No. 21-55229

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KRISTINA RAINES ET AL.,

Plaintiffs-Appellants,

v.

U.S. HEALTHWORKS MEDICAL GROUP ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
No. 3:19-CV-01539-DMS
Hon. Dana M. Sabraw

APPELLANTS' OPENING BRIEF

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INTRODUCTION

"Have you had, or do you commonly have, any of the following: Venereal disease? Painful or irregular vaginal discharge or pain? Problems with menstrual periods? Penile discharge? Prostate problems? Cancer? Hair loss? Diarrhea? Constipation? Tumors? Painful/frequent urination? Hemorrhoids? Headaches? Asthma? Anemia?" "Are you pregnant?" "State the date of your last menstrual period." "Have you ever had any major injuries?" "Have you ever had a surgery or been hospitalized?" "Do you have any permanent disabilities?" "Are you currently on any medications? List them and the dosage."

While one might expect these kinds of probing and deeply personal inquiries from one's personal physician, in California, this kind of interrogation has been prohibited as a condition of employment for decades. In 2000, the state's Legislature amended the Fair Employment and Housing Act ("FEHA") to protect job applicants from invasions of privacy and discrimination by restricting pre-employment medical screenings. Specifically, FEHA only permits pre-employment screenings to the extent any medical inquiry or examination is "job

related and consistent with business necessity." Cal. Gov. Code § 12940(e).

Defendants are large occupational health services corporations that provide pre-employment screenings in California in excess of 200,000 annually. Defendants wholly ignore the strict limits imposed by FEHA, and instead subject applicants to detailed and all-encompassing medical inquiries and force applicants to disclose their entire history of health conditions, treatment, and medication, including their physical, psychological and sexual health. There are dozens of such questions. Defendants also coerce applicants to authorize them to release any collected health information to employers and to other unspecified parties. Applicants who decline to answer every question asked of them are "failed" by Defendants and denied medical clearance for work.

Having been subjected to these illegal practices, Plaintiffs, individually and on behalf of over 500,000 similarly-situated job applicants, brought this putative class action against Defendants, challenging their violations of California law. The district court dismissed Plaintiffs' claims based on narrow, erroneous interpretations

of the statutes and common law at issue. That decision should be reversed.

First, Plaintiffs sued Defendants for violating FEHA's clear prohibition on their conduct. Even though FEHA expressly treats an employer's direct or indirect agents as the "employer" for this purpose, the district court found that Defendants are not subject to FEHA liability. The court's conclusion was based on an unwarranted extension of the California Supreme Court's 1998 decision in *Reno v. Baird* holding that FEHA does not impose personal liability on an employer's individual supervisory employees. But these corporate Defendants are in no way comparable to individual subordinate employees of an employer, and no California case has ever interpreted FEHA in the narrow manner adopted by the district court. Indeed, the California Supreme Court has repeatedly declined to interpret FEHA in the way the district court did. This Court should reverse the district court's errroneous constriction of FEHA's protections, or, if there is any doubt as to the proper scope of FEHA, refer the matter to the California Supreme Court for an authoritative decision.

Second, Plaintiffs sued Defendants on the alternative theory that they are "business establishments" subject to the Unruh Act, Cal. Civ. Code § 51 *et seq*. and that job applicants are their patrons (or, to use Defendants' term, their "patients"). Plaintiffs allege that they went to Defendants to receive a service in the form of medical clearance for the job position they had been offered and that Defendants discriminated against them and the putative class by arbitrarily treating them as if they were disabled and drawing arbitrary distinctions between them on the basis of gender. The district court fundamentally misapprehended these claims and the nature of discrimination, conceptualizing the "service" as "receiving an exam" and concluding that so long as everyone received an exam there was no discrimination. But Plaintiffs allege that the service is medical clearance for work, and that because that service was provided in a discriminatory manner, it constitutes actionable discrimination. It does not matter that no one was denied a medical screening: Plaintiffs and the putative class are entitled to job clearance free from discriminatory treatment based on perceived disabilities, sex, gender, or any other characteristic that has no relationship to their jobs.

Third, Plaintiffs sued Defendants for common law invasion of privacy by intrusion upon seclusion. The district court found that, as a matter of law, Defendants' illegal, invasive, irrelevant, and mandatory inquiries are not offensive to a reasonable person because doctors ask similar questions of their patients during routine medical exams. But this was not a routine medical exam. Despite Defendants referring to applicants as their "patients," Plaintiffs and the putative class did not seek or receive treatment, and the illegal questions had no bearing on medical clearance for work. Defendants then magnified the offensiveness of their conduct by forcing applicants to consent to Defendants disclosing their health information to employers and unspecified others. Whether Defendants' practice is highly offensive in this context should be left to a trier of fact; it certainly cannot be conclusively determined at the pleading stage.[1]

[1] Plaintiffs elect not to pursue their California Unfair Competition Law ("UCL") claim under Cal. Bus. & Prof. Code § 17200 *et seq*., which the district court dismissed for lack of standing.

JURISDICTIONAL STATEMENT

The district court exercised diversity jurisdiction following removal of this case from the Superior Court of the State of California (San Diego County) under the Class Action Fairness Act, 28 U.S.C. § 1332(d). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

The Order dismissing with prejudice the first three causes of action in the Third Amended Complaint ("TAC") and dismissing the fourth cause of action (under the UCL) without prejudice was entered on January 25, 2021. ER-3–21. Pursuant to *WMX Techs. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir. 1997) and upon Plaintiffs' *ex parte* application, the district court entered its Order dismissing with prejudice the UCL cause of action on March 2, 2021. ER-22–23. Plaintiffs filed their Notice of Appeal on March 10, 2021. ER-99–100. This appeal is therefore timely pursuant to 28 U.S.C. § 2107(a) and Fed. R. App. P. 4(a) and is taken from a final order or judgment that disposes of all of the claims below.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. FEHA prohibits employers from subjecting a job applicant to medical inquiries unless the inquiries are both job-related and necessary. FEHA defines "employer" to include persons acting directly or indirectly as the employer's agent. Defendants are corporations that conduct pre-employment screenings as agents for employers, not individual supervisory employees. Defendants do not limit their inquiries to applicants as required by FEHA. Can Plaintiffs sue Defendants for violating FEHA?
2. The Unruh Act prohibits discrimination by businesses providing services in California. As an alternative to their FEHA claim, Plaintiffs allege that Defendants provide services to applicants to medically clear them for work in a discriminatory fashion. Defendants ask all applicants

invasive and irrelevant questions that assume they are disabled and are designed to confirm that assumption, and also include many gender-specific questions directed to irrelevant reproductive and sexual health issues. If Defendants are not liable as employers under FEHA, can they state a claim for intentional discrimination under the Unruh Act? (Even if the Court finds that Defendants can be liable under FEHA, given that Defendants contest the sufficiency of Plaintiffs' agency allegations, it should still decide this Unruh Act issue.)

3. California Rule of Court 8.548 allows this Court to certify questions of law to the California Supreme Court for decision. Certification is appropriate where the Supreme Court's decision would dispose of a claim, there is no controlling precedent, and the issue has important public policy ramifications. The above questions fall squarely within this criteria. Should this Court certify the two questions above to the California Supreme Court rather than predict what that court would decide?

4. To state a claim for intrusion upon seclusion, Plaintiffs must allege conduct that is highly offensive to a reasonable person. Applicants are required to submit to Defendants' medical inquiries for the sole purpose of receiving clearance to begin work. Defendants unlawfully force Plaintiffs and the putative class to answer invasive medical questions, including about their perceived disabilities and reproductive and sexual histories. Defendants also force Plaintiffs to consent to disclosure of their health information to employers and other unspecified parties. Refusal to answer any question or to authorize disclosure results in denial of clearance. Do these facts allege highly offensive conduct sufficient to state a common law claim for intrusion upon seclusion against Defendants?

STATEMENT OF THE CASE

California law permits employers to condition an offer of employment upon an applicant's completion of a pre-employment medical screening conducted by a healthcare provider of the employer's choice. Under FEHA, such "examination or inquiry" must be "job

related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3).

Historically, employers conducted pre-employment medical screenings themselves through an in-house "company doctor." ER-69. Over the years, however, employers began outsourcing these pre-employment screenings to corporate, third-party occupational healthcare providers such as Defendant U.S. Healthworks Medical Group and the other Defendants. ER-69. Before it was purchased by Concentra defendants[2] in 2018-2019 and re-branded, U.S. Healthworks was the nation's second largest provider of occupational health services and the largest in California, owning and operating 78 medical centers in this state. ER-68–69. Defendants conducted in excess of 200,000 pre-

[2] The "Concentra defendants" were at all relevant times together the nation's largest provider of occupational and urgent care centers, with over 1,200 medical centers nationally, and together are the successor in interest to U.S. Healthworks. ER-69. Concentra defendants consist of Select Medical Holdings Corporation, Select Medical Corporation, Concentra Group Holdings, LLC, Concentra, Inc., Concentra Primary Care of California, a medical corporation, and Occupational Health Centers of California, a medical corporation. ER-69. For purposes of this appeal, each Defendant is alleged to have engaged in the same conduct, and they thus are referred to simply as "Defendants."

employment medical screenings in California annually during the relevant time period. ER-70.

Referring employers delegated to Defendants the decision either to permit or deny employment to applicants, and employers accepted and adopted Defendants' "recommendations" as a matter of course. ER-70. Employers told applicants that they were required to undergo and pass the pre-employment screening by Defendants at Defendants' California facilities in order to be hired. ER-71. The screening was involuntary and applicants had no say in the administrator of the screening; they were not free to go to a medical provider of their choice. ER-71. While employers could choose to provide certain screening protocols to Defendants (*e.g.*, by specifying "lifting restrictions") and provided other instructions to Defendants, Defendants at all times unilaterally followed a practice requiring every applicant, at the outset of the screening and regardless of job position, to complete in full an omnibus Health History Questionnaire ("Questionnaire"). ER-35–36, 71, 75.

The Questionnaire asked numerous unlawful, highly-intrusive, highly-private, non-job-related and discriminatory questions. ER-57, 74.

These included whether the applicant has and/or has ever had: (1) venereal disease; (2) painful or irregular vaginal discharge or pain; (3) problems with menstrual periods; (4) irregular menstrual period; (5); penile discharge, prostate problems, genital pain or masses; (6) cancer; (7) mental illness; (8) HIV; (9) permanent disabilities; (10) painful/frequent urination; (11) hair loss; (12) hemorrhoids; (13) diarrhea; (14) black stool; (15) constipation; (16) tumors; (17) organ transplant; (18) stroke; or (19) a history of tobacco or alcohol use. ER-57, 74. The Questionnaire likewise asked about (20) pregnancy, (21) all over-the-counter and prescribed medication, and (22) prior on-the-job injuries or illnesses. ER-57, 74. In effect, the Questionnaire was so broad that it required applicants to disclose their entire personal and private medical and disability history from birth to present. ER-57, 75. Certain of these questions only women were required to answer in a box marked "FOR WOMEN ONLY"; others only men were required to answer in a box marked "FOR MEN ONLY." ER-57, 74, 85–86.

Employers did not develop the Questionnaire and did not require that applicants complete it; rather, Defendants were solely responsible for creating and implementing that document and for the policy

requiring all applicants answer every question it posed. ER-71–72, 73–75. If an applicant failed or refused to fully answer the Questionnaire, Defendants would not pass the applicant, resulting in denial of employment. ER-70–71, 75, 86.

Defendants' highly-intrusive Questionnaire was almost entirely unrelated to any applicant's ability to perform the essential functions of any job position. ER-75. Further, when the applicant provided a positive response, it was Defendants' systematic policy and practice to verbally ask the applicant to explain the basis for the positive response. ER-74.

In direct contravention of California law, Defendants treated no question as out-of-bounds. ER-37–38, 75. Only once Defendants had reviewed the applicant's answers to the Questionnaire would they assess what information was relevant to the job position. ER-37–38, 75.

To make matters worse, Defendants required all applicants to sign an unlawful form titled "Authorization to Disclose Protected Health Information to Employer" (the "Authorization"). ER-71, 74. This document authorized Defendants to disclose the applicants' protected health information to their prospective employers and to unspecified others. ER-71, 74. Defendants themselves acknowledged that this

authorization violated the Americans with Disabilities Act ("ADA"), having advised every employer that "in compliance with the ADA," the Defendants may not disclose the applicant's medical diagnoses or conditions to the employer. ER-58, 74–75. This Authorization was coerced, since it was unlawful and threatened every one of the more than 500,000 putative class member applicants that her or his "refusal to sign" "may violate a condition of … employment" and that "revocation of this authorization may carry consequences related to [the applicant's] … employment." ER-71, 74–75.

Plaintiff Kristina Raines applied for a job as a food service aide at a California retirement community managed by Front Porch Communities. ER-76. Her job duties were to consist of delivering food trays to residents; cleaning, disposing of waste, and washing dishes; re-stocking food supplies; and the like. ER-76. Front Porch offered her the job but conditioned the start of work on her passing Defendants' pre-employment medical screening at their Carlsbad, California facility. ER-76.

During the required screening, Defendants' staff directed Raines to fill out the Questionnaire and to sign the Authorization. ER-76. She

signed the Authorization and answered all of the questions on the Questionnaire and all subsequent verbal questions—save for a question about the date of her last menstrual period. ER-77. She objected on the grounds that the date of her last menstrual period had nothing to do with the job Front Porch offered her and that the question sought particularly private information. ER-77.

Defendants' staff then threatened Raines by stating that she would not "pass" the screening or be permitted to start work unless she answered all of their questions. ER-77. When she again declined, consistent with their policy, Defendants terminated and refused to administer the remainder of the screening and forced her to leave the premises. ER-77. Shortly thereafter, Front Porch revoked the job offer because Defendants' staff informed it that Raines did not complete the screening. ER-77.

Plaintiff Darrick Figg applied for a job as a member of the San Ramon Valley Fire Protection District's Volunteer Communication Reserve. ER-77. The Fire Protection District offered Figg the job but conditioned the start of work on him passing a pre-employment medical screening at one of Defendants' facilities. ER-77. Figg attended the

screening at Defendants' facility in Pleasanton, California. ER-77. Like Raines, Figg was required to complete the entire Questionnaire and to sign the Authorization. ER-77–78. He complied, despite that most of the questions had no bearing on his present ability to do the job in question. ER-78. He was then deemed by Defendants "medically acceptable for the position offered" and, because he "passed" the screening, was allowed to begin work. ER-78.

On October 23, 2018, Raines filed an individual action against Front Porch and U.S. Healthworks in the Superior Court of California for the County of San Diego. She later substituted Concentra defendants for Doe defendants. Following discovery revealing that Defendants systematically asked the questions on its Questionnaire to all California jobseekers, Raines filed a First Amended Complaint to assert class claims.

On August 15, 2019, Defendants removed the action to the United States District Court for the Southern District of California under the Class Action Fairness Act, 28 U.S.C. § 1332(d). ER-113. On February 19, 2020, Raines filed a Second Amended Complaint ("SAC") adding

Figg as a plaintiff, dismissing Front Porch as a defendant pursuant to a settlement, and adding additional Concentra defendants. ER-108.

On March 27, 2020, Defendants moved to dismiss the SAC under Fed. R. Civ. P. 12(b)(6), which the district court granted with leave to amend. ER-98, 107. On August 6, 2020, Plaintiffs filed the operative Third Amended Complaint ("TAC"), asserting the same causes of action as the SAC with additional facts. ER-69–94. Defendants again moved to dismiss. ER-59. On January 25, 2021, the district court granted the motion under Fed. R. Civ. P. 12(b)(6) without leave to amend as to the FEHA, Unruh Act, and intrusion upon seclusion claims and with leave to amend as to the claim for violation of the UCL. ER-3–21.

Plaintiffs thereafter on February 26, 2021 filed an *ex parte* application to dismiss the UCL claim with prejudice pursuant to *WMX Techs. v. Miller*, 104 F.3d 1133, 1136-37 (9th Cir. 1997), which the district court granted. ER-22–23, 24–25. On March 10, 2021, Plaintiffs timely filed their Notice of Appeal of the district court's orders dismissing the TAC's causes of action. ER-99–100.

SUMMARY OF THE ARGUMENT

I. California's Fair Employment and Housing Act ("FEHA") prohibits employers from subjecting a job applicant to medical inquiries or examinations except where they are both "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). FEHA and its implementing regulations specifically provide that persons who act, directly or indirectly, as agents for the employer are themselves treated as employers and subject to this requirement. Defendants are corporations that provided pre-employment medical screenings for employers and violated FEHA's clear prohibitions by asking numerous invasive and personal questions that were not job related and not consistent with business necessity.

The district court erroneously concluded that Defendants are immune from FEHA liability based on the court's misapplication of *Reno v. Baird*, 18 Cal. 4th 640 (1998), which held that an employer's individual supervisory employee is not subject to personal liability for discrimination under FEHA. The district court's dramatic constriction of FEHA's scope is inconsistent with the language and policy of the statute and applicable regulations and wholly unsupported by the

holding or reasoning of *Reno v. Baird*. This Court should either reverse or, if it finds the legal standard unclear, certify the highly important question of the proper scope of FEHA's treatment of agents as employers to the California Supreme Court for a definitive decision.

II. The district court erred by dismissing the alternative Unruh Civil Rights Act claim against Defendants. The Unruh Act prohibits discrimination by businesses in California, including those providing employment-related services. Defendants improperly discriminated in the provision of medical clearance services for employment by requiring applicants—under threat of denying clearance—to answer numerous invasive questions that regarded applicants as disabled and were designed to discover actual or perceived disabilities and biological sex-based differences among applicants which had no bearing on their fitness to work. Conditioning employment clearance in this manner discriminated on the bases of perceived disability and gender, irrespective of whether all applicants were asked the same questions. This Court should reverse the district court's dismissal of Plaintiffs' Unruh Act claim or, alternatively, certify it along with the FEHA claim to the California Supreme Court so that court can delineate the proper

scope of FEHA and the Unruh Act in preventing such discrimination. Given that Defendants contest the sufficiency of Plaintiffs' agency allegations, this Court (or the California Supreme Court) should reach the Unruh Act question even if Defendants can be liable under FEHA.

III. The district court also improvidently dismissed Plaintiffs' common law privacy claim for intrusion upon seclusion, concluding that Defendants' alleged conduct was not highly offensive to a reasonable person. Plaintiffs were forced as a condition of receiving employment clearance to answer broad, invasive, and personal medical inquiries even though FEHA specifically prohibits making such inquiries as a condition of employment. The district court erred in treating these mandatory screenings as analogous to either an examination by one's own doctor, undergone for the purpose of seeking treatment, or a college athlete's mandatory drug testing, undergone as a condition of playing competitive sports. The district court also erred by concluding that the inquiries must be repeated or persistent to be sufficiently offensive. The offensiveness of such conduct was magnified by Defendants coercing applicants to consent to disclosure of their personal health information to employers and unspecified others. Because the medical inquiries

were compulsory, irrelevant to employment and illegal, and because Defendants illegally threatened disclosure to employers and others, the district court's conclusion that as a matter of law no jury could find them highly offensive was error and its dismissal of this claim should be reversed.

STANDARD OF REVIEW

An order granting a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. See *Depot, Inc. v. Caring for Montanans*, 915 F.3d 643, 652 (9th Cir. 2019).

ARGUMENT

I. DEFENDANTS, AS AGENTS OF EMPLOYERS, ARE LIABLE UNDER FEHA FOR SYSTEMATICALLY VIOLATING FEHA'S PROHIBITION ON IRRELEVANT AND INVASIVE PRE-EMPLOYMENT MEDICAL INQUIRIES

A. FEHA Prohibits Forcing Prospective Employees to Submit to Broad Medical Examination or Inquiry

California law provides that "it is an unlawful employment practice … for any employer or employment agency … to make any medical or psychological inquiry of an applicant." Cal. Gov. Code §

12940(e)(1). FEHA provides a limited exception for inquiries made after employment is offered, but before work has commenced, "provided that the … inquiry is job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). An inquiry is job related if it is "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." *Kao v. Univ. of S.F.*, 229 Cal. App. 4th 437, 451 (2014) (quoting Cal. Code Regs., tit. 2, § 11065(k)). It is consistent with business necessity if "the need for the disability inquiry or medical examination is vital to the business." *Id.* at 452 (quoting Cal. Code Regs., tit. 2, § 11065(b)); see also *Rodriguez v. Walt Disney*, No. 8:17-CV-01314-JLS, 2018 WL 3201853, at *4 (C.D. Cal. June 14, 2018). The purpose of a permissible examination is to assess whether the applicant is presently able to do the specific job in question, and to facilitate the required good faith, interactive process between applicant and employer to determine whether a reasonable accommodation is necessary. See *Assem. Com. on Lab. and Emp.,* Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended April 5, 2000, p. 1 (hereinafter "*Legislative Analysis*").

Defendants make no attempt to assert that their Questionnaire only asks questions which are "job related and consistent with business necessity." Nor could they, given the broad and invasive nature of the Questionnaire. See ER-57. Plaintiffs allege many of these questions are irrelevant to *any* job position. ER-75.

Instead, Defendants argue Plaintiffs failed to adequately plead agency, and that even if Defendants are agents, FEHA exempts them from liability. See ER-60. While the district court accepted Plaintiffs' agency allegations as well-pled, it nevertheless agreed with Defendants and misconstrued cases holding that individual supervisory employees are not personally liable under FEHA as creating a broad immunity for any "agent" despite the clear statutory definition subjecting agents to the law's prohibitions. ER-7–12. The district court's novel interpretation of California law should be reversed or, at a minimum, referred to the California Supreme Court for decision.

B. FEHA Expressly Treats an Employer's Agents as Themselves Being an Employer

FEHA defines "employer" to include four categories of regulated persons: (1) a person with five or more employees, (2) "any person acting as an agent of an employer, directly or indirectly," (3) the state and its

subdivisions, and (4) cities. Cal. Gov. Code § 12926(d). Thus, FEHA's prohibitions on unlawful employment practices, including the one at issue here, apply both to the employer itself *and* to "any person acting as an agent of the employer, directly or indirectly." *Id.* FEHA's implementing regulations leave no doubt on this point: "Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer." Cal. Code Regs., tit. 2, § 11008(d)(3).

The plain language of Cal. Gov. Code §§ 12926(d) and 12940(e) thus prohibit any person acting "directly or indirectly" as an employer's agent from making irrelevant and unnecessary medical inquiries of a job applicant. Plaintiffs unequivocally allege that Defendants are doing that. ER-65, 69–72, 83. Defendants conduct these unlawful medical inquiries on behalf of employers who refer job applicants to them, delegate the power to deny employment to them, and retain some contractual ability to control Defendants' conduct. ER-65, 69–72. Defendants are therefore the employers' agents, and thus "employers" under the plain language of FEHA and its implementing regulations. ER-81–82. See *Los Angeles Metro. Transp. Auth. v. Alameda Produce*

Mkt., 52 Cal. 4th 1100, 1107 (2011) ("If the statutory language is unambiguous, then its plain meaning controls.").

Defendants argued, however, and the district court agreed, that despite the plain language of Cal. Gov. Code § 12926(d) and Cal. Code Regs., tit. 2, § 11008(d)(3), corporations like Defendants are immune from FEHA liability. ER-9–12. The court reached this broad conclusion by expanding the holding of *Reno v. Baird*, 18 Cal. 4th 640 (1998), which held that individual supervisory employees are not personally liable for discrimination under FEHA. The district court's ruling constitutes a dramatic constriction of FEHA's scope and effectively negates Cal. Code Regs., tit. 2, § 11008(d)(3). That ruling cannot be justified by existing California cases, the policy behind exempting individual supervisors from liability, or the scope of analogous federal law.

C. California Courts Have Never Found a Corporation Like Defendants Immune from FEHA Liability

The trial court's conclusion that Defendants are immune from FEHA liability was based on *Reno v. Baird*, 18 Cal. 4th 640 (1998). In *Reno*, the California Supreme Court considered whether an individual supervisory employee could be sued for discrimination under FEHA.

The Court agreed with an earlier Court of Appeal decision, *Janken v. GM Hughes Electronics*, 46 Cal. App. 4th 55 (1996), which had analyzed this "difficult question" of "whether the FEHA exposes individual supervisory employees to the risk of personal liability for discrimination" and concluded that individual supervisors are not liable for discrimination as the "agents" of the employer. *Id.* at 59, 66-76.

The *Reno* decision was quite narrow. The only "issue in this case is *individual* liability for discrimination." *Reno*, 18 Cal. 4th at 658 (emphasis in original). The Court expressly did not determine when other types of agents are regulated as employers for FEHA purposes. "We specifically express no opinion on whether the 'agent' language [in Gov. Code § 12926(d)] merely incorporates respondeat superior principles or has some other meaning." *Reno*, 18 Cal. 4th at 658. A decade later in *Jones v. Torrey Pines*, 42 Cal. 4th 1158 (2008), the California Supreme Court applied the same rule to retaliation claims under FEHA, but again only addressed the narrow question of whether individual supervisory employees may be held personally liable. *Id.* at 1164 ("*Reno*'s rationale for not holding individuals personally liable for discrimination applies equally to retaliation.").

The district court erroneously extended *Reno* well beyond its holding and logic to dispose of the question presented here which the California Supreme Court expressly did not consider. The district court concluded that the statute defining "agents" as "employers" "simply ensures employers will be liable for agents' actions, rather than imposing liability on the agents themselves." ER-9. That ruling is not supported by *Reno* or the plain language of the statute and is directly contrary to the implementing regulation. Cal. Gov. Code § 12926(d); Cal. Code Regs., tit. 2, § 11008(d)(3). Appellants are not aware of any other case in the 23 years since *Reno* or before that has limited the scope of FEHA in this manner.

D. The Policy Reasons Animating *Reno*'s Exemption of Individual Supervisory Employees from FEHA Liability Do Not Apply to Corporate Third-Party Agents

The district court's expansion of *Reno* fails to recognize the significant policy differences between holding individual supervisory employees personally liable for discrimination and holding corporate third-party agents like Defendants liable for violating FEHA.

In evaluating legislative intent, courts look both to the wording of a statute and to the consequences of differing possible constructions.

See *California Teachers Assn. v. San Diego Community College*, 28 Cal. 3d 692, 698 (1981); *Whitman v. Sup. Ct.*, 54 Cal. 3d 1063, 1072 (1991).

The public policy consequences of holding corporate third-party agents liable for unlawful employment practices, as FEHA's plain language provides, are entirely different from the consequences of holding individual supervisors liable for discrimination. *Reno* was concerned, for example, with the "incongruity" of holding individual supervisors personally liable when FEHA does not apply to employers with fewer than five employees. See *Reno*, 18 Cal. 4th at 650-51. *Reno* reasoned that the "Legislature clearly intended to protect employers of less than five from the burdens of litigating discrimination claims," and "it is 'inconceivable' that the legislature simultaneously intended to subject individual non-employers to the burdens of litigating such claims." *Id.*

Needless to say, that rationale has no application here. Defendants are not individuals. During the relevant time period, they were California's largest occupational healthcare providers. ER-65. There is no inconsistency in holding both employers with more than five

employees and their direct and indirect corporate agents of similar or greater size liable for violating FEHA.

Nor do any of the other policy reasons cited by *Reno* or *Janken* for exempting individual supervisory employees from FEHA liability apply to Defendants. Unlike individuals, Defendants do not face potentially ruinous "burdens of litigating such [FEHA discrimination] claims." *Janken*, 46 Cal. App. 4th at 71-72. Nor is there any "in terrorem" effect attached to Defendants' liability as there might be for individual supervisors. See *Janken*, 46 Cal. App. 4th at 75; *Reno*, 18 Cal. 4th at 653. Requiring Defendants to comply with FEHA does not raise, as it might for individual supervisors, "the spectre of financial ruin for themselves and their families." *Janken*, 46 Cal. App. 4th at 75. Nor does holding Defendants liable for violating FEHA create the inherent conflict of interest among co-workers and management that the Supreme Court was concerned about in *Reno* and *Jones*. See *Reno*, 18 Cal. 4th at 651-54; *Jones*, 42 Cal. 4th at 1166.

Defendants argued below that the full burden of FEHA must fall exclusively on the actual employer. See ER-11. But that argument cannot be reconciled with FEHA's express language making both

employers and direct *or indirect* agents liable, or with FEHA's implementing regulation. Cal. Gov. Code § 12926(d); Cal. Code Regs., tit. 2, § 11008(d)(3). On the contrary, Defendants are the businesses performing the unlawful medical inquiries and profiting, in the words of *Janken*, "from the fruits of the enterprise," and it is they who should bear the consequences of their legal violations. *Janken*, 46 Cal. App. 4th at 78-79. See also ER-89.

Indeed, it is Defendants—and not referring employers—who benefit from propounding and requiring answers to a cost-saving, all-encompassing Questionnaire instead of spending the additional time to tailor inquiries to the job in question as the law requires. ER-37, 75. It is Defendants who unilaterally created and imposed this offending Questionnaire and required all questions be answered before an applicant could be deemed to have "completed" the screening. ER-71–72, 73–75. And it is Defendants that are directly committing the conduct prohibited by FEHA. ER-75, 83. Defendants simply cannot be analogized to an individual employee with supervisory responsibility who would not be subject to FEHA liability.

Holding corporate agents responsible for their own unlawful practices also furthers the underlying purposes of FEHA. The animating purpose of the statute is "to provide effective remedies that will eliminate … discriminatory practices." Cal. Gov. Code § 12920. Unlike individual supervisory employees, who might make a "personnel decision which could *later* be considered discriminatory" (see *Janken*, 46 Cal. App. 4th at 66) (emphasis added), corporate occupational medical screeners know at the time of the screening whether their medical inquiries are tailored or not. If the screening is tailored to the job in question, there is no latent risk of liability. But if, as here, the occupational medical screener simply applies the same overbroad examination or inquiry to everyone, it should be well aware that its conduct is unlawful.

E. Federal Cases Involving Similar "Agent" Language Under the ADA and Title VII Support FEHA Liability Here

The district court's decision is also out of step with analogous federal law. Because the California Supreme Court considers federal court decisions in resolving novel legal questions, the Ninth Circuit may

likewise consider federal court decisions. See *Fourth Investment LP v. United States*, 720 F.3d 1058, 1069 (9th Cir. 2013).

By the California Legislature's design, FEHA is far more protective than its federal counterparts. See*, e.g.*, Cal. Gov. Code § 12926.1(a) ("Although the [ADA] provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."). Yet federal courts interpreting the ADA and Title VII have held that a third-party corporate agent or administrator can be liable for discrimination as an "employer." That is because, liberally construed, "employer" encompasses third-party administrators of an employer's pre-employment medical screenings like Defendants.

In *Williams v. City of Montgomery*, 742 F.2d 586, 588-589 (11th Cir. 1984), for example, the Court of Appeals held that a third-party agent was liable under Title VII where the employer delegated control of its traditional rights to the third-party agent. See also *Cyprian v. Auburn University Montgomery, et. al.*, 2010 WL 2683163, at *1 (M.D. Ala. 2010) (citing *Williams* and finding that supervisor could be held liable under Title VII as a third-party agent).

Similarly, where, as here, the agent "significantly affects access of any individual to employment opportunities," federal courts have held that the agent can be independently liable. *Spirt v. Teachers Ins.*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983), *reinstated and modified on other grounds*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984) (interpreting Title VII); see also *Ass'n of Mexican-Am. Educators v. State of Cal.*, 231 F.3d 572, 581–82 (9th Cir. 2000) (same). Agents of employers can also be liable where, as here, the agents "exercise control over an important aspect of [Plaintiffs'] employment." *Carparts Distrib. v. Auto. Wholesaler's*, 37 F.3d 12, 17 (1st Cir. 1994) (interpreting the ADA).

Just as the California Supreme Court did in interpreting FEHA in *Reno*, the federal courts have also noted that the rule prohibiting the imposition of ADA or Title VII liability upon individual agents reflects the desire of Congress to strike a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims. See *E.E.O.C. v. AIC Security Investigations*, 55 F.3d 1276, 1281 (7th Cir. 1995). Crucially, "those objectives are not in conflict when the 'agent' engaging in

discriminatory conduct falls within the applicable statutory definition [of 'employer']." *E.E.O.C. v. Grane Healthcare*, 2 F. Supp. 3d 667, 684 (W.D. Pa. 2014). That is, an agent that "has the requisite number of employees and is engaged in an industry affecting commerce" can be liable for discriminatory conduct perpetrated against a plaintiff employed by another. *DeVito v. Chicago Park Dist.*, 83 F.3d 878, 882 (7th Cir. 1996).

The federal cases—interpreting statutes that provide less protection to employees than FEHA—thus agree that third party agents like Defendants are subject to liability under discrimination and civil rights laws even where individual employees are not. The district court's contrary conclusion wholly undermines the purpose of FEHA and shifts responsibility away from the centralized large corporation that is actually committing the legal violation.

F. Any New Judicial Determination on FEHA's Scope Should Come from the California Supreme Court

In interpreting state law, this Court follows the decisions of the California Supreme Court. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *Muniz v. UPS*, 738 F.3d 214, 219 (9th Cir. 2013). Absent a binding California Supreme Court decision, this Court must endeavor to

predict how California's highest court would decide the question. *Ingenco Holdings v. ACE American Ins.*, 921 F.3d 803, 815 (9th Cir. 2019). Where an issue of California law is both important and unsettled, however, there is a better option. Rather than predict what the California Supreme Court would say, this Court can ask it.

California Rule of Court 8.548(a) allows this Court to certify questions of law to the California Supreme Court for decision. See *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997) ("Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when the state courts stand willing to address questions of state law on certification from a federal court"). Certification is appropriate where (1) the decision could determine the outcome of the matter pending in the requesting court, (2) there is no controlling precedent, and (3) the case presents significant issues with important public policy ramifications. *Kremen*, 325 F.3d at 1037. Whether FEHA imposes liability on corporate third-party agents like Defendants clearly meets that standard.

First, the California Supreme Court's interpretation of FEHA will clearly determine the outcome of this appeal with respect to the FEHA claim. The only basis for that claim's dismissal was the district court's incorrect conclusion that no agent *of any kind* is subject to liability under FEHA. ER-11–12.

Second, as discussed above, the applicability of FEHA to agents like Defendants is a question of California law for which there is no judicial precedent. This is a matter of first impression in California. Indeed, the district court's Order tacitly acknowledges as much. ER-9–10.

Third, whether FEHA's prohibition on unlawful employment practices applies to agents—as Cal. Code Regs., tit. 2, § 11008(d)(3) says it does—has important public policy ramifications for hundreds of thousands of California workers who are required to undergo these screenings every year and whom these laws ostensibly protect. FEHA expresses California's fundamental public policy against arbitrary discrimination. See *City of Moorpark v. Sup. Ct.*, 18 Cal. 4th 1143, 1156–57 (1998) ("FEHA broadly announces 'the public policy of this state that it is necessary to protect and safeguard the right and

opportunity of all persons to seek … employment without discrimination or abridgment on account of … physical [or] mental disability"). It must be liberally construed in order to carry out its purposes. See *id.* at 1157-58.

This Court should not predict that the California Supreme Court would remove an entire category of businesses from FEHA's prohibitions, particularly when it has already expressly declined to do so. See *Reno*, 18 Cal. 4th at 658. To the extent this Court harbors any question about whether FEHA subjects corporate third party agents to liability, it should refer that question to the California Supreme Court rather than predict whether or not that Court would limit FEHA's scope as the district court did.

G. Should the Court Decline to Refer the Question to the California Supreme Court and Affirm the District Court's Interpretation of FEHA, It Should Remand with Instructions to Consider Whether Plaintiffs Can Amend

In addition to prohibiting any "employer" and any employer's direct and indirect agents from making untailored inquiries during the post-offer hiring process, FEHA at Cal. Gov. Code § 12940(e)(3) also forbids any "employment agency" to do so. An "employment agency" is

"any person undertaking for compensation to procure … opportunities to work." Cal. Gov. Code § 12926(e). Were this Court both to decline to certify the FEHA question to the California Supreme Court and to affirm the district court's order as to Plaintiffs' FEHA claim on the ground that Defendants cannot be liable as an "agent" of an "employer," it should nevertheless remand to the district court with instruction to consider whether Plaintiffs have either stated a claim for FEHA liability on the theory that Defendants are an "employment agency" under Cal. Gov. Code § 12926(e) or can cure any defects by alleging facts supporting that theory. See *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995).

Here, Plaintiffs alleged that a significant part of Defendants' business was the undertaking for compensation of more than 200,000 pre-employment screenings in California every year and that employers who referred applicants to Defendants for these screenings accepted Defendants' "recommendations" as to applicants' fitness for work as a matter of course. ER-70. Federal courts interpreting similar language under Title VII (which defines an "employment agency" as "any person regularly undertaking with or without compensation to procure

employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person," see 42 U.S.C. § 2000e(c)) have found plaintiffs stated a claim under Title VII where the agency specializes, as Defendants do in evaluating applicants for fitness for duty, in certification for employment.[3]

II. PLAINTIFFS STATE A CLAIM FOR DISCRIMINATION UNDER THE UNRUH ACT

Plaintiffs alternatively pled a claim against Defendants for violation of the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq*. ER-65, 72–73, 84–87. In enacting the Unruh Act, the "Legislature intended to prohibit *all* arbitrary discrimination by business establishments." *Marina Point, Ltd. v. Wolfson*, 30 Cal. 3d 721, 725 (1982) (emphasis in

[3] See, e.g., *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 980 (5th Cir. 1980) (plaintiff stated a valid claim under Title VII when she alleged that the personnel board that certified her for employment conspired with town's officials to avoid hiring a black person), *overruled on other grounds, Larkin v. Pullman-Standard Div., Pullman, Inc.,* 854 F.2d 1549, 1569 (11th Cir. 1988); *Scaglione v. Chappaqua Cent. Sch. Dist.*, 209 F. Supp. 2d 311, 318 (S.D.N.Y. 2002) (agency that certified plaintiff for employment was an "employment agency" because it exercised significant control over potential employees' opportunities for employment and access to those opportunities) (citing *Spirt*, 691 F.2d at 1063); cf. *Beasley v. Desai*, No. B239941, 2013 WL 1943974, at *3-4 (Cal. Ct. App. May 13, 2013), *as modified* (June 6, 2013) (holding, on the basis of *Reno* and *Jankins*, that an individual supervisory employee could not be liable as an "employment agency" under FEHA).

original). While, unlike FEHA, the Unruh Act does not prohibit discrimination by employers and their agents (see *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 500 (1970)), it does apply to a business that provides employment-related services. See *Alch v. Superior Court*, 122 Cal. App. 4th 339, 392-93 (2004) ("'employment discrimination' claims not covered by the [Unruh] Act are confined to claims by an employee against his employer, or against an entity in the position of the employer"). Thus, to the extent Defendants were not entities in the position of the employer subject to liability under FEHA (which, as discussed above, they are), they are subject to liability under the Unruh Act.

Plaintiffs allege that Defendants provide services to Plaintiffs and the putative class and fall under the Unruh Act's statutory definition of a "business establishment." ER-72–73. Defendants do not contest this, nor could they: the Legislature "intended that the phrase 'business establishments' be interpreted 'in the broadest sense reasonably possible.'" *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 78 (1985), *as modified on denial of reh'g* (Dec. 19, 1985) (citation omitted). Corporate entities like Defendants that are open to the public, employ

large staffs, and operate facilities that are not incidental to their purposes undoubtedly do qualify. See *Harris v. Mothers Against Drunk Driving*, 40 Cal. App. 4th 16, 20-22 (1995), *as modified* (Nov. 30, 1995) (enumerating factors). Further, "medical practices and physician services" are considered "business establishments" under the Act. *Leach v. Drummond Med. Grp., Inc.*, 144 Cal. App. 3d 362 (1983).

Here, job applicants, as patrons, went to Defendants—who referred to applicants as their "patients"—to receive medical clearance for the job position they had been offered. ER-39, 72–73. That medical clearance is a service provided to them by Defendants. ER-72–73, 84–86. Plainitffs allege that Defendants discriminated against them and the putative class because in providing the service of medical clearance to applicants, Defendants arbitrarily treated them as if they were disabled and drew arbitrary distinctions between them on the basis of gender. ER-85–86.

The district court fundamentally misapprehended these claims and the nature of discrimination, conceptualizing the "service" as "receiving an exam" and concluding that so long as everyone received an exam there was no discrimination. ER-14–15. But Plaintiffs do not

allege that the "service" was a medical screening, per se, or that they were denied that service. Instead, they allege that the service is medical clearance for work, and that because that service was provided in a discriminatory manner, it constitutes actionable discrimination. As the California Courts have long made clear, that is sufficient to state a claim.

A. Business Establishments Need not "Deny" Services to Patrons or "Exclude" Them to Be Liable under the Unruh Act

As with FEHA, the California Supreme Court has consistently held that the Unruh Act "must be construed liberally in order to carry out its purpose." *White v. Square, Inc.*, 7 Cal. 5th 1019, 1025 (2019). That purpose is the "eradication of discrimination" in California's business establishments. *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 36 (1985). Consistent with its broad purpose, the Unruh Act uses expansive and pliant language to guarantee all persons in California "the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b). "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 … is liable for

each and every offense." Cal. Civ. Code § 52. The Act's broad language and long history "compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments." *In re Cox*, 3 Cal. 3d 205, 216 (1970).

Thus, as the California Supreme Court recently clarified on certification of the question from this Court, the standing requirements under the Unruh Act are extremely low. For example, the Act does not require a plaintiff to make use of any facility or even engage in any transaction with a business establishment to have standing. *White*, 7 Cal. 5th at 1028, 1033. "It is sufficient for a plaintiff to encounter [the] facility with the intent to use it." *Id.* at 1028 (citations and quotations omitted). While the court in *White* reiterated that "a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct," it did not hold that "suffering discriminatory conduct" requires being denied services or excluded from a facility. *Id.* at 1025.

Indeed, it has long been understood that "[t]he scope of the statute is clearly not limited to exclusionary practices" and the "Legislature's choice of terms evidences concern *not only with access* to business

establishments, but with equal treatment of patrons in *all aspects* of the business." *Koire*, 40 Cal. 3d at 29 (emphasis added). See also *Smith v. BP Lubricants USA Inc.*, No. E073174, 2021 WL 1905229, at *8 (Cal. Ct. App. May 12, 2021) (that plaintiff was "not denied anything" is "not dispositive"); *Hutson v. The Owl Drug Co.*, 79 Cal. App. 390, 392 (1926) (African American patron who was not denied service at soda fountain nevertheless experienced "humiliation and embarrassment" actionable under the Unruh Act). As the court in *Disney* observed, "making impermissible medical inquiries *is discrimination*." *Disney*, 2018 WL 3201853, at *3 (emphasis added). The fact that in *Disney* the plaintiff received the screening did not mean that he did not experience discrimination. The same pertains here: Plaintiffs allege that in asking them the impermissible questions, Defendants "*made a discrimination or distinction* … contrary to Civil Code [section] 51" on the basis of perceived disability and gender. ER-85.

B. Defendants Discriminated on the Basis of Perceived Disability

The Unruh Act applies the FEHA definition of disability. Cal. Civ. Code § 51(e)(1) ("'Disability' means any mental or physical disability as defined by Sections 12926 and 12926.1 of the Government Code").

"[D]isability" must "be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling." Cal. Gov. Code § 12926.1(b); see also Cal. Gov. Code § 12926.1(c).

Thus, the Unruh Act protects against discrimination based on actual or perceived disability, including "[h]aving any physiological disease, disorder, condition" that both affects one or more enumerated body systems and limits a "major life activity." Cal. Gov. Code § 12926(m)(1). "Physical disability" also includes "[h]aving a record or history of a disease, disorder, condition, … or health impairment described in [§ 12926(m)(1)]." Cal. Gov. Code § 12926(m)(3). It further includes "[b]eing regarded or treated" by a business establishment "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or that "has no present disabling effect but may become a physical disability." Cal. Gov. Code § 12926(m)(4)-(5). Working is, of course, a major life activity. Cal. Gov. Code § 12926(m)(1)(B)(iii).

As such, where a business establishment makes a "discrimination or distinction contrary to" the provision of "full and equal services" because the applicant presently has or ever had a condition or a record of such a condition or because the business perceives or regards the patron as presently having or ever having a condition that makes "working" "difficult" for that patron, the business has engaged in prohibited discrimination. Similarly, even if the patron's perceived condition does not presently make "working" "difficult" but may in the future, and the business makes a "discrimination or distinction" on that basis, then the business has engaged in prohibited discrimination.

Plaintiffs allege Defendants' business model was precisely that. ER-74, 86. Defendants' Questionnaire by design regarded applicants as disabled and their subsequent verbal inquiries concerning any positive indication provided by applicants were designed to confirm Defendants' pre-existing perceptions. ER-74, 86. That is, Defendants' assumed applicants were disabled and posed inquiries "designed to bring any and every health condition to the surface" and to "ferret[] out" and confirm those perceived disabilities. ER-82–83, 86. The district court took no account of these allegations of disparate treatment discrimination on

the basis of perceived disability. Instead, relying on *Turner v. Ass'n of Am. Med. Colleges*, 167 Cal. App. 4th 1401, 1408 (2008), *as modified on denial of reh'g* (Nov. 25, 2008), the district court reasoned in cursory fashion that a practice cannot be discriminatory if it applies to everyone, even if the policy is not facially neutral.

In *Turner*, the plaintiffs challenged a decision not to provide extra time as an accommodation to MCAT test-takers with disabilities. *Id.* at 1405. There, the court construed the plaintiffs' claim as one for disparate impact discrimination because the time limit applied to all test takers (*i.e.*, was "neutral on its face") but adversely impacted disabled ones. *Id.* at 1408-1409. Relying on Cal. Civ. Code § 51(c) and prior cases, *Turner* held that disparate impact discrimination is not actionable under the Unruh Act. *Turner* also noted that there was no allegation that the defendant applied its facially neutral policy in an intentionally discriminatory manner. *Id.* at 1411 (citing *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824, 854 (2005)). Nor was there any allegation that the defendant's MCAT time limits were motivated by an animus toward those disabled test-takers; on the contrary, the defendants had a process for granting reasonable test-

taking accommodations to test-takers with disabilities. *Turner*, 167 Cal. App. 4th at 1404.

Because this case is not about disparate impact, *Turner* is inapposite. First, unlike in *Turner*, here *the district court acknowledged* that Plaintiffs alleged the Questionnaire is *not* facially neutral; instead, it is discriminatory on its face. ER-14. Whereas in disparate impact cases "the disproportionate impact of a facially neutral policy on a protected class is a substitute for discriminatory intent," here Plaintiffs' theory does not rely "on the *effects* of a facially neutral policy on a particular group" to show discrimination or "require [the court] to infer *solely* from such effects a discriminatory intent." *Koebke*, 36 Cal. 4th at 854 (emphasis in original). Rather, Plaintiffs allege that the overbreadth of Defendants' inquiries and the inquiries themselves expressed an intent to discriminate on the basis of perceived disability—the Court need not infer *solely* from the *effects* of the inquiries that there was intentional discrimination. ER-82–83, 86.

Second, the fact that Defendants gave the facially discriminatory and illegal medical questionnaire to every applicant does not immunize them from discrimination. For example, in *Hankins v. El Torito*

Restaurants, Inc., 63 Cal. App. 4th 510, 518 (1998), the defendant argued that its purportedly neutral bathroom policy, prohibiting all diners from using a first-floor restroom, "was not discriminatory because it applied to all restaurant patrons," even though its available second floor bathroom was inaccessible to disabled patrons. *Id.* at 518. The court disposed of that "semantic argument," noting that the plaintiff both "alleg[ed] a violation of section 51" and that the restaurant "acted with knowledge of" the effect its conduct had on its patrons and therefore the plaintiff "did plead intentional discrimination." *Id.* (quotation omitted). Here, Plaintiffs have also sufficiently alleged intentional discrimination: Defendants' inquiries were "designed to bring any and every health condition to the surface," to "regard every applicant as having a disability," to "ferret[] out" disabilities, and that the inquiries "express[ed]" an "intent to" discriminate on the basis of perceived disability." ER-82–83, 86.

Finally, in *Turner,* there was nothing illegal about the MCAT, which is designed to "assess a medical school applicant's knowledge of basic science concepts, writing skills and facility in problem solving and critical thinking." *Turner,* 167 Cal. App. 4th at 1404. Here, by contrast,

the broad Questionnaire and related verbal follow-up questions are expressly illegal under Cal. Gov. Code § 12940(e) and *necessarily* "is discrimination" under Cal. Gov. Code § 12940(d). See *Disney*, 2018 WL 3201853, at *3.

C. Defendants Discriminated on the Basis of Gender

Defendants also discriminated on the basis of gender. Defendants' Questionnaire asked numerous questions about reproductive and sexual health, including different questions for men and women. ER-57, 74, 85–86. Women, for example, were separately required to answer whether they have ever had or commonly have painful or irregular menstruation or vaginal discharge or pain and to disclose whether they are pregnant and the date of their last menstrual periods. ER-57, 74, 85–86. The questions were in a box marked "FOR WOMEN ONLY." ER-57, 74, 85–86. Men were separately required to answer whether they have ever had or commonly have penile discharge, prostate problems, or genital pain or masses. ER-57, 74, 85–86. These questions were in a box marked "FOR MEN ONLY." ER-57, 74, 85–86. None of these questions had any bearing on fitness for employment.

Here, both Defendants and the district court disregarded the context of Defendants' conduct. Defendants argued, and the district court appeared to accept, that this facially discriminatory practice was not actionable because "there is no authority that medical professionals must ignore anatomical differences." ER-15, 61. This, however, conflates a routine medical examination, conducted by a patient's own physician, with a FEHA-regulated pre-placement employment screening. But Plaintiffs were not seeking treatment or health advice from their own physicians. ER-50, 57, 87–88, 90. They were receiving a compelled medical screening, from strangers they did not select, in order to be cleared for employment for their specific jobs. ER-87–88. And although California law severely restricts the scope of such screenings, Defendants simply ignored and ran roughshod over that restriction. ER-37, 75, 83, 89. The "anatomical differences" between Raines and a man or between Figg and a woman have nothing to do with their respective abilities to serve food and wash dishes or to serve in a volunteer fire corps. ER-86.

It is thus wholly irrelevant that medical professionals providing health care and treatment are allowed to address their patient's

biological sex-specific issues. None of those issues were relevant to an employment screening except as a way to discriminate, for example, against applicants who might be pregnant or have a history of prostate cancer.

Nevertheless, Defendants argue that their arbitrary sex discrimination is not actionable because there is "a strong public policy" allowing it—namely, that they must be permitted "to explore medical conditions without fear of frivolous litigation like this." ER-62–63. Setting aside that there are other sufficient protections against "frivolous litigation" and Plaintiffs' claims are not frivolous, the California Supreme Court has unequivocally explained that "'public policy' exceptions to the Unruh Act are rare." *Koire*, 40 Cal. 3d at 32, n.8. On the rare occasions where they do exist, *Koire* explained that those public policy exceptions "may be gleaned by reviewing other statutory enactments" and indeed *usually* have a statutory basis. *Id.* at 31-32 & n.8 (citing *Pines v. Tomson*, 160 Cal. App. 3d 370, 387 (1984)). But "few cases have held discriminatory treatment to be nonarbitrary," as the district court did here, "based solely on the special nature of the business establishment." *Id.* at 30.

As noted above, businesses providing medical services are not categorically immune from Unruh Act liability. *Leach*, 144 Cal. App. 3d at 370. Nor did Defendants point to any statutory basis justifying the exemption from Unruh Act liability they seek. On the contrary, the public policy of the State of California concerning pre-employment screenings—as expressed by FEHA—is that all medical inquiries must be individually tailored such that they are "job related and consistent with business necessity." Cal. Gov. Code § 12940(e)(3). While it may be true, as Defendants argued below, that "generally, males have different parts than females," it does not follow that this "is a reality that must be addressed and factored into" pre-employment screenings regardless of the job in question. See ER-62–63. FEHA expressly prohibits that kind of arbitrary and irrelevant questioning.

For the same reasons, Defendants' parade of horribles—that Plaintiffs' reasoning "would render it nearly impossible for medical professionals to ever ask patients questions pertaining to gender or disability"—is misconceived. ER-15. This improperly conflates a routine and voluntary medical exam conducted by a patient's own personal doctor regarding the patient's general health for the purpose of

diagnosis and treatment with a pre-placement medical screening conducted by a corporate agent selected by a job applicant's employer for the sole purpose of being medically cleared for employment. Medical professionals have always been subject to Unruh Act liability; where they provide employment-related services such as pre-employment screenings, the Unruh Act, consistent with the related provisions of FEHA, simply requires that those services be non-discriminatory and that all questions be limited to those which are job related and consistent with business necessity.

D. The Unruh Act Question Is Also Appropriate for Certification to the California Supreme Court

Plaintiffs request that, to the extent that the Court refers the scope of FEHA's application to agents to the California Supreme Court, it would be appropriate to also submit the alternative Unruh Act claim as well. The two statutes were passed in the same legislative session as part of a comphrensive effort serving twin goals. See *Alcorn*, 2 Cal. 3d at 500; *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 167 (2007) (The Unruh Act was "intended as an active measure that would create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious

discrimination by such establishments"). Given the complimentary nature of these claims (one against employers and their agents and the other against non-employer businesses), it is logical and useful for the claims to be addressed together to avoid the gap created by the district court here when it found that Defendants are not subject to either statute.

III. DEFENDANTS' INTRUSIVE AND ILLEGAL CONDUCT CONSTITUTES INTRUSION UPON SECLUSION

Finally, Plaintiffs alleged that Defendants' use of the illegal and overbroad Questionnaire, the illegal Authorization, and their follow-up verbal inquiries during their pre-employment screenings constitute intrusion upon seclusion. ER-87–91. To state a claim for intrusion upon seclusion, a plaintiff must plead (1) "intrusion into a private place, conversation or matter" of which the plaintiff has an objectively reasonable expectation of privacy, (2) "in a manner highly offensive to a reasonable person." *Shulman v. Group W Productions*, 18 Cal. 4th 200, 231 (1998). The district court held that as a matter of law Defendants' conduct was not "highly offensive."[4]

[4] In granting USHW's motion to dismiss the SAC with leave to amend, the district court found that Plaintiffs failed to plead facts

Plaintiffs agree with the district court that "there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1483 (1986). But given that "California tort law provides no bright line" on what is "highly offensive," "each case must be taken on its facts." *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272, 287 (2009) (internal citations omitted). Thus, in making the "preliminary determination" of whether conduct is "highly offensive," the court *must* consider "*all of the circumstances* of the intrusion" as alleged. *Shulman*, 18 Cal. 4th at 236 (emphasis added). These circumstances include but are not limited to "the degree

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sufficient to support either element. ER-96–97. It is unclear whether the district court found the TAC adequately pleads facts supporting a reasonable expectation of privacy in Plaintiffs' personal health histories. See ER-15–19. In any event, the courts have resolved that question in the affirmative: "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 41 (1994) (citing *Bd. of Med. Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678 (1979)), *disapproved of on other grounds by Williams v. Superior Court*, 3 Cal. 5th 531 (2017). And FEHA provides a bright line for what constitutes a reasonable expectation of privacy in the pre-employment screening context, *i.e.*, only inquiries that are "job related and consistent with business necessity" may be made. Cal. Gov. Code § 12940(e)(3)

of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Miller*, 187 Cal. App. 3d at 1483–84.

The district court erred by failing to consider the specific circumstances of Defendants' inquiry, as well as the express prohibition of such broad inquiries in Cal. Gov. Code § 12940(e) and the coerced consent to disclose applicants' health information to employers and unspecified others. Based on the totality of circumstances alleged here, Plaintiffs adequately alleged a claim for intrusion upon seclusion.

A. This Was Not a Traditional Medical Examination

The district court's primary error on this claim was accepting Defendants' analogy that their pre-employment screenings are no different than routine medical examinations. There is no doubt that questions "about personal health history are routinely asked in the context of a medical exam." ER-17. But this is not a routine medical exam in which a patient seeks treatment from a physician of his or her choice for the purposes of diagnosis and treatment or maintenance of general health; it is a mandatory pre-employment screening conducted

by a corporate agent of the employer's choice for the narrow purpose of assessing a job applicant's present ability to do the specific job in question. ER-71, 87–90.

Where a patient is seeking treatment from his or her own physician, the patient can choose the physician and can choose what and how much to disclose to that physician. ER-71, 87–90. Here, on the other hand Plaintiffs were forced to undergo an involuntary, extensive, and invasive inquiry by Defendants, and a single refusal to state when her last menstrual period occurred resulted in one Plaintiff being denied medical clearance. ER-77.

Nor can this screening be analogized to the drug testing in *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994) relied on by the district court. "[A]thletic participation" is not "an economic necessity that society has decreed must be open to all." *Id.* at 42-43. Drug use also is plainly relevant to athletics. *Id.* at 44 ("[Athletic] competition should be decided on the basis of who has done the best job of perfecting and utilizing his or her natural abilities, not on the basis of who has the best pharmacist."). Here, by contrast, working is without question an economic necessity that society has decreed must be open to all (see Cal.

Gov. Code § 12920), and the occurrence of Ms. Raines' last menstrual period was not relevant in any way to assessing her present ability to serve food, wash dishes, and the like. ER-75, 77.

Indeed, overbroad and irrelevant medical screenings are specifically prohibited in this context. Cal. Gov. Code § 12940(e)(3). There is simply no analogy to school athletics which present a "unique set of demands" justifying rigorous medical examinations and full disclosure of an athlete's "bodily condition, both internal and external" as a condition of participating in physically demanding competitive sport. *Hill*, 7 Cal. 4th at 42. Nor is medical examination and testing of student athletes strictly regulated in the way pre-employment screenings are by FEHA. See *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905, 913 (9th Cir. 2019) ("under California law, student-athletes are generally deemed not to be employees of their schools, [or] the NCAA/PAC-12").

An unlawful, overbroad pre-employment inquiry cannot be analogized—as a matter of law no less—to a routine medical examination by one's personal physician or to a student athlete's drug test. Indeed, while an intrusion does not need to be separately unlawful

to constitute a tort, see *Shulman*, 18 Cal. 4th at 241 n.19, the illegality of the Questionnaire under FEHA is plainly relevant to its offensiveness. See, *e.g., id.* (wiretapping law relevant); *Helton v. U.S.*, 191 F. Supp. 2d 179, 181, 182, 186 (D.D.C. 2002) (plaintiffs stated a claim for intrusion when U.S. Marshalls compelled them to submit to a strip search); *Hutchinson v. West Virginia State Police*, 731 F. Supp. 2d 521, 548 (S.D. W.Va. 2010) (denying summary judgment against plaintiff's intrusion claim where she was forced to remain nude without any reasonable justification for such nakedness).

Thus, to characterize Defendants' improper inquiries as nothing more than "uncomfortable and irrelevant" and not actionable "given the setting" (see ER-17) is to ignore FEHA's privacy dimensions. As the legislative history reveals, its additional protections were developed *expressly to protect jobseekers' privacy*:

> According to the author, the provision of the bill requiring post-offer medical or psychological examinations or inquiries to be job-related and consistent with business necessity appropriately builds upon the ADA's provisions in this area, *especially given this state's long history of strong protections for the privacy rights of Californians*.

Legislative Analysis at p. 4 (emphasis added). It would undermine those very same protections—and contravene clear legislative intent—to

foreclose Plaintiffs' privacy claim on the grounds that, in other medical examinations unregulated by FEHA, such questions are generally permitted.

B. The District Court Ignored Factual Allegations and Improperly Characterized Plaintiffs' Privacy Claims as Challenging Only the Act of "Asking Questions" About Private Information, Thereby Failing to Consider All Relevant Circumstances

Citing to the putative class definition and Raines' refusal to disclose the date of her last menstrual period, the district court concluded that Plaintiffs

> cannot base their claim on a theory that USHW intruded by *obtaining* their personal information, because not all of members of the putative class disclosed information. Accordingly, the alleged intrusion is USHW's act of asking questions.

ER-17–18 (emphasis in original). Here too the district court failed to consider all of the relevant circumstances alleged and instead improperly drew inferences *against* Plaintiffs.

First, this characterization ignores the allegation that, while Plaintiff Raines refused to answer one question, she answered dozens of others that were similarly unnecessary to assessing her present ability to do the job in question. ER-77.

Second, it likewise ignores the allegation that Plaintiff Figg answered every question. ER-77–78.

Third, it does not follow from the class definition, consisting of "all applicants for employment in the State of California requested to respond to standardized Impermissible Non-Job-Related Questions at USHW within the Class Period" (see ER-78), that "not all members of the putative class disclosed information." ER-17–18. There is no allegation in the TAC that some members of the class refused to answer *any* question. Quite the opposite: the TAC clearly alleges Defendants inquired "about virtually every conceivable past and present health condition" and as such, "*all Class Members* were required to *and did disclose* one or more health conditions." ER-86 (emphasis added). To infer the opposite—that some class members did not disclose any information—based on the class definition alone is unwarranted, especially where the opposite is clearly alleged. To the extent the district court made that unwarranted inference *against* Plaintiffs, it failed to construe all facts in the light most favorable to them. See *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Because the district court improperly limited Plaintiffs' theory based on an unwarranted inference improperly drawn against them, the two federal trial court decisions it cited for the proposition that the mere act of questioning likely must be persistent or repeated to be actionable are inapposite. Those cases, *Chaconas v. JP Morgan Chase Bank*, 713 F. Supp. 2d 1180, 1185 (S.D. Cal. 2010) and *In re Vizio, Inc., Consumer Priv. Litig.*, 238 F. Supp. 3d 1204, 1216 (C.D. Cal. 2017), do not hold that questioning must *necessarily* be persistent or repeated to be highly offensive—those were just the facts presented in those cases. That repeated and persistent debt collection calls are offensive does not mean that dozens of illegal medical inquiries in a compelled pre-employment screening can only be offensive if they are repeated and persistent.

Indeed, the Restatement (Second) of Torts provides many other examples where a single action was offensive: "opening [] private and personal mail," "searching [a] safe or [a] wallet," "examining [a] private bank account," or "compelling" someone by improper means such as "a forged court order to permit an inspection of [] personal documents." See Restatement (Second) of Torts § 652B, comment b. In any event, the

district court's focus on the fact that applicants underwent only a "single" screening ignores the allegation that during each screening applicants were asked *dozens* of impermissible questions both through the questionnaire and again in a verbal follow-up. See ER-17, 57, 74.

The offensive conduct also went beyond the impermissible asking of questions. Defendants compelled applicants to disclose highly personal and irrelevant information, in violation of FEHA, with the threat that failure to answer all questions on the Questionnaire and all follow-up questions would result in revocation of the job offer. ER-71, 74–75, 77, 83. Defendants also required applicants to sign the illegal Authorization form purporting to permit Defendants to disclose that information to third parties, such as referring employers and others. ER-71, 88, 90. Defendants further threatened jobseekers that failure to sign the Authorization may violate a condition of their employment and that revoking it "may carry consequences related to [their] employment." ER-71, 88.

Further aggravating their illegal and coercive conduct, Defendants compelled these disclosures, as in *Miller*, "at a time of vulnerability and confusion." 187 Cal. App. 3d at 1484. That is,

Plaintiffs underwent these screenings as a condition of working, under illegal threat of disclosure to their prospective employers and unspecified others, in the presence of Defendants' staff members who were strangers to them and who sought information about "an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." *Hill*, 7 Cal. 4th at 41.

Finally, the district court was required, but failed, to consider the Defendants' "motives and objectives" in making a preliminary determination of offensiveness. See *Shulman*, 18 Cal. 4th at 236; *Miller*, 187 Cal. App. 3d at 1483–84. Plaintiffs alleged that Defendants' "motives were contrary to [Plaintiffs'] interests" and that Defendants' failure to tailor inquiries as required by FEHA was for the purpose of enriching themselves by "expediting the exam process to be able to conduct more exams (and thereby generate more revenue)." ER-89. These motives are especially concerning given that FEHA's pre-employment screening protections were designed both to protect applicants' privacy and to require and facilitate a good faith, interactive process with an applicant in response to a request for reasonable

accommodations—not to line the pockets of for-profit medical screening administrators in violation of those applicants' rights and with utter disregard for Defendants' responsibilities. See *Legislative Analysis* at p. 1, 4.

The foregoing facts, taken as a whole and applying all inferences in Plaintiffs' favor as required, state a claim for intrusion upon seclusion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the judgment of the district court on Plaintiffs' First, Second, and Third causes of action be reversed or, alternatively as to the First and Second causes of action, that the Court certify the proper scope of FEHA and the Unruh Act on the alleged facts for determination by the Supreme Court of the State of California.

Date: June 9, 2021

Phillips, Erlewine, Given & Carlin LLP

s/ R. Scott Erlewine
R. Scott Erlewine
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATEMENT OF RELATED CASES

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

The undersigned attorney or self-represented party states the following:

[**X**] I am unaware of any related cases currently pending in this court.

Signature s/ R. Scott Erlewine
Date June 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

I am the attorney or self-represented party.

This brief contains 12,372 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

9th Cir. Case Number(s) No. 21-55229

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Description of Document(s):

Plaintiffs-Appellants' Opening Brief
Addendum
Excerpts of Record (Vol. 1 of 1)

Signature s/ R. Scott Erlewine
Date June 9, 2021

ADDENDUM

Table of Contents

Cal. Gov. Code § 12920

Public policy; discrimination in employment rights and opportunities and housing; purpose; police power

It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

Cal. Gov. Code § 12926

Additional definitions

As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g)(1) “Genetic information” means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) “Genetic information” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) "Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Veteran or military status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(l) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336)1 would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, or veteran or military status" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts,

and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r)(1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

Cal. Gov. Code § 12926.1

Legislative findings and declarations; disability, mental disability, and medical condition; broad coverage under state law; interaction in determining reasonable accommodation

The Legislature finds and declares as follows:

(a) The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-336).1 Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections.

(b) The law of this state contains broad definitions of physical disability, mental disability, and medical condition. It is the intent of the Legislature that the definitions of physical disability and mental disability be construed so that applicants and employees are protected from discrimination due to an actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling.

(c) Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, clinical depression, bipolar disorder, multiple sclerosis, and heart disease. In addition, the Legislature has determined that the definitions of "physical disability" and "mental disability" under the law of this state require a "limitation" upon a major life activity, but do not require, as does the federal Americans with Disabilities Act of 1990, a "substantial limitation." This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, "working" is a major life activity, regardless of whether the actual or perceived

working limitation implicates a particular employment or a class or broad range of employments.

(d) Notwithstanding any interpretation of law in Cassista v. Community Foods (1993) 5 Cal.4th 1050, the Legislature intends (1) for state law to be independent of the federal Americans with Disabilities Act of 1990, (2) to require a "limitation" rather than a "substantial limitation" of a major life activity, and (3) by enacting paragraph (4) of subdivision (j) and paragraph (4) of subdivision (l) of Section 12926, to provide protection when an individual is erroneously or mistakenly believed to have any physical or mental condition that limits a major life activity.

(e) The Legislature affirms the importance of the interactive process between the applicant or employee and the employer in determining a reasonable accommodation, as this requirement has been articulated by the Equal Employment Opportunity Commission in its interpretive guidance of the federal Americans with Disabilities Act of 1990.

Cal. Gov. Code § 12940

Employers, labor organizations, employment agencies and other persons; unlawful employment practices; exceptions

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, 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, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability

resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5)(A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health

benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, 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, or veteran or military status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person 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, or veteran or military status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person 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, or veteran or military status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital

status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e)(1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f)(1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job

related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the

workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4)(A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l)(1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This

subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m)(1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or

applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

Cal. Civ. Code § 51

Unruh Civil Rights Act; equal rights; business establishments; violations of federal Americans with Disabilities Act

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, sexual orientation, citizenship, primary language, or immigration status, or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) “Disability” means any mental or physical disability as defined in Sections 12926 and 12926.1 of the Government Code.

(2)(A) “Genetic information” means, with respect to any individual, information about any of the following:

(i) The individual's genetic tests.

(ii) The genetic tests of family members of the individual.

(iii) The manifestation of a disease or disorder in family members of the individual.

(B) “Genetic information” includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(C) “Genetic information” does not include information about the sex or age of any individual.

(3) “Medical condition” has the same meaning as defined in subdivision (i) of Section 12926 of the Government Code.

(4) “Religion” includes all aspects of religious belief, observance, and practice.

(5) “Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person's gender. “Gender” means sex, and includes a person's gender identity and gender expression. “Gender expression” means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) “Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status” includes a perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) “Sexual orientation” has the same meaning as defined in subdivision (s) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (Public Law 101-336)1 shall also constitute a violation of this section.

(g) Verification of immigration status and any discrimination based upon verified immigration status, where required by federal law, shall not constitute a violation of this section.

(h) Nothing in this section shall be construed to require the provision of services or documents in a language other than English, beyond that which is otherwise required by other provisions of federal, state, or local law, including Section 1632.

Cal. Civ. Code § 52

Denial of civil rights or discrimination; damages; civil action by persons aggrieved; intervention; unlawful practice complaint; waiver of rights by contract

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.

(3) Attorney's fees as may be determined by the court.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil

action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure,

nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

(i) Subdivisions (b) to (f), inclusive, shall not be waived by contract except as provided in Section 51.7

42 U.S.C. § 2000e

Definitions

For the purposes of this subchapter--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint

or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term “employee” means an individual employed by an employer, except that the term “employee” shall not include any person elected to

public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for

all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

Cal. Code Regs., tit. 2, § 11065

Definitions.

As used in this article, the following definitions apply:

(a) "Assistive animal" means an animal that is necessary as a reasonable accommodation for a person with a disability.

(1) Specific examples include, but are not limited to:

(A) "Guide dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) "Signal dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) "Service dog," as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

(D) "Support dog" or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.

(2) Minimum standards for assistive animals include, but are not limited to, the following. Employers may require that an assistive animal in the workplace:

(A) is free from offensive odors and displays habits appropriate to the work environment, for example, the elimination of urine and feces; and

(B) does not engage in behavior that endangers the health or safety of the individual with a disability or others in the workplace.

(3) A "support animal" may constitute a reasonable accommodation in certain circumstances. A support animal is one that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression. As in other contexts, what constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.

(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.

(c) "CFRA" means the Moore-Brown-Roberti Family Rights Act of 1993. (California Family Rights Act, Gov. Code §§ 12945.1 and 12945.2.) As used in this article "CFRA leave" means medical leave taken pursuant to CFRA.

(d) "Disability" shall be broadly construed to mean and include any of the following definitions:

(1) "Mental disability," as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity. "Mental disability" includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post-traumatic stress disorder, and obsessive compulsive disorder.

(2) "Physical disability," as defined at Government Code section 12926, includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

(A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and

(B) limits a major life activity.

(C) "Disability" includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic

conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart and circulatory disease.

(3) A "special education" disability is any other recognized health impairment or mental or psychological disorder not described in section 11065(d) of this article, that requires or has required in the past special education or related services. A special education disability may include a "specific learning disability," manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities. A specific learning disability can include conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. A special education disability does not include special education or related services unrelated to a health impairment or mental or psychological disorder, such as those for English language acquisition by persons whose first language was not English.

(4) A "record or history of disability" includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer or other covered entity is aware.

(5) A "perceived disability" means being "regarded as," "perceived as" or "treated as" having a disability. Perceived disability includes:

(A) Being regarded or treated by the employer or other entity covered by this article as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or

(B) Being subjected to an action prohibited by this article, including non-selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

(6) A "perceived potential disability" includes being regarded, perceived, or treated by the employer or other covered entity as having, or having had, a physical or mental disease, disorder, condition or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability that has no present disabling effect, but may become a mental or physical disability or special education disability.

(7) "Medical condition" is a term specifically defined at Government Code section 12926, to mean either:

(A) any cancer-related physical or mental health impairment from a diagnosis, record or history of cancer; or

(B) a "genetic characteristic," as defined at Government Code section 12926. "Genetic characteristics" means:

1. Any scientifically or medically identifiable gene or chromosome, or combination or alteration of a gene or chromosome, or any inherited characteristic that may derive from a person or the person's family member, and

2. That is known to be a cause of a disease or disorder in a person or the person's offspring, or that is associated with a statistically increased risk of development of a disease or disorder, though presently not associated with any disease or disorder symptoms.

(8) A "Disability" is also any definition of "disability" used in the federal Americans with Disabilities Act of 1990 (ADA), and as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, that would result in broader protection of the civil rights of individuals with a mental or physical disability or medical condition than provided by the FEHA. If so, the broader ADA protections or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the FEHA's definition of disability.

(9) "Disability" does not include:

(A) excluded conditions listed in the Government Code section 12926 definitions of mental and physical disability. These conditions are compulsive gambling, kleptomania, pyromania, or psychoactive

substance use disorders resulting from the current unlawful use of controlled substances or other drugs, and "sexual behavior disorders," as defined at section 11065(q), of this article; or

(B) conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis. These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

(e) "Essential job functions" means the fundamental job duties of the employment position the applicant or employee with a disability holds or desires.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's or other covered entity's judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

(3) "Essential functions" do not include the marginal functions of the position. "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.

(f) "Family member," for purposes of discrimination on the basis of a genetic characteristic or genetic information, includes the individual's relations from the first to fourth degree. This would include children, siblings, half-siblings, parents, grandparents, aunts, uncles, nieces, nephews, great aunts and uncles, first cousins, children of first cousins, great grandparents, and great-great grandparents.

(g) "FMLA" means the federal Family and Medical Leave Act of 1993 and its implementing regulations. For purposes of this section only, "FMLA leave" means medical leave taken pursuant to FMLA.

(h) "Genetic information," as defined at Government Code section 12926, means genetic information derived from an individual's or the individual's family members' genetic tests, receipt of genetic services, participation in genetic services clinical research or the manifestation of a disease or disorder in an individual's family members.

(i) "Health care provider" means either:

(1) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or employee; or

(2) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet

the definition of "others capable of providing health care services" under FMLA and its implementing regulations, including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(3) a health care provider from whom an employer, other covered entity, or a group health plan's benefits manager will accept medical certification of the existence of a health condition to substantiate a claim for benefits.

(j) "Interactive process," as set forth more fully at California Code of Regulations, title 2, section 11069, means timely, good faith communication between the employer or other covered entity and the applicant or employee or, when necessary because of the disability or other circumstances, his or her representative to explore whether or not the applicant or employee needs reasonable accommodation for the applicant's or employee's disability to perform the essential functions of the job, and, if so, how the person can be reasonably accommodated.

(k) "Job-related," as used in sections 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.

(l) "Major life activities" shall be construed broadly and include physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement.

(1) Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine,

hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system.

(3) An impairment "limits" a major life activity if it makes the achievement of the major life activity difficult.

(A) Whether achievement of the major life activity is "difficult" is an individualized assessment, which may consider what most people in the general population can perform with little or no difficulty, what members of the individual's peer group can perform with little or no difficulty, and/or what the individual would be able to perform with little or no difficulty in the absence of disability.

(B) Whether an impairment limits a major life activity will usually not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence, where appropriate.

(C) "Limits" shall be determined without regard to mitigating measures or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(D) Working is a major life activity, regardless of whether the actual or perceived working limitation affects a particular employment or class or broad range of employments.

(E) An impairment that is episodic or in remission is a disability if it would limit a major life activity when active.

(m) A "medical or psychological examination" is 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.

(n) "Mitigating measure" is a treatment, therapy, or device that eliminates or reduces the limitation(s) of a disability. Mitigating measures include, but are not limited to:

(1) Medications; medical supplies, equipment, or appliances; low-vision devices (defined as devices that magnify, enhance, or otherwise

augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics, including limbs and devices; hearing aids, cochlear implants, or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; and assistive animals, such as guide dogs.

(2) Use of assistive technology or devices, such as wheelchairs, braces, and canes.

(3) "Auxiliary aids and services," which include:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing disabilities such as text pagers, captioned telephone, video relay TTY and video remote interpreting;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual disabilities such as video magnification, text-to-speech and voice recognition software, and related scanning and OCR technologies;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(4) Learned behavioral or adaptive neurological modifications.

(5) Surgical interventions, except for those that permanently eliminate a disability.

(6) Psychotherapy, behavioral therapy, or physical therapy.

(7) Reasonable accommodations.

(o) "Qualified individual," for purposes of disability discrimination under California Code of Regulations, title 2, section 11066, is an applicant or employee who has the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) "Reasonable accommodation" is:

(1) modifications or adjustments that are:

(A) effective in enabling an applicant with a disability to have an equal opportunity to be considered for a desired job, or

(B) effective in enabling an employee to perform the essential functions of the job the employee holds or desires, or

(C) effective in enabling an employee with a disability to enjoy equivalent benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

(2) Examples of Reasonable Accommodation. Reasonable accommodation may include, but are not limited to, such measures as:

(A) Making existing facilities used by applicants and employees readily accessible to and usable by individuals with disabilities. This may include, but is not limited to, providing accessible break rooms, restrooms, training rooms, or reserved parking places; acquiring or modifying furniture, equipment or devices; or making other similar adjustments in the work environment;

(B) Allowing applicants or employees to bring assistive animals to the work site;

(C) Transferring an employee to a more accessible worksite;

(D) Providing assistive aids and services such as qualified readers or interpreters to an applicant or employee;

(E) Job Restructuring. This may include, but is not limited to, reallocation or redistribution of non-essential job functions in a job with multiple responsibilities;

(F) Providing a part-time or modified work schedule;

(G) Permitting an alteration of when and/or how an essential function is performed;

(H) Providing an adjustment or modification of examinations, training materials or policies;

(I) Modifying an employer policy;

(J) Modifying supervisory methods (e.g., dividing complex tasks into smaller parts);

(K) Providing additional training;

(L) Permitting an employee to work from home;

(M) Providing a paid or unpaid leave for treatment and recovery, consistent with section 11068(c);

(N) Providing a reassignment to a vacant position, consistent with section 11068(d); and

(O) other similar accommodations.

(q) "Sexual behavior disorders," as used in this article, refers to pedophilia, exhibitionism, and voyeurism.

(r) "Undue hardship" means, with respect to the provision of an accommodation, an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors:

(1) the nature and net cost of the accommodation needed under this article, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business;

(3) the overall financial resources of the employer or other covered entity, the overall size of the business of a covered entity with respect to the number of its employees, and the number, type, and location of its facilities;

(4) the type of operation or operations, including the composition, structure, and functions of the workforce of the employer or other covered entity; and

(5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities.

Cal. Code Regs., tit. 2, § 11008

Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) "Applicant." Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, "Applicant" is also an individual who can prove that he or she has been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice. "Applicant" does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(b) "Apprenticeship Training Program." Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(c) "Employee." Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) "Employee" does not include an independent contractor as defined in Labor Code section 3353.

(2) "Employee" does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) "Employee" does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service

agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d) "Employer." Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) "Regularly employing" means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) "Regular basis" refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season "regularly employs" the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by

the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) "Employer" includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) "Employer" includes any non-profit corporation or non-profit association other than that defined in subsection (5).

(e) "Employer or Other Covered Entity." Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f) "Employment Agency." Any person undertaking for compensation to procure job applicants, employees or opportunities to work.

(g) "Employment Benefit." Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment" or discharge

from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, "employment benefit" includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) "Employment benefit" also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) "Provision of a discrimination-free workplace" is a provision of a workplace free of harassment, as defined in section 11019(b).

(h) "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.

(i) "Labor Organization." Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j) "Person performing services pursuant to a contract." A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) "Unpaid interns and volunteers." For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.