FAIR EMPLOYMENT AND HOUSING COUNCIL
EMPLOYMENT REGULATIONS REGARDING DEFINITIONS; HARASSMENT AND DISCRIMINATION PREVENTION AND CORRECTION; AND TRAINING

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 1. General Matters; Article 2. Particular Employment Practices

UPDATED INFORMATION [Government Code Section 11346.9(a)(1)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person. Accordingly, FEHA requires that "employers" as defined in the Act and these regulations, refrain from discrimination and harassment on the basis of these protected classes and provide training on the prevention of harassment and discrimination.

Specifically, this rulemaking action clarifies the definition of "employer." This is necessary in order to conform to statutory definitions and avoid unintended gaps in the application of FEHA to newly established employers. The rulemaking action also clarifies existing harassment prevention training requirements, including in response to newly enacted legislation, Statutes 2017, chapter 858 (S.B. 396).

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

The Council heard public comment on the originally proposed text at a public hearing in San Francisco on August 17, 2018. The Council further solicited public comment on three modified texts at three subsequent meetings: October 19, 2018, in Los Angeles; December 10, 2018, in Oakland; and January 28, 2019, in Sacramento.

The following list summarizes the Council's amendments to the originally proposed text:
- clarifying how to count employees in section 11008(d) for the sake of defining an "employer" because some stakeholders found pre-existing language to be imprecise and possibly contain inadvertent loopholes;

- deleting “average or normal complement” from section 11008(d)(1) because this concept is already covered by the language “regular basis” and thus, is unnecessarily duplicative;
- deleting “intermittent” from section 11008(d)(1)(A) because this concept is already covered in subdivision (d)(1)(A) and thus, is unnecessarily duplicative;
- deleting the first sentence of section 11008(d)(1)(B) because this language is already covered by caselaw and thus, is unnecessary. Other minor, nonsubstantive changes were made to subdivision (d)(1)(B) to improve grammar;
- revising section 11008(d)(2) to make “section” plural. This change is necessary to fix a grammatical error;
- clarifying that every employer must post a poster developed by the Department regarding transgender rights in a prominent and accessible location in the workplace because that is required by Government Code section 12950(a)(2);
- inserting “sexual” before “harassment” in section 11023(b) in order to align with Government Code section 12950(b);
- clarifying that the definitions in section 11024 are to be used in determining whether an employer must provide the training and education and whether the training and education are legally compliant because employers require guidance about whether and how to train;
- revising section 11024(a) to delete unnecessarily duplicative language;
- clarifying in section 11024(a)(1) that “contractors” must meet the same criteria that apply to employers as described in section 11008(d) because a contractor does not always have the same responsibilities as an “employer” in some other areas of employment law;
- clarifying that the definition of “employee” in section 11024(a)(3), which includes unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract, applies only to section 11024 because unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract do not always have the same rights as “employees” in some other areas of employment law;
- inserting “unpaid” before “interns” in section 11024(a)(3) in order to align with Government Code section 12940(j)(1). Other minor, nonsubstantive changes were made to subdivision (a)(3) to improve grammar;
- clarifying that the definition of “harassment” in section 11024(a)(5) applies only to section 11024 because workplace harassment may be based on characteristics other than sex, gender identity, gender expression, and sexual orientation that are covered in other sections of the regulations not being amended by this rulemaking action;
- requiring in section 11024(a)(10) that “trainers or educators” have the ability to provide training on the definitions of abusive conduct, sexual harassment, gender identity, gender expression, sexual orientation, and the other bases enumerated in the FEHA and have the ability to provide training on practical examples of preventing harassment, discrimination, retaliation, and abusive conduct because that is required by statute in Government Code section 12950.1 and would ensure productive training;
- clarifying in section 11024(a)(10) that an employer may use multiple trainers who, in combination, meet the required qualifications because some employers may prefer to hire several subject matter experts to each speak to their topics of expertise, which would still comply with the training requirements even though it was not conducted by an individual “trainer”;
- revising section 11024(a)(10) to include cross references in order to make it easier for the regulated public to locate the specified definitions. “Ing” was underlined to properly illustrate changes to text;

- adding “peer-to-peer trainers” to the group of eligible trainers under section 11024(a)(10)(A)2. because that is a term that is often used by trainers who are in effect “harassment prevention consultants” but use a more familiar title;
- removing “working as employees or independent contractors” after “human resource professionals, harassment prevention consultants, or peer-to-peer trainers” in section 11024(a)(10)(A)2., which is necessary to clarify the text by removing unnecessary instruction on how trainers may be compensated;
- removing the requirement in section 11024(a)(10)(A)2. that “professors or instructors” cannot be trainers without “a postgraduate degree or California teaching credential,” which is necessary because those qualifications are not required by statute and impose an arbitrarily high bar to becoming a trainer;
- revising the reference from “(h)(2)” to “(i)(2)” in section 11024(c)(1) to reflect the renumbering of Government Code section 12950.1;
- revising section 11024(c)(2)(C) to strikeout “s” after “constitutes” to improve grammar; and
- revising the reference from “(h)(2)” to “(i)(2)” in section 11024(c)(2)(M) to reflect the renumbering of Government Code section 12950.1.

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

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

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

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council’s response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act for the reasons described below.

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

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

NONDUPLICATION STATEMENT [1 CCR 12].

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

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

Section 11008(d):

Comment: California Government Code Section 12935 does provide the FEHC with authority to adopt regulations that interpret and apply all sections of the Fair Employment & Housing Act (FEHA). However, that authority is limited to the statutory language of FEHA and must not conflict with the language of the statute. When interpreting FEHA, California seeks guidance from Title VII of the Civil Rights Act of 1964, as the language and intent of both statutes are similar. Williams v. Chino Valley Independent Fire Dist., 61 Cal.4th 97 (2015).

According to the Supreme Court of the United States, the "ultimate touchstone" in determining whether an employer has a sufficient number of employees to satisfy the jurisdictional prerequisite for coverage under Title VII is "whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question." Equal Employment Opportunity Commission and Walters v. Metropolitan Educational Enterprises, Inc., 117 S.Ct. 660, 666 (1997). The current FEHA regulations align with Title VII regarding the requisite number of days that an employer must employ an individual to be covered by the Act — "twenty consecutive calendar weeks in the current calendar year…" Cal. Code Regs. tit. 2, § 11008.

However, the proposed amendments drastically deviate from the current state and federal definitions by removing the requisite number of weeks someone needs to be employed (20 weeks) to just giving a very generic requirement of "regular basis." "Regular basis" is not a legally defined term providing a threshold number of days. Rather than having a set number of weeks where the employer can certify whether or not someone was employed for that amount of time, now an employer is left to interpret "regular basis" and simply hope the Department and the courts have the same interpretation of "regular basis". This radical lowering of the durational threshold will cause extreme confusion and additional employer liability. Employers may have an individual who only works for them for 5 days or even 1 day, but it is the same day each year. Does that count toward the threshold? Is that considered a "regular basis"? A change from approximately 120 days (20 weeks) to potentially 1 day is a radical change that is very unsettling for employers and exceeds statutory authority.

The proposed amendments cause further confusion because they are contradictory. In Section (d)(1) "regularly employing" is defined as "employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing an average or normal complement of five or more employees on a regular basis." And then Section (d)(1)(A) states that "regular basis" means "at least five employees are regularly on its payroll during the season." So, is the required standard 5 individuals on the day the unlawful conduct allegedly occurred, or is it 5

employees on its payroll during the season? This type of inconsistency is very confusing for employers and simply leads to additional liability exposure.

We recommend that the "twenty consecutive calendar weeks in the current calendar year…" not be changed for this section or its proposed application to Sections 12945.2, 12945.6, and 12950.1 because the definition of "regular basis" is not a known or established evidentiary standard and will create confusion in its application.

Council response: The Council disagrees that "regular basis" is vague. Employer is defined in section 11008(d)(1)(A) to include businesses that are recurring, rather than constant, and thereby adheres to the definition of "employer" in Gov. Code sec. 12926(d): "Employer" includes any person regularly employing five or more persons…."

In contrast to FEHA, Title VII of the Civil Rights Act contains a qualifier that for jurisdictional purposes, an employer must have 15 or more employees *for each working day in each of twenty or more calendar weeks in the current or preceding calendar year*." FEHA contains no such limitation. In 11008(d)1)(A), the Council has clarified that the durational threshold appropriately would impose liability on a business that that regularly employs five or more individuals on a regular basis, in accord with the plain meaning of the term. For example, a business that recurs annually and employs at least five individuals during that period would count toward the number of individuals required to meet the definition of "regularly employing." The Council did not pull its definition from thin air. It is entirely consistent with courts' understanding of what it means for an employer to regularly employ workers. See, *e.g. Robinson v. FEHC* (1992) 2 Cal.4th 226, 238; *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Commission* (2017) 895 N.W.2d 446 (relying on California law and *Robinson*). It should be noted that in *Robinson,* the court quotes with approval an explanation of "regularly employing five or more persons" by Michael Tobriner, California FEPC (1965) 16 Hastings L.J. 32-343: "This does not mean that the accused employer must have five or more employees at the time of the discriminatory act. It does mean that he must have an 'average' or 'normal' complement of five or more persons in his employ on a *'regular' basis."* (emphasis added)

The Council disagrees that the proposed amendments are contradictory. Subdivision (d)(1) provides that regularly employing means *either* (1) employing five or more individuals on the day of the alleged unlawful conduct *or* (2) having five or more employees regularly on payroll during the business's season.

Sections 11023 and 11024:

Comment: We believe all references in Cal. Gov't Code §11023 and §11024 of the text proposed by the FEHC, is inconsistent with existing statutes, court decisions, and other provisions of law and unclear to those persons directly affected by the regulations. SB-396's amendment to Cal. Gov't Code §12950.1 did not rename training, instead, the legislation added to the existing sexual harassment training requirement, specifying that, "[a]n employer <u>shall also provide</u> training… <u>as a component</u> of the training and education specified in subdivision (a)" [<u>emphasis</u> added]. Striking the word "sexual" from the regulation would rename, and possibly rebrand the required training, publicly known as sexual harassment prevention training, potentially confusing both practitioners and employers. Further, the authorizing statute's use of the phrase "sexual harassment", in subdivision (a), rather than "harassment" further supports this distinction. Inconsistency and lack of clarity pose the threat

of confusion, lack of uniformity, and varying degrees of effectiveness in the sexual harassment prevention training supplied.

Council response: The Council disagrees that the proposed text is inconsistent with existing statutes, court decisions, or other provisions of law. The Council disagrees that striking the word "sexual" from the regulation will confuse practitioners and employers because the text of the regulations and the new title of the section ("Required Training and Education Regarding Harassment Based on Sex, Gender Identity, Gender Expression, and Sexual Orientation") explicitly state that the training regards harassment based on sex, as well as the other new components of the training required by SB-396. Rather, keeping the word "sexual" in the regulation while also requiring training on harassment based on gender identity, gender expression, and sexual orientation could promote confusion by implying that employers must provide two separate trainings.

Comment: Adoption of the text proposed by the FEHC will burden and adversely affect us and the LGBTQ+ community at large, in that the proposed lacks any and all guidance regarding additional scrutiny warranted by Cal. Gov't Code §12950.1(c), through SB-396, therein depriving our trainers, all of which, through years instructing employers on how to best prevent harassment based on gender identity, gender expression, and sexual orientation, the right of asserting the qualification of knowledge and expertise as required by the aforementioned statute. Unable to promote our knowledge and expertise of how to best prevent harassment based on gender identity, gender expression, and sexual orientation, as the knowledge and expertise called for by SB-396, we and the LGBTQ+ community at large lack a level playing field with competitor compliance training organizations, in that financial commitment by employers for gender identity, gender expression, and sexual orientation harassment experts seems, per the text proposed by the FEHC, a necessity not demanded. The adoption of the text proposed by the FEHC us and the LGBTQ+ community at large, preventing the creation of new jobs and opportunities for one of California's most marginalized communities, most likely forcing the reduction and/or elimination of jobs, and/or the reduction and/or elimination of our business operations, possibly reducing our ability to expand and do business within California. Additionally, adoption of the text proposed by the FEHC will adversely affect LGBTQ+ worker safety and the environment because the proposed fails to further codify existing statutes, clarify terms, and make technical changes, which will affect the supply of LGBTQ+ inclusive jobs and/or ability for LGBTQ+ owned businesses to do business in California, making it more difficult for LGBTQ+ employees and employers to understand their rights and obligations, and additional litigation costs for businesses.

SB-396's amendment to Cal. Gov't Code §12950.1, implemented January 1, 2018, obligates our state, through the FEHC, to assist transgender and nonbinary workers in overcoming the disproportionate unemployment and lack of inclusion they face. A review of existing and pending legislation further indicates the legislature's intention of resting this duty to effectively guide employers, through regulations, on the content and trainer qualifications of SB-396's amendment to Cal. Gov't Code §12950.1. Therefore, we believe, that it is the FEHC's duty to provide that clarification, as asserted within these comments.

Council response: The Council disagrees that adoption of the proposed text will prevent the creation of new jobs and opportunities or reduce or eliminate jobs or business operations for the LGBTQ+

community or will adversely affect LGBTQ+ worker safety and the environment because the proposed text clarifies that qualified "trainers" must, through a combination of training, experience, knowledge, and expertise, have the ability to provide training about practical examples in the prevention of harassment, discrimination, and retaliation based on sex, gender identity, gender expression, and sexual orientation and because the proposed text would permit peer-to-peer trainers to provide harassment prevention training. The proposed text will create opportunities for members of the LGBTQ+ community to serve as trainers even if they do not have the formal, professional qualifications previously required. And by requiring training on practical examples in the prevention of harassment, discrimination, and retaliation based on sex, gender identity, gender expression, and sexual orientation, the proposed text will promote the safety of LGBTQ+ workers.

Section 11024(a)(3):

Comment: Additionally, the proposed change to Section (a)(3) defining "employee" is not legally accurate and will lead to further confusion for employers. The proposed amendments add the phrase "interns and unpaid volunteers" to the definition of "employee." However, these classifications do not necessarily create employer-employee relationships. With regards to classification of an intern, the "primary beneficiary" test is utilized. U.S Department of Labor Fact Sheet #71; Benjamin v. B&H Education, Inc., 877 F.3d 1139 (9th Cir. 2017). Thus, while the term "intern" is a loosely used term, if properly classified, these individuals are not employees. Whether a person is properly classified as an unpaid volunteer is determined by the parties' intent. So long as the person intends to volunteer his/her services for public service, religious or humanitarian objectives, not as an employee and without expecting pay, the person is properly classified as a volunteer rather than an employee. DLSE Opinion Letter 1988.10.27; DLSE Enforcement Policies and Interpretations Manual sec. 43.6.7. Thus, these terms should not be used to define "employee."

Most concerning is the addition of "persons providing services pursuant to a contract" to the definition of "employee" because it is legally inaccurate to presume these individuals are employees. So long as these individuals are properly classified as independent contractors, these individuals are not employees. The proposed amendments cause even further confusion because they are contradictory. "Contractor" is separately defined in the previous Section 11024 (a)(1) as "a person performing services pursuant to a contract with an employer[.]" Since this section already provides a separate definition for "contractor" there is no logical reason to repeat this term again under the definition of "employee" given the fact that contractors are not employees.

While we understand FEHA provides protections to these individuals, we respectfully request the Council to delete the addition of "interns and unpaid volunteers, and persons providing services pursuant to a contract," to the definition of "employee" in Section 11024 (a)(3) and separately define each term so there is no presumption of an employer-employee relationship. Furthermore, providing conflicting definitions of "employee" in various provisions of these regulations will only lead to confusion for employers, difficulty in compliance and increased exposure to liability despite good faith compliance efforts.

Council response: The Council disagrees. Interns and volunteers are explicitly included for counting purposes only, and not to expand the definition of "employee." These groups of affected individuals were added for counting purposes because, since January 1, 2015, they have been deemed to be

subject to the protections of FEHA in the context of harassment, for which an employer may be liable. In amending its regulations on April 1, 2016, the Council has recognized that unpaid interns and volunteers are considered employees under the harassment protections. (See Gov. Code, §on 12940(j)(1); see also Cal. Code Regs., tit. 2, § 11019(b).) Therefore, it is entirely appropriate to count them for jurisdictional purposes in this section only for the definition of "employer," which is separate from the definition in other sections/contexts.

Section 11024(a)(10):

Comment: Much of my community's more recent gains are attributable to the numerous LGBTQ+ employees and volunteers throughout the State, and nation, providing cultural competency and gender identity, gender expression, and sexual orientation harassment prevention training to public and private sector organizations. One major reason for the gain is attributable to the training's context: We are telling our story. However, one aspect limiting this outreach effort is that the audience which it serves is limited to those voluntarily undergoing said training. Through SB-396, the legislature intended to address this setback and mandate the instruction of California hiring managers, supervisors, and employers, many of which are entirely unfamiliar with the challenges we face. Yet, this law's impact, and our ability to effectively engage these employment gatekeepers, relies on the FEHC's adoption of a regulation that requires the content and practical examples of harassment based on gender identity, gender expression, and sexual orientation and the employment challenges we face, provided by qualified experts in harassment based on gender identity, gender expression, and sexual orientation. It's admitted that knowledge and expertise of the law is requisite for quality assurance, however, so, too, is the knowledge and expertise of the community which those laws intended to serve, if the aims of SB-396's amendment to Cal. Gov't Code §12950.1 is to be fulfilled.

Those of us who have devoted ourselves to both the law and LGBTQ+ civil rights may meet existing trainer qualifications, however, the existing and proposed trainer qualifications do not place any additional burden on qualified practicing trainers, thereby allowing those unfamiliar with, and lacking working knowledge of, our community, therein of harassment based on gender identity, gender expression, and sexual orientation, and of 12950.1's requirement of practical, or real-life, examples of LGBTQ+ workplace harassment, to use their potentially damaging words to share, in many cases for the first time, the story of our struggle. I would never presume to assert my expertise on a subject of which I am unfamiliar, let alone to relay the experiences of a community for which I'm not a member, and, rather than permitting those without said knowledge and expertise to take up a role to possibly relay erroneous LGBTQ+ information, data, or facilitate conversation or discussion within the trusted compliance training format, potentially to the detriment of the LGBTQ+ civil rights movement, instead, we implore you to adopt regulations which allow only those with actual knowledge and expertise of LGBTQ+ discrimination and harassment and of the experiences we face in the workplace to qualify as trainers under this regulation. Additionally, given public and private sector employer reliance on the numerous LGBTQ+ employees and volunteers throughout the state, and nation, that have supplied their cultural competency and LGBTQ+ harassment prevention training, those public and private sector employers will be denied clarity, with respect to sourcing training, by the proposed regulatory language, therein denying them the knowledge and expertise, as demanded by SB-396.

The text proposed by the FEHC regulation fails to set specific content guidelines for training on gender identity, gender expression, and sexual orientation harassment prevention, and adds no additional qualifications, as required by the statute, for a trainer or educator with knowledge and expertise in harassment based on gender identity, gender expression, and sexual orientation. For that reason, we suggest adding the following to §11024(a)(10):

(C) Employers subject to the biennial training requirement of Government Code section 12950.1(a), shall, in fulfillment of the mandate specified in Government Code section 12950.1(c), use peer trainers or educators with knowledge and expertise in harassment based on gender identity, gender expression, and sexual orientation, from a gender identity, gender expression, and sexual orientation-focused organization, to supply the mandate specified in Government Code section 12950.1(c).

1. A "gender identity, gender expression, and sexual orientation focused-organization" is a nonprofit, benefit, or social purpose corporation, as defined by Title 1 of California's Corporations Code, that provides peer-delivered or peer-developed effective interactive training, as specified in section 11023(a)(2). Qualified gender identity, gender expression, and sexual orientation focused organizations possess all of the following: a.) owned, operated, managed, or controlled by a majority (at least 51%) of transgender or nonbinary person or persons who are either U.S. citizens or lawful permanent residents; b.) exercises independence from any non-transgender or gender nonconforming business enterprise; c.) have a Mission or Social Purpose dedicated to transgender or gender nonconforming workplace equality; d.) has its principal place of business (headquarters) in the United States; e.) has been formed as a legal entity in the United States. To track compliance, an employer shall maintain documentation of the training requirement by completing and signing a form, to be created by the Department of Fair Employment and Housing, certifying compliance with Section 12950.1(c) of the Government Code. The form shall identify, at a minimum: a.) the date and location of the training; b.) the type of training; c.) the names of the supervisory employees trained; d.) the name of the gender identity, gender expression, and sexual orientation focused-organization supplying the training; e.) the name of the peer trainer or educator with knowledge and expertise in harassment based on gender identity, gender expression, and sexual orientation that provided the training, or, with respect to use of a qualified gender identity, gender expression, and sexual orientation focused-organization's e-learning or other computer-based effective interactive training material, the name of the qualified peer trainer or educator with knowledge and expertise in harassment based on gender identity, gender expression, and sexual orientation that was made available to answer questions and provide guidance and assistance to the supervisory employees trained; and f.) a brief description of the peer trainer or educator's harassment based on gender identity, gender expression, and sexual orientation knowledge and expertise qualifications.

> 2. A "peer trainer or educator with knowledge and expertise in harassment based on gender identity, gender expression, and sexual orientation" shall, in addition to possessing the trainer or trainer educator's qualifications specified in section 11023(a)(10)(A), have a minimum of two or more years of practical experience in the following: a.) utilizing interactive instruction strategies to train or teach any of the following: i.) gender identity, gender expression, and sexual orientation-specific discrimination, retaliation, and harassment prevention; ii.) transgender-centered or transgender-informed workplace harassment prevention principals and techniques; iii.) the longterm effects of unlawful workplace behavior and the intersection of discrimination, oppression, and harassment based on gender identity, gender expression, and sexual orientation; iv.) the availability of local, state, and national resources for victims of harassment based on gender identity, gender expression, and sexual orientation; v.). culturally competent and fluent in the language or languages that the relevant employees understand; b.) responding to complaints of gender identity, gender expression, and sexual orientation harassment and discrimination; c.) conducting investigations of gender identity, gender expression, and sexual orientation harassment and discrimination complaints; d.) advising and instructing employees on managing incidents specific to gender identity, gender expression, and sexual orientation discrimination, retaliation, and harassment.

Council response: The Council disagrees because the proposed text does add in section 11024(a)(10), as required by the statute, the additional qualification that a trainer must have the ability to provide training about the definitions of gender identity, gender expression, and sexual orientation and the ability to provide training including practical examples in the prevention of harassment, discrimination, and retaliation based on gender identity, gender expression, and sexual orientation. Requiring that a trainer come from organizations that meet the suggested requirements goes beyond the mandate of the statute.

Section 11024(c):

Comment: We ask the FEHC to draft guidance as to what the FEHC would deem "training inclusive of harassment based on gender identity, gender expression, and sexual orientation," as implied by SB-396's language mirroring that used in the statute`s existing subdivisions and the language used in AB-1825. We believe the legislature, through SB-396, sought to introduce LGBTQ+ specific topics and terminology into the dialogue of groups which have not yet become familiar with our struggles and reoccurring impediments all too common to our transgender experience. The inclusion of guidance on what substantive training content is necessary to help mitigate the unlawful employment actions that have befallen my highly marginalized community. With nearly half (47%) of transgender individuals reporting an adverse job outcome and transgender women of color being 7x more likely to earn less than $10,000 a year, we urge the FEHC to support the transgender community by adopting language that conforms with SB-396's legislative intent of reducing the prevalence of transgender and nonbinary harassment in the workplace.

Council response: The Council disagrees that the proposed text fails to adopt language that conforms to SB-396's legislative intent. Although it does not specify substantive LGBTQ+ specific topics and terminology, section 11024(c) does provide guidance as to what the Council deems "training inclusive of harassment based on gender identity, gender expression, and sexual orientation." It is unclear what language is being requested and if it is even possible for regulatory language to have the effect of "reducing the prevalence of transgender and nonbinary harassment in the workplace."

Other:

Comment: The proposed regulations regarding harassment and discrimination prevention and correction and training are premature given the number of bills currently pending before the California legislature regarding harassment prevention and training. The Council should wait for the legislative year to end before imposing new mandates on employers that may change as quickly as they are adopted.

Council response: The Council disagrees that the proposed regulations are premature because it is necessary, as soon as possible, to provide clarity on what the law currently requires in harassment prevention training.

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

Section 11008:

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

Section 11008(d):

Comment: If the duration is going to be changed, we suggest that a payroll method be used. For this purpose, the number of weeks is calculated based on how many weeks the individual is on the company payroll.

Additionally, we suggest that, if any change is going to be made to the 20-week period, a reasonable and predetermined number of weeks be used rather than the term "regular basis" because employers need certainty.

Council response: The Council disagrees. Payroll records are the most common way to identify who is and who is not an employee, although they are not the exclusive means. In Walters v. Metropolitan Education Enterprises, Inc. (1997) 519 US 202, the issue was whether the defendant-employer met the 15-employee threshold required under Title VII's anti-retaliation provision, 42 USC sec. 2000e-3(a) (i.e., having 15 or more employees "for each working day in each of twenty or more calendar

weeks in the current or preceding calendar year.") The Supreme Court, in a decision authored by Justice Scalia, held that an employer "has" an employee on any working day on which the employer maintains an "employment relationship" with the employee, and not just on days when the employee performs work or receives compensation from the employer. The most commonly used test for determining whether the employer has an employment relationship with the individual "is generally called the 'payroll method' since the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." (Id. at 206). Justice Scalia notes that it is the preferred method of EEOC and had been adopted by the Department of Labor in its enforcement of the federal Family and Medical Leave Act of 1993. (Id. at 207). However, Justice Scalia emphasized that "what is ultimately critical…is the existence of an employment relationship, not appearance on the payroll." Thus, a person could appear on a payroll but be an agent rather than an employee, and therefore would not count toward the minimum threshold. (Id. at 211-212). Conversely, an individual may be an employee but not show up on a payroll record. For example, "employees" who may not appear on a payroll record include individuals assigned to a business under a work program that pays participants' stipends or salaries (i.e. welfare recipients), union stewards, and volunteers who receive benefits and other percs but not salaries. (See EEOC Compliance Manual 915.003; US EEOC, FAQ's for Small Businesses.) According to EEOC, the types of records needed to determine the number of employees will vary from case to case and include payroll records, employment contracts, contracts involving workers provided by temporary agencies and other staffing firms, and other personnel documents. If only payroll records were used, then negligent employers who do not maintain records would essentially be rewarded with immunity from civil rights laws.

Additionally, subdivision (d)(1)(A) provides sufficient certainty for employers by stating that "regular basis" includes employment that is recurring, seasonal, or otherwise not the same every day. The statute does not refer to a specific time period, as Title VII does, and because businesses differ, the regulation should provide guidance to as many as possible. See response above to the comment on this subdivision from the 45-day comment period.

Section 11008(k):

Comment: We request that section 1008(k) be deleted because it only serves to create confusion.

Council response: The Council declines to make this change because it refers to pre-existing text that is not being modified by this rulemaking action and is necessary to implement AB 1443 (Skinner, Chapter 302, Statutes of 2014).

Section 11023:

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018. In further review of this section, we respectfully request the Council clarify that the policy discussed in Subdivisions (b)(1)-(10) can be included in the general employee handbook since that is the current practice for many employers.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period. Regarding clarifying that employers may include the policy

discussed in Subdivisions (b)(1)-(10) in their handbook, the Council believes that is unnecessary because nothing in the proposed text indicates that the required harassment, discrimination, and retaliation prevention policy be separate from a general employee handbook.

Section 11024:

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

[Proposed] Section 11024(a):

Comment: To avoid excessive repetition of Government Code §12950.1(c)'s phrase "gender identity, gender expression, and sexual orientation," and to conform with common usage, we suggest incorporating into the definitions of §11024(a):

> "LGBTQ+" means Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, and other individuals united by having gender identities, gender expressions, or sexual orientations that differ from the heterosexual and cisgender majority.

Council response: The Council declines to make this addition because it is more appropriate to mirror the statute's phrase "gender identity, gender expression, and sexual orientation" rather than to insert new phraseology. The proposed definition of "LGBTQ+" is not necessary because the phrase "gender identity, gender expression, and sexual orientation" adequately describes the concepts involved.

[Proposed] Section 11024(a)(10):

Comment: We believe, the modified text of §11024(a)(10) a "trainer" or "trainer or educator", is inconsistent with the authorizing statute and will confuse those persons directly affected by the regulation. Although the modified text outlines, generally, what skills a trainer or educator must possess, §11024(a)(10)(A)'s profession-specific qualifications is often the only provision used by employers and practitioners to examine trainer credentials. In its current organization, subparagraph (A), lacking any additional burden for trainers regarding SB-396 subject-matter, will continue to confuse and permit those unfamiliar with our LGBTQ+ experience, and of practical, or real-life, examples of sexual orientation, gender identity, and gender expression workplace harassment, to share, in many cases for the first time, the very personal story of our struggle. Admittedly, knowledge and expertise of the law are requisite for quality assurance, however, if the aims of SB-396 are to be fulfilled, so, too, is the knowledge and expertise of the community which the Transgender Work Opportunity Act intended to serve. We implore you to adopt regulations which permit only those with actual knowledge and expertise of LGBTQ+ discrimination, harassment, and of the experiences we face in the workplace to qualify as trainers under this regulation. Accordingly, we suggest modifying §11024(a)(10) as follows:

(10) “Trainers” or “Trainers or educators” are individuals who, through a combination of training, experience, knowledge, and expertise, have the ability to provide training about the following: 1) the definitions of abusive conduct, sexual harassment, gender identity, gender expression, sexual orientation, and the definitions of the other bases enumerated in the FEHA; 2) how to identify behavior that may constitute unlawful harassment, discrimination, and/or retaliation under both California and federal law; 3) what steps to take when harassing behavior occurs in the workplace; 4) how to report harassment complaints; 5) supervisors’ obligation to report harassing, discriminatory, or retaliatory behavior of which they become aware; 6) how to respond to a harassment complaint; 7) the employer’s obligation to conduct a workplace investigation of a harassment complaint; 8) what constitutes retaliation and how to prevent it; 9) essential components of an anti-harassment policy; 10) the effect of harassment on harassed employees, co-workers, harassers and employers; and 11) how to eliminate and prevent harassment and discrimination based on actual or perceived sexual orientation, gender identity, and gender expression, utilizing relevant and practical LGBTQ+ examples.

(A) A trainer or educator qualified to provide training under this section shall be:

(i) Individuals with a minimum of two years of experience identifying and addressing the legal and social challenges faced by LGBTQ+ persons and those faced specifically by transgender and nonbinary applicants and employees in the workplace; and

(ii) One or more of the following:

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

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

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

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

(B) Nothing in this section shall preclude an employer from utilizing multiple trainers who, in combination, meet all of the qualifications required by this subsection.

Council response: The Council declines to revise this subdivision as suggested because subdivision (a)(10), number 11, is sufficiently specific in requiring that trainers be qualified to provide training on "practical examples in the prevention of harassment, discrimination, and retaliation based on sex, gender identity, gender expression, sexual orientation, and the prevention of abusive conduct." The adopted text therefore already requires trainers to have the type of "actual knowledge" that the commenter noted, from whatever source that knowledge has been acquired. In some locales around the state, it may not be feasible to require such specific qualifications as the commenter proposes.

[Proposed] Section 11024(c)(2):

Comment: We ask the FEHC to adopt regulations as to what the FEHC would deem "training inclusive of harassment based on gender identity, gender expression, and sexual orientation," as mandated by Government Code §12950.1(c). We believe the legislature sought to introduce LGBTQ+ specific harassment prevention topics, provided by trainers with actual knowledge and expertise, covered in appropriate and reasonable depth, into the dialogue of groups which have not yet become familiar with the struggles and reoccurring impediments all too common to our transgender experience. However, §11024(c)(2)'s failure to indicate the minimum content requirements is inconsistent with the demands of the authorizing statute and will continue to confuse employers and trainers as to how much attention should be given to gender identity, gender expression, and sexual orientation harassment prevention. For that reason, we suggest adding the following to §11024(c)(2):

How to eliminate and prevent harassment and discrimination based on actual or perceived sexual orientation, gender identity, and gender expression, utilizing relevant and practical LGBTQ+ examples. This training shall address the following: i) definitions and examples of common terms associated with sexual orientation, gender identity, and gender expression and explanation and examples of sexual orientation, gender identity, and gender expression; ii) methods of communicating with or about LGBTQ+ individuals, including the importance of using transgender and nonbinary individuals' preferred terminology when addressing or speaking about them, incorporating a segment on the use of suitable vocabulary regarding gender identity, including respecting pronouns; iii) the employment and social challenges historically faced by LGBTQ+ persons, information on the history of harassment, discrimination, hostility directed toward LGBTQ+ persons, and information about LGBTQ+ persons' reluctance to seek assistance for fear of further discrimination; iv) practical examples of harassment and discrimination faced by transgender and nonbinary people, and the importance of being sensitive and responsive to individuals' gender identity and gender expression; v) methods to create a safe and affirming workplace, the importance of professionalism, and the ways attitudes affect access and participation and overall employment outcomes; vi) contemporary legal topics relating to LGBTQ+ persons, including, but not limited to, those enumerated in the Sex Discrimination Article of this Chapter of the California Code of Regulations, the Unruh Civil Rights Act at section 51 of the Civil Code,

the Fair Employment and Housing Act, and the Department's Civil Code section 12950(a)(2) compliant transgender workplace rights poster.

Council response: The Council declines to adopt the proposed amendment because doing so would go beyond the mandates of the statute, which provides that training must be "inclusive of harassment based on gender identity, gender expression, and sexual orientation," must "include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation," and must "be presented by trainers or educators with knowledge and expertise in those areas." The requirement that trainers have knowledge and expertise in those areas and provide practical examples of harassment based on gender identity, gender expression, and sexual orientation will ensure that the training includes appropriate and necessary content.

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

Section 11008:

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018 and November 7, 2018.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

Section 11023:

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018 and November 7, 2018.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

Section 11024:

Comment: By incorporating the proposed amendments of Section 11008(d) into Section 11024, we have the same concerns as discussed in "Comments to Section 11008(d)" above. The proposed modifications drastically deviate from the current state and federal definitions since they remove the requisite number of weeks someone needs to be employed (20 weeks) to simply providing a very generic requirement of "regular basis." "Regular basis" is not a well-known legal term providing a specific threshold number of days. Rather than having a set number of weeks where the employer can certify whether or not someone was employed for that amount of time and must be provided training, now an employer is left to interpret "regular basis." Given the proposed modifications, the employer must hope the Department and the courts have the same interpretation of "regular basis", which is already at issue given the testimony by Councilmember Brodsky at the December 10, 2018 meeting.

This radical lowering of the durational threshold will cause extreme confusion and additional employer liability given that employers will no longer know which individuals they are expected to train. Employers may have an individual who only works for them for 5 days or even 1 day, but it is the same day each year. Does that count toward the threshold? Is that considered a "regular basis" and is the company expected to provide sexual harassment training to that individual? A change from approximately 120 days (20 weeks) to potentially 1 day is a radical change that is very unsettling for employers and exceeds statutory authority.

As previously discussed in our prior letters (dated August 16 and November 7, 2018), the proposed amendments are also contradictory to the current regulations. As stated by the California Supreme Court in its discussion of FEHA, "[A]n employer falls within its provisions only when he is regularly employing five or more persons. This does not mean that the accused employer must have five or more employees every day throughout the year or that he must have five or more employees at the time of the discriminatory act. It does mean that he must have an 'average' or 'normal' complement of five or more persons in his employ on a 'regular' basis." (Robinson v. Fair Employment & Hous. Com., 2 Cal. 4th 226, 238, 825 P.2d 767, 773
(1992), internal citations omitted.) However, Section (d)(1) defines "regularly employing" as "employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing an average or normal complement of five or more employees on a regular basis." Next, Section (d)(1)(A) states that "regular basis" means "at least five employees are regularly on its payroll during the season." This type of inconsistency is very confusing for employers and simply leads to further liability exposure. Thus, we request that the Council amend these sections to maintain consistency.

Council response: The Council has responded to the substance of this comment above, which is no longer responsive for this comment period.

Comment: We incorporate herein by reference our prior comments from our letter dated August 16, 2018 and November 7, 2018.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period.

Other:

Comment: We incorporate by reference all of our written and oral comments.

Council response: The Council has responded to all of the written comments above and oral comments below, all of which are no longer responsive for this comment period.

Comment: We deeply and sincerely thank the Council for taking action to change § 11008(d)'s current definition of "employer" to remove the gaping loophole in FEHA's coverage.

Council response: The Council appreciates the feedback.

PUBLIC HEARING COMMENTS MADE August 17, 2018 [Government Code Section 11346.9(a)(3)].

Laura Curtis of the California Chamber of Commerce and Chloe Hollett-Billingsley from Employment Equality commented on the text noticed for the 45-day comment period. They submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above. Noah Lebowitz of the California Employment Lawyers Association and Dennis Seaton of the Church State Council both thanked the Council for its work but did not submit written comments.

PUBLIC HEARING COMMENTS MADE OCTOBER 19, 2018 [Government Code Section 11346.9(a)(3)].

Comment: Mark Murray from the California Teachers Association inquired about including different training requirements for unpaid, hourly volunteers.

Council response: Unpaid, hourly volunteers are not addressed in the regulations because these regulations only pertain to the training of supervisors.

Chloe Hollett-Billingsley from Employment Equality commented on the text noticed for the first 15-day comment period. She submitted written comments that included all of her oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE DECEMBER 10, 2018 [Government Code Section 11346.9(a)(3)].

No one commented in person on the text noticed for the second 15-day comment period.

PUBLIC HEARING COMMENTS MADE JANUARY 28, 2019 [Government Code Section 11346.9(a)(3)].

Laura Curtis from the California Chamber of Commerce commented at the meeting and Chloe Hollett-Billingsley from Employment Equality emailed in a comment during the meeting. Both submitted written comments that included all of their oral/emailed comments and additional comments, which are summarized and responded to above.

There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council unanimously voted to submit this draft to the Office of Administrative Law as the final version of the regulations.