RESOLUTION 08-01-2019

DIGEST
Employment Discrimination: Limitation of Actions
Amends Government Code section 12960 to extend the employment discrimination statute of limitations from one to three years.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolution 06-01-2006, which was disapproved.

Reasons:
This resolution amends Government Code section 12960 to extend the employment discrimination statute of limitations from one to three years. This resolution should be disapproved because delays in reporting discrimination and harassment allow inappropriate behavior to continue unchecked and result in the loss of important evidence.

Under current law, Government Code section 12960 provides a one year statute of limitations for plaintiffs to file administrative claims with the Department of Fair Employment and Housing ("DFEH") for unlawful employment practices, including claims for unlawful discrimination, harassment, retaliation, failure to provide reasonable accommodations, and failure to provide protected time off. (Gov. Code, § 12960, subd. (b).) Filing an administrative claim is a prerequisite to filing a civil action for violation of the Fair Employment and Housing Act. (Gov. Code, § 12965, subd. (b).) In most cases, the DFEH issues a right to sue letter, either at the plaintiff's request or if the DFEH determines not to pursue its own enforcement process. The plaintiff has one year from the date of the right to sue letter within which to bring a civil action. (Gov. Code, § 12965, subd. (b).)

This resolution seeks to extend the deadline for filing administrative claims asserting unlawful employment practices to three years. It does not affect the statute of limitations for administrative charges alleging violations of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), which does not apply in the employment context. Other changes in the statute are made to clarify the timeline differences between employment claims and those brought under the Unruh Civil Rights Act.

The Statement of Reasons asserts that "it is apparent that current laws are not providing victims with an adequate amount of time to obtain justice or hold perpetrators adequately accountable. Many victims have no idea their window to act is limited until it is too late, or they fear retaliation and want to find a new job before suing their employer." Recent legislation addresses this concern. As the result of legislative changes that became effective January 1, 2019, California imposed requirements that all employers having five or more employees provide harassment prevention training every two years. Training must include "information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to

victims of sexual harassment in employment." (Gov. Code, § 12950.1, subd. (a).) The training will encourage victims to come forward and educate them on their rights.

The resolution would hamper the employer's ability to take prompt and effective remedial action and to gather evidence and resolve claims. Individuals can obtain an immediate right to sue letter from the Department of Fair Employment and Housing without notifying the employer of their action. Once the right to sue letter has been obtained, the individual has an additional year to file the lawsuit. (Gov. Code, § 12965, subd. (b).) During this time, employees will change jobs, memories will fade, and records, particularly electronic records, may become extremely difficult to access. The current limitations period strikes an appropriate balance between the plaintiff's need for time to prepare to file and the employer's need to take corrective action or to preserve evidence.

Assembly Bill No. 9 (2018-2019 Reg. Session) is identical to Resolution 08-01-2019 and, if passed, will make this resolution action unnecessary.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12960 to read as follows:

§ 12960

(a) This article governs the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or the director's authorized representative may in like manner, on that person's own motion, make, sign, and file a complaint.

(c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(d) ~~No~~ A complaint alleging a violation of Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code, shall not ~~may~~ be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred~~,~~. A complaint alleging any other violation of Article 1 (commencing with Section 12940) of Chapter 6 shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred. However, the filing periods set forth by this section ~~except that this period~~ may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration ~~of that year~~ the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice ~~after~~ during the 90 days following the expiration of the applicable filing deadline. ~~expiration of one year from the date of their occurrence~~.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Existing law, the California Fair Employment and Housing Act, makes specified employment and housing practices unlawful, including discrimination against or harassment of employees and tenants, among others. Existing law authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a complaint with the Department of Fair Employment and Housing within one year from the date upon which the unlawful practice occurred, unless otherwise specified.

In the midst of the #metoo movement, it is apparent that current laws are not providing victims with an adequate amount of time to obtain justice or hold perpetrators adequately accountable. Many victims have no idea their window to act is limited until it is too late, or they fear retaliation and want to find a new job before suing their employer. Too often, victims also do not feel safe and have not had the opportunity to heal and build the resilience to come forward within the one-year period currently allowed to bring claims under existing law. The current short statute of limitations to bring these claims has enabled cultures of discrimination and harassment to flourish in employment settings in most prominent industries in California, including entertainment and tech.

The Solution: This resolution would extend a complainant’s time to file an administrative charge with the DFEH from one year to three years after the alleged incident. This expansion of the limitations period would apply to all types of FEHA-prohibited conduct, including sexual harassment. The resolution would make conforming changes in provisions that grant a person allegedly aggrieved by an unlawful practice who first obtains knowledge of the facts of the alleged unlawful practice after the expiration of the limitations period, as specified.

This resolution would allow victims the time they need to seek justice and protect due process so that every Californian has equal access to recourse. Extending the time victims can report ensures they are supported and empowered to speak out when they feel comfortable. Violators should not be able to avoid accountability simply because a claim is not filed within 12 months.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
AB-1870 Employment discrimination: limitation of actions. (2017-2018). Introduced by Assembly Member Reyes. Vetoed by Governor Brown.

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RESPONSIBLE FLOOR DELEGATE: Felicia Medina

RESOLUTION 08-02-2019

DIGEST
Fair Employment and Housing: Protecting Transgender Individuals Against Discrimination
Amends Government Code section 12920 to include transgender, non-binary, asexual or intersex status as protected classes.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 12920 to include transgender, non-binary, asexual or intersex status as protected classes. This resolution should be disapproved because title 2 of California Code of Regulations section 11030, which provides additional definitions used to interpret Government Code section 12920, includes transgender, non-binary, asexual and intersex status as protected classes.

Title 2 of the California Code of Regulations section 11030 currently provides detailed definitions, which expand upon and interpret the gender-related classes protected in section 12920, specifically "gender expression, "gender identity," and "transgender." In addition, section 11030 provides expansive definitions of "sex stereotype" and "transitioning."

This regulation provides adequate definition of the statutory terms "gender identity" and "gender expression" as used in Government Code section 12920. These regulations prevent the risk that a transgender individual would have to "prove" their gender identity and transition in order to benefit from "gender identity" protections. In addition, the definitions provided in the resolution may conflict with and be read more narrowly than the definitions provided in the regulation. For example, the linking of "pre- and post-operative" to "transgender status" suggests that only those who proceed with gender correction surgery fall into the "transgender" definition. Moreover, as scientific knowledge regarding the gender spectrum develops, the regulations can be more easily amended to address the latest understanding.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Government Code section 12920 to read as follows:

§ 12920.

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, transgender status (pre and post-operative), non-binary, asexual or intersex status, 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, transgender status (pre and post-operative), non-binary, asexual or intersex status sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, 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.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: The law as it stands now uses catch-all terms for people on the trans spectrum in housing and employment discrimination cases.

The categories of "gender identity" and "gender expression" in the current law are well-meaning, but they do not hold as much power against discrimination as do the adjunct terms added in the current draft resolution. For example, a transgender individual discriminated in a housing or job application solely for being transgender should be able to use the DFEH statute in a discrimination case by using this term alone, without having to explain "gender expression" and "gender identity" factors, which may only compound their issues in their cases.

A way this could work our poorly for a complaining witness is to have a transgender individual to have to "prove" their gender identity in the instant case, by having to state in court that they used to be this former sex or that, otherwise they would not get the benefit of the "gender identity" clause in the DFEH statute. Better to have transgender individuals discriminated in this way to be able to point to the exact word that describes their situation, to avoid the pitfall from falling inside a catch-all term.

The Solution: This resolution would add direct language in the relevant DFEH statute to cover transgender (pre- and post-operative) status, as well non-binary, agender, and intersex status to the anti-discriminatory laws now in place.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Rae Raucci

RESOLUTION 08-03-2019

DIGEST
Employment Law: Parental and Familial Status is a Protected Class
Amends Government Code section 12940 to include parental and familial status as protected classes.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 12940 to include parental and familial status as protected classes. This resolution should be approved in principle because whether or not someone has a family is unrelated to the ability to do one's job.

California's public policy is to safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement. (Gov. Code, § 12920.) Thus, the law provides that it is an unlawful employment practice for an employer to permit discrimination, harassment, and retaliation on the basis of marital status, sex, gender, gender identity, gender expression, and sexual orientation, race, national origin, among other protected categories. (Gov. Code, § 12940, subd. (a).) In addition, the Family Care Leave Act permits parents to take up to 12 workweeks in a 12-month period to care for sick children or to take children to medical appointments and provides that it is unlawful for an employer with more than 50 employees to refuse to grant such requests or to terminate an employee for taking the time or making the request. (Gov. Code, § 12945.2, subds. (a) & (b).) The statute also provides that "[i]t shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section." (Gov. Code, § 12945.2, subd. (t).)

However, while California's current employment law provides anti-discrimination protections for employees based on their marital status and pregnancy (by virtue of it being a medical condition and as it corresponds to discrimination on the basis of sex), it does not provide protection for employees on the grounds of familial status, i.e. that they do, or do not, have children. (Gov. Code, § 12921, subd. (a).) As a result, under current employment law, while a female employee could not be terminated because she is unmarried and/or pregnant, she could subsequently receive disparate treatment if her employer found that caring for her children distracted from the employee's work, even if the employee otherwise complied with her employment requirements. Likewise, current law does not prevent an employer from retaliating against an employee because that employee took time off to attend to their children, instead of taking time off for something the employer found more productive.

Conversely, under the current law, if an employer had to lay-off employees, then the employer could lay-off a childless employee rather than an employee with children, regardless of the employees' qualifications, work habits, time on the job, or other sources of income. Also, an employer could ask, or expect, a childless employee to work longer hours or take business trips, while excusing an equally eligible employee with children from doing so, and the employer could retaliate against that childless employee if they complained about the unequal treatment.

Although familial status may appear to be a corollary to the existing protections against discrimination based on sex, marital status, or medical condition, under current law employees can be retaliated or discriminated against depending on whether or not they have children. This resolution would help close that gap, promote California's public policy for safeguarding the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement, and ensure that employees are treated equally based on their skills and work.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12940 to read as follows:

§12940

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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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, parental or familial status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran 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.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Current employment law does not protect against discrimination, harassment, or retaliation on the basis of a person's parental or familial status. For example, an employer may state a job requirement that employees be childless. An employer may refuse to promote employees who have children, or fire employees upon discovering that they do.

Existing protections are patchy and insufficient: for example, an employee is entitled to take time off to enroll a child in school, but not to take a child to a routine medical visit. Parents of disabled children are protected under associational disability, but parents of healthy children are not protected.

The state of California believes that sound public policy includes supporting and accommodating parents. Present parents make for healthy families. That's why current laws allow for pregnancy leave, baby bonding, and time off to attend school functions. This proposed amendment more coherently codifies parental and familial status as protected classifications, instead of only protecting isolated events.

The Solution: Including parental and familial status alongside the other protected classifications in section 12940 would provide fair and consistent protection.

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Nicole Nguyen

RESOLUTION 08-04-2019

DIGEST
Transgender Individual Rights: Access to Lactation/Wellness Rooms in Workplace
Amends Labor Code section 1031 to allow transgender employees access to workplace lactation/ wellness rooms for post-surgical trans care.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Labor Code section 1031 to allow transgender employees access to workplace lactation / wellness rooms for post-surgical trans care. This resolution should be approved in principle because post-surgical transgender employees need a private space to take care of their post-operative needs and access to lactation/wellness rooms will allow transgender employees to return to work more quickly after their surgery.

Current law requires employers to make reasonable efforts to provide employees with the use of a private office, room or area, which is not a bathroom, for its employees to express milk. (Lab. Code, § 1031, subd. (a).) The use of this room should be extended to transgender employees for post-surgical needs. In the first few months after male to female gender confirmation surgery, the transgender woman is required to dilate her vaginal canal two to three times a day.

Just as a workplace bathroom is not an appropriate space for a lactating woman to express her milk, a workplace bathroom is not an appropriate place for a post-surgical transgender woman to address her post-surgical needs. Access to the lactation/wellness room is necessary for a few reasons. First, to dilate properly, a person needs a private space that is bigger than a bathroom stall can offer. Second, because of the need for privacy during dilation, access to the lactation/wellness room is necessary so the transgender employee can dilate in private without interruption. Third, if the post-surgical transgender woman has access to a lactation or wellness room it will allow the employee to return to work and take care of her post-operative needs on the job. Finally, this resolution does not require the employer to create a room for this purpose if none already exists. Thus, both the employer and employee will benefit at no additional cost to the employer.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend California Labor Code section 1031 to read as follows:

§1031

(a) An employer shall make reasonable efforts to provide an employee with the use of a room or other location, other than a bathroom, in close proximity to the employee's work area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section.

(b) An employer shall make reasonable efforts to make such private lactation / wellness rooms open to transgender employees on an ad-hoc basis for post-surgical care.

~~(b)~~ (c) An employer who makes a temporary lactation location available to an employee shall be deemed to be in compliance with this section if all of the following conditions are met:

(1) The employer is unable to provide a permanent lactation location because of operational, financial, or space limitations.

(2) The temporary lactation location is private and free from intrusion while an employee expresses milk.

(3) The temporary lactation location is used only for lactation purposes while an employee expresses milk.

(4) The temporary lactation location otherwise meets the requirements of state law concerning lactation accommodation.

~~(c)~~ (d) An agricultural employer, as defined in Section 1140.4, shall be deemed to be in compliance with this section if the agricultural employer provides an employee wanting to express milk with a private, enclosed, and shaded space, including, but not limited to, an air-conditioned cab of a truck or tractor.

~~(d)~~ (e) If an employer can demonstrate to the department that the requirement to provide the employee with the use of a room or other location, other than a bathroom would impose an undue hardship when considered in relation to the size, nature, or structure of the employer's business, an employer shall make reasonable efforts to provide an employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Currently transgender individuals in California face a crisis when they decide on Gender Confirmation Surgery (CGS). As a cure for acute gender dysphoria, GCS may be needed in some, but not all trans cases. For those individuals who choose GCS, post-surgical care may include morning and afternoon after-care sessions, which, for some individuals, may have to extend for the individuals' lifetime. The existing law for lactation room use does not feature access for certain transgender individuals, who sorely need this access at work.

The Solution: For the transgender workers in California with this condition, allowing them to use already established lactation wellness rooms on an ad-hoc basis for trans after-care will allow them to mainstream themselves back into the workplace, without having the same issues with California workplaces before lactation rooms were used (ie, having to use substandard bathroom facilities). By amending the existing lactation-room law, an easy fit can be made for transgender accommodations in California workplaces.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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RESOLUTION 08-05-2019

DIGEST
Payment of Wages: Inapplicability to Tenants Providing Less than Six Hours of Assistance
Amends California Code of Regulations, title 8, section 11150 to exempt tenants providing less than six hours of assistance to a landlord or other tenant from wage requirements.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends California Code of Regulations, title 8, section 11150 to exempt tenants providing less than six hours of assistance to a landlord or other tenant from wage requirements. This resolution should be disapproved because personal attendants are exempt from the requirements of this section, it is not clearly defined what tasks would constitute "light assistance," and it is illegal to offer reduced or free rent as a form of compensation.

Section 11150 limits the number of hours and days that persons employed in household occupations as live-in employees can work on a daily and weekly basis before they are entitled to overtime. (Cal. Code Regs., tit. 8, § 11150, subd. (3)(A).) This resolution seeks to amend the regulations such that its provisions would not apply to a nonpaying tenant or reduced rent paying tenant that receives assistance from a government agency or nongovernmental agency "whose purpose is to pair those needing housing with those living alone who might benefit from reduced isolation…. [and where the tenant provides] incidental (6 hours a week or less) light assistance to the landlord or occupant." (Resolution lines 168-171.)

The resolution should be disapproved because the identification of a person "who might benefit from reduced isolation" is not clearly defined and the work involved in "light assistance" is also not clearly defined. In-home caregivers often assist in the activities of daily living such as grooming, bathing, toileting, and other matters. If the tenant is only required to do this once a week for half an hour, does that constitute "light assistance?" "Light assistance" might also mean something as simple as opening one's mail or running an errand for someone. However, if the mail were lost or the tenant gets into an accident while running the errand, does that expose the tenant to liability? Finally, this resolution may not be necessary because the regulation does not apply to a "personal attendant" which is defined as someone in the health care industry who is trained to "supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. (Cal. Code Regs., tit. 8, § 11150, subd. (2)(J).) If this is the "light assistance" contemplated by the resolution, then an amendment to the regulation is unnecessary.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that regulations be sponsored to amend California Code of Regulations, title 8, section 11150 to read as follows:

§ 11150

1. Applicability of Order This order shall apply to all persons employed in household occupations, whether paid on a time, piece rate, commission, or other basis unless such occupation is performed for an industry covered by an industry Order of this Commission, except that:

(A) Provisions of Sections 3 through 12 of this Order shall not apply to persons employed in administrative, executive, or professional capacities. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(1) Executive Exemption A person employed in an executive capacity means any employee:

(a) Whose duties and responsibilities involve the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order *29 C.F.R. §§ 541.102*, 541.104-111, 541.115-116. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(f) Such an employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in *Labor Code § 515(c)* as 40 hours per week.

(2) Administrative Exemption A person employed in an administrative capacity means any employee:

(a) Whose duties and responsibilities involve either:

(1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department of subdivision thereof; in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section), or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(e) Who executes under only general supervision special assignments and tasks, and

(f) Who is primarily engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order 29 C.F.R. §§ 541.201-205, 541.207-208, 541.210, 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(e) (sic) Such employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in *Labor Code § 515(c)* as 40 hours per week.

(3) Professional Exemption A person employed in a professional capacity means any employee who meets all of the following requirements:

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraphs (a) and (b).

(d) Who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

(e) Subparagraph (b) above is intended to be construed in accordance with the following provisions of federal law as they existed as of the date of this Order: 29 C.F.R. §§ 541.207, *541.301(a)*-(d), 541.302, 541.306, 541.307, 541.308, and 541.310.

(f) Notwithstanding the provisions of this subparagraph, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, shall not be considered exempt professional employees, nor shall they be considered exempt from coverage for the purposes of this subparagraph unless they individually meet the criteria established for exemption as executive or administrative employees.

(g) Subparagraph (f) above, shall not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with *Section 2746) of Chapter 6 of Division 2 of the Business and Professions Code.*

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with *Section 2825) of Chapter 6 of Division 2 of the Business and Professions Code.*

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with *Section 2834) of Chapter 6 of Division 2 of the Business and Professions Code.*

(iv) Nothing in this subparagraph shall exempt the occupations set forth in clauses (i), (ii), and (iii) from meeting the requirements of subsection 1(A)(3)(a)-(d), above.

(h) Except as provided in subparagraph (i), an employee in the computer software field who is paid on an hourly basis shall be exempt, if all of the following apply:

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(ii) The employee is primarily engaged in duties that consist of one or more of the following:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
- The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than forty-one dollars ($ 41.00). The Division of Labor Statistics and Research shall adjust this pay rate on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

(i) The exemption provided in subparagraph (h) does not apply to an employee if any of the following apply:

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation

instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities set forth in subparagraph (h) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

(B) Except as provided in sections 1, 2, 4, 10, and 15, the provisions of this Order shall not apply to personal attendants. The provisions of the Order shall not apply to any person under the age of eighteen who is employed as a baby sitter for a minor child of the employer in the employer's home.

(C) Provisions of this Order shall not apply to any individual who is the parent, spouse, child, or legally adopted child of the employer.

(D) The provisions of this Order shall not apply to any individual participating in a national service program, such as AmeriCorps, carried out using assistance provided under Section 12571 of Title 42 of the United States Code. (See Stats. 2000, ch. 365, amending *Labor Code § 1171*.)

(E) The provisions of this order shall not apply to any individual whose occupancy as a non-paying tenant (tenant-at-will) or reduced-rent-paying-tenant is arranged through, or with the assistance of, a government or non-government organization (NGO) program whose purpose is to pair those needing housing with those living alone who might benefit from reduced isolation. This exemption applies notwithstanding the tenant providing incidental (6 hours a week or less) light assistance to the landlord or occupant in exchange for free or reduced rent, so long as the tenant is provided with tenant's own private room and bed, and is 1) not required to remain on the premises during evening hours or any other time; and 2) not required to attend to the landlord or occupant at any specified regular time or meals.

2. Definitions

(A) An "alternative workweek schedule" means any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period.

(B) "Commission" means the Industrial Welfare Commission of the State of California.

(C) "Division" means the Division of Labor Standards Enforcement of the State of California.

(D) "Emergency" means an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(E) "Employ" means to engage, suffer, or permit to work.

(F) "Employee" means any person employed by an employer.

(G) "Employer" means any person as defined in *Section 18 of the Labor Code*, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

(H) "Hours worked" means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

(I) "Household Occupations" means all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householder. Said occupations shall include, but not be limited to, the following: butlers, chauffeurs, companions, cooks, day workers, gardeners, graduate nurses, grooms, house cleaners, housekeepers, maids, practical nurses, tutors, valets, and other similar occupations.

(J) "Personal attendant" includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of

advanced age, physical disability, or mental deficiency needs supervision. The status of "personal attendant" shall apply when no significant amount of work other than the foregoing is required.

(K) "Minor" means, for the purpose of this Order, any person under the age of eighteen (18) years.

(L) "Primarily" as used in Section 1, Applicability, means more than one-half the employee's work time.

(M) "Shift" means designated hours of work by an employee, with a designated beginning time and quitting time.

(N) "Split shift" means a work schedule which is interrupted by non-paid non-working periods established by the employer, other than bona fide rest or meal periods.

(O) "Teaching" means, for the purpose of Section 1 of this Order, the profession of teaching under a certificate from the Commission for Teacher Preparation and Licensing or teaching in an accredited college or university.

(P) "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

(Q) "Workday" and "day" mean any consecutive 24-hour period beginning at the same time each calendar day.

(R) "Workweek" and "week" mean any seven (7) consecutive days, starting with the same calendar day each week. "Workweek" is a fixed and regularly recurring period of 168 hours, seven (7) consecutive 24-hour periods.

3. Hours and Days of Work

(A) A LIVE-IN employee shall have at least twelve (12) consecutive hours free of duty during each workday of twenty-four (24) hours, and the total span of hours for a day of work shall be no more than twelve (12) hours, except under the following conditions:

(1) The employee shall have at least three (3) hours free of duty during the twelve (12) hours span of work. Such off-duty hours need not be consecutive, and the schedule for same shall be set by mutual agreement of employer and employee, provided that

(2) An employee who is required or permitted to work during scheduled off-duty hours or during the twelve (12) consecutive off-duty hours shall be compensated at the rate of one and one-half (1 1/2) times the employee's regular rate of pay for all such hours worked.

(B) No LIVE-IN employee shall be required to work more than five (5) days in any one workweek without a day off of not less than twenty-four (24) consecutive hours except in an emergency as defined in subsection 2(D), provided that the employee is compensated for time worked in excess of five (5) workdays in any workweek at one and one-half (1 1/2) times the employee's regular rate of pay for hours worked up to and including nine (9) hours. Time worked in excess of nine (9) hours on the sixth (6th) and seventh (7th) workdays shall compensated at double the employee's regular rate of pay.

(C) The following overtime provisions are applicable to non-LIVE-IN employees eighteen (18) years of age or over and to employees sixteen (16) or seventeen (17) years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay for all hours worked over forty (40) hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(1) One and one-half (1 1/2) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and

(2) Double the employee's regular rate of pay for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(3) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as 1/40th of the employee's weekly salary.

(D) One and one-half (1 1/2) times a minor's regular rate of pay shall be paid for all work over forty (40) hours in any workweek except that minors sixteen (16) and seventeen (17) years old who are not required by law to attend school and may therefore be employed for the same hours as an adult are subject to subsections (A) and (B), or (C) above. (VIOLATIONS OF CHILD LABOR LAWS are subject to civil penalties of from $ 500 to $ 10,000 as well as to criminal penalties. Refer to California *Labor Code Sections 1285* to *1312* and *1390* to *1399* for additional restrictions on the employment of minors and for descriptions of criminal and civil penalties for violation of the child labor laws. Employers should ask school districts about any required work permits.)

(E) An employee may be employed on seven (7) workdays in one workweek with no overtime pay required when the total hours of employment during such workweek do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

(F) The provisions of *Labor Code §§ 551* and *552* regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven (7) or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).

(G) Except, as provided in subsection (D) and (F), this section shall not apply to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than thirty (30) percent more than the state minimum wage.

(H) Notwithstanding subsection (G) above, where the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement pertaining to the hours of work of the employees, the requirement regarding the equivalent of one (1) day's rest in seven (7) (see section (F) above) shall apply, unless the agreement expressly provides otherwise.

(I) If an employer approves a written request of an employee to make-up work time that is or would be lost as a result of a personal obligation of the employee, the hours of that make-up work time, if performed in the same workweek in which the work time was lost, may not be counted toward computing the total number of hours worked in a day for purposes of the overtime requirements, except for hours in excess of eleven (11) hours of work in one (1) day or forty (40) hours of work in one (1) workweek. If an employee knows in advance that he or she will be requesting make-up time for a personal obligation that will recur at a fixed time over a succession of weeks, the employee may request to make-up work time for up to four (4) weeks in advance; provided, however, that the make-up work must be performed in the same week that the work time was lost. An employee shall provide a signed written request for each occasion that the employee makes a request to make-up work time

pursuant to this subsection. While an employer may inform an employee of this make-up time option, the employer is prohibited from encouraging or otherwise soliciting an employee to request the employer's approval to take personal time off and make-up the work hours within the same workweek pursuant to this subsection.

4. Minimum Wages

(A) Every employer shall pay to each employee wages not less than six dollars and twenty five cents ($ 6.25) per hour for all hours worked, effective January 1, 2001, and not less than six dollars and seventy five cents ($ 6.75) per hour for all hours worked effective January 1, 2002, except:

LEARNERS. Employees during their first one hundred and sixty (160) hours of employment in occupations in which they have no previous similar or related experience, may be paid not less than eighty-five percent (85%) of the minimum wage rounded to the nearest nickel.

(B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

(C) When an employee works a split shift, one hour's pay at the minimum wage shall be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.

(D) The provisions of this section shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

5. Reporting Time Pay

(A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage.

(B) If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage.

(C) The foregoing reporting time pay provisions are not applicable when:

(1) Operations cannot commence or continue due to threats to employees or property; or when recommended by civil authorities; or

(2) Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities, or sewer system; or

(3) The interruption of work is caused by an Act of God or other cause not within the employer's control.

(C) This section shall not apply to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time.

6. Licenses for Disabled Workers

(A) A license may be issued by the Division authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at less than the minimum wage. Such licenses shall be granted only upon joint application of employer and employee and employee's representative if any.

(B) A special license may be issued to a nonprofit organization such as a sheltered workshop or rehabilitation facility fixing special minimum rates to enable the employment of such persons without requiring individual licenses of such employees.

(C) All such licenses and special licenses shall be renewed on a yearly basis or more frequently at the discretion of the Division.

(See California *Labor Code, Sections 1191* and *1191.5*.)

7. Records

(A) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

(B) Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

(D) Clocks shall be provided in all major work areas or within reasonable distance thereto insofar as practicable.

8. Cash Shortage and Breakage

No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

9. Uniforms and Equipment

(A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer. The term "uniform" includes wearing apparel and accessories of distinctive design or color. Note: This section shall not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.

(B) When tools or equipment are required by the employer or are necessary to the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This subsection (B) shall not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.

Note: This section shall not apply to protective equipment and safety devices on tools regulated by the Occupational Safety and Health Standards Board.

(C) A reasonable deposit may be required as security for the return of the items furnished by the employer under provisions of subsections (A) and (B) of this section upon issuance of a receipt to the employee for such deposit. Such deposits shall be made pursuant to Section 400 and following of the Labor Code or an employer with the prior written authorization of the employee may deduct from the employee's last check the cost of an item furnished pursuant to (A) and (B) above in the event said item is not returned. No deduction shall be made at any time for normal wear and tear. All items furnished by the employer shall be returned by the employee upon completion of the job.

10. Meals and Lodging

(A) "Meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.

(B) "Lodging" means living accommodations available to the employee for full-time occupancy which are adequate, decent, and sanitary according to usual and customary standards. Employees shall not be required to share a bed.

(C) Meals or lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee. When credit for meals or lodging is used to meet part of the employer's minimum wage obligation, the amounts so credited may not be more than the following:

Effective Dates:	January 1, 2001	January 1, 2001
Lodging:		
Room occupied alone	$ 29.40 per week	$ 31.75 per week
Room shared	$ 24.25 per week	$ 26.20 per week
Apartment -- two-thirds (2/3) of the ordinary rental value, and in no event more than	$ 352.95 per month	$ 381.20 per month
Where a couple are both employed by the employer, two-thirds (2/3) of the ordinary rental value, and in no event more than	$ 522.10 per month	$ 563.90 per month
Meals:		
Breakfast	$ 2.25	$ 2.45
Lunch	$ 3.10	$ 3.35
Dinner	$ 4.15	$ 4.50

(D) Meals evaluated as part of the minimum wage must be bona fide meals consistent with the employee's work shift. Deductions shall not be made for meals not received nor lodging not used.

(E) If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, then the employer may not charge rent in excess of the values listed herein.

11. Meal Periods

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes, except that if the total hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a thirty (30) minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee with a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

12. Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted, as hours worked for which there shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

13. Change Rooms and Resting Facilities

(A) Employers shall provide suitable lockers, closets, or equivalent for the safekeeping of employees' outer clothing during working hours, and when required, for their work clothing during non-working hours. When the occupation requires a change of clothing, change rooms or equivalent space shall be provided in order that employees may change their clothing in reasonable privacy and comfort. These rooms or spaces may be adjacent to but shall be separate from toilet rooms and shall be kept clean.

Note: This section shall not apply to change rooms and storage facilities regulated by the Occupational Safety and Health Standards Board.

(B) Suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.

14. Seats

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

15. Penalties (See *Labor Code, section 1199*.)

(A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:

(1) Initial Violation -- $ 50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.

(2) Subsequent Violations -- $ 100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

(3) The affected employee shall receive payment of all wages recovered.

(B) The Labor Commissioner may also issue citations pursuant to *Labor Code § 1197.1* for payment of wages for overtime work in violation of this order.

16. Elevators

Adequate elevator, escalator or similar service consistent with industry-wide standards for the nature of the process and the work performed shall be provided when employees are employed four floors or more above or below ground level.

17. Exemptions

If, in the opinion of the Division after due investigation, it is found that the enforcement of any provision contained in Section 7, Records; Section 12, Rest Periods; Section 13, Change Rooms and Resting Facilities; Section 14, Seats; Section 15, Temperature; or Section 16, Elevators, would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer, exemption may be made at the discretion of the Division. Such exemptions shall be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption shall be made by the employer or by the employee and/or the employee's representative to the Division in writing. A copy of the application shall be posted at the place of employment at the time the application is filed with the Division.

18. Filing Reports (See California *Labor Code, Section 1174(a)*.)

19. Inspection (See California *Labor Code, Section 1174*.)

20. Penalties (See California *Labor Code, Section 1199*.)

21. Separability

If the application of any provision of this Order, or any section, subsection, subdivision, sentence, clause, phrase, word, or portion of this Order should be held invalid or unconstitutional or unauthorized or prohibited by statute, the remaining provisions thereof shall not be affected thereby, but shall continue to be given full force and effect as if the part so held invalid or unconstitutional had not been included herein.

22. Posting of Order

Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the work day. Where the location of work or other conditions make this impractical, every employer shall keep a copy of this Order and make it available to every employee upon request.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: National Lawyers Guild, San Francisco Chapter

STATEMENT OF REASONS

The Problem: Currently, with limited exception, anyone who performs services for another in that person's home falls under IWC Wage Order 15, triggering all the wage and hour law requirements including keeping time sheets, enforcing meal and rest breaks, payroll deductions, workers compensaton, etc. Programs seeking to promote housesharing, such as those sponsored by the Area Agencies on Aging, or local universities trying to expand housing opportunities for students, can pair those seeking housing with those who live alone and could benefit from some minimal occasional assistance, as well as the companionship of a housemate, but current labor law requirements make such arrangements fraught with peril for the homeowner/landlord by making them potentially liable in a wage and hour claim.

The Solution: A very limited exception to the wage order for those entering into a landlord tenant relationship where the provision of services is so minor and incidental to the relationship would allow more participants in these housing programs sponsored by government and charitable organizations, without exposing the participants to potential significant liability in a future wage and hour claim.

CURRENT OR PRIOR RELATED LEGISLATION
Not known.

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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