 1999, c. 591 (A.B. 1670, § 9)) and 2004 legislation (Stats. 2004, c. 647 (A.B. 2870, § 5)) amending provisions covering pregnancy discrimination, indicate that the Legislature did not believe that either legislation had any fiscal impact for employers. See Assembly Committee on Appropriations Fiscal Summary for the May 26, 1999 hearing on A.B. 1670 prepared by consultant Chuck Nicol,<sup>1</sup> and the Senate Committee on Appropriations August 30, 1999 hearing on A.B. 1670, prepared by consultant Lisa Matocq.<sup>2</sup> Neither of these analyses noted any costs attributable to employers for the portion of the legislation amending FEHA's pregnancy provisions. Similarly, the Assembly Appropriations Committee Fiscal Summary for the May 5, 2004 hearing on A.B. 2870 prepared by consultant Stephen Shea<sup>3</sup> did not note any costs attributable to employers.

Mandate on local agencies and school districts: None.

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<sup>1</sup> Available at: [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_1651-1700/ab\\_1670\\_cfa\\_19990524\\_163820\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1651-1700/ab_1670_cfa_19990524_163820_asm_comm.html) (Ex. A).

<sup>2</sup> Available at: [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_1651-1700/ab\\_1670\\_cfa\\_19990908\\_143603\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1651-1700/ab_1670_cfa_19990908_143603_sen_comm.html) (Ex. B).

<sup>3</sup> Available at: [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2851-2900/ab\\_2870\\_cfa\\_20040504\\_152353\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2851-2900/ab_2870_cfa_20040504_152353_asm_comm.html) (Ex. C).

Cost or savings to any state agency: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: None.

Cost or savings in federal funding to the state: None.

Significant, statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: None.

Cost impacts on a representative private person or businesses: The Commission estimates that the total statewide costs that businesses may incur to comply with these amended regulations over a three year period would be **\$11,872,916**. The proposed regulations clarify sections 12926, 12940, 12943 and 12945 and impose no further costs. The Commission arrived at this figure with the following calculations, assumptions and estimates:

According to labor data obtained from the Employment Development Department, there are approximately 4,357,182 women between the ages of 16 and 44 that are employed in California.<sup>4</sup> General fertility rates for this population are 71.3 per thousand.<sup>5</sup> Approximately 310,654 (4,357,182 x 71.3) of these women are expected to become pregnant in any given year with 52% of those women, or 161,540 (310,654 x 52%) continuing to work until they deliver.<sup>6</sup>

**Cost of average pregnancy reasonable accommodation: \$500**

Department of Public Health statistics indicate that the average number of prenatal visits is 9-12 visits.<sup>7</sup> It is assumed that each prenatal care visit would require 1-2 hours of leave

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<sup>4</sup> “Sex By Age By Employment Status for the Population 16 Years and Over,” Universe: Population 16 years and older, Data Set Census 2000 Summary File 4 (SF 4) – Sample Data (2000) (hereinafter PCT 79) available at <http://www.calmis.ca.gov/FILE/Census2000/LFbySexbyAge.xls> (Ex. D).

<sup>5</sup> California Department of Public Health TABLE 2-30. GENERAL FERTILITY RATES, TOTAL FERTILITY RATES, AND BIRTH RATES BY AGE AND RACE/ETHNIC GROUP OF MOTHER, CALIFORNIA, 2002 – 2006 available at <http://www.cdph.ca.gov/data/statistics/Documents/VSC-2006-0230.xls> (Ex. E).

<sup>6</sup> Guendelman, Pearl, Graham, Angulo and Kharrazi, “Utilization of Pay-in Antenatal Leave Among Working Women in Southern California,” *Maternal and Child Health Journal*, Vol. 10, No. 1, January 2006, p. 63, 66 (Ex. F).

<sup>7</sup> California Department of Public Health, Table 2-9. NUMBER AND PERCENT OF LIVE BIRTHS BY NUMBER OF PRENATAL VISITS AND RACE/ETHNIC GROUP OF MOTHER, CALIFORNIA, 2006 available at <http://www.cdph.ca.gov/data/statistics/Documents/VSC-2006-0209.pdf> (Ex. G).

time from work, which would result in an impact of 24 hours per pregnant employee receiving prenatal care that an employer would have to cover for while absent or accept reduced productivity due to the absence. According to a National Institute of Health study,<sup>8</sup> 86.3% or 142,475 (161,540 x 86.3%) women in California receive prenatal care.

According to the latest EDD Quarterly Wage Information report,<sup>9</sup> the average monthly wage for females in California for the last three quarters of 2008 was \$3,315.00. Assuming this compensation rate, the average impact to employers for employees receiving prenatal care is approximately \$500 per pregnant employee. ( $\$3315 \div 4 \text{ weeks} \div 40 \text{ hours} \times 24 \text{ hours} = \$497$ , rounding up to \$500.)

A study conducted by University of California Berkeley researchers<sup>10</sup> reveals that one in three California women take advantage of pregnancy benefits prior to delivery. (142,475  $\div$  3 = 47,491). The overall cost to California businesses to accommodate pregnant employees is estimated to be approximately \$23,745,833 annually. ( $\$500 \times 47,491$ .)

Assuming that approximately 50% of employers are already providing reasonable accommodations to pregnant employees and that half of the accommodations would result in employers allowing flexible scheduling to accommodate the increased time off,<sup>11</sup> the net impact to state employers would be approximately \$11,872,916 (1/2 of \$23,745,833). Spread across the approximately 405,874 businesses that employ 5 or more employees in California within child bearing age, this estimate would result in an impact of \$29 for each business. ( $\$11,872,916 \div 405,874$ .)

Legislative analysis of AB 1670 (the bill requiring “employers to provide reasonable and measured accommodations to pregnant employees”) indicates that the Legislature “intended to permit employers to allow pregnant employees to remain in their current positions for longer time periods without the need for transfer, while assuring that less costly and disruptive steps (such as simply permitting more frequent restroom breaks or rest periods) are taken for pregnant employees who do not want or need to be transferred

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<sup>8</sup> Rittenhouse, Marchi, Braveman, “Improvements in Prenatal Care Utilization and Insurance Coverage in California: An Unsung Public Health Victory?” ABSTR ACAD HEALTH SERV RES HEALTH POLICY MEET. 2002; 19: 23. Family and Community Medicine & Institute for Health Policy Studies, University of California, San Francisco, available at <http://gateway.nlm.nih.gov/MeetingAbstracts/ma?f=102273714.html> (Ex. H).

<sup>9</sup> Source: LEHD State of California County Reports - Quarterly Workforce Indicators, Third Quarter, 2008, Age Group 14-99, Gender, Female, available at <http://www.labormarketinfo.edd.ca.gov/?pageid=127>. No more current data is available. (Ex. I)

<sup>10</sup> Source: University of California Newsroom article: Few Women Take Pregnancy Leave in California, Study Finds (available at: <http://www.universityofcalifornia.edu/news/article/8035> (Ex. J).

<sup>11</sup> Source: Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” p. 2, last updated September 1, 2009 and available at <http://www.jan.wvu.edu/media/LowCostHighImpact.doc> (Ex. K).

from their current positions.”<sup>12</sup> Therefore, the Legislature’s understanding was that the cost of accommodations provided for by the statute would be de minimus. Additionally, any accommodation that would impose an undue hardship on an employer would not be required by the regulations.<sup>13</sup>

The Legislature’s assumption that minor accommodations for employees affected by pregnancy or related medical conditions short of transfer or leave would be of no or little cost to employees is consistent with research conducted by the Department of Labor, Office of Disability Policy Job Accommodation Network (JAN) about the types of accommodations needed for a broad spectrum of disabled employees in the work place.<sup>14</sup> A JAN 2008-2009 survey of 366 employers found that 56% of all job accommodations for persons with disabilities came to no cost to the employer.<sup>15</sup>

In general, pregnancy accommodation can be expected to be less costly than average disability accommodations because no special equipment is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time. The Commission’s proposed pregnancy regulations amendments follow legislative changes to permit employers to implement minor accommodations that are less costly than transferring an employee or requiring an employee to take a pregnancy disability leave (already required prior to the 1999 and 2004 amendments): seven of the eight accommodations required by the proposed regulation will impose no additional cost on employers, as noted in the Commission’s Fiscal Impact Statement.

**Initial cost for California employers to provide reasonable accommodations for 47,491 affected employees or \$0 - \$500 per employer. \$11,872,916**

**Cost over three years to provide reasonable accommodation \$11,872,916**

The Commission estimated an initial cost for California employers by multiplying \$500 (the approximate cost for an individual employer whose employee takes 9-12 prenatal visits) by 47,491 to reach \$23,745,833 divided by two because the Commission assumed that half of California employers were already providing reasonable accommodations to employees and half of the accommodations would result in employers allowing flexible scheduling to accommodate the increased time off. The Commission assumed that a

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<sup>12</sup> Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1670 (1999-2000) as amended May 6, 1999, p. 11, available at [http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab\\_1651-1700/ab\\_1670\\_cfa\\_19990513\\_122013\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1651-1700/ab_1670_cfa_19990513_122013_asm_comm.html), last visited December 1, 2009 (Ex. L).

<sup>13</sup> Gov. Code § 12940, subd. (m); Proposed amended Cal. Code Regs., tit. 2, § 7291.6, subd. (a)(2).

<sup>14</sup> Source: Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” p. 2, last updated September 1, 2009 and available at <http://www.jan.wvu.edu/media/LowCostHighImpact.doc> (Ex. K).

<sup>15</sup> *Id.*

fertile employee would be pregnant once in three years, so that the cost over three years would not exceed the initial estimate.

The proposed regulations do not impose any additional costs beyond the statute.

Adoption of these regulations will not:

- (1) create or eliminate jobs within California.
- (2) create new businesses or eliminate existing businesses within California; or
- (3) affect the expansion of businesses currently doing business within California.

Significant effect on housing costs: None.

#### *Small Business Determination*

The Commission has determined that the proposed regulations will affect all businesses with five or more employees, including, potentially, 405,874 businesses with 5 to 50 employees.<sup>16</sup>

#### CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Commission must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Commission invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

#### CONTACT PERSON

Inquiries concerning the proposed administrative action may be directed to:

Ann M. Noel, Executive and Legal Affairs Secretary  
or Caroline L Hunt, Administrative Law Judge  
Fair Employment and Housing Commission  
455 Golden Gate Avenue, Suite 10600  
San Francisco, CA 94102  
Telephone: (415) 557-2325

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<sup>16</sup> Source: Employment Development Department, Labor Market Information Division, Table 1, Number of Businesses, Number of Employees, and Third Quarter Payroll by Size of Business, State of California, Third Quarter, 2008 (hereinafter “EDD Table 1”) available at <http://www.labormarketinfo.edd.ca.gov/?pageid=138> [to download Excel spreadsheet]. Businesses with 5 or more employees were added to reach 405,874. More current data is not available. (Ex. M).

Facsimile: (415) 557-0855  
[regs@fehc.ca.gov](mailto:regs@fehc.ca.gov)

Please direct requests for copies of the proposed text (the “express terms”) of the regulations, the initial statement of reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based to Ms. Noel or Judge Hunt at the above address.

#### AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Commission will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, and the initial statement of reasons. Copies may be obtained by contacting Ann M. Noel at the address or phone number listed above, or by downloading copies from the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov).

#### AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearings and considering all timely and relevant comments received, the Commission may adopt the proposed regulations substantially as described in this Notice. If the Commission makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Commission adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Ann M. Noel at the address indicated above. The modified text will also be available on the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov). The Commission will accept written comments on the modified regulations for 15 days after the date on which they are made available.

#### AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Noel at the above address or on the Commission’s website at [www.fehc.ca.gov](http://www.fehc.ca.gov).

#### AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action including all exhibits, the Initial Statement of Reasons, and the text of the regulations in underline and strikeout can be accessed through our website at [www.fehc.ca.gov](http://www.fehc.ca.gov).

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