NOTICE

POLICY AND PERSONNEL COMMITTEE MEETING AND AGENDA

Thursday, July 8, 2019
1401 Los Gamos Drive Suite 220
San Rafael, California 94903

Appointed Members
Sashi McEntee (Chair) | Damon Connolly (Vice Chair) | Sloan Bailey

12:00 Noon – Call to Order by Chair McEntee

ROLL CALL BY COMMISSION CLERK

PUBLIC COMMENT
This portion of the meeting is reserved for persons desiring to address the committee on any relevant matter not listed on this agenda and that are within the jurisdiction of the committee. Speakers are limited to three minutes.

BUSINESS ITEMS
The Committee is scheduled to discuss and provide direction on the following items.

1. Approval of February 7, 2019 Meeting Minutes
2. Review of Updates to the Marin LAFCo Policy Handbook
3. Determine Criteria for the revised Personnel Policy

ADJOURNMENT

ATTEST:

Jason Fried

Executive Officer

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Any writings or documents pertaining to an open session item provided to a majority of the Commission less than 72 hours prior to a regular meeting shall be made available for public inspection at Marin LAFCo Administrative Office, 1401 Los Gamos Drive, Suite 220, San Rafael, CA 94903, during normal business hours.

Pursuant to GC Section 84308, if you wish to participate in the above proceedings, you or your agent are prohibited from making a campaign contribution of $250 or more to any Commissioner. This prohibition begins on the date you begin to actively support or oppose an application before LAFCo and continues until 3 months after a final decision is rendered by LAFCo. If you or your agent have made a contribution of $250 or more to any Commissioner during the 12 months preceding the decision, in the proceeding that Commissioner must disqualify himself or herself from the decision. However, disqualification is not required if the Commissioner returns that campaign contribution within 30 days of learning both about the contribution and the fact that you are a participant in the proceedings. Separately, any person with a disability under the Americans with Disabilities Act (ADA) may receive a copy of the agenda or a copy of all the documents constituting the agenda packet for a meeting upon request. Any person with a disability covered under the ADA may also request a disability-related modification or accommodation, including auxiliary aids or services, in order to participate in a public meeting. Please contact the LAFCo office at least three (3) working days prior to the meeting for any requested arraignments or accommodations.

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Marin Local Agency Formation Commission

Regional Service Planning | Subdivision of the State of California

AGENDA REPORT
July 8, 2019
Item No. 1 (Business)

TO: Policy and Personnel Committee

FROM: Candice Bozzard, Commission Clerk

SUBJECT: Approve the February 7, 2019 Committee Meeting Minutes

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Background

The Ralph M. Brown Act was enacted by the State Legislature in 1953 and establishes standards and processes therein for the public to attend and participate in meetings of local government bodies as well as those local legislative bodies created by State law; the latter category applying to LAFCos. The "Brown Act" requires – and among other items – public agencies to maintain minutes for all meetings.

Discussion

The draft minutes for the February 7, 2019 Committee meeting accurately reflect the Committee's actions as recorded by staff and are attached. A copy of the approved meeting minutes are available online.

Staff Recommendation for Action

1. **Staff recommendation** – Approve the draft minutes prepared for the Policy and Personnel Committee meeting with any desired corrections or clarifications.

2. Alternative Option - Continue consideration of the item to the next committee meeting and provide direction to staff, as needed.

Attachment:
1) Draft Minutes for February 7, 2019

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DRAFT

POLICY AND PERSONNEL COMMITTEE MEETING MINUTES

Thursday, February 7, 2019
1401 Los Gamos Drive Suite 220
San Rafael, California 94903

Appointed Members
Sashi McEntee (Chair)| Damon Connolly (Vice Chair)| Sloan Bailey

CALL TO ORDER

Vice Chair Connolly called the meeting to order at 8:08am.

ROLL CALL

Commission Clerk called roll.

Commissioners Connolly and Bailey present
Commissioner McEntee (arrived 8:20am)

PUBLIC COMMENT

Vice Chair Connolly asked for public comment. Hearing none, closed public comment.

BUSINESS ITEMS

1. Approval of January 22 and January 25, 2019 Meeting Minutes

Approved; M/S by Commissioners Bailey and Connolly to approve the January 22nd and 25th meeting minutes.

Ayes: Commissioners Bailey, Connolly
Absent: Commissioner McEntee
Noes: None
Abstaining: None

Motion was approved by majority.

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2. Review of Amendments for the Marin LAFCo Policy Handbook

Staff reported that Chair McEntee had taken on the tremendous task of reformatting and making the agreed upon changes to the Policy Handbook. The Committee assessed and approved the revised layout and recommended the new Policy Handbook be presented at the next Commission meeting.

The Committee as a whole felt that at this time defining "substantially surrounded" was not necessary at this time.

It was suggested by legal counsel and supported by staff and the Committee to use the Santa Cruz LAFCo's Indemnity policy as a template for Marin LAFCo.

Staff reported that commission counsel recommended the personnel rules be removed from the Policy Handbook and made into a separate document. The Committee requested that staff research the to update the personnel rules and make sure they are compliant with state law. Staff reported they are also working with the commission counsel on records retention policy, which will be brought back to the Committee for review.

There was a brief discussion on determining term start/end dates for the Public Member's seat as the current policy only states the month of May. The Committee unanimously agreed the Public Member's term of office would officially begin on the first day in May.

(Vice Chair Connolly left at 9:55am)

Approved; M/S by Commissioners Bailey and McEntee to authorize the EO to make the indicated updates and any necessary grammatical corrections, then present the newly revised Policy Handbook at the next Commission meeting for review and possible approval at the April Commission meeting.

Chair McEntee called for adjournment at 10:01am.

ATTEST:

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Candice Bozzard
Clerk to the Commission

AGENDA REPORT
July 8, 2019
Item No. 2 (Business)

TO: Policy and Personnel Committee

FROM: Jason Fried, Executive Officer

SUBJECT: **Review of Updates to the Marin LAFCo Policy Handbook**

Background

At the April 11th LAFCo meeting, the full Commission approved a new Policy Handbook. At the time of approval, it was known that some sections may need to be reviewed, such as how special district elections are held. Attached are pages to the current handbook that have suggested staff revisions. Only pages with staff recommendation are included in this packet but the Committee can suggest changes to other parts as it sees fit. The page number mentioned for each item is the page number in the Policy Handbook, found bottom right corner of the page, and not the page number in this packet.

Page 10 – This is to help clarify when terms for all seats naturally expire and anybody appointed to replace them will take place. Also, on page 10 is clarification to public member selection needing one member for each type of group that makes up LAFCo based on state government code.

Page 11 - The addition at the bottom of page 11 and going onto page 12 is a way for the Commission to align both of its Public seats that would expire and therefore be appointed at the same time. This seemed to be of interest to some members of the Commission during the selection of the regular public seat the Commission did earlier this year. The process staff has selected to get both seats aligned is to have the alternate seat when it is up next for appointment, in 2021, to have it be a two-year term. This way in 2023 it would be aligned with the regular seat and become a four-year term again.

Page 12 – 13 – All these changes have to do with how the Special District elections work. Normally most other LAFCo's do not run the election process for the Special District seats. There is a Special Districts Council (SDC) that does this and informs LAFCo who they choose to be in the seats. When an SDC is not able to make a quorum, which is what occurs in Marin County, state government code has a process for LAFCo's to run the elections of the special district seats. Staff has not been able to find any evidence that in Marin County an SDC has approved any process for the election. The changes to this part are to change the LAFCo process to fit what the State Government code says we should do. There is also a provision to automatically change our process should the SDC meet and approve a different process.

Page 19 – While this may fall under LAFCo policy 1.5 which allows staff to make clerical changes without Commission approval, since we are making amendments, staff would suggest we change Auditor to Department of Finance. A few years ago, the County merged several offices into the Department of Finance. Their services mentioned in this part are all done now by the Department of Finance.

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Page 23 – As discussed at the June 2019 full Commission meeting, our Policy requires us to change auditors every 5 years. The state requires this change must occur after 6 times of using the same auditor. This change brings us to the same requirements as the state.

Page 25- 26 – The Commission recently passed a new addition to the Policy Handbook around legislation matters occurring in the State Legislative process. This is the first year we have used the policy. Staff realized that a "sponsor" position was missing and how when CALAFCO takes a "sponsor" position, Marin LAFCo may not want to be a "sponsor" but supportive of the bill. This addition simply adds some clarifying language to the policy to address this.

Page 36 – This item was something that was meant to be added in the original update but got missed with all the major changes that got approved. As a reminder, this is simply adding one more item that needs to be presented to staff as part of the process when two or more city/towns want to join fire services into a JPA process using the exemption in state government code section 56134. This general section was used at the end of last year by both Corte Madera and Larkspur. This new clause would have helped speed up the LAFCo approval process and both City/Town Managers are fine with this addition.

Recommendation for Action

1. Staff Recommendation – Accept the recommended staff changes, with any additions as desired by the Committee, and move to the full Commission for adoption.

2. Alternate Option - Take no action today and give staff further instructions.

Attachment:
1. Amended pages of Policy Handbook

CHAPTER 3 LAFCO BUSINESS AND OPERATIONS

3.1 SELECTION OF COMMISSIONERS

Marin LAFCo has seven regular voting Commissioners and four alternate members, consisting of:

- **2 City/Town Councilmembers**, selected as voting Commissioners by the Marin County Council of Mayors and Councilmembers (MCCMC), along with 1 alternate;
- **2 County Board of Supervisors**, selected as voting Commissioners by the Board of Supervisors, along with 1 alternate;
- **2 Special District Board Members**, selected by the special districts as prescribed below 3.1 (B), along with 1 alternate;
- **1 Public Member**, selected by the Commission as prescribed below, along with 1 alternate, for a four-year term.

Alternate members shall be automatically seated in the event of absence or disqualification of the regular member.

In accordance with Government Code §56334 all terms of commissions shall expire on the first Monday in May in the year the Commission Term expires.

3.1 (A) Procedures for Selection of Public Members

The public member and alternate public member shall be appointed by a majority vote of the regular County, City/Town, and Special District members and must include one positive vote from each group classification.

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3.1 (A)(i) Ninety (90) days prior to an appointment, the Executive Officer shall issue a news release announcing the pending vacancy on the Commission and solicitation of applications.

3.1 (A)(ii) The news release shall be mailed to the Marin Independent Journal and local newspapers within Marin County. Additionally, the news release shall be mailed to all current regular and alternate members of Marin LAFCo, the clerk or secretary of the Board of all local governments within Marin County and to community organizations including homeowners' associations and civic groups on file with the Marin LAFCo and shall be posted as provided by Government Code §56158.

3.1 (A)(iii) The application period shall be at least twenty-one (21) days and shall begin upon the date legal notice appears in the Independent Journal, a posting of the notice as provided by Government Code §56158, and notice sent to the clerk or secretary of the Board. Among other things, the notice/news release shall outline the function and purpose of the Commission, indicate the application filing period and invite interested persons to contact the Executive Officer for an application and information concerning the general duties and responsibilities of the public member.

3.1 (A)(iv) Interviews for pending vacancies for expiring terms should be held during the month of April prior to the May expiration date of the current member's term of office, if possible. A standard list of questions should be asked to each candidate as agreed to by the Commission. As required by the Ralph Brown Act, interviews shall be conducted in public sessions and formal selection shall be confirmed at a regular public meeting.

3.1 (A)(v) With respect to selection and eligibility criteria, and in addition to requirements under Government Code the public member shall be a resident of Marin County and not currently an officer or employee of a local agency subject to Marin LAFCo jurisdiction. The public member shall also not concurrently hold any elected or appointed office with a local government agency that makes or informs land use or municipal service decisions while serving on the Commission. In selecting the public member, the Commission shall consider the candidate's qualifications as described in his or her letter of interest and the reasons listed for wanting to serve as a member of the Commission.

3.1 (A)(vi) In the event a vacancy occurs during the public member's term of office, a new appointment shall be made for the unexpired term in a timely manner. The Commission may: (a) Direct the Executive Officer to send out a news release announcing the vacancy and solicit applications for future consideration by the Commission; or (b) Appoint the alternate public member to serve as regular public member until the appointment and qualification of regular public member to fill the vacancy.

3.1 (A)(vii) The terms for the Public Seat shall be as follows:

3.1 (A)(vii)(1) Regular Public Seat shall be appointed in 2019 and every four years thereafter.

3.1 (A)(vii)(2) Alternate Public Seat shall be 2017 and again in 2021. The 2021 seat shall be for 2 years to align the appointment

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with the Regular Public Seat and then shall be every four years thereafter.

3.1 (B) Procedures for Selection of Special District Members

Government Code §56332(c)(1) provides for selection of regular and alternate special district members by a mail ballot process when the Executive Officer determines that a meeting of the Special District Selection Committee is not feasible. Meetings of the Marin County Special District Selection Committee have previously failed to reach a quorum, indicating the infeasibility of Selection Committee meetings. Accordingly, it is the policy of Marin LAFCo to conduct selection proceedings of regular and alternate special district members by a mail ballot process consistent with the procedures outlined below. Should the Speical District Selction Committee hold a meeting and approve a different process than stated below, that process shall automatically replace the current process.

3.1 (B)(i) The Executive Officer shall initiate the mail ballot selection process for special district members 180 days prior to the pending expiration of the term of a special district member or immediately upon notification the eligibility of a special district member on Marin LAFCo will end prior to the expiration of his or her term.

3.1 (B)(ii) The Executive Officer shall initiate the mail ballot process by distributing to each independent special district a call for nominations, including a schedule of the selection process and a copy of this policy. Nominations must be submitted in writing by special district governing boards within 60 days of the date of the call for nominations. The submittal of a nomination must include a statement of the candidate's qualifications. With the prior concurrence of any special district, the Executive Officer may transmit these materials to and receive nominations from that special district by electronic mail.

3.1 (B)(iii) Within five working days of the close of the nomination period, the Executive Officer shall distribute by certified mail one ballot to each independent special district. The distribution of ballots shall include a statement of qualifications for each candidate on the ballot.

3.1 (B)(iv) Ballots may be submitted by mail or facsimile or electronic mail within 60 days of distribution of the ballots. A majority of

independent special districts must cast ballots to select a special district member.

3.1 (B)(v) Ballots cast by each special district must bear the signature of the district's presiding officer. If the presiding officer is unavailable, the district board may authorize another member of the board to cast the district's vote. Ballots may be returned to the Marin LAFCo office by mail or by facsimile or electronic mail.

3.1 (B)(vi) All ballots and other records of each selection process shall be retained in the Marin LAFCo office for at least four years and shall be available for public inspection.

3.1 (B)(vii) When more than two candidates are nominated, the ballot form shall provide for selection by plurality of votes cast.

3.1 (B)(viii) Should a vacancy occur during a special district member's term of office, a new appointment shall be made for the unexpired term of the special district member or alternate member according to the process above.

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Deleted: <#>Each district casting a vote shall rank the candidates in order of their preference. District boards would simply indicate a "1" next to their first choice, a "2" next to their second choice, a "3" next to their third choice etc. ¶
<#>¶
<#>In counting the votes by the Executive Officer, all first choice votes are counted. If any candidate receives over 50 percent of the first choice votes, that candidate is selected as special district member. ¶
<#>¶
<#>If no candidate receives a majority, then the candidate with the fewest "1" votes is eliminated. The ballots of the supporters of the eliminated candidate are then transferred to whichever of the remaining candidates they marked for their second choice. This process shall be continued until one candidate receives a majority and is selected as special district member.¶

3.2 ROLE OF COMMISSIONERS

Commissioners shall independently fulfill their responsibilities while serving on Marin LAFCo in the best interests of the general public, irrespective of interests of their appointing authorities. Alternate Commissioners are encouraged to take an active role in Marin LAFCo to help further inform all related discussions and actions and should attend all meetings if at all possible. Alternate members may not vote, however, unless a regular member, from the same representation category as the alternate, is absent or disqualified from participating in an open meeting of the Commission. An alternate member may participate in a closed session. However, alternate members may not vote or make a motion in closed session when the regular member(s) is (are) present.

3.3 DISQUALIFICATION AND CONFLICT OF INTEREST

Pursuant to Government Code §56336, a commission member or alternate of a city/town or special district shall not be disqualified from acting on a proposal affecting that city, town, or the special district. A regular or alternate Commissioner shall only be disqualified from voting on matters in which the Commissioner has a financial interest, when it is reasonably foreseeable that such interest may be materially affected by the decision, as provided by the Political Reform Act.

3.10 (A) Budget Objectives

In the course of adopting and amending its annual budget, Marin LAFCo will strive to balance effectively and proactively fulfilling its regulatory and planning responsibilities while taking measures to limit new cost-impacts to the funding agencies.

3.10 (B) Procedures

3.10 (B)(i) The Budget Committee shall prepare and present a proposed budget and accompanying workplan for adoption by Marin LAFCo no later than May 1st at a noticed public hearing as provided under Government Code §56381.

3.10 (B)(ii) Following adoption, Marin LAFCo's proposed budget and workplan will be made available for review by the public, the Board of Supervisors, each city/town, and each independent special district for a minimum of 45 days.

3.10 (B)(iii) Staff will provide an opportunity for informal discussion of the adopted proposed budget by the Commission within the 45-day circulation period.

3.10 (B)(iv) Marin LAFCo will hold a public hearing for consideration and final action on the budget and accompanying workplan no later than June 15th as provided under Government Code §56381. Following adoption, a certified copy of the adopted final budget shall be transmitted to the Board of Supervisors, the County Department of Finance, each city/town, and to each independent special district.

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3.10 (B)(v) The County Department of Finance shall apportion the net costs of Marin LAFCo's budget to the County, cities/towns, and independent special districts under the provisions of Government Code §56381.

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3.10 (B)(vi) If the County, a city/town or an independent special district does not remit its required payment within 60 days of notice, the Executive Officer shall request that the County Department of Finance collect an equivalent amount from the property tax, or any fee or eligible revenue owed to that county, city/town or district pursuant to Government Code §56381(c).

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3.13 (H)(i) **Capitalization Policy**: Physical assets acquired through purchase or contribution with fair market value in excess of $1,500.00 are capitalized as fixed assets on the financial statements and accounted for at their historical costs. All fixed assets, with the exception of land, are subject to depreciation over their estimated useful lives.

3.13 (H)(ii) **Fixed Assets Inventory:** All capitalized fixed assets shall be recorded in a property log, maintained by the Commission Clerk and including date of acquisition, acquisition type (purchase or contribution), description (color, model, serial number), location, depreciation method, and estimated useful life. The Commission Clerk shall perform a physical inventory of all capitalized assets on an annual basis. This physical inventory shall be reconciled to the property log and adjustments made as necessary with approval by the Executive Officer. If a fixed asset is sold, donated, stolen, or otherwise removed, the inventory will be duly updated.

3.13 (H)(iii) **Depreciation Policy:** Fixed assets shall be depreciated over their estimated useful lives as determined by the Executive Officer. Depreciation expense shall be calculated on an annual basis. The following depreciation schedule is suggested:

Fixed Asset	Estimated Useful Life
Furniture and fixtures	10 years
General office equipment	5 years
Computer hardware	5 years
Computer software	3 years
Leased assets	Life of lease

3.13 (H)(iv) **Repairs of Fixed Assets:** Expenses to repair capitalized assets shall be expensed as incurred if the repairs do not materially add to the value of the item or materially prolong the estimated useful life of the item.

3.13 (I) Financial Reporting & Annual Audit

The Executive Officer shall present financial reports to the Commission at all regular meetings identifying actual year-to-date expenses and revenues relative to adopted budgeted amounts.

Marin LAFCo shall utilize an independent auditor to prepare annual or biennial financial statements. The audit report, including the firm's opinion, shall be presented to the Commission for formal acceptance. Marin LAFCo shall select a different independent auditor no less than every six years. The Commission may waive this requirement upon a majority vote of the membership at a public meeting.

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3.15 LEGISLATIVE MATTERS

3.15 (A) Process

Under ideal circumstances, newly introduced or identified legislation that may directly or indirectly impact Marin LAFCo is to be designated by Executive Officer for further review. Such applicable legislation shall then be presented to and reviewed by the Legislative Committee. Finally, the Legislative Committee shall then offer recommendations to the full Commission for approval. This ideal process may be altered or modified if the legislation is time sensitive situation (3.15 D).

3.15 (B) Formal Position on Legislation

LAFCo shall take one of the following positions:

3.15 (B)(i) Sponsor – A position given to bills that the Commission helped draft and believes to be consistent with or would further Marin LAFCo policy positions or implementation of the Cortese-Knox-Hertzberg Act, would benefit Marin LAFCo, or reflects good governance principles as public policy.

3.15 (B)(ii) **Support** - A position given to bills that the Commission believes are consistent with or would further Marin LAFCo policy positions or implementation of the Cortese-Knox-Hertzberg Act, would benefit Marin LAFCo, or reflects good governance principles as public policy.

3.15 (B)(iii) **Neutral** - A position given to bills that have no direct impact upon Marin LAFCo or have been sufficiently amended to remove Marin LAFCo support or opposition, but for which the sponsor and/or legislative author requests a position from Marin LAFCo.

3.15 (B)(iv) **Watch** - A position given to bills that are of interest to Marin LAFCo but do not directly affect Marin LAFCo at that time, including spot bills or two-year bills where the author has indicated that the bill will be amended or the subject area may change to impact Marin LAFCo (also known as gut and amend bills). These bills will be tracked but do not warrant taking a position at that time.

3.15 (B)(v) **Oppose** - A position given to bills or propositions that the Commission believes would be detrimental to the policy position or implementation of the Cortese-Knox-Hertzberg Act, or Marin LAFCo, or to good governance principles as public policy.

3.15 (B)(vi) **Support/Oppose Unless Amended** - A position given to bills for which a support or oppose position could be taken if amendments were made to address identified concerns of the Commission. This may include changing a previously stated Marin LAFCo position. This position can be changed by the Executive Director if identified amendments are presented and accepted by the legislator. Timeliness is usually important in responding to requests on these types of bills**.**

3.15 (B)(vii) **No Position** - A position given to bills that either are of interest to or have an impact on Marin LAFCo and for which no adopted position is possible and for which there is a clear lack of consensus amongst the Commission on the appropriate position. This may include situations in which a substantive number of Commissioners have divergent positions or policy issues of concern with proposed legislation and no final consensus position is possible.

3.15 (B)(viii) **Alignment with CALAFCO** - A position for bills that have little to no impact on Marin LAFCo but where CALAFCO has taken a position and Marin LAFCo wishes to be supportive of other LAFCos across the state. As the legislative process moves forward, the Executive Officer shall send in letters in support of the CALAFCO position as requested by CALAFCO. Should CALAFCO change positions, then Marin LAFCo shall automatically change position to mirror. In cases where CALAFCO is the "Sponsor" of a bill but Marin LAFCo did not help draft then Marin LAFCo position shall be of "Support".

3.15 (C) Resource Priorites

Given the limited resources of Marin LAFCo, any bill that the Commission takes action on shall be given one of the following priorities:

3.15 (C)(i) **Priority 1** - Bills that have highest importance and a direct impact on Marin LAFCo. These bills receive primary attention and comprehensive advocacy by the Executive Officer and Commissioners. Such advocacy may include letters of position, testimony in policy committees, contact with legislators, and grassroots mobilization to members of the legislator. This level requires the greatest resource commitment.

3.15 (C)(ii) **Priority 2** - Bills that have a significant impact on or are of interest to Marin LAFCo, may set a policy precedent or have impact relevant to the mission of Marin LAFCo, or have a major importance to a CALAFCO member or group of members or

4.10 (C)(v)(7) Sharing of management or other personnel between or among two or more agencies in which the contracts or agreements do not constitute a 25 percent change in employment status as defined.

4.10 (C)(v)(8) Sharing or loaning of equipment, facility, or property between or among two or more agencies

4.10 (C)(vi) Establishment of joint-power authorities to provide fire protection services in which all of the following criteria is satisfied as verified by the Commission's Executive Officer:

4.10 (C)(vi)(1) The jurisdictions wanting to establish the joint-power authority can demonstrate how they qualify for the exemption in Government Code Section 56134.

4.10 (C)(vi)(2) The boundaries of the proposed joint-powers authority are entirely coterminous with the member agency boundaries, and therefore services are not extended to previously unserved areas by the agencies.

4.10 (C)(vi)(3) The member agencies and the affected represented safety employees' organizations have ratified agreements in support of the proposed joint-powers authority and any changes therein to employment status.

4.10 (C)(vi)(4) The proposed joint-powers authority does not create any conflicts with adopted LAFCo policies or recommendations with respect to fire protection services in Marin County.

4.10 (C)(vi)(5) The proposed joint-powers authority does not create any conflicts with any active reorganization application on file with LAFCo.

4.10 (C)(vi)(6) The total service area for the proposed joint-powers authority does not exceed a resident service population of 50,000.

4.10 (D) Applicability Determination

The County, cities, towns, special districts, and State agencies may request at no-cost a written response from Marin LAFCo as to whether any potential new or extended contract or agreement for fire protection is subject or exempt to these proceedings. The Commission delegates to the Executive Officer the responsibility to determine this applicability. If the inquiry is determined to be not exempt, the jurisdiction

AGENDA REPORT
July 8, 2019
Item No. 3 (Business)

TO: Policy and Personnel Committee

FROM: Jason Fried, Executive Officer

SUBJECT: **Determine Criteria and Clauses for the Revised Personnel Policy**

Background

At the June 13th meeting, the full Commission approved working with Liebert Cassidy Whitmore (LCW) and using the Liebert Model Personnel Policy Portal (LMP3) they offer. LCW just implemented, started on July 1, a new pricing structure that meant we had to wait to sign-up and get LMP3 to get the document. Given the size and scope of LMP3 (see attachment) staff at the time of writing this memo is still reviewing the documents and will bring to the Committee a list that includes which prewritten policies staff is recommending be included.

Staff would recommend a three-step approach to creating a new Policy Handbook.

Step 1 - Review LMP3 and decide; which policies are good as written, which policies need to be reworked to fit Marin LAFCo's needs, which policies are not needed for Marin LAFCo, and what item(s), if any, are not included in LMP3 that the committee would like to see added.

Step 2 – Work with LCW on any items that need editing or are not included in LMP3 to be drafted.

Step 3 – Compile all policies in one handbook to present to the full Commission.

As a side note at the June 13 Commission meeting, a question arose about the LMP3 product and if we can keep the handbook if we don't continue using the service in the future. The new pricing structure that LCW offers is a 1-year subscription to LMP3. During that year, should any changes occur in the law, we will be noticed of the change so we can amend the affected policy. Should we wish after the first year to not continue the service, we keep the handbook we have already done but will no longer get updates from any changes in laws that impact policies we have selected.

No action is needed at this meeting but should the Committee get far enough it could decide on which policies fall into each sub-grouping of step 1.

Attachment:
1. LCW Model Personnel Polices Portal

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LCW LIEBERT CASSIDY WHITMORE

LCW Model Personnel Policies Portal (LMP3)

Last Updated – January 2018

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100 Introduction and General Information Policies

102 Effect and Applicability of Personnel Policies

102.1 No Contract Right; [Agency's] Discretion to Modify These Policies

These Personnel Policies ("Policies") do not create any contract right, or any express or implied contract of employment. The **[Agency]** retains the full discretion to modify these Policies at any time in accordance with law.

Commentary:

*The California Supreme Court has determined that public agencies can create implied contracts for employment rights and benefits through written materials and statements. (*Retired Employees' Association of Orange County v. County of Orange *(2011) 52 Cal.4th 1171.) To prevent the creation of implied rights or benefits, this language expressly denies any intent to create an employment contract.*

102.2 Applicability of Policies

These Policies apply to all categories of employees of the **[Agency]** unless a specific section or provision excludes them. Independent contractors, volunteers, and **[board or council members]** are not employees.

102.3 Conflict Between These Policies and a Collective Bargaining Agreement

If a provision of these Policies conflicts with any provision of a valid collective bargaining agreement between the **[Agency]** and a recognized employee organization, the provision of the collective bargaining agreement that is in conflict shall apply to employees covered by that collective bargaining agreement.

Commentary

*If there is a conflict between the Policies and a collective bargaining agreement/memorandum of understanding, the collective bargaining agreement/memorandum of understanding prevails. (*Glendale City Employees' Assn., Inc. v. City of Glendale *(1975) 15 Cal.3d 328, 124 Cal.Rptr. 513.)*

102.4 Employee Acceptance of Policies and Revisions to Policies

As a condition of employment, all employees are required to read and request necessary clarification of these Policies. Each employee is required to sign a statement of receipt acknowledging that: a) he or she has received a copy, or has been provided access to the Policies; and b) understands that he or she is responsible to read and become familiar with the contents and any revisions to the Policies.

Commentary

It is critically important that employees have easy access to the Policies and understand them. By requiring a written acknowledgement of receipt and understanding of the Policies, and storing that acknowledgement in the personnel file, the agency can keep each employee up to date and accountable for following the Policies.

104 Delegation of Authority

104.1 Delegation of Appointing and Personnel Authority to [City Manager, County Administrator, General Manager]

The **[City Counsel, County Board of Supervisors, District Board]** delegates to the **[City Manager, County Administrator, General Manager],** the authority to authorize employment, establish job responsibilities, and perform other personnel actions as to all subordinate employees in accordance with all federal and state laws and regulations and these Policies. The **[City Manager, County Administrator, General Manager]** may delegate responsibility to the **[Personnel Officer]** to perform personnel actions in accordance with this section.

104.2 Retention of Personnel Authority as to Certain Personnel

As to those elected officials, or employees who directly report to the **[City Counsel, County Board of Supervisors, District Board],** if any**,** the **[City Counsel, County Board of Supervisors, District Board]** retains all authority over all personnel actions as authorized by law and these Policies.

Commentary

Delegation of Authority: *Article XI, sections 4, 5 and 7 of the California Constitution give a charter city or county, or a general law city or county the authority to establish local laws and rules. A city may delegate specific administrative power to subordinates subject to specific standards. (*See, e.g., Pacific Legal Foundation v. Brown *(1981) 29 Cal.3d 168, 201;* Bagley v. City of Manhattan Beach *(1976) 18 Cal.3d 22, 26.) A special district must look to*

*its enabling law to find its authority to delegate. (*Los Angeles Flood Control Dist. v. So. Cal. Edison Co. *(1958) 51 Cal.2d 331, 333.)*

Appointing Authority: *The delegation of authority in this Policy makes the City Manager, County Administrator, or General Manager the appointing authority for all agency personnel, except for those employees who directly report to the elected body, such as a City Attorney, County Counsel, Chief of Police, or other elected officials. Your agency should customize this portion of the Policy to list your appointing authority.*

Delegation of Personnel Authority to "Personnel Officer": *This Policy allows the appointing authority to delegate authority for personnel functions to the "Personnel Officer." Throughout these Policies, the term "Personnel Officer" is used to refer to human resources professional. Your agency can customize these Policies to allow for the delegation of authority that best fits your agency. Note that the term "Personnel Officer" is a generic designation only. The appropriate term in your agency may be the Administrative Services Director, the Human Resources Director, the Human Resources Manager, or another title.*

106 Categories of Employees and Non-Employees

106.1 At-Will Employee

An at-will employee is one who serves at the pleasure of the appointing authority, has no property right in continued employment, and has no right to any pre- or post-disciplinary procedural due process or evidentiary appeal. At-will employees include any of the following:

(a) **[City or General]** Manager
(b) Assistants to the **[City or General]** Manager
(c) **[City Attorney or General Counsel]**
(d) **Assistant** or Deputy **[City Attorneys, or General Counsels]**
(e) **Department** heads
(f) **Employees** whose positions are funded under a state or federal employment program
(g) **Employees** designated as temporary/ seasonal **[or extra-help, limited-term, etc.]**
(h) **Probationary** employees

Commentary

This list of "at-will" employees is an exemplar only and may not accurately reflect the classifications that are considered "at-will" within your agency. Your agency will need to customize this list of at-will employees to accurately reflect those classifications that are "at-

will". All of these categories of at-will employees are excluded from the pre-and post-disciplinary due process procedures set forth in these Model Policies.

106.2 Probationary Employee

A probationary employee is one who is serving a probationary period at either: the outset of initial employment with the **[Agency]**; or at the outset of a promotion to a higher classification. During the initial probationary period, a probationary employee serves at the pleasure of the appointing authority, has no property right in continued employment, and has no right to any pre- or post-disciplinary procedural due process or evidentiary appeal. A probationary employee serving in the initial probationary period is an at-will employee.

Commentary

The Policy that addresses the separation of a Probationary Employee is Policy 902, Resignation, Job Abandonment, Layoff, and Separation.

106.3 For-Cause Employee

A for-cause employee is one who has satisfactorily completed the initial probationary period and cannot be disciplined except when the **[Agency]** has cause to do so. A for-cause employee has a property right in continued employment, and has the right to pre- and post-disciplinary procedural due process and an evidentiary appeal for certain types of disciplinary actions that result in a significant deprivation of property.

Commentary

*For-cause public sector employees have a property right to continued employment unless their public agency employer proves cause for significant disciplinary action or dismissal. (*Skelly v. State Personnel Board *(1975) 15 Cal.3d 194, 215.) Use Policy 1002 Causes for Discipline and Procedures to provide pre- and post-disciplinary due process rights for for-cause public sector employees. The term "for-cause" may not be the term that is used by your agency to designate an employee with property rights to his or her position. Rather, your agency may use terms such as "permanent employee," "regular employee," or some other designation.*

106.4 Full or Part-Time Employee

A full time employee is one whose position is budgeted to work at least **[40]** hours per week. Full-time employees receive all benefits provided in these Policies, unless otherwise provided in an MOU, or an employment agreement approved by the **[Agency's governing body]**. A part-time employee is one whose position is budgeted to work less than **[40]** hours per week. Part-time employees may have different rights to leave and other benefits under the law or these Policies, depending on the number of hours they work.

Commentary

Customize the Full-Time / Part-Time Definition: *Your agency has the freedom to set a number of hours that is less than 40 to define the number of hours in a full-time schedule and a part-time schedule for overtime-eligible employees. For example, some agencies have a 38 hour work week for full-time employees.*

Part-Time Employee Benefits: *All part-time employees are entitled to certain statutorily-created leave rights, such as, industrial injury leave, leave as a reasonable accommodation for a disability, kin care, pregnancy disability leave, state and federal family leave, family temporary disability leave (only if the employee contributes to the State Disability Insurance (SDI) program), military leave, leave to appear at a child's school, leave for victims of domestic violence, leave for jury duty and court appearances, time off to vote, and leave due to incarceration. The amount of leave that a part-time employee may receive under these laws may or may not be prorated to the hours the employee works. These Model Policies, Policies 802-810, address the leave rights of part-time employees. If a Policy is silent about proration of leave rights, then the part-time employee has the same leave rights as a full-time employee. Effective July 1, 2015, part-time employees who work for 30 or more days within one year of the commencement of their employment are also entitled to leave under California's paid sick leave law. (Labor Code §§ 245-249.)*

106.5 Temporary / Seasonal /[Extra-Help] Employee

A temporary/ seasonal **[or extra-help]** employee is an at-will employee who is appointed other than from an eligible list for a short term or seasonal basis, not to exceed six months. A temporary/ seasonal **[or extra-help]** employee serves at-will and at the pleasure of the appointing authority, has no property right in continued employment, and has no right to any pre- or post-disciplinary procedural due process or evidentiary appeal.

Commentary

Your agency may use different terms to describe employees who are at-will and the Policy can be customized as needed.

106.6 Volunteer

A volunteer is not an employee, but instead is an individual who provides services to the Agency for civic or philanthropic reasons and receives no compensation or benefits other than nominal fees and reimbursement of expenses. A volunteer serves at-will and at the pleasure of the appointing authority, has no property right in continued employment, and has no right to any pre- or post-disciplinary procedural due process or evidentiary appeal.

Commentary

The Fair Labor Standards Act does not define "volunteer." Instead it excludes from the definition of "employee" those who volunteer for philanthropic or civic reasons to perform services for a public agency if: 1) the individual receives no compensation or is paid only expenses, nominal fees, or reasonable benefits; and 2) the services the individual performs are not the same type that the individual is paid to perform for the public agency. (29 USC § 203(e)(4)(A); 29 CFR §§ 553.100 & 553.101.) As a result, volunteers can never be paid an hourly wage, nor can an employee volunteer to do the same work that the agency pays him or her to do.

106.7 Independent Contractor

An independent contractor is not an employee, and serves solely pursuant to a contract that has been formed and approved as required by **[Agency]** purchasing policies and procedures. An independent contractor cannot be used to perform any part of the **[Agency's]** regular and customary work.

Commentary

*A true independent contractor generally operates a separate business that provides services that are different from the services the Agency's employees perform. In addition, an independent contractor has discretion and control in determining how to best provide those services to the agency. (*See *Labor Code § 3353.) The consequences of misclassifying an employee as an independent contractor are potentially substantial, and may include liability for: wages, benefits, workers' compensation insurance, and payroll taxes. California law prohibits an employer from willfully misclassifying an individual as an independent contractor. (Labor Code §226.8.) The above guidance helps an agency avoid misclassifying an independent contractor as an employee.*

200 Equal Employment Opportunity

202 Equal Employment Opportunity Policy

The **[Agency]** affords equal employment opportunity for all qualified employees and applicants as to all terms of employment, including compensation, hiring, training, promotion, transfer, discipline and termination. The **[Agency]** prohibits discrimination against employees or applicants for employment on the basis 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 (40 and over), sexual orientation, or military and veteran status or any other basis protected by law. (Gov. Code § 12940(a).) Employees, volunteers, or applicants who believe they have experienced any form of employment discrimination or abusive conduct are encouraged to report the conduct immediately by using the complaint procedures provided in these Policies, or by contacting the U.S. Equal Employment Opportunity Commission, or the California Department of Fair Employment and Housing.

Commentary

Effective January 1, 2017, Labor Code section 1197.5 ("Section 1197.5") is amended to prohibit wage differentials based on race or ethnicity. Additionally, the law now specifies that prior salary cannot, standing alone, justify disparities in compensation.

These new amendments are made in addition to amendments made in 2016 to Section 1197.5 that prohibit wage differentials based on sex. Accordingly, employers are prohibited from paying an employee a wage rate less than the rates paid to employees of the opposite sex, or of a different race or ethnicity, for substantially similar work, when considering skill, effort and responsibility, and which is performed under similar working conditions. Wage differentials, however, are still permissible if they exist pursuant to a seniority system, a merit system, a system which measures earnings by quality or quantity of product, or another bona fide factor other than sex, race, or ethnicity. In addition, under the new law, prior salary alone cannot justify a disparity in compensation based upon gender, race, or ethnicity.

Agencies should examine and consider auditing their compensation practices to identify and remedy any discrepancies based on an employee's sex, race or ethnicity for positions that perform substantially similar work. If such discrepancies exist, employers should examine to what extent any permissible factors for wage differentials exist or look to remedy the discrepancies.

204 Policy Against Discrimination, Harassment and Retaliation; Complaint Procedure

204.1 Purpose

The **[Agency]** has a strong commitment to prohibiting and preventing discrimination, harassment and retaliation in the workplace. The **[Agency]** has zero tolerance for any conduct that violates this Policy. Conduct need not arise to the level of a violation of state or federal law to violate this Policy. Instead a single act can violate this Policy and provide grounds for discipline or other appropriate sanctions. This Policy establishes a complaint procedure for investigating and resolving internal complaints of discrimination, harassment and retaliation. The **[Agency]** encourages all covered individuals to report any conduct they believe violates this Policy as soon as possible. Any retaliation against an employee because they filed or supported a complaint or because they participated in the complaint resolution process is prohibited. Individuals found to have retaliated in violation of this Policy will be subject to appropriate sanction or disciplinary action, up to and including termination.

204.1.1 Covered Individuals and Scope of Policy

The individuals covered by this Policy are: applicants, employees regardless of rank or title, elected or appointed officials, interns, volunteers, and contractors. This Policy applies to all terms and conditions of employment, internships, and volunteer opportunities, including, but not limited to, selection, hiring, placement, promotion, disciplinary action, layoff, recall, transfer, leave of absence, compensation, and training.

Commentary

> ***Volunteers and Unpaid Interns:*** *Effective January 1, 2015, Government Code section 12940(j)(1) extends the coverage of California's anti-discrimination laws to volunteers and unpaid interns.*
>
> ***Members of a Legislative Body and Elected Officials:*** *Effective January 1, 2017, local agency legislative body members and any elected local agency official (collectively "local agency officials") who receive any kind of compensation, salary or stipend in the performance of his or her duties, must receive sexual harassment prevention and education training. (*See *Gov. Code § 53237 et seq.) Local agency officials must receive at least two hours of such training – taken at home, in person, or online – within the first six months of taking office or commencing employment, and every two years thereafter. In addition, agencies must maintain records of (1) the dates each local agency official completed his or her training and (2) which entity provided the training. Such records must be kept for at least five (5) years and are subject to disclosure under the California Public Records Act. These new requirements are in addition to and do not supersede other harassment training*

requirements, including but not limited to trainings commonly referred to as "AB 1825" training.

204.2 Definitions

204.2.1 Protected Classification

This Policy prohibits harassment, discrimination or retaliation because of an individual's protected classification. "Protected Classification" includes race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age (40 and over), sexual orientation, or military and veteran status, or any other basis protected by law. (Gov. Code § 12940(a).) This Policy prohibits discrimination, harassment or retaliation because: 1) of an individual's protected classification; 2) the perception that an individual has a protected classification; or 3) the individual associates with a person who has or is perceived to have a protected classification.

Commentary

California's anti-discrimination law, which is called the Fair Employment and Housing Act (FEHA), identifies the protected classifications listed in the above definition. (Gov. Code § 12940(a).) Note that treating an individual differently because of a misperception that an individual is within one or more of these protected classifications is also unlawful. (Gov. Code § 12926(o).) In addition, the FEHA prohibits discrimination, harassment, or retaliation against an individual because that individual associates with another individual who is within a protected classification.

204.2.2 Protected Activity

This Policy prohibits discrimination, harassment, or retaliation because of an individual's protected activity. Protected activity includes: making a request for an accommodation for a disability; making a request for accommodation for religious beliefs; making a complaint under this Policy; opposing violations of this Policy; or participating in an investigation under this Policy.

Commentary

Effective January 1, 2016, California law specifically provides that making a request for accommodation for a disability or for religious beliefs is a protected activity under the FEHA. (Gov. Code § 12940(l)(4) & (m)(2).) California and federal law has long prohibited harassment, discrimination or retaliation for: complaining of discrimination or harassment; opposing discrimination or harassment; or participating in an investigation into such a complaint.

204.2.3 Discrimination

This Policy prohibits treating covered individuals differently and adversely because of the individual's protected classification, actual or perceived; because the individual associates with a person who is member of a protected classification, actual or perceived; or because the individual participates in a protected activity as defined in this Policy. (Gov. Code § 12926(o).)

204.2.4 Harassment

Harassment includes, but is not limited to, the following types of behavior that are taken because of a person's actual or perceived protected classification:

(a) Speech, such as epithets, derogatory comments or slurs, and propositioning on the basis of a protected classification. This includes inappropriate comments about appearance, dress, physical features, gender identification, or race-oriented stories and jokes.

(b) Physical acts, such as assault, impeding or blocking movement, offensive touching, or physical interference with normal work or movement. This includes pinching, grabbing, patting, or making explicit or implied job threats or promises in return for submission to physical acts.

(c) Visual acts, such as derogatory posters, cartoons, emails, pictures or drawings related to a protected classification.

(d) Unwanted sexual advances, requests for sexual favors and other acts of a sexual nature, where submission is made a term or condition of employment, where submission to or rejection of the conduct is used as the basis for employment decisions, or where the conduct is intended to or actually does unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment. (Gov. Code §12940(j); 2 Cal.Code Regs § 11091(b)(1).)

204.2.4.1 Guidelines for Identifying Harassment

Harassment includes any conduct which would be unwelcome or unwanted to an individual of the recipient's same protected classification. The following guidelines to determine if conduct is unwelcome or unwanted should be followed:

(a) It is no defense that the recipient "appears" to have consented to the conduct at issue by failing to protest about the conduct. A recipient may not protest for many legitimate

reasons, including the need to avoid being insubordinate or to avoid being ostracized or subjected to retaliation.

(b) Simply because no one has complained about a joke, gesture, picture, physical contact, or comment does not mean that the conduct is welcome. Harassment can evolve over time. Small, isolated incidents might be tolerated up to a point. The fact that no one has yet complained does not preclude someone from complaining if the conduct is repeated in the future.

(c) Even visual, verbal, or physical conduct between two people who appear to welcome the conduct can constitute harassment of a third person who witnesses the conduct or learns about the conduct later. Conduct can constitute harassment even if it is not explicitly or specifically directed at a particular individual.

(d) Conduct can constitute harassment even if the individual has no intention to harass. Even well-intentioned conduct can violate this Policy if the conduct is directed at, or implicates a protected classification, and if an individual would find it offensive (e.g., gifts, over-attention, endearing nicknames, hugs).

204.2.5 Retaliation

Retaliation occurs when adverse conduct is taken against a covered individual because of the individual's protected activity as defined in this Policy. "Adverse conduct" may include but is not limited to: disciplinary action, counseling, taking sides because an individual has reported harassment or discrimination; spreading rumors about a complainant or about someone who supports or assists the complainant; shunning or avoiding an individual who reports harassment or discrimination; or making real or implied threats of intimidation to prevent or deter an individual from reporting harassment or discrimination.

Commentary

Abusive Conduct: *Beginning on January 1, 2015, employers who are already required to provide supervisory employees AB 1825 harassment prevention training, must also provide training on the prevention of "abusive conduct" as a component of that training. (Gov. Code § 12950.1(b).) This law defines "abusive conduct" as malicious conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. (Gov. Code § 12950.1(g)(2).) "'Abusive conduct' may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious." (Gov. Code § 12950.1(g)(2).)*

Abusive Conduct is Listed as Cause for Discipline in the Disciplinary Policy: *The definition of "abusive conduct" is not listed separately in this Policy because: 1) unlike anti-discrimination law, abusive conduct is not conduct that is linked to any protected classification; and 2) it requires a malicious intent, which is not required for harassment. Abusive conduct, offensive conduct, and the like (e.g. workplace bullying) are certainly misconduct, however, so this category of misconduct is listed in Policy 1002, Causes for Discipline and Procedures as grounds for discipline.*

204.3 Complaint Procedure

A covered individual who believes he or she has been subjected to discrimination, harassment or retaliation may make a complaint -- orally or in writing -- to any supervisor, manager, or department head, without regard to any chain of command. Any supervisory or management employee who receives a harassment complaint should immediately notify the **[Personnel Officer].** Upon receiving notification of a harassment complaint, the **[Personnel Officer]** will complete and/or delegate the following steps. If the **[Personnel Officer]** is accused, or a witness to the events at issue, an individual with higher authority will complete and/or delegate the following steps.

(a) Authorize and supervise the investigation of the complaint and/or investigate the complaint. The investigation will usually include interviews with: 1) the complainant; 2) the accused; and 3) other persons who have relevant knowledge concerning the allegations in the complaint.

(b) Review the factual information gathered through the investigation to determine whether the alleged conduct violates the Policy giving consideration to all factual information, the totality of the circumstances, including the nature of the conduct, and the context in which the alleged incidents occurred.

(c) Report a summary of the determination as to whether this Policy has been violated to appropriate persons. If discipline or sanctions are imposed, the level of discipline or sanctions will not be communicated to the complainant.

(d) If conduct in violation of this Policy occurred, take or recommend to the appointing authority prompt and effective remedial action. The remedial action will be commensurate with the severity of the offense.

(e) Take reasonable steps to protect the complainant from further harassment, discrimination or retaliation.

204.3.1 Proactive Approach

The **[Agency]** takes a proactive approach to potential Policy violations and will conduct an investigation if its supervisory or management employees become aware that harassment, discrimination or retaliation may be occurring, regardless of whether the recipient or third party reports a potential violation.

204.4 Option to Report to Outside Administrative Agencies

An individual has the option to report harassment, discrimination or retaliation to the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH). These administrative agencies offer legal remedies and a complaint process. The nearest offices are listed on the Internet, in the government section of the telephone book or employees can check the posters that are located on **[Agency]** bulletin boards for office locations and telephone numbers.

204.5 Confidentiality

Every effort will be made to assure the confidentiality of complaints made under this Policy to the greatest extent allowed by law. Complete confidentiality cannot occur, however, due to the need to fully investigate and the duty to take effective remedial action. An employee who is interviewed during the course of an investigation is prohibited from attempting to influence any potential witness while the investigation is ongoing. An employee may discuss his or her interview with a designated representative. The **[Agency]** will not disclose a completed investigation report except as it deems necessary to support a disciplinary action, to take remedial action, to defend itself in adversarial proceedings, or to comply with the law or court order.

Commentary

*Employers cannot prohibit employees from discussing wages, hours, or working conditions. (Labor Code §§ 232, 232.5.) In addition, a blanket instruction to employees not to contact others during an investigation constitutes unlawful interference with collective bargaining rights. (*Los Angeles Community College Dist.*, PERB Dec. 2404-E (12/24/14).) The language above allows an employee to discuss his or her investigative interview with a designated representative and only prohibits an employee from attempting to influence other potential witnesses. An agency may be able to validly order an employee to not discuss a pending investigation, but such orders must be carefully crafted and narrow in scope.*

204.6 Responsibilities

(a) Each non-manager or non-supervisor is responsible for:

1) Treating all individuals in the workplace or on worksites with respect and consideration.

2) Modeling behavior that conforms to this Policy.

3) Participating in periodic training.

4) Cooperating with the **[Agency's]** investigations pursuant to this Policy by responding fully and truthfully to all questions posed during the investigation.

5) Taking no actions to influence any potential witness while the investigation is ongoing.

6) Reporting any act he or she believes in good faith constitutes harassment, discrimination or retaliation as defined in this Policy, to his or her immediate supervisor, or department head, or **[Personnel Officer].**

(b) In addition to the responsibilities listed above, each manager and supervisor is responsible for:

1) Informing employees of this Policy.

2) Taking all steps necessary to prevent harassment, discrimination and, retaliation from occurring, including monitoring the work environment and taking immediate appropriate action to stop potential violations, such as removing inappropriate pictures or correcting inappropriate language.

3) Receiving complaints in a fair and serious manner, and documenting steps taken to resolve complaints.

4) Following up with those who have complained to ensure that the behavior has stopped and that there are no reprisals.

5) Informing those who complain of harassment or discrimination of his or her option to contact the EEOC or DFEH regarding alleged Policy violations.

6) Assisting, advising, or consulting with employees and the **[Personnel Officer]** regarding this Policy.

7) Assisting in the investigation of complaints involving employee(s) in their departments and, when appropriate, if the complaint is substantiated, recommending appropriate corrective or disciplinary action in accordance with these Policies, up to and including termination.

8) Implementing appropriate disciplinary and remedial actions.

9) Reporting potential violations of this Policy of which he or she becomes aware to the **[Personnel Officer]**, regardless of whether a complaint has been submitted.

10) Participating in periodic training and scheduling employees for training.

Commentary

This Policy follows the State law requirement that a harassment prevention Policy address all of the following: (1) the illegality of sexual harassment; (2) the definition of sexual harassment under applicable state and federal law; (3) a description of sexual harassment, utilizing examples; (4) the internal complaint process of the employer available to the employee; (5)the legal remedies and complaint process available through the California Department of Fair Employment and Housing (DFEH); (6)directions on how to contact the DFEH; and (7)the protection against retaliation provided by state anti-harassment law. (Gov. Code § 12950(b).) State administrative regulations require that all supervisors receive the employer's discrimination, harassment, and retaliation prevention policy and require each supervisor to read and to acknowledge receipt of that policy; and if 10% or more of the workforce at any facility speak a language other than English as their spoken language, the employer must translate the policy into each relevant language. (2 Cal.Code Regs. § 11023(c)(11) and (d); Gov. Code § 12950(b).) In addition, the regulations provide details regarding the proper training methods and recordkeeping of required sexual harassment trainings. (2 Cal.Code Regs. § 11024.)

206 Reasonable Accommodation and Interactive Process

206.1 Reasonable Accommodation

Absent undue hardship or direct threats to the health and safety of employee(s), the **[Agency]** provides employment-related reasonable accommodations to:

(a) qualified individuals with disabilities, both applicants and employees, to enable them to perform essential job functions (Gov. Code § 12940(m)); and

(b) employees with conditions related to pregnancy, childbirth, or a related medical condition, if she so requests, and with the advice of her health care provider (Gov. Code § 12945(3)(A)); and

(c) employee victims of domestic violence, sexual assault, or stalking to promote the safety of the employee victim while at work (Labor Code § 230(f)(4)); and

(d) employees who request reasonable accommodation to address a conflict between religious belief or observance and any employment requirement (Gov. Code § 12940(l)).

Commentary

For Disabilities: *Each public agency has an affirmative duty to provide reasonable accommodation(s) to applicants or employees with disabilities unless the timely, good faith interactive process reveals that there is no reasonable accommodation that will allow the applicant or employee to perform essential job functions without causing the agency undue hardship or without presenting a direct threat to the health and safety of himself/herself or others. (Gov. Code § 12940(m); 2 Cal.Code Regs § 11068(a).) The required interactive process is discussed below.*

For Pregnancy and Related Medical Conditions: *Each public agency must provide an interactive process to assess reasonable accommodations, in addition to leave rights, to employees disabled by pregnancy and related medical conditions. (Gov. Code § 12945(3)(A); 2 Cal.Code Regs. § 11040(a)(2)(B) & 11050(a)(4)-(5).)*

For Victims of Domestic Violence, Sexual Assault, or Stalking: *Effective January 1, 2014, each public agency also has an affirmative duty to provide reasonable accommodations to employee-victims of domestic violence, sexual assault, or stalking, that would protect the safety of the employee-victim while at work. (Labor Code § 230(f)(1).) As is the case with disability-related accommodations, the law requires a timely, good faith interactive process. (Labor Code § 230(f)(4).) The goal is to identify safety-related accommodations that do not cause undue hardship and that do not compromise the safety and health of all employees. (Labor Code § 230(f)(6).) Like the interactive process for disabilities, the agency has the duty to restart the interactive process if the employee requests new accommodation(s) due to changed circumstances. (Labor Code § 230(f)(7)(E).)*

For Religious Belief or Observance: *Unlike the other categories identified above, there is no legal requirement that the employer must use an interactive process to analyze potential reasonable accommodations of an employee's religious beliefs or observance, including religious dress or grooming practices. (*See *Gov. Code §§ 12926(q) & 12940(l).) Accommodation for religious belief is included here because the law does require an employer to provide a reasonable accommodation unless the agency can prove an undue hardship. (Gov. Code § 12940(l).) In addition, the employer is required to prove that it has "explored any available reasonable alternative means of accommodating the religious belief or observance." Though an interactive process is not legally mandated for religious accommodation, an interactive process meeting is an effective way for an employer to prove that it explored any available reasonable alternative means of accommodating the religious belief or observance. (Gov. Code § 12940(l).)*

Associational Disabilities: *A California Court of Appeal recently held that "associational disability discrimination"—discriminating against someone who is associated with a disabled person—is a viable claim under FEHA and that there may be a duty to provide a reasonable accommodation in such circumstances. Accordingly, agencies should proceed with caution if an employee requests an accommodation to help care for a disabled person, and consider the request through the interactive process. (See* Castro-Ramirez v. Dependable Highway Express, Inc. *(2016) 2 Cal.App.5th 1028.)*

206.2 Supporting Documentation or Certification

Commentary

The law regarding accommodation of religious beliefs does not specifically allow the employer to request documentation about the employee's religious beliefs. As a result, this portion of the Policy describes the documentation the employer can request for: disabilities; pregnancy and related medical conditions; and victims of domestic violence, sexual assault, or stalking.

206.2.1 Reasonable Medical Documentation of Disability

If the disability or the need for reasonable accommodation is not obvious, the **[Agency]** may require the individual to provide reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation, along with the name and credentials of the individual's health care provider. If the individual provides insufficient documentation, the agency will: 1) explain the insufficiency; 2) allow the employee or applicant to supplement the documentation; and 3) pursue the interactive process only to the extent that the request for reasonable accommodation is supported by the medical documentation provided. (2 Cal.Code Regs § 11069(c)(2) & (d).)

Commentary

An agency is not entitled to know the underlying medical cause or name of the disability, but is entitled to request reasonable documentation confirming the existence of a disability, the need for a reasonable accommodation and the functional limitations or work restrictions that apply to the employee's ability to perform the essential functions of the job. (2 Cal.Code Regs § 11069(c)(2).) If an employee or applicant provides documentation that does not confirm the existence of a disability, the need for a reasonable accommodation, or his or her functional limitation(s) in performing essential job functions, then the agency should explain why the documentation is insufficient and allow the applicant or employee to provide a timely supplement. (2 Cal. Code Regs. § 11069(d).)

206.2.2 Medical Certification Indicating the Need for a Reasonable Accommodation or Transfer Due to Pregnancy or Related Conditions

If a pregnant employee, or an employee with a pregnancy-related condition, requests a reasonable accommodation or transfer due to pregnancy, the **[Agency]** will provide the employee with notice of the need for a medical certification within two business days after the employee's request for accommodation. A medical certification confirming the need for a reasonable accommodation, including transfer, is sufficient if it contains: a description of the requested accommodation or transfer; a statement describing the medical advisability of the accommodation or transfer due to pregnancy; and the date that the need for the accommodation or transfer will become necessary and the estimated duration of the accommodation or transfer. (2 Cal.Code Regs § 11050(b)(3).)

Commentary

In order to receive a medical certification to support a request for accommodation for pregnancy, the agency must ask for it at the time the employee gives notice of the request for accommodation or within two business days thereafter, or in the case of unforeseen leave, within two business days after the leave commences. (2 Cal.Code § 11050(b)(3).) The California Code of Regulations provides a certification form that can be used. (2 Cal. Code § 11050(e).)

206.2.3 Certification of Victim Status

An employee who is a victim of domestic violence, sexual assault, or stalking and who requests an accommodation to provide for his or her safety while at work must provide both of the following:

(a) a written statement signed by the employee or an individual acting on the employee's behalf, to certify that the accommodation is to address victim-safety concerns while at work; and

(b) a certification demonstrating the employee's status as a victim of domestic violence, sexual assault, or stalking, which can be in the form of: a police report indicating the employee's victim status; a court order separating the perpetrator from the employee or that the employee has appeared in court for that purpose; or documentation from a medical professional or counselor that the employee is undergoing treatment for physical or mental injuries or abuse resulting from an act of domestic violence, sexual assault, or stalking. (Labor Code § 230(f)(7).)

Commentary

In addition to the documentation identified above, California Labor Code § 230(f)(7) also allows the employer to request recertification of the documentation every six months. (Labor Code § 230(f)(7)(C).) If circumstances change and the employee needs a new accommodation, the employer must restart the certification and interactive process. (Labor Code § 230(7)(E).)

206.3 Fitness for Duty Examinations

206.3.1 Applicants

After a conditional offer of employment has been extended to an applicant, the **[Agency]** may require the applicant to submit to a fitness for duty examination that is job-related; necessary for efficient operations of the agency; and required of all applicants for the job classification. (Gov. Code § 12940(e) &(f).) An applicant or employee who is required to pass a medical and/or psychological examination will be notified of his/her right to obtain a second opinion at his/her expense and that he/she may submit such second opinions for consideration. (2 Cal.Code Regs § 11071(b)(2).)

206.3.2 Current Employee

The **[Personnel Officer]** may require an employee to submit to a fitness for duty examination to determine if the employee has a disability and is able to perform the essential functions of his or her job when there is significant evidence that:

(a) the employee's ability to perform one or more essential functions of his or her job has declined; or

(b) could cause a reasonable person to question whether an employee is still capable of performing one or more of his or her essential job duties, or is still capable of performing those duties in a manner that does not harm him or herself or others. (Gov. Code § 12940(e) &(f).)

Commentary

California law prohibits requiring employees or applicants to undergo any medical examination unless the employer can prove that the exam is job-related and consistent with business necessity. (Gov. Code §12940(e) and (f); 2 Cal.Code Regs. § 11016(b).) In the case of an applicant, the examination must be given to all of those entering the same job classification. (Gov. Code § 12940(e)(3) and (f)(2).) The above Policy uses the language that the courts have used to apply the business necessity standard. (Brownfield v. City of Yakima *(9th Cir. 2010) 612 F.3d 1140.) Note that the business necessity standard is a high*

standard, but it can be met before the employee's work performance declines if the employer can point to evidence supporting a genuine reason to doubt that the employee can perform essential job functions. An employee's behavior must be much more than merely annoying or inefficient to meet the business necessity standard. Requiring an employee to attend a psychological fitness for duty examination is more intrusive than a physical exam and should only be used where the agency has strong facts to question the employee's fitness, with due consideration being given to the essential job duties of the position and the importance of mental fitness in the position.

206.3.3 Role of Health Care Provider

The **[Agency]** may request the applicant's or employee's health care provider to conduct a fitness for duty exam on the applicant or employee, or may request an **[Agency]**-selected health care provider to do so at the **[Agency]'s** expense. The **[Agency]** will allow an employee paid time off to attend the exam. The **[Agency]** will provide the heath care provider with a letter requesting a fitness for duty examination and a written description of the essential functions of the job. The examination will be limited to determining whether the applicant or employee can perform the essential functions of his/her position and any work restrictions and/or functional limitations that apply to the applicant or employee. The health care provider will examine the employee and provide the **[Agency]** with non-confidential information regarding whether:

(a) the applicant or employee has a disability within the meaning of the California Fair Employment and Housing Act;

(b) the applicant or employee is fit to perform essential job functions;

(c) workplace restrictions or functional limitations apply to the applicant or employee, and the duration of the work restrictions or functional limitations;

(d) there are any reasonable accommodations that would enable the employee to perform essential job functions; and

(e) the employee's continued employment poses a threat to the health and safety of him or herself or others.

Should the health care provider exceed the scope of the **[Agency]**'s request and provide confidential health information, without valid consent of the applicant or employee, the **[Agency]** will return the report to the health care provider and request another report that includes only the non-confidential fitness for duty information that the **[Agency]** has requested. (2 Cal.Code Regs § 11069(c) & (d).)

Commentary

A fitness for duty examination conducted by the employee's or applicant's health care provider is generally more persuasive if there is a history of care. If the employer has reason to doubt the employee's or applicant's health care provider's expertise or lack of specialization, or if there is no history of care, then the Agency should consider sending the employee or applicant to a specialist with excellent credentials, if possible.

206.3.4 Authorization for Use of Medical Information

During the course of a fitness for duty examination, the **[Agency]** will not seek or use information regarding an employee's medical history, diagnoses, or course of treatment without an employee's written authorization.

Commentary

The Confidentiality of Medical Information Act (CMIA) generally prohibits an employer from using or disclosing "medical information" relating to an employee unless the employee first signs a valid authorization. (Civil Code §§ 56-56.37.) "Medical information" is information regarding an employee's medical history, diagnoses, or course of treatment. (Civil Code § 56.05(g).) A valid authorization under the CMIA must meet specific criteria set forth in the statute. (Civil Code §56.11.)

206.3.5 Medical Information from the Employee or Applicant

If an employee or applicant submits medical information to the **[Agency]** from his or her own health care provider, the **[Personnel Officer]** will not forward that information on to the health care provider who conducted the examination for the **[Agency]**, without the employee or applicant's written authorization. Upon receipt of the written authorization, the **[Personnel Officer]** will request the **[Agency]**-paid health care provider to determine whether the information alters the original fitness for duty assessment.

206.4 Interactive Process

206.4.1 When to Initiate the Interactive Process

The **[Personnel Officer]** will initiate the interactive process when:

(a) an applicant or employee with a known physical or mental disability or medical condition requests reasonable accommodation(s) (2 Cal.Code Regs § 11069(b)(1)); or

(b) the **[Agency]** otherwise becomes aware of the need for an accommodation through a third party (e.g. a doctor's note requesting an accommodation), or by observation of the employee's work (2 Cal.Code Regs. § 11069(b)(2)); or

(c) the **[Agency]** becomes aware of the possible need for an accommodation because the employee with a disability has exhausted workers' compensation leave, Family and Medical Act leave, or other leave rights, but the employee and/or the employee's health care provider indicate that further accommodation is still necessary for recuperative leave or other accommodation (2 Cal.Code Regs. § 11069(b)(3)); or

(d) an employee disabled by pregnancy, childbirth or related medical conditions requests a reasonable accommodation or transfer based on the advice of her health care provider (2 Cal.Code Regs § 11040(a)(1)); or

(e) an employee with a physical or mental disability, regardless of cause, fails to return to work following pregnancy disability leave (2 Cal.Code Regs § 11047); or

(f) an employee-victim of domestic violence, sexual assault, or stalking requests a reasonable accommodation(s) for his or her safety at work (Labor Code § 230(f)(1)); or

(g) an employee requests an accommodation to address a conflict between religious belief, observance, or practice and any employment requirement (Gov. Code § 12940(l)); or

(h) an employer is aware of the need for a reasonable accommodation for an employee's or applicant's religious beliefs, observance or practices. (2 Cal.Code Regs § 11060(b).)

Commentary

Note that the duty to initiate the interactive process is not limited to an actual request from an employee. Any of the preceding circumstances can be sufficient to trigger the need to conduct an interactive process.

206.4.2 Interactive Communication

After the occurrence of any of the above-stated circumstances that trigger the need to conduct an interactive process meeting, the **[Personnel Officer]** will promptly arrange for a discussion or discussions, in person or via conference telephone call, with the applicant or employee and his or her designated representative, (if any). The purpose of the interactive communications will be to discuss in good faith all feasible potential reasonable accommodations. The **[Personnel Officer]** will document these communications in writing. (Gov. Code 12940(n); 2 Cal.Code Regs § 11069(a).)

206.4.2.1 Potential Accommodations for Applicants or Employees with Disabilities

Depending on the facts of each case, the interactive process analysis will generally begin with a review of possible reasonable accommodations that would enable the individual to retain his or her current job. The process will generally then move on to possible reasonable accommodations in other vacant jobs, for which the individual is qualified, if there is no reasonable accommodation in the current job that does not cause undue hardship, or that does not present a risk of harm to the individual or others. The **[Agency]** will consider accommodations that the applicant or employee suggests, but has the right to select and implement any reasonable accommodation that it deems effective. The range of potential reasonable accommodations includes, but is not limited to:

- making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities, including: acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, and/or the provision of qualified readers or interpreters;
- job restructuring;
- part-time or modified work schedules (Gov. Code § 12926(p));
- paid or unpaid leave of absence of a finite duration that is likely to enable the employee to return to work at the end of the leave (2 Cal.Code Regs § 11068(c));
- preferential consideration to reassignment to a vacant, comparable position, except when such preference would violate a bona fide seniority system (2 Cal.Code Regs § 11068(d)(5));
- reassignment to a vacant lower-paid position if there is no funded, vacant comparable position for which the individual is qualified for (2 Cal.Code § 11068(d)(2)); or
- reassignment to a temporary position, if the individual agrees. (2 Cal.Code Regs § 11068(d)(3).)

Commentary

***Good Faith Requirement**: State law gives the employer the duty 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." (Government Code § 12940(n).) Employers must act in good faith to creatively consider all potential accommodations.*

***Invite the Applicant or Employee's Attorney, or Union or Family Representative to Participate in the Interactive Process:** Allowing an employee or applicant to bring an attorney, or union or family representative to an interactive process is an essential part of an agency's duty to act in good faith. (Gov. Code § 12940(n).) The interactive process*

*communication is not only enhanced by a representative's good faith brainstorming, but the law requires allowing the employee or applicant to bring a representative. (*Sonoma Superior Court *(2015) PERB Dec 2409-C; 2 Cal.Code Regs § 11065(j).)*

***Broaden the Analysis of Potential Accommodations**: California law requires consideration of the individual's preferences and encourages considering a broad scope of potential accommodations. Agencies should be careful to consider all possible reasonable accommodations before making a decision. (Gov. Code § 12926(p); 2 Cal. Code Regs § 11068(c)-(e).) An agency does not have to eliminate essential job functions or lower quality or quantity standards that are essential functions of a position as a reasonable accommodation. (2 Cal.Code Regs. § 11068(b).) Although your agency must consider the individual's preferences and the range of all potential accommodations, your agency has the ultimate right to select and implement a reasonable accommodation that is effective for both your agency and the individual. (2 Cal.Code Regs. § 11068(e).)*

***Put it in Writing:** Employers must also be able to prove they acted with good faith during the interactive process. Agencies should create and maintain written documentation of the agency's interactive process communications, including: letters to medical providers; letters to the employee to recap interactive process meetings; and notes to file regarding any analyses or consultations with experts as to potential accommodations. The level of documentation should be detailed and include: that the employee had the option to be represented and whether the representative attended the meetings; that the employer was flexible in scheduling the time and location of the meetings; whether the meeting was recorded; the accommodations that were suggested by the employer and the employee; the responses each party had to the suggested accommodations; and whether the interactive process meeting(s) resulted in any agreements.*

***Hard of Hearing Individuals:** Effective January 1, 2017, various California Codes, including but not limited to the Civil Code, Government Code, and Health and Safety Code, replaced the term "hearing impaired" with the term "hard of hearing." While no substantive changes were made to the codes, to the extent and an agency's policies, written procedures, or forms use the term "hearing impaired," agencies should consider replacing this term with "hard of hearing," to conform with these codes.*

***Support Animals:** A support animal may constitute a reasonable accommodation in certain circumstances. According to the Civil Code, 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." (2 Cal.Code Regs. § 11065(a)(3).) Whether a support animal is an appropriate reasonable accommodation must be determined on a case by case basis.*

206.4.2.2 Potential Accommodations for Employees Affected by Pregnancy and Related Medical Conditions

Depending on the facts of each case, the interactive process will attempt to identify and implement a reasonable accommodation that is consistent with the medical certification applicable to the applicant or employee. Whether an accommodation is reasonable is a case-by-case analysis that takes into account several factors, including, but not limited to: the employee's medical needs; the duration of the needed accommodation; and the employer's legally permissible past and current practices. (2 Cal.Code Regs. § 11040(a)(2)(A).) The range of potential accommodations includes, but is not limited to:

- transfer to a less strenuous or hazardous position for the duration of the pregnancy (Gov. Code § 12945(a)(3)(C));
- change in or restructuring of work duties, such as modifying lifting requirements (2 Cal.Code Regs § 11040(b));
- providing more frequent breaks;
- providing seating;
- time off for medical appointments;
- transfer temporarily to a job with equivalent pay and benefits that the employee is qualified to perform in order to accommodate reduced work schedule or intermittent leave. (2 Cal.Code Regs. § 11041(c).) (However, a reduction in work hours may be considered a form of pregnancy disability leave and deducted from the employee's four month pregnancy disability leave entitlement.) (2 Cal.Code Regs § 11040(b).)

Commentary

Accommodation for Pregnancy is in Addition to Accommodation for Other Disabilities: *The right to take pregnancy disability leave under Government Code section 12945 (*See *Policy 808, Leave Because of Pregnancy, Childbirth, or Related Medical Condition) is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation for a disability. For example, if an employee has depleted pregnancy disability leave and has a mental or physical disability, which may or may not be related to pregnancy, childbirth, or related medical conditions, the employee may be entitled to a reasonable accommodation for that disability. The potential right to further accommodation is not diminished by the employee's use of accommodations due to pregnancy, childbirth or related medical conditions. (2 Cal.Code Regs. § 11047.)*

Limitations on Pregnancy-Related Accommodations: *An agency need not: create additional employment that it would not have otherwise created to accommodate a pregnancy-related condition; discharge another employee to free up a job; violate the terms of a collective bargaining agreement; transfer another employee with more seniority; or*

promote or transfer an employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no requirement to do so. (2 Cal.Code Regs. § 11041(a)(2)(B).)

206.4.2.3 Potential Accommodations for Employee-Victims of Domestic Violence, Sexual Assault, or Stalking

Depending on the facts of each individual case, the interactive process analysis will review all possible accommodations that would enhance the safety of the employee victim at work. In determining what accommodation is reasonable, the **[Agency]** will consider the exigent circumstance or danger facing the employee. The **[Agency]** will consider the preferences of the employee to be accommodated, but has the right to select and implement any accommodation that it deems effective. The range of potential safety measure accommodations includes, but is not limited to:

- transfer, reassignment, modified schedule;
- change in work telephone number;
- change in location of work station;
- installation of locks;
- assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace;
- the implementation of a safety procedure(s);
- adjustment to job structure, workplace facility, or work requirement; and
- referral to a victim assistance organization. (Labor Code § 230(f)(2).)

Commentary

Consider All Potential Safety Accommodations: *This list of potential accommodations is found in Labor Code section 230(f)(2). In determining whether an accommodation is reasonable, the agency must consider the exigent circumstances or danger that the employee is facing. (Labor Code § 230(f)(5).)*

Restart the Interactive Process: *The agency must restart the interactive process if the employee requests a new accommodation due to changed circumstances. (Labor Code § 230(f)(7)(E).)*

Follow the Commentary Above for Disability Interactive Process: *All of the commentary listed above regarding the interactive communication for disability accommodation applies to employee-victims of domestic violence, sexual assault, or stalking, including: providing "a timely, good faith interactive process" (Labor Code § 230(f)(4)); inviting the employee to*

bring representatives; actively considering any and all accommodations and analyzing whether they would be effective or pose an undue hardship or safety risk to employees (Labor Code § 230(f)(6)); and documenting all interactive communications and accommodations in writing.

206.4.2.4 Potential Accommodations for Religious Creed, Religious Dress Practice, or Religious Grooming Practice

Depending on the facts of each case, the interactive process analysis will review all possible accommodations that would resolve the conflict between the religious belief or observance and any employment requirement. The **[Agency]** will consider the preference of the employee or applicant, but has the right to select and implement any accommodation that it deems effective. The range of potential accommodations includes, but is not limited to:

(a) job restructuring or job reassignment (but not segregation from other employees or the public) (Gov. Code § 12940(l)(2));

(b) modification of work practices, including dress or grooming standards (2 Cal.Code Regs § 11062(c)(2));

(c) allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his or her religious observances (2 Cal.Code Regs § 11062(a));

(d) allowing alternatives to union membership or payment of union dues (2 Cal.Code Regs § 11062(c)(3)).

Commentary

"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" is 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 the observance by an individual of his or her religious creed. "Religious grooming practice" is construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed. (Gov. Code § 12926(q).)

206.4.3 Determination

After the interactive process communications, the **[Personnel Officer]** will review the information received, and determine: whether all available information has been reviewed; whether all potential accommodations that the applicant or employee has suggested have been considered; whether additional discussions with the applicant or employee would be helpful; whether the applicant's or employee's preferences have been taken into account; if there is a reasonable accommodation that would enable the applicant or employee to perform essential job functions without harming him or herself or others; and if the accommodations would pose an undue hardship on **[Agency]** finances or operations. The **[Personnel Officer]** will inform the applicant or employee of his or her determination in writing. The **[Personnel Officer]** will use his or her discretion based upon the particular facts of each case.

Commentary

Each of the factors above must be taken into account in your Agency's analysis and determination of each particular reasonable accommodation, if any. A very individualized analysis is required by law. (2 Cal.Code Regs § 11069(c).)

206.5 Access to Medical Information Regarding Fitness for Duty

Medical records and information regarding fitness for duty, or the need for an accommodation, will be maintained separately from non-medical records and information. Medical records and information regarding fitness for duty and the need for accommodation will be accessible only by the **[Personnel Officer]**, the **[Agency]**'s legal counsel, first aid and safety personnel in case of emergency, and supervisors who are responsible for identifying reasonable accommodations. Medical records and information contained therein may be released pursuant to state and federal law. (2 Cal.Code Regs § 11069(g).)

Commentary

All medical information gathered during the interactive process should be maintained in separate files and should be confidential except as provided in the Policy above. (2 Cal.Code Regs. § 11069(g).)

208 Whistleblower Protection

208.1 Policy

The **[Agency]** prohibits all of the following:

(a) taking any retaliatory adverse employment action against an employee because the employee has or is believed to have disclosed information to any government or law enforcement agency, including to the **[Agency]**, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law, or a violation or noncompliance with a local, state, or federal rule or regulation (Labor Code § 1102.5(b));

(b) preventing an employee from disclosing information to a government agency, including to the **[Agency]**, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law, or a violation or noncompliance with a local, state, or federal rule or regulation (Labor Code § 1102.5(a));

(c) retaliating against an employee for refusing to participate in any activity that would result in a violation of state or federal law, or a violation or noncompliance with a local, state, or federal rule or regulation (Labor Code § 1102.5(c)); and

(d) retaliating against an employee because the employee's family member has, or is perceived to have engaged in any of the protected activities listed in (a)-(c) above.

Commentary

This Policy reflects the protections provided in California's whistleblower protection law. (Labor Code § 1102.5.) Effective January 1, 2016, California law also prohibits an agency from retaliating against an employee because his or her family member is perceived to have engaged in any of the protected activity described above. (Labor Code § 1102.5(h).) The law does not define "family member."

208.2 Policy Coverage

This Policy governs and protects **[Agency]** officials, officers, employees, **[seasonal/ temporary/ extra help employees],** or applicants for employment.

Commentary

California law makes these whistle blower protections applicable to employees of charter cities or counties. (Labor Code §§ 1106, 53296(a).) This Model Policy covers applicants for employment because applicants are specifically mentioned in Government Code section 53297(a). In addition, applicants are implicitly protected by Labor Code section 1102.5(d), which prohibits employers from retaliating against an "employee for having exercised his or her rights" to disclose alleged violations of law "in any former employment." (Labor Code § 1102.5(d).)

208.3 Definitions

(a) "Protected activity" includes any of the following:

- Filing a complaint with a federal or state enforcement or administrative agency that discloses any information that the employee has reasonable cause to believe violates state or federal law or a violation or noncompliance with a local, state, or federal rule or regulation.
- Participating in or cooperating in good faith with a local, federal or state enforcement agency that is conducting an investigation in to alleged unlawful activity.
- Testifying in good faith and with reasonable cause as a party, witness, or accused regarding alleged unlawful activity.
- Associating with another covered individual who is engaged in any of the protected activities enumerated here.
- Making or filing in good faith and with reasonable cause an internal complaint with the **[Agency]** regarding alleged unlawful activity.
- Providing informal notice to the **[Agency]** regarding alleged unlawful activity.
- Calling a governmental agency's "Whistleblower hotline" in good faith.

- Filing a written complaint under penalty of perjury that the **[Agency]** has engaged in gross mismanagement, a significant waste of public funds, or a substantial and specific danger to public health or safety. (Labor Code §§ 53296(c) & 53297(d).)
- Refusing to participate in any activity that the employee reasonably believes would result in a violation of state or federal law, or a violation or noncompliance with a local, state, or federal rule or regulation. (Labor Code § 1102.5(c).)

(b) "Adverse action" may include, but is not limited to, any of the following:

- Real or implied threats of intimidation to attempt or prevent an individual from reporting alleged wrongdoing or because of actual or potential protected activity.
- Refusing to hire an individual because of actual or potential protected activity.
- Denying promotion to an individual because of actual or potential protected activity.
- Taking any form of disciplinary action because of actual or potential protected activity.
- Extending a probationary period because of actual or potential protected activity.
- Altering work schedules or work assignments because of actual or potential protected activity.
- Condoning hostility and criticism of co-workers and third parties because of actual or protected activity.
- Spreading rumors about a person because of that person's actual or perceived protected activity.
- Shunning or unreasonably avoiding a person because of that person's actual or perceived protected activity.

Commentary

*Labor Code §1102.5, a whistleblower statute, protects not only employees who report a violation of state or federal law, or a violation or noncompliance with a local, state, or federal rule or regulation, but also employees that the employer **believes** will make such a complaint.*

208.4 Complaint Procedure

An applicant, employee, or **[seasonal/ temporary/ extra help employee]** who feels he or she has been retaliated against in violation of this Policy should immediately report the conduct according to the complaint procedure in the **[Agency's]** Policy Against Discrimination, Harassment or Retaliation so that the complaint can be resolved fairly and quickly. Supervisors and Managers have the same responsibilities as defined in the Policy Against Discrimination, Harassment or Retaliation.

Commentary

Why Have a Whistleblower Protection Policy? *Labor Code section 1102.5 and Government Code sections 53296-53299 prohibit public employers from retaliating against actual or perceived whistleblowers. Moreover, several state and federal laws, such as the Patient Protection and Affordable Care Act, and the California Family Sick Leave law, prohibit retaliation against employees when employees use the benefits these law provide or protest what they perceive to be violations of those laws. (29 USC § 218C; Labor Code § 234.)*

Be Open and Transparent*: This Policy is designed to provide the agency with the opportunity to promptly address and remedy retaliation against actual or perceived whistleblowers. Be as open and transparent as possible in response to complaints of whistleblowing. The goal is always to comply with the law, and promptly correct any failures to do so. History shows that the cover up is always worse than the original failure of compliance.*

302 Classification Plan

302.1 Classification Plan

The **[Personnel Officer]** shall ascertain and record the duties and responsibilities of all positions and, after consulting with affected department heads, shall recommend a classification plan, including job descriptions, for such positions. The plan and any revisions thereof shall become effective upon approval of the **[Agency's Board or City Council, or City/ General Manager]**.

Following the approval of the classification plan, the **[Personnel Officer]** shall allocate every position to one of the classifications established by the plan.

When a new position is created, such position may not be filled, until the classification plan has been amended to provide for the new position.

302.2 Reclassification

The **[Personnel Officer]** may initiate a job audit to determine whether the duties of a position have changed to such an extent that they necessitate reclassification of the position from the existing classification to a more appropriate classification. Upon completion of the job audit, the **[Personnel Officer]** shall make a recommendation regarding reclassification to the **[Agency's Board or City Council or City/General Manager]**.

Commentary

This Policy provides an orderly process for an agency to add or revise classifications and job descriptions. By requiring the Personnel Officer or Human Resources Department to be in charge of the creation and updating of the classification plan, the agency centralizes this function with the agency's expert and promotes agency-wide consistency and fairness. The agency's governing body or manager is required to approve new positions under the Policy to ensure that each new position is budgeted and the procedure has been followed.

402 Recruitment, Selection and Appointment Policy

402.1 Job Announcement

The **[Personnel Officer]** will prepare a job announcement to announce a proposed recruitment. The announcement may be posted on the **[Agency]**'s website and other locations the **[Personnel Officer]** deems appropriate, depending upon whether the recruitment is open to the public or current employees only. The announcement will include:

- The title and pay for the position;
- The nature of the work to be performed and essential job duties of the position;
- The minimum qualifications, including whether the job is a promotional position;
- A statement of the employment status of the position – for cause or at-will;
- The last date that the **[Personnel Officer]** will accept applications, if any;
- The time, place, and type of the examination, if known, and if a medical examination, and/or a drug screen will be required following a conditional offer of employment; and
- Such other information as determined in the discretion of the **[Personnel Officer].**

Commentary

> ***Pre-employment Drug Testing:*** *As a general matter, pre-employment testing of job applicants for illegal drug use is permitted only if: 1) all applicants for a position are required to test; 2) the employer can show a "special need" to justify a test that is not based upon A desire to have a drug-free workplace is not sufficient to justify a pre-employment drug test. (*Loder v. City of Glendale *(1997) 14 Cal.4th 846, 881-882 [59 Cal.Rptr.2d 696, 717-718], cert. den. 522 U.S.807 [118 S.Ct. 44].) A "special need" will likely exist for safety-sensitive positions and positions that supervise children. (*Lanier v. City of Woodburn *(9th Cir. 2008) 518 F.3d 1147.) The term "special need" has not been specifically defined by case law and agencies that are interested in conducting pre-employment drug tests should consider, on a case-by-case basis, whether a pre-employment drug test is appropriate for any particular classification.*

402.2 Application Forms

Job applications shall require information describing an individual's training, experience, and other pertinent information as deemed necessary to assess qualifications for the job. Applicants may be required to provide supplementary information, including but not limited to: answers to job-related questions; resume; licenses; certifications; diplomas; letters of recommendation; and references. All applications must be completed in full and signed, physically or electronically,

by the person applying. The **[Personnel Officer]** will not process any application which is not fully completed and signed. Should an applicant be appointed to a position, the supplemental information shall become a part of the individual's permanent employment records.

Commentary

Application Forms Cannot Request Conviction History: *Since July 1, 2014, a state or local agency shall not require an applicant for employment in most non-safety positions to disclose, orally or in writing, information concerning his or her conviction history until the agency has determined that he or she meets the minimum employment qualifications for the position. (Labor Code § 432.9(a).) This does not apply to those positions for which the agency is required by law to conduct a criminal history background check (e.g., peace officers) or to positions within a criminal justice agency. (Labor Code § 423.9(b).)*

Effective January 1, 2017, employers are expressly prohibited from inquiring into or using as a factor in determining a condition of employment, a job applicant's juvenile offense history. (Labor Code § 432.7) Limited exceptions to this law apply to health facilities. In addition, this law does not apply to persons seeking employment or employed as peace officers or in other specified criminal justice agencies.

Work Authorization: *Effective January 1, 2017, employers may not request from applicants any work authorization documents other than those documents that may or must be requested under federal law. (Labor Code § 1019.1)*

Salary History: *Effective January 1, 2018, employers are prohibited from attempting to obtain information regarding a job applicant's private sector salary history, from considering that salary history in determining whether to offer employment to an applicant, or what salary to offer an applicant. (Labor Code § 432.3.) In addition, employers, "upon reasonable request," must provide the pay scale of a position to an applicant.*

402.3 Disqualification of Applications

The **[Personnel Officer]** may reject any application which: is not properly completed or incomplete; received after the application deadline; or indicates that the applicant does not meet the minimum qualifications for the position. Whenever an application is rejected, notice of such rejection shall be mailed or emailed to the applicant.

402.3.1 Criminal Conviction Check

After the **[Agency]** makes a conditional offer of employment, the **[Personnel Officer]** may then request information about criminal convictions, except for misdemeanor marijuana-related convictions that are over two years old, or convictions that have been judicially sealed, eradicated, or expunged. (Labor Code §§ 432.7-432.8.) Unless required by law, the **[Agency]** will not deny employment to any applicant solely because he or she has been convicted of a crime. The **[Agency]** may, however, consider the nature, date and circumstances of the offense, evidence of rehabilitation, as well as whether the offense is relevant to the duties of the position. This Policy does not apply to applicants for public safety jobs.

Commentary

Case-by-Case Analysis of Convictions*: Effective January 1, 2018, employers are prohibited from requesting or considering conviction history until after the applicant has received a conditional offer of employment. (Government Code § 12952(a)(2).). Even then, the agency cannot ask about arrests not resulting in convictions (Labor Code § 432.7), judicially sealed or expunged convictions, or about misdemeanor marijuana convictions over two years old. (Labor Code §§ 432.7- 432.8.) Moreover, an agency cannot automatically disqualify any non-safety applicant because of a criminal conviction, but must review: evidence of rehabilitation; the nature and seriousness of the crime; the age of the applicant at the time of the conviction; the time elapsed since the conviction; and whether the conviction is related to the duties required of the employment sought. (2 Cal.Code Regs § 11017(d).)*

402.4 Employment Examinations

(a) The **[Personnel Officer]** will determine the manner and methods of administering employment examinations. Examinations may consist of: written tests; oral tests; performance tests; evaluations of prior training and performance, experience and/or education; interviews; working style assessments; practical exercises; file review; or any combination thereof. The content of all examinations will be job-related and designed to test knowledge, skills or abilities that help predict successful completion of job duties.

(b) The content of all examinations will be kept confidential prior to the administration of the examination. All applicants who are invited to the examination will be notified of the nature of the examination.

(c) An applicant with a disability may request accommodation in an examination process. Following receipt of a request for accommodation, the **[Personnel Officer]** may require additional information, such as reasonable documentation of the existence of a disability. (2 Cal.Code Regs § 11069(c)(2).)

Commentary

An applicant, who provides medical documentation that he or she has a disability, is entitled to request a reasonable accommodation for the examination process, if needed. (2 Cal.Code Regs § 11069(c)(2).) See *the California Fair Employment & Housing Regulations for a listing of testing condition accommodations, e.g., accessible testing sites, use of Braille, interpreters, additional time, alternate tests or individualized assessments. (2 Cal.Code Regs. § 11072(b)(5).)*

(d) Failure in one part of the examination, or the failure to meet established standards described in the job announcement, may be grounds for declaring such applicant as failing in the entire examination or as disqualified for subsequent parts of an examination. Each applicant will be notified by mail whether he or she will continue in the examination process.

(e) Applicants who meet the minimum qualifications and pass all examinations may be subject to a background and/or reference check.

Commentary

Using a Vendor to Complete a Background-Reference Check: *If the agency uses a vendor to complete a background check, then the agency must comply with the state and federal fair credit reporting laws (e.g., provide the applicant a disclosure that identifies the vendor, the applicant's option to receive the background investigation report; and the applicant's right to dispute the accuracy or completeness of the report.) (*See *Civil Code §§ §§ 1785.20.5, 1786.10, 1786.16.)*

402.5 Eligibility Lists

(a) After completion of an open or promotional examination for a classification, the **[Personnel Officer]** will prepare an eligibility list consisting of the names of candidates who passed the examination. Eligibility lists shall become effective upon the certification by the **[Personnel Officer]**.

(b) A person appearing on an eligible list will be mailed or emailed notice of his or her placement on the list.

(c) A person placed on an eligibility list shall be removed from the list if he or she so requests in writing or fails to respond to notification of an opening within five days after notification. It is the responsibility of the eligible person to keep the **[Personnel Officer]** informed of his/her current physical or email address, or phone number.

402.6 Appointments

(a) The **[Personnel Officer]** will make all appointments except for those classifications that report to the governing body. The **[Personnel Officer]** has discretion to decide in what manner a vacancy shall be filled. Vacancies may be filled by reinstatement, promotion, transfer, demotion, appointment of temporary / seasonal employees, or from an appropriate eligibility list if available. No specific list shall have priority over other lists. The **[Agency's Board or Council]** will make appointments for those classifications that report to it.

(b) When a position is to be filled from a promotional or open eligibility list, the **[Personnel Officer]** may choose from the specified list one of the top three candidates on the eligibility list. If no person among the top three candidates indicates a willingness to accept the appointment, the **[Personnel Officer]** may make the appointment from among the remaining names on the eligibility list, may request a new examination and establish a new eligibility list, or may fill the position by any other method authorized by these Policies.

Commentary

The eligibility list and appointment policies set forth above give the agency maximum flexibility to make appointments – from a list or from another source. Eligibility lists have no set duration to allow the agency to freshen the candidate pool as desired.

(c) Appointment to certain positions may be made contingent upon the applicant/employee passing a drug / alcohol test, and/or a job-related medical and/or psychological examination. Such examination shall only be required after a conditional offer of employment has been made. (*See* Policy 206, Reasonable Accommodation and Interactive Process; and Policy 1208, Prohibitions on Drugs and Alcohol in the Workplace.)

Commentary

Best Practice is to Conduct a Pre-Employment Drug Test after a Conditional Offer of Employment: *The above Policy indicates that a pre-employment drug test will occur after a conditional offer of employment. While a drug test is not considered a medical examination, testing an applicant's blood or urine for any other reason would constitute a medical examination and would likely be considered unlawful before a conditional offer. (*Leonel v. American Airlines, Inc. *(9th Cir. 2005) 400 F.3d 702, 708-709.) As a result, the best practice is to conduct pre-employment drug testing after a conditional offer of employment.* See *Policy 206, Reasonable Accommodation and Interactive Process, for the Policy regarding conditional offers of employment.*

(d) The person accepting appointment shall report to the **[Personnel Officer]** or designee on the date designated by the **[Personnel Officer]**. Otherwise, the applicant shall be deemed to have declined the appointment.

402.6.1 Probationary Appointment

(a) At-Will Status: The probationary period is part of the examination process and is used to determine whether work performance or work-related behavior meets the required standards of the position. A probationary employee may be rejected at any time during the probationary period with or without cause or reason, without notice or appeal or grievance, and without any rights set forth under Policy 1002, Causes for Discipline and Procedures. The probationary employee will be notified prior to the expiration of the probationary period that he or she has been rejected from probation.

(b) Length of Probation: Unless otherwise specified by memorandum of understanding or these Policies, the probationary period is **[12 months, 2080 hours]** of actual and continuous service. The probationary period is automatically extended by the length of any absence of one work week or more. The probationary period can also be extended by the Agency at the discretion of the City Manager or his/her designee.

402.6.2 Probationary Period for Promotional Appointments

(a) At-Will Status: A promotional probationary employee may be rejected at any time during the promotional probationary period with or without cause or reason, without notice or appeal or grievance, and without any rights described in Policy 1002, Causes for Discipline and Procedures. If the employee fails to satisfactorily complete the probationary period in the promotional position, the employee may return to the position held prior to promotion at the range and step held prior to promotion, if there is a vacancy in the prior position, unless he or she is terminated for cause.

(b) Length of Probation: On accepting a promotion, an employee serves a new probationary period of **[six months]** of actual and continuous service. The probationary period is automatically extended by the length of any absence of a week or more.

Commentary

Your agency can set probationary periods for original appointments and for promotions for longer periods of time than the one year and six month periods listed in the Policies above. Some agencies use an 18-month probation for initial appointment and a one year probation for promotional appointments. The procedures for rejection of a probationary employee are provided in Policy 902, Resignation, Job Abandonment, Layoff & Separation.

502 Employment of Relatives, Spouses, Domestic Partners

502.1 Policy

The [Agency] regulates the employment and placement of relatives, spouses, and domestic partners so as to avoid conflicts of interest and to promote safety, security, supervision, and morale.

502.2 Definitions

(a) "Relative" means child, step-child, parent, grandparent, grandchild, brother, sister, half-brother, half-sister, aunt, uncle, niece, nephew, or in-laws of those enumerated by marriage or domestic partnership.

(b) "Spouse" means one of two persons to a marriage, or two people who are registered domestic partners, as those terms are defined by California law. (Fam. Code § 297 & 300.)

(c) "Supervisory relationship" means one in which one employee exercises the right or responsibility to control, direct, reward, or discipline another by virtue of the duties and responsibilities assigned to his or her **[Agency]** appointment.

502.3 Employment of Relatives

The **[Agency]** will not appoint, promote or transfer a person to a position within the same department, division, or facility in which the person's relative already holds a position, if any of the following would result:

- A direct or indirect supervisory relationship between the relatives;
- The two employees having job duties which require performance of shared duties on the same or related work assignment;
- Both employees having the same supervisor; or
- A potential for creating an adverse impact on supervision, safety, security, morale or efficiency.

502.4 Spouses or Domestic Partners

The **[Agency]** will not appoint, promote, or transfer a person, to the same department, division, or facility in which the person's spouse or registered domestic partner already holds a position, if such employment would result in any of the following:

- One spouse or domestic partner being under the direct supervision of the other spouse or domestic partner; or
- Potential conflicts of interest or hazards for married persons or those in domestic partnership which are greater than for those who are not married or in domestic partnerships.

502.5 Marriage or Domestic Partnership After Employment

(a) **Transfer:** If two **[Agency]** employees who work in the same department later become spouses or domestic partners, the **[Personnel Officer]** has discretion to transfer one of the employees to a similar position in another department. Although the wishes of the two employees will considered, the **[Personnel Officer]** retains sole discretion to determine which employee will be transferred based upon **[Agency]** needs for supervision, safety, security or morale. Any such transfer that results in a salary reduction is not disciplinary and is not subject to any grievance or appeal, or pre- or post-disciplinary appeal due process.

(b) **Separation:** If continuing employment of both employees, who work in the same department and who later become spouses or domestic partners, cannot be accommodated in a manner the **[Personnel Officer]** finds to be consistent with the **[Agency]**'s interest in the promotion of supervision, safety, security, or morale, then the **[Personnel Officer]** retains sole discretion to separate one employee from **[Agency]** employment. Absent the resignation of one employee, the less senior employee will be separated. Any such separation is not considered to be disciplinary and is not subject to any grievance or appeal, or pre- or post-disciplinary appeal due process.

Commentary

Greater Restrictions Are Permissible for Family Members who are Not Spouses or Domestic Partners: *California's anti-discrimination law prevents discrimination on the basis of marital or domestic partner status. (Gov. Code § 12940(a)(3)(A); 2 Cal Code Regs § 11057(a) & (b).) There is no such prohibition on discrimination, however, as to other family relationships. As a result, an agency can place tougher hiring and employment placement restrictions on non-spouse or non-domestic partner relationships, than are permissible for spouse or domestic partner relationships. An agency must be able to justify hiring or placement decisions regarding spouses or domestic partners by showing that the placement of the spouses or domestic partners together or under the same supervision would disrupt supervision, safety, security, or morale. For example, placing a married dispatcher with his or her police officer spouse or domestic partner on the same shift would potentially compromise the safety of all officers on the shift.*

602 Work Schedules and Attendance

602.1 Work Schedules

Work schedules are determined at the discretion of the department head and are subject to change with or without notice, according to the needs of the department or **[Agency]**. An overtime-eligible employee shall be in attendance and at work during the hours specified by the supervisor.

602.2 Meal Period

A **[one hour]** non-compensated meal period will be provided to all full-time overtime-eligible employees who work at least an eight hour work day. A 30 minute non-compensated meal period will be provided to all overtime-eligible full-time employees who work more than five hours, but less than eight hours during the work day. Overtime-eligible employees are responsible for taking their meal period at a time designated by the supervisor.

Commentary

Your agency can shorten the meal period for full-time employees to no less than 30 minutes, if desired. The FLSA allows a meal period to be unpaid if the meal time is at least 30 minutes and if the employee is completely relieved from work/duty. (29 CFR § 785.19(a).) There is no requirement that the employee be able to leave the workplace for the meal period. (29 CFR § 785.19(b).) Note that the California wage orders regarding meal periods do not apply to public employers. (Wage Order 4, at § 1(B).)

602.3 Rest Period

A 15-minute compensated rest period will be provided to all overtime-eligible employees for each four-hour period of service. The rest period shall be taken at a time designated by the employee's supervisor. Rest periods may not be combined to shorten the workday or to extend the meal period.

Commentary

The FLSA requires that employees be paid for break times of up to 20 minutes. (29 CFR § 785.18.) Note that the California wage orders regarding rest periods do not apply to public employers. (Wage Order 4, at § 1(B).)

602.4 Lactation Break Time

An overtime-eligible employee who wishes to express breast milk for her infant child during her scheduled work hours will receive additional unpaid time beyond the 15-minute compensated rest period. (Labor Code § 1030; 29 USC § 207(r).) Those desiring to take a lactation break must notify a supervisor prior to taking such a break. Breaks may be reasonably delayed if they would seriously disrupt operations. (Labor Code § 1032.) Once a lactation break has been approved, the break should not be interrupted except for emergency or exigent circumstances.

Commentary

Lactation Accommodation: State law requires every employer, and federal laws require employers of 50 or more to provide lactation accommodation to overtime-eligible employees. (29 USC § 207(r); Labor Code §§ 1030 and following.) Note too that California's anti-discrimination in employment law defines discrimination on the basis of sex to include discrimination on the basis of breast feeding. (Gov. Code § 12926(r)(1)(C).) As a result, overtime exempt employees should also be allowed to use work time for expressing breast milk.

602.4.1 Private Location

The **[Agency]** will make reasonable efforts to accommodate employees by providing an appropriate location to express milk in private. The **[Agency]** will attempt to find a location in close proximity to the employee's work area, and the location will be other than a toilet stall. (Labor Code § 1031; 29 USC § 207(r).) Employees occupying such private areas shall either secure the door or otherwise make it clear to others through signage that the area is occupied and should not be disturbed. All other employees should avoid interrupting an employee during an authorized break under this section, except to announce an emergency or other urgent circumstance. Authorized lactation breaks for employees assigned to the field may be taken at the nearest appropriate private area.

602.4.2 Storage of Expressed Milk

Any employee storing expressed milk in any authorized refrigerated area within the **[Agency]** shall clearly label it as such. No expressed milk shall be stored at the **[Agency]** beyond the employee's work day/ shift.

Commentary

Only the portion of the above Policy regarding storage of expressed milk is not required by law, but is instead a best practice.

602.5 Advance Request for Permission to Deviate from Regular Work Hours

An overtime-eligible employee is required to seek advance permission from his or her supervisor for any foreseeable absence or deviation from regular working, break, and meal times.

602.6 Notification of Unforeseen Late Arrival or Absence

An overtime-eligible employee who is unexpectedly unable to report for work as scheduled must notify his or her immediate supervisor no later than the beginning of the employee's scheduled work time and report the expected time of arrival or absence. If the immediate supervisor is not available, the employee must notify the department head.

602.7 Unauthorized Absence is Prohibited

Arriving late to work or leaving early in connection with scheduled work times, breaks, or meal periods is prohibited, absent authorization. An overtime-eligible employee who fails to timely notify the supervisor of any absences as required by this Policy, or who is not present and ready to work during all scheduled work times will be deemed to have an unauthorized tardy or absence and will not receive compensation for the period of absence.

602.8 Excessive Tardiness/Absenteeism and Abuse of Leave

Excessive tardiness occurs when an overtime-eligible employee who, without authorization, is late to work or late to return from breaks more than three times during any 30-day period. Excessive absenteeism occurs when the number of unapproved absences for reasons that are not permitted by state or federal law, exceeds **[three days in any three-month period]**. Excessive tardiness or absenteeism may be grounds for discipline, up to and including termination.

Abuse of leave is a claim of entitlement to leave when the employee does not meet the requirements for taking the leave, and may be grounds for discipline, up to and including termination. Should the **[Agency]** suspect that there is an abuse of leave by an employee, the **[Agency]** may require that the employee submit a physician's certificate to support the absence.

Commentary

> ***Excessive Absenteeism/ Tardiness****: Excessive absenteeism and tardiness are the two most prevalent disciplinary issues of employees in the U.S. workforce. The Policies above provide one definition of what constitutes "excessive." Note that a leave that is permitted by state or federal law is "protected" and cannot be counted toward any absence control policy. All of the leaves described in these policies are protected, with the exception of: any sick leave that*

the employer provides beyond the protected leave under the 2014 Healthy Workplaces law and Kin Care laws (i.e. beyond 3 days / 24 hour limit per year; and one-half of annual accrued sick leave for diagnosis, care or treatment of, or preventative care for, an employee or an employee's family member); administrative leave; vacation leave; and holiday leave.

604 Work Week, Overtime and Compensatory Time Off

604.1 Work Week

The work week begins at 12:00 a.m. on Saturday and ends at 11:59 p.m. on Friday, except for employees on a 9/80 work schedule, or as otherwise designated in an applicable MOU, or by a Fair Labor Standards Act (FLSA) 29 USC § 207(k) work period for fire and police employees.

Commentary

The FLSA requires that the employer designate a work week or work period starting day and time for every employee – both overtime-exempt and overtime-eligible. (29 CFR § 516.2(5) & 516.3.) The work week or work period designation can be stated in these Policies, or as superseded by a MOU or a notation in the payroll records. (29 CFR § 516.2(5) and 516.3.)

604.1.1 Work Week for 9/80 Work Schedule

Employees working a 9/80 work schedule will have a regular day off every other week as determined by the **[Agency]**. For employees working a 9/80 work schedule, each employee's designated work week shall begin exactly four hours after the start of his/her eight hour shift on the day of the week that corresponds to the employee's alternating regular day off.

Commentary

If your agency allows employees to use a 9/80 work schedule, you must require employees to strictly adhere to that schedule to avoid incurring unexpected overtime for overtime-eligible employees. The FLSA requires employers to establish a seven-day work week with a consistent starting day and time, which cannot be changed to avoid overtime. FLSA overtime accrues for non-safety employees after 40 hours of work in the designated work week. (29 USC § 207(a).) In order to limit each work week of a two-week 9/80 schedule to 40 hours, your agency must: 1) prohibit employees from working on, or changing their regular day off; and 2) designate the work week to begin exactly four hours after the start of the eight-hour work day.

604.1.2 Work Period for Fire and Police

The work period for the **[Agency's]** sworn police employees is that regularly recurring **[7-28-day]** period that began on **[Date 7(k) exemption work period adopted].** The work period for the **[Agency's]** firefighting personnel is that regular recurring **[7-28-day]** period that began on **[Date 7(k) exemption work period adopted].**

Commentary

A public employer can claim a partial overtime exemption for sworn police officers and firefighters. The Section 207(k) partial overtime exemption (also referred to as the "7(k) exemption") allows a police officer to work up to 171 hours in 28 days, and a fire employee to work up to 212 hours in 28 days, before the agency incurs FLSA overtime. (29 USC § 207(k).) In order to claim the partial overtime exemption, it is critical that your agency designate a starting date (including month, day and year) and the length (from 7-28 days) for the work period. In this way, your agency can track each work period working forward from the starting date of the first work period. Note that some work period lengths are better suited to work/ shift schedules that others, so a careful analysis is required to select the most cost-effective work period for your agency. (See *29 CFR § 553.230(c) for the maximum hours that can be worked for each work period.)*

604.2 Overtime

Overtime is all hours an overtime-eligible employee actually works over 40 hours in his or her designated work week. Only actual hours worked will be counted toward the 40-hour threshold for purposes of calculating Fair Labor Standards Act (FLSA) overtime pay; paid leave will not be counted. Overtime-eligible employees who are directed to work overtime must do so.

Commentary

This Policy follows the FLSA to the extent that only hours worked, and not paid leave hours, such as vacation or sick time, count toward overtime or Compensatory Time Off. (29 USC § 207(a).) Although this is the FLSA threshold for calculation of overtime hours, some agencies do apply non-working hours (such as sick time) to count as hours worked for overtime purposes through an MOU or policy.

604.2.1 No Remote Access for Overtime-Eligible Employees

Unless the **[Personnel Officer]** specifies otherwise in writing, overtime-eligible employees may not have remote access to **[Agency]** equipment, resources, or email.

Commentary

The above Policy allows the agency to avoid unmonitored "off the clock" work and excessive overtime. Employees who receive authorization to have remote access to agency equipment, resources, or email should be instructed, in writing, to record and regularly submit to the employer all time worked and to limit the amount of remote monitoring per the agency's direction.

604.2.2 Prior Approval Required for Overtime

Overtime-eligible employees are not permitted to work overtime except as directed and authorized by their supervisor, or in case of emergency, as determined by the agency. Working overtime without prior authorization or approval is grounds for discipline. In emergency situations that necessitate working overtime, the employee must notify a supervisor as soon as possible, and in no event later than the end of that day upon which the emergency occurred. If the supervisor denies the request to work overtime, the employee must obey the supervisor's directive and cease working. Failure to follow these overtime approval procedures may subject the employee to disciplinary action, up to and including termination, for violating the overtime approval procedures.

604.3 Accurate Time Reporting

All employees must accurately report all work time to the nearest five minutes.

Commentary

The FLSA regulations allow rounding of work time to the nearest 5-6 minutes as long as it does not detriment the employee over time. (29 CFR § 785.48(b).)

604.4 No Volunteering of Work Time

All time spent for the benefit of the **[Agency]** must be reported as hours worked on time records so that the employee is paid for all work. Overtime-eligible employees may not "volunteer" work time to perform duties that are the same or similar as their stated or regular job duties. Employees have no authorization to work without compensation. No supervisor has authority to request overtime-eligible employees to volunteer work time.

Commentary

Volunteered time or "off the clock" work is the subject of many FLSA collective action lawsuits that cost employers millions of dollars. Ensure that your agency is not one of those by forbidding employees from working off the clock and by forbidding supervisors from asking subordinates to perform off the clock work.

604.5 Compensatory Time Off

An overtime-eligible employee may opt to accrue compensatory time-off (CTO) in lieu of cash payment for overtime worked if his or her supervisor agrees prior to overtime work being performed.

(a) **Accrual Rate**: CTO accrues at the rate of 1.5 hours for each hour, or fraction thereof, worked after 40 hours of actual work within the employee's designated work week. Time in paid leave status does not count toward CTO. CTO cannot be accumulated in excess of **[80]** hours at any given time.

Commentary

Understanding or MOU to Allow CTO: *The FLSA allows a public employer to substitute CTO for cash overtime if there is an agreement in a MOU, or in the absence of a MOU, if there is an understanding between the employer and employee before the performance of work. (29 USC § 207(o)(2)(A)(ii).) As a result, requiring employees to acknowledge receipt and understanding of these Policies may constitute the necessary understanding to use CTO in lieu of cash overtime in the absence of a MOU. (*See *Policy 102.4, Employee Acceptance of Policies and Revisions to Policies.)*

CTO Accrual Limit: *While the FLSA allows CTO to accumulate to up to 480 hours for safety, emergency response and seasonal employees, and 240 hours for other employees, this Policy only allows CTO to accumulate up to 80 hours in order to contain the value of CTO. Your agency is free to increase the 80 hour cap stated above up to the FLSA maximums. (29 USC § 207(o)(3)(A).)*

(b) **Employee Request to Use CTO:** The **[Agency]** will grant an employee's request to use accumulated CTO provided that: 1) the department can accommodate the use of CTO on the day requested without undue disruption to department operations; and 2) the employee makes the request in writing to the supervisor no later than five days prior to the date requested. If the employee does not provide five days' notice, or if the department cannot accommodate the time off without undue disruption, the **[Agency]** will provide the employee the opportunity to cash out the amount of CTO requested at the end of the current pay period.

Commentary

This Policy relies on the Ninth Circuit Court of Appeals' interpretation of the FLSA in Mortensen v. County of Sacramento *(9th Cir. 2004) 368 F.3d 1082. In* Mortensen*, the Court decided that an employer does not need to allow an employee to use accrued CTO on the specific day the employee requests, but can instead honor the request by providing alternative dates within a reasonable time period after the request to use compensatory time is made. Thus, once an employee requests the use of CTO on a particular date, the employer has a reasonable period of time on or after the date the employee requests to schedule the*

time off. Other circuit courts of appeal, interpret the FLSA CTO regulations at 29 CFR § 553.25 to require the employer to give CTO on the date that the employee requests, unless the employer can prove that CTO use on the date requested would unduly disrupt agency operations. California public agencies can follow the Mortensen *interpretation until the U.S. Supreme Court decides otherwise.*

(c) **[Agency] Cash Out:** The **[Agency]** reserves the right to cash out accumulated CTO at any time.

Commentary

*The U.S. Supreme Court has decided that the employer retains the right to cash out CTO at any time. (*Christensen v. Harris County *(2000) 529 US 576, 120 S.Ct. 1655.) If your agency does not currently force employees to cash out CTO, changing that practice would require meeting and conferring with represented parties.*

(d) **Value of CTO Cash Out:** During employment, CTO is cashed out at the employee's current FLSA regular rate of pay (including all FLSA-applicable salary differentials and special pays). Employees separating from **[Agency]** service shall be compensated for all accrued, unused compensatory hours at their current FLSA regular rate of pay, or their average FLSA regular rate for the prior three years, whichever is higher. (29 USC § 207(o)(3)(B) & (4); 29 CFR § 553.27.)

702 Performance Evaluations

702.1 Performance Evaluations

A non-probationary employee's supervisor will prepare and sign a performance evaluation on an **[Agency]** form for each performance evaluation period. The **[Department Head]** will review and approve all performance evaluations of subordinates in his or her department. The **[City Manager, General Manager, Administrator]** will review and approve all performance evaluations of department heads or any other employees under his or her direct supervision. Additional performance evaluations may be prepared at any time the **[Personnel Officer or Department Head]** deems necessary.

702.2 Probationary Employee Performance Evaluations

On or about the completion of six months of a probationary period, and again at any point prior to separation or the successful completion of the probationary period, the probationary employee's supervisor will prepare and sign a performance evaluation. The purpose of the probationary performance evaluation is to chart the probationer's progress toward meeting the standards of his or her position.

702.3 Performance Evaluation Meeting

The supervisor will meet with the employee to discuss the evaluation. The employee shall sign the evaluation to acknowledge its contents and that he or she has met with his or her supervisor to discuss the evaluation. The employee's signature shall not mean that he or she endorses the contents of the evaluation.

702.4 No Appeal Right

An employee does not have the right to appeal or submit a grievance regarding any matter relating to the content of a performance evaluation. Instead, the employee may comment on the evaluation in a written statement which will then be placed with the evaluation in the employee's personnel file. The written statement must be submitted within 10 days after the employee receives the evaluation.

Commentary

Frequency of Evaluations: *This Policy calls for two probationary performance evaluations, an annual evaluation for non-probationary employees, and more frequent evaluations whenever the department head or personnel officer deems necessary (e.g., during a performance improvement plan). Although probationary evaluations are not required by law, they are a best practice because they can be helpful to prove job-related and non-discriminatory reasons for releasing a probationer.*

Performance Evaluation Meeting: *Although not required by law, the performance evaluation meeting is a best practice to communicate job-related expectations and areas for improvement.*

No Appeal Right: *There is no formal appeal from any matter relating to the content of a performance evaluation; instead, the employee is limited to providing a written statement to comment on the evaluation. The statement should be reviewed for any express or implied complaint of discrimination, harassment, or retaliation, acted upon if necessary, and must be kept with the evaluation in the personnel file. It is up the agency to determine whether employees will be allowed to submit a grievance over a performance evaluation, but many agencies exclude disputes over performance evaluations from the grievance procedure.*

802 Vacation Leave and Holidays

802.1 Vacation Leave

Eligible full-time and part-time employees, **[with the exception of temporary/ seasonal and extra help employees,]** earn vacation leave while in paid status until they reach the applicable vacation accrual cap. Employees accrue vacation time according to their full or part-time status and the number of consecutive years the employee has worked for the **[Agency]** as follows:

(a) Full-Time Employee Accrual Rate:

Consecutive Full Time Years of Service	Received Per Pay Period of Paid Status	Received per Year of Paid Status
Less than 5 years	3.08	80 hours
5 – 10 years	4.62	120 hours
10 or more years	6.15	160 hours

Commentary

The accrual rates set forth above are exemplars and your agency will likely have different accrual rates for employees.

(b) Part-Time Employee Accrue Pro-rated Vacation:

Part-time employees **[who are budgeted to work at least 20 hours per week]** earn vacation leave while in paid status in a pro-rated amount based upon the accrual applicable to full time employees. Once a part-time employee reaches the pro-rated accrual cap, they stop earning vacation.

Commentary

No Law Requires Vacation Leave: *California law does not require public agencies to provide employees with vacation leave. Your agency can decide whether to provide vacation at all, and to which categories of employees.*

"Use It or Lose It" Vacation Policies in Personnel Policies Are Illegal*: Unless your agency's employees are covered by an MOU, once an employee accrues vacation, that*

vacation cannot be forfeited. (Labor Code § 227.3.) Conversely, "use it or stop earning/ accruing" vacation policies like the above Policy are lawful.

802.2 Limitations on Vacation Leave Accrual

No employee may accrue more than the equivalent of **[two times]** the employee's annual vacation leave accrual rate, or for part-time employees, the equivalent of **[two times]** the pro-rated accrual rate. When an employee reaches the equivalent of **[two times]** the employee's annual vacation leave accrual rate, he/she shall cease earning vacation leave until his or her leave balance falls below the equivalent of **[two times]** the employee's annual vacation leave accrual rate. Vacation leave will not accrue during leaves of absence without pay unless required by law.

Commentary

*Your agency has discretion to set any specific "stop earning-accrual limit" to meet its needs. This Policy also prevents vacation from accruing during unpaid leave unless required by law, as is the case for some military leaves. (*See *Mil. & Vet. Code § 395.05; Mil. & Vet. Code § 395(d).)*

802.3 Scheduling of Vacation Leave

Vacation leave may not be used until it is earned. The employee and the department head will schedule the times when an employee may take vacation leave. The scheduling will be based on the employee's preference and the **[Agency's]** operational needs. An employee shall provide a minimum of one week's written advance notice, unless waived by the department head, when requesting vacation time off. The **[Agency]** may, at its discretion, require an employee to use accrued vacation.

Commentary

Your agency can address requirements for vacation scheduling that best meet the agency's needs. The Policy above requires written advance notice so as to curb excessive absenteeism.

802.4 Unused Vacation Leave Upon Separation

Any employee separating from the **[Agency]** who has accrued vacation leave shall be paid for all accrued vacation at his or her rate of pay at the time of separation.

Commentary

California law requires a cash out of accrued vacation pay at separation at the employee's "final rate," unless the employee is covered by a MOU that provides otherwise. (Labor Code § 227.3.)

802.5 Holidays

Full-time employees, except **[temporary/ seasonal and extra help employees]** receive the holidays listed below with pay. If New Year's Day, Independence Day, or December 25 falls on a Sunday, the Monday following shall be treated as the holiday. If any of those three holidays falls on a Saturday, the preceding work day shall be treated as the holiday. Part-time employees whose scheduled work time falls on a holiday will receive that holiday off with pay for the hours they were scheduled to work.

- New Year's Day
- Martin Luther King's Birthday
- President's Day
- Memorial Day
- Independence Day
- Labor Day
- Thanksgiving Day
- Day After Thanksgiving Day
- December 25

802.6 Effect of Holiday on Vacation Leave

If one or more holidays falls within a vacation leave that an eligible full time employee is taking, such holiday shall not be charged as vacation leave. **[Full time employees on a 9/80 work schedule, however, do not receive any holiday pay for a holiday that falls on the regular day off.]**

Commentary

This Policy prevents employees on a 9/80 work schedule from being paid for a holiday that falls on the regular day off. This is not required by law.

802.7 Floating Holidays

Full time employees who are entitled to holidays receive two floating holidays per calendar year that must be used during that year. Any time not used will be cashed out on the last pay period of the calendar year.

Commentary

No law requires your agency to provide floating holidays.

802.8 Pay for Holidays

Employees entitled to paid holidays or floating holidays shall be paid for the number of hours the employee was scheduled to work had it not been a holiday or floating holiday. An overtime-eligible employee who is required to work on a holiday will receive holiday pay and pay for the actual time worked on the holiday.

Commentary

No law requires your agency to pay a premium rate for work on holidays, but most agencies do.

804 Sick Leave

804.1 Purposes for Sick Leave

Sick leave is paid leave from work that can be used for the following purposes:

(a) diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or any of the following of the employee's family members: child of any age or dependency status; parent; parent-in-law; spouse; registered domestic partner; grandparent; grandchildren; or sibling (Labor Code §§ 233(b)(2); 245.5(c); 246.5(a)(1)); or

(b) for an employee who is a victim of domestic violence, sexual assault, or stalking to: i) obtain or attempt to obtain a temporary restraining order or other court assistance to help ensure the health safety or welfare of the employee or his or her child; or ii) obtain medical attention or psychological counseling; services from a shelter; program or crisis center; or participate in safety planning or other actions to increase safety. (Labor Code §§ 230(c); 233(b)(3)(A); 246.5(a)(2).)

Commentary

California Has Two Different Sick Leave Laws:

a. California's 2014 Healthy Workplaces, Healthy Families Act of 2014, also known as Senate Bill 1522, and amended on 7/13/2015 by Assembly Bill 304 (Labor Code §§ 245-249) is the first law in California (and only the second in the nation) that requires employers to provide paid sick leave. This 2014 Healthy Workplaces Law entitles any employee who has worked at least 30 days in 12 months with an employer in California to accrue sick leave. Because of that low eligibility bar, employees who have never received employer-provided sick leave before – such as temporary

employees, seasonal employees, or part time employees – are now entitled to earn sick leave at the rate of one hour of sick leave for every 30 hours worked (about 5.7 hours a month for full time work). In addition, the 2014 Healthy Workplaces Law expands the permissible purposes of sick leave. As stated above, employees can now use paid sick leave to attend to not only their own illness, but: 1) issues related to domestic violence: or 2) the illness of the family members listed in the Kin Care leave law, plus the following additional family members – siblings, parent in laws, grandchildren, and grandparents.

b. *California's 2001 Kin Care law (Labor Code §§ 233-234) requires those employers who already provide paid sick leave to expand the permissible use of that sick leave, so that employees can use up to one-half of accrued and available annual sick leave entitlement to attend to the illness of the following family members: child, parent, spouse, or registered domestic partner. (Labor Code § 233(a).) Effective January 1, 2016, the California Legislature made two changes to the Kin Care law to match the 2014 Healthy Workplaces Law. First, Kin Care leave can be used to attend to issues related to domestic violence. (Labor Code § 233(b)(30)(A).) Second, the list of Kin Care family members was expanded to match the list in the 2014 Healthy Workplaces Law. (Labor Code § 233(b)(2) (siblings, parent in laws, grandchildren, and grandparents)).*

This Policy Complies with Both of California's Sick Leave Laws: *The 2014 Healthy Workplaces Law provides that it is independent of any other rights employees have under other laws. (Labor Code § 245.) As a result, the Kin Care law will now apply to all employees who are entitled to sick leave under the 2014 Healthy Workplaces Law. This Policy is drafted to comply with both laws.*

Concept – Give Newly Eligible Employees the Letter of the 2014 Healthy Workplaces Law; Give Previously-Eligible Employees Existing Rights Plus Enhancements from the 2014 Law: *The concept for this Policy is to provide those who were not entitled to paid sick leave before the 2014 law – generally seasonal, temporary, or extra help employees -- to receive only the sick leave required by the 2014 law. Those who were receiving sick leave before the 2014 law, conversely, continue to receive the generally higher sick leave accruals that they have been receiving, but they now enjoy the expanded uses for sick leave under the 2014 law. Because this approach limits changes to those the law requires, the employer can generally narrow the scope of any necessary collective bargaining to the impacts of the changes imposed by the 2014 law.*

804.2 Terms of Sick Leave

(a) Accrual & Carryover for Different Categories of Employees:

1) Full time employees who are not **[seasonal/ temporary or extra help]** accrue **[eight hours]** of sick leave for each calendar month of paid status; part-time employees who are not **[seasonal/temporary or extra help]** accrue sick leave in an amount prorated to the lower number of hours they work each calendar month in paid status. Accrued sick leave carries over from year to year. No accrual limit applies.

2) A **[*seasonal/ temporary or extra help employee*]** who works 30 or more days within a year from the commencement of employment with the **[Agency]** accrues one hour of paid sick leave for every 30 hours worked. (Labor Code § 246(a).) Accrued and unused sick leave carries over to the following year of employment but a **[seasonal/ temporary or extra help employee]** stops earning sick leave once he or she has accrued 48 hours or 6 work days/ shifts, whichever is greater. (Labor Code § 246(i).)

Commentary

Lack of Clarity as to Annual Use and Accrual Caps: *The 2014 Healthy Workplaces Law allows the employer to limit the use of sick leave to "24 hours or three days in each year of employment" but does not define whether the three days is at an 8 hour rate or a 4, 10 or 12-hour a day rate. (Labor Code § 246(d).) In an August 7, 2015 opinion letter, the California Department of Industrial Relations, Division of Labor Standards Enforcement stated that this law provides a minimum standard for all employees – including those who work fewer than 8 hours in a day and those who work more. As a result, the opinion letter advises to provide "24 hours or three days of paid sick leave, whichever is more for an employee [original emphasis]."*

Similarly, the 2014 Healthy Workplaces Law allows the employer to cap sick leave accrual to "48 hours or 6 days," but does not explain how the three days is measured. (Labor Code § 246(i).) As a result, this Policy sets the sick leave use per year cap at "24 hours or 3 days of work, whichever is greater", and sets the sick leave accrual cap at "48 hours or 6 days, whichever is greater." In this way, the employer will apply the minimum standard referenced in the August 7, 2015 opinion letter and avoid incurring the penalties that can be imposed for violating this law. (Labor Code § 248.5.)

Credit Entire Accrual At Once, or Earn over the Year and Carry Over: *The 2014 Healthy Workplaces Law requires that the employer either: 1) provide the entire 24 hours or three days per year accrual at the beginning of each calendar year, year of employment or 12-month period; or 2) allow the accrued and unused sick leave to carry over to the year following the year it was earned. (Labor Code § 246(d).) Because most employers will want*

employees to earn sick leave each month rather than crediting it all at once at the beginning of the year, this Policy provides for carry over to the following year. If your agency credits the entire, annual sick leave amount at once, however, you can modify this Policy and eliminate the accrual rate and carry over to the following year. (Labor Code § 246(d).)

No Accrual Caps for Those Who Received Sick Leave Before the 2014 Law: *The 2014 Healthy Workplaces Law allows the employer to cap sick leave accrual at 48 hours, or 6 days. (Labor Code § 246(i).) The above Policy uses this accrual cap for the sick leave for newly-covered seasonal, temporary, or extra help employees, but sets no accrual cap for employees who received sick leave before the 2014 Healthy Workplaces Law. The different treatment between the two categories of employees is designed to retain the status quo for those employees who received sick leave before the 2014 law. If your agency had a cap for employees who received sick leave before the 2014 law, however, be sure to insert it here, or use the 48 hour/ 6-day cap, whichever is higher.*

Use the Employee Categories Your Agency Uses: *To customize this Policy, identify the categories of employees who did not receive sick leave in your agency before the 2014 law. This Policy lists in* ***bold*** *the terms "temporary, seasonal, or extra-help employee" to describe the categories of employees who did not receive sick leave prior to the 2014 law. Agencies should also change the accrual rate for full-time employees to match the accrual rate your agency provides, provided that the rate your agency uses is greater than the 5.7 hours a month for full time work that the 2014 Healthy Workplaces Law requires. This Policy lists an 8-hour a month accrual rate for full time employees because that rate is most common.*

(b) Sick Leave Use

An employee may use accrued sick leave, in a minimum increment of two hours, beginning on the 90th day after the first day of employment with the **[Agency]**, subject to the limits and request provisions in this Policy. (Labor Code § 246(c) & (j).)

Commentary

90-Day Waiting Time: *This 90-day waiting time is part of the 2014 Healthy Workplaces Law and is measured in calendar days. (Labor Code § 246(c).) The waiting period will not affect continuing employees who have always had sick leave under your agency's policies.*

Minimum Increment: *Employers may set a minimum increment for paid sick leave use that is less than the two hours listed in this Policy. This Policy uses the largest minimum increment -- two hours -- that the law allows (Labor Code § 246(j)) as a means to prevent some types of sick leave abuse. Because the 2014 Healthy Workplaces Law generally does not allow an employer to request verification of the need for leave, the larger the minimum*

increment that the employer uses, the less likely an employee is to use sick leave in very small increments or as means to cover tardiness to work or a late return to work from a break.

Rate of Pay for Sick Leave: *The 2014 Healthy Workplaces Law allows employers to calculate paid sick leave for FLSA overtime-eligible employees in either of the following ways: 1) dividing the employee's total wages, excluding overtime pay, by the total number of hours worked in the workweek in which the employee uses the sick time (Labor Code § 246(k)(1)); or 2) dividing the employee's total wages, excluding overtime pay, by the total number of hours worked in the prior 90 days of employment. (Labor Code § 246(k)(2).) Employers can calculate the value of paid sick leave for FLSA-exempt employees in the same manner as the employer calculates wages for other paid leaves. (Labor Code § 246(k)(3).)*

(c) Protected Sick Leave:

1) For full time employees who are not **[seasonal/temporary or extra help]**, one-half of the employee's accrued and available annual sick leave is protected and may be used for any of the purposes stated in this Policy. (Labor Code §§ 233(b)(2); 233(b)(3)(A); 246(d).)

2) For **[Seasonal / temporary or extra help employees]**, up to 24 hours, or three days, whichever is greater, of accrued and available sick leave each year is protected and may be used for any of the purposes stated in this Policy. (Labor Code § 246(d).) The year is measured beginning on July 1, 2015, or the employee's anniversary of hire date, whichever is later.

Commentary

Tracking Protected Sick Leaves*: Both the 2014 Healthy Workplaces Law and Kin Care Leave law protect the use of sick leave. This means that your agency cannot count the sick leave provided under these laws toward any excessive absence disciplinary policy. Half of the annual sick leave accrual is protected for employees who are not seasonal, temporary or extra help. All 24 hours or three days of the sick leave for seasonal, temporary or extra help employees is protected.*

Written Notice Each Payday of Available Leave: *The 2014 Healthy Workplace Law requires the employer to provide each employee with written notice of the amount of paid sick leave available with the pay check on each designated pay date. (Labor Code § 246(h).) While public employers are exempt from the requirement to provide the itemized wage statement referenced by Labor Code section 226 (*see *Labor Code § 226(i)), they are still required to provide a written notice that states the employee's leave balance each payday. (Labor Code § 246(h).) Failure to provide this written notice subjects the employer to stiff penalties, including liquidated damages to affected employees. (Labor Code § 248.5.)*

Leave Year: *The 2014 Healthy Workplaces Law says that the sick leave year is "each year of employment, calendar year, or 12-month period." (Labor Code § 246(d).) This policy allows the employer to use either the year starting July 1, 2015 when the law first became effective, or the employee's anniversary of hire date, whichever is later. In the alternative, your agency can use a different 12-month period to be consistent with the 12-month period your agency already uses for paid leaves.*

(d) Sick Leave Request:

To request to use sick leave if the need for leave is foreseeable, an employee must give the immediate supervisor reasonable advance written or oral notice. (Labor Code §§ 246(l); 246.5(a).) If the need for sick leave is not foreseeable, the employee shall provide written or oral notice of the need for the leave as soon as practicable. (Labor Code § 246(l).) If the employee is required to be absent on sick leave for more than one day, the employee must keep the immediate supervisor informed each day as to the date the employee expects to return to work and the purpose of the leave. Failure to request sick leave as required by this Policy without good reason, may result in the employee being treated as absent without leave.

Commentary

Supervisor Has No Veto Power: *The 2014 Healthy Workplaces Law requires only that the employee give advance notice if the sick leave is foreseeable; otherwise, the employee may provide notice as soon as is practicable. (Labor Code § 246(l).) The 2014 Healthy Workplaces Law allows the employee to provide either a verbal or written request for leave. (Labor Code § 246.5(a).) Moreover, the 2014 Healthy Workplaces Law prohibits employers from denying requests for sick leave (Labor Code § 246.5(c)(1)); and allows an employee to decide how much leave he or she needs to use. (Labor Code § 246(j).) Moreover, the 2014 Healthy Workplaces Law establishes a rebuttable presumption of "unlawful retaliation" if the employer denies an employee the right to use accrued sick days. (Labor Code § 246.5(c)(2).) This Policy applies the 2014 Healthy Workplaces Law sick leave request standard to all requests for sick leave, even after the annual 24 hours or three days required by the 2014 Healthy Workplaces Law leave is exhausted, because using differing sick leave request procedures would generally be too difficult to administer.*

(e) Certification

The **[Agency]** may require that employees who are not **[seasonal, temporary, or extra help]**, must provide a physician's certification to support any absence that involves the illness of the employee or family member if the **[Agency]** suspects that there is an abuse of sick leave by the employee. All employees, including **[seasonal, temporary, or extra help],** who use paid leave to address issues related to domestic violence, sexual assault or stalking, and who cannot provide advance notice of their need for leave must provide certification of the need for leave within a reasonable time thereafter. (Labor Code § 230(d)(2).)

Commentary

The 2014 Healthy Workplaces Law is silent as to whether the employer can require a doctor's note to verify sick leave. But, the following provisions of that law imply that the employer cannot require any verification: the requirement that employers provide leave on the employee's request (Labor Code § 246.5(a)); the provision that allows an employee to decide how much leave he or she needs to use (Labor Code § 246(j)); and the provision that prohibits employers from denying the leave. (Labor Code § 246.5(c)(1).) As a result, the Policy only requires certification for: domestic violence leaves for all employees as permitted by (Labor Code § 230(d)(2)), and for employees who are not seasonal/ temporary or extra help for all paid sick leave used over the 2014 Healthy Workplaces Law annual sick leave use cap of three days, or 24 hours. If the employer provides seasonal/temporary or extra help employees with more than three days or 24 hours of paid sick leave, then it can also require certification in the same manner as required in this Policy for employees who are not seasonal/temporary or extra help (i.e. require certification after the employee has used 24 hours or three days of paid sick leave).

(f) Sick Leave on Separation from Employment

Unused sick leave is not cashed out upon termination, resignation, retirement, or other separation from employment. (Labor Code § 246(f)(1).) Unused sick leave may be converted to retirement service credits only as may be permitted under applicable retirement system laws and regulations.

Commentary

This Policy does not allow cash out of sick leave, because the 2014 Healthy Workplaces Law states that the employer is not required to do so (Labor Code § 246(f)(1)) and because sick leave cash out can trigger additional taxation based on a constructive receipt theory. California's 2014 Healthy Workplaces law is silent regarding whether unused sick leave can be converted to service credit under CalPERS or the 37 Act, so this Policy allows sick leave conversion in order to be competitive with other agencies.

(g) Sick Leave Reinstatement:

If an employee separates and is rehired within one year from separation, accrued and unused sick leave, to a maximum of 6 days or 48 hours, whichever is greater, will be reinstated. (Labor Code § 246(f)(2).) An employee who worked at least 90 days in the initial employment with the **[Agency]** may immediately use reinstated sick leave. An employee who had not worked 90 days in the initial employment with the **[Agency]** must work the remaining amount of the 90 day-qualifying period to be able to use accrued sick leave. (Labor Code § 246(c).)

Commentary

This sick leave reinstatement is required by the 2014 Healthy Workplace Law. (Labor Code § 246(f)(2).) The only exception to the sick leave reinstatement requirement is if the employer already cashed out unused sick leave upon the employee's separation, which is not required by the 2014 Healthy Workplace Law. (Labor Code §§ 246(f)(1) & (2).) Note that if your agency has a sick leave reinstatement right that is different than that required under the 2014 Healthy Families Workplace Law, you would need to modify this portion of the Policy.

806 Family and Medical Care Leaves

806.1 Statement of Policy; Concurrent Running of FMLA and CFRA Leaves

The **[Agency]** provides family and medical care leave for eligible employees as required by State and federal law. Employees who misuse or abuse family and medical care leave may be disciplined up to and including termination. Employees who fraudulently obtain or use CFRA leave are not protected by the CFRA's job restoration or maintenance of health benefits provisions. This Policy is supplemented by the Federal Family and Medical Leave Act ("FMLA"), and the California Family Rights Act ("CFRA"). Unless otherwise stated in this Policy, "Leave" means leave pursuant to the FMLA and CFRA. Unless otherwise provided by law, the **[Agency]** will run each employee's FMLA and CFRA leaves concurrently.

806.2 Definitions

(a) "12-Month Period" means a rolling 12-month period measured backward from the date leave is taken and continuous with each additional leave day taken. (29 CFR § 825.200(b)(4); 2 Cal.Code Regs § 11090(b).)

Commentary

An agency can select from four different options for defining the 12-Month Period for counting the 12-week family leave entitlement. (29 CFR § 825.200(d)(1).) The above Policy uses the rolling backward method. (29 CFR § 825.200(b)(4); 2 Cal.Code Regs. § 11090(b).) Under the rolling backward method, each time an employee takes FMLA leave, the remaining leave entitlement is any balance of the 12 weeks which has not been used during the previous 12-month period. (29 CFR § 825.200(c).) The second option is the rolling forward option; each time an employee takes FMLA leave, the remaining leave entitlement is any balance of the 12 weeks which has not been used during the immediately preceding 12 months. (29 CFR § 825.200(c).) The remaining two options for defining the 12-Month Period are the calendar year (29 CFR § 825.200(b)(1)), or any fixed 12-month year, such as a fiscal year or the employee's anniversary date. (29 CFR § 825.200(b)(2).) Only the

"rolling" options prevent leave from being stacked together to make a 24-week leave covering two 12-Month Periods.

(b) "Single 12 Month Period" means a 12-month period which begins on the first day the eligible employee takes FMLA leave to take care of a covered servicemember and ends 12 months after that date. (29 CFR § 825.200(f).)

(c) "Child" means a child under the age of 18 years of age, or 18 years of age or older who is incapable of self-care because of a mental or physical disability. An employee's child is one for whom the employee has actual day-to-day responsibility for care, and includes a biological, adopted, foster or step-child. A child is "incapable of self care" if he/she requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living, such as caring for grooming and hygiene, bathing, dressing and eating, cooking, cleaning shopping, taking public transportation, paying bills, maintaining a residence, or using telephones and directories. (29 CFR § 825.102; Gov. Code § 12945.2(c)(1).)

(d) "Parent" means the biological parent of an employee or an individual who stands or stood in loco parentis (in place of a parent) to an employee when the employee was a child. This term does not include parents-in-law. (29 CFR § 825.102; Gov. Code § 12945.2(c)(7).)

(e) "Spouse" means one or two persons to a marriage, regardless of the sex of the persons, and for purposes of CFRA leave, includes a registered domestic partner as defined below. (29 CFR § 825.102; Fam. Code § 300; 2 Cal.Code Regs § 11087(r).)

Commentary

California law was amended in 2014 to define "marriage" as "a personal relation arising out of a civil contract between two persons...." (Fam. Code § 300.) The CFRA regulations were amended in 2015 to define "spouse" to expressly include same-sex partners in marriage, as well as domestic partners. (2 Cal.Code Regs § 11087(r).) In addition, the definition of "spouse" in federal Family and Medical Leave Act (FMLA) regulations was amended effective March 27, 2015 to provide same-sex couples FMLA rights as spouses. Specifically, the U.S. Department of Labor amended the definition of spouse to look to the law where the marriage was entered into or celebrated, as opposed to the law of the state where the employee resides. (29 CFR § 825.102.)

(f) "Domestic Partner" is another adult with whom the employee has chosen to share their life in an intimate and committed relationship of mutual caring and with whom the employee has filed a Declaration of Domestic Partnership with the Secretary of State, and

who meets the criteria specified in California Family Code section 297. A legal union formed in another state that is substantially equivalent to the California domestic partnership is also sufficient. (Fam. Code § 299.2.)

(g) "Serious Health Condition" means an illness, injury impairment, or physical or mental condition that involves:

1) Inpatient Care in a hospital, hospice, or residential medical care facility, including any period of incapacity (e.g., inability to work or perform other regular daily activities due to the serious health condition, treatment involved, or recovery therefrom). A person is considered "inpatient" when a health care facility admits him or her to the facility with the expectation that he or she will remain at least overnight, even if it later develops that such person can be discharged or transferred to another facility, and does not actually remain overnight; or

2) Continuing treatment by a health care provider: A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

    a. A period of incapacity (i.e., inability to work, or perform other regular daily activities) due to serious health condition of more than three consecutive calendar days; and

    b. Any subsequent treatment or period of incapacity relating to the same condition, that also involves:

        i. Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision by a health care provider, or by a provider of health care services (e.g., a physical therapist) under orders of, or on referral by a health care provider; or

        ii. Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. This includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition. If the medication is over the counter, and can be initiated without a visit to a health care provider, it does not constitute a regimen of continuing treatment.

3) Any period of incapacity due to pregnancy or for prenatal care. (29 CFR § 825.120; Gov. Code §12945.2(c)(8).) Note that pregnancy is a "serious health

condition" only under the FMLA. Under California law, an employee disabled by pregnancy is entitled to pregnancy leave. (*See* Policy 808, Leave Because of Pregnancy, Childbirth, or Related Medical Condition.)

4) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

   i. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

   ii. Continues over an extended period of time (including recurring episodes of a single underlying condition); and

   iii. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.). Absences for such incapacity qualify for leave even if the absence lasts only one day.

5) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by health care provider.

6) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment. (29 CFR § 825.113; Gov. Code § 12945.2(c)(8); 2 Cal.Code Regs § 11087(q)(1).)

(h) "Health Care Provider" means:

1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery in the State of California;

2) Individuals duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, which directly treats or supervises treatment of a serious health condition;

3) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist) authorized to practice in California and performing within the scope of their practice as defined under California State law;

4) Nurse practitioners and nurse-midwives and clinical social workers who are authorized to practice under California State law and who are performing within the scope of their practice as defined under California State law;

5) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; and

6) Any health care provider from whom an employer or group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits. (29 CFR § 825.102; Gov. Code § 12945.2(c)(6).)

(i) "Covered active duty" means: 1) in the case of a member of a regular component of the Armed Forces, duty during deployment of the member with the Armed Forces to a foreign country; or 2) in the case of a member of the reserve component of the Armed Forces, duty during the deployment of members of the Armed Forces to a foreign country under a call or order to active duty under certain specified provisions. (29 CFR § 825.102.)

(j) "Covered Servicemember" means: 1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or 2) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces, including a member of the National Guard or Reserves, at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. (29 CFR § 825.102 & 825.122.)

(k) "Outpatient Status" means, with respect to a covered servicemember, the status of a member of the Armed Forces assigned to either: (1) a military medical treatment facility as an outpatient; or (2) a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. (29 CFR § 825.102.)

(l) "Next of Kin of a Covered Servicemember" means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically

designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. (29 CFR § 825.102.)

(m) "Serious Injury or Illness" means: 1) in the case of a member of the Armed forces, including a member of the National Guard or reserves, means an injury or illness that a covered servicemember incurred in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by the service in the line of duty on active duty in the Armed Forces) and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; or 2) in the case of a veteran who was a member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran. (29 CFR § 825.102.)

Commentary

In 2013, the FMLA was amended to broaden the rights of members of the Armed Forces and to allow veterans to take leave. The FMLA regulations were amended in 2008 and 2013. In July 2015, new CFRA regulations followed some, but not all of the 2008 and 2013 FMLA regulations. The above definitions include all of these amendments.

806.3 Reasons for Leave

Leave is only permitted for the reasons listed below.

(a) The birth of a child or to care for a newborn of an employee; (29 CFR § 825.120; Gov. Code § 12945.2(c)(3)(A));

(b) The placement of a child with an employee in connection with the adoption or foster care of a child; (29 CFR § 825.121; Gov. Code § 12945.2(c)(3)(A));

(c) Leave to care for a child, parent, spouse, or domestic partner who has a serious health condition; (29 CFR § 825.113; Gov. Code § 12945.2(c)(3)(A) & (B));

(d) Leave because of a serious health condition that makes the employee unable to perform any one or more essential functions of his/her position; (29 CFR § 825.113; Gov. Code § 12945.2(c)(3)(C));

(e) Leave for a variety of "qualifying exigencies" arising out of the fact that an employee's spouse, son, daughter, or parent is on active duty or call to active duty status in the

National Guard or Reserves in support of a contingency operation (29 CFR § 825.126 -- This is a FMLA leave and not a CFRA leave); or

(f) Leave to care for a spouse, son, daughter, parent, or "next of kin" who is a covered servicemember of the U.S. Armed Forces who has a serious injury or illness: incurred in the line of duty while on active military duty; or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces. This leave can run up to 26 weeks of unpaid leave during a single 12-month period. (29 CFR § 825.127 -- This is a FMLA leave and not a CFRA leave.)

Commentary

Notice Regarding Employees' Rights as Victims of Domestic Violence, Sexual Assault or Stalking: *Labor Code Section 230.1("Section 230.1") prohibits employers from discharging, or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking, or for taking time off from work to seek medical attention resulting from related injuries, obtain counseling, participate in safety planning or obtain services from a domestic violence shelter, program or rape crisis center.*

Effective July 1, 2017, Section 230.1 now requires employers to provide employees with written notice of their rights to leave under Sections 230 and 230.1 This notice must be provided to all new employees upon hire and to existing employees upon request. (Labor Code § 230.1(h)(1).) The Labor Commissioner has developed a model notice to comply with these requirements. Public agencies may choose to adopt the Labor Commissioner's model notice as their own notice to employees. Alternatively, public agencies may develop their own notice so long as it is "substantially similar" to the Labor Commissioner's notice.

806.4 Employees Eligible For Leave

An employee is eligible for leave if:

(a) The employee has been employed by the **[Agency]** for at least 12 months; and

(b) The employee has been employed by the **[Agency]** for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave; and

(c) The **[Agency]** directly employs at least 50 full or part-time employees within a 75-mile radius for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase "current or preceding calendar year" refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. (29 CFR § 825.109(d)-29 CFR § 825.111; Gov. Code § 12945.2(a) & (b); 2 Cal.Code Regs §§ 11087(d)(1) & 11087(e).)

An employee is eligible for 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption or foster care placement if:

(a) The employee has been employed by the **[Agency]** for at least 12 months; and

(b) The employee has been employed by the **[Agency]** for at least 1,250 hours during the 12-month period immediately preceding the commencement of the leave; and

(c) The **[Agency]** directly employs at least 20 full or part-time employees within a 75-mile radius. (Gov. Code § 12945.6(a)(1.)

Commentary

FLSA Standard is Used: *In determining if the 1,250 hours requirement is met, the law uses the FLSA standard, which is hours worked and not paid leave. (*See *29 CFR § 825.102.)*

Baby Bonding Leave Eligibility**:** *Effective January 1, 2018, Section 12945.6 has been added to the Government Code making it unlawful to refuse to allow an employee with more than 12 months of service with the employer, who has at least 1,250 hours of service with the employer during the previous 12-month period, and who works at a worksite in which the employer employs at least 20 employees within 75 miles, upon request, to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement.*

806.5 Amount of Leave

Eligible employees are entitled to a total of 12 workweeks (or 26 workweeks to care for a covered servicemember) of leave during any 12-month period. If FMLA leave qualifies as both military caregiver leave and care for a family member with a serious health condition, the leave will be designated as military caregiver leave first. (29 CFR § 825.127.)

806.6 Minimum Duration of Leave

(a) If leave is requested for the birth, adoption or foster care placement of a child of the employee, leave must be concluded within one year of the birth or placement of the child. In addition, the basic minimum duration of such leave is two weeks. However, an employee is entitled to leave for one of these purposes (e.g. bonding with a newborn) for less than two weeks duration on any two occasions. (2 Cal.Code Regs § 11090(d).)

(b) If leave is requested to care for a child, parent, spouse or the employee him/herself with serious health condition, there is no minimum amount of leave that must be taken. However, compliance with the notice and medical certification provisions in this Policy is required. (29 CFR § 825.205; 2 Cal.Code Regs § 11090(e).)

806.7 Parents both Employed by the [Agency]

If both parents of a child, adoptee, or foster child are employed by the **[Agency]** and are entitled to bonding leave, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period. (29 CFR § 825.120(a)(3).) If both parents of a covered servicemember are employed by the **[Agency]** and are entitled to leave to care for a covered servicemember, the aggregate number of workweeks of leave to which both may be entitled is limited to 26 work weeks during the 12-month period. This limitation does not apply to any other type of leave under this Policy. (29 CFR § 825.127(f).)

806.8 Employee Benefits While On Leave

(a) **Group Health Insurance During Unpaid Leave:** Leave under this Policy is unpaid. While on unpaid leave, employees will continue to be covered by the **[Agency]**'s group health insurance for up to 12 weeks each leave year to the same extent that coverage is provided while the employee is on the job. If the employee is disabled by pregnancy, coverage will continue up to four months each leave year. If an employee disabled by pregnancy also uses leave under the CFRA for baby-bonding, the **[Agency]** will maintain

her coverage while she is disabled by pregnancy (up to four months or 17 1/3 weeks) and during her CFRA leave (up to 12 weeks). (Gov. Code §§ 12945(a)(2)(A) & 12945.2(s).)

Commentary

Beginning in 2011, an employee disabled by pregnancy became entitled to continue health insurance coverage in an employer-provided group health plan for the duration of California's pregnancy leave of up to four months. (Gov. Code § 12945(a)(2)(A).) Because pregnancy disability is not covered by CFRA (Gov. Code § 12945.2(s)), an employee will also be entitled to continue health insurance coverage during up to 12 weeks of bonding leave. (Gov. Code § 12945.2(f)(1).)

(b) **Benefit Plans Not Provided through the [Agency's] Group Health Plan During Unpaid Leave Do Not Continue:** The **[Agency]** does not pay for benefit plans that are not part of the group health plan for any employee on unpaid leave. As a result, employees will not continue to be covered under the **[Agency's]** benefit plans that are not provided through the **[Agency's]** group health plans while the employee is on unpaid leave. (2 Cal. Code Regs § 11092(e).)

OR …

(b) **Benefit Plans Not Provided through the [Agency's] Group Health Plan During Unpaid Leave Do Continue:** While on unpaid leave, employees will continue to be covered by the **[Agency's]** benefits plans that are not part of its group health plan for up to 12 weeks each leave year to the same extent that coverage is provided while the employee is on the job. (2 Cal.Code Regs § 11092(e).)

Commentary

Your agency should choose between one of the two provisions above, depending upon whether your agency provides those on unpaid leave the opportunity to continue coverage in employer-provided benefit plans that are not part of your agency's group health plan benefits. The CFRA entitles employees on unpaid leave to participate in these plans (e.g., life, short-term, or long-term disability or accident insurance, retirement and pension plans) to the same extent and under the same conditions that would apply to employees on any other unpaid leave other than family leave. (Gov. Code § 12945.2(f)(2); 2 Cal. Code Regs § 11092(e).) Note that the employer need not contribute to a pension plan during the portion of unpaid family leave. (Gov. Code § 12945.2(f)(2); 2 Cal.Code Regs § 11092(e).)

(c) **Payment of Premiums:** Employees may make the appropriate contributions for continued coverage under the health benefits plans by payroll deductions (if the employee is using his or her paid leave) or direct payments (if the employee is not using his or her paid leave). The **[Agency]** will inform the employee whether the direct payments for premiums should be paid to the carrier or to the **[Agency]**, and the deadlines for paying premiums in order to prevent coverage from being dropped. Employee contribution rates are subject to any changes in rates that occur while employee is on leave.

(d) **Recovery of Premium if the Employee Fails to Return from Leave:** If an employee fails to return to work after his/her leave entitlement has been exhausted or expires, the **[Agency]** shall have the right to recover its share of health plan premiums for the entire leave period, unless the employee does not return because of the continuation, recurrence, or onset of a serious health condition of the employee or his/her family member which would entitle the employee to leave, or because of circumstances beyond the employee's control. (29 CFR § 825.213; Gov. Code § 12945.2(f)(1); 2 Cal.Code Regs § 11092(c)(5).)

806.9 Substitution of Paid Accrued Leaves

Although family and medical care leave is unpaid, an employee may elect and the **[Agency]** will require an employee to concurrently use all paid accrued leaves during family and medical care leave as described below.

806.9.1 Employee's Right to Use Paid Accrued Leave Concurrently with Family Leave

An employee may use any earned or accrued paid leave except sick leave for all or part of any unpaid family and medical care leave. An employee is entitled to use sick leave concurrently with family and medical care leave for the employee's own serious health condition or that of the employee's parent, spouse, domestic partner or child. (Gov. Code § 129045.2(e); Labor Code §§ 233 & 246.5(a)(1).)

806.9.2 [Agency]'s Right to Require an Employee to use Paid Leave when using FMLA/CFRA Leave

Employees must use and exhaust their accrued leaves concurrently with family and medical care leave to the same extent that employees have the right to use their accrued leaves concurrently with family and medical care leave with two exceptions:

(a) Employees are not required to use paid leave during leave pursuant to a disability plan that pays a portion of the employee's salary while on leave unless the employee agrees to use paid leave to cover the unpaid portion of the disability leave benefit; (29 CFR § 825.207(d); 2 Cal.Code Regs. § 11092(b)(2) & (3)); and

(b) An employee must agree to use accrued sick leave to care for a child, parent, spouse or domestic partner. (Gov. Code § 12945.2(e); 2 Cal.Code Regs § 11092(b).)

806.9.3 [Agency]'s Right to Require an Employee to Exhaust FMLA/CFRA Leave Concurrently with Other Leaves

If an employee takes a leave of absence for any purpose which also qualifies under both the FMLA and CFRA, the **[Agency]** will designate that leave as running concurrently with the employee's 12-week FMLA/CFRA leave entitlement. The only exception is for **[peace officers and firefighters]** who are on paid industrial injury leave. (Labor Code §4850(e).)

806.9.4 [Agency]'s and Employee's Rights if an Employee Requests Accrued Leave without Mentioning FMLA or CFRA

If an employee requests to utilize accrued vacation leave or other accrued paid time off without reference to a FMLA/CFRA qualifying purpose, the **[Agency]** may not ask the employee if the leave is for a FMLA/CFRA qualifying purpose. (2 Cal.Code Regs § 11092(b)(4)(A).) However, if the **[Agency]** denies the employee's request and the employee provides information that the requested time off is for a FMLA/CFRA qualifying purpose, the **[Agency]** may require the employee to exhaust accrued leave as described above. (2 Cal.Code Regs § 11092(b)(4)(A)(1).)

806.10 Medical Certification/ Recertification

Employees who request leave must provide a medical certification and/or recertification to support the need for the leave as described below:

(a) ***Employee's Own Serious Health Condition***: Employees who request leave for their own serious health condition must provide written certification from the health care provider that contains all of the following: the date, if known, on which the serious health condition commenced; the probable duration of the condition; and a statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position. (Gov. Code § 12945.2(j)(2); 2 Cal. Code Regs § 11087(a)(2); 2 Cal.Code Regs § 11091(b)(2).) Upon expiration of the time period the health care provider originally estimated that the employee needed for his/her own serious health condition, the employee must obtain recertification if additional leave is requested. (Gov. Code § 12945.2(j)(2); 2 Cal. Code Regs § 11091(b)(2); 29 CFR § 825.308.)

(b) ***Family Member Serious Health Condition:*** Employees who request leave to care for a child, parent, domestic partner or a spouse who has serious health condition must provide written certification from the health care provider of the family member requiring care that contains all of the following: the date, if known, on which the serious health condition commenced; the probable duration of the condition; an estimate of the amount of time which the health care provider believes the employee needs to care for the child,

parent, domestic partner, or spouse, and a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse. The term "warrants the participation of the employee" includes, but is not limited to, providing psychological comfort, and arranging third party care for the covered family member, as well as directly providing, or participating in, the medical care. (Gov. Code § 12945.2(k)(1); 2 Cal.Code Regs § 11087(a)(1); 2 Cal.Code Regs § 11091(b)(1).) Upon expiration of the time period the health care provider originally estimated that the employee needed to care for a covered family member, the employer must obtain recertification if additional leave is requested. (Gov. Code § 12945.2(j)(2); 2 Cal.Code Regs § 11091(b)(1); 29 CFR § 825.308.)

(c) ***Servicemember Serious Injury or Illness:*** Employees who request FMLA leave to care for a covered servicemember who is a child, spouse, parent or "next of kin" of the employee, must provide written certification from a health care provider regarding the injured servicemember's serious injury or illness. (29 CFR § 825.310.) The **[Agency]** will verify the certification as permitted by the FMLA regulations. (29 CFR § 825.310(e) &(f).)

(d) ***Qualifying Exigency:*** The first time an employee requests FMLA leave because of a qualifying exigency, an employee may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to active duty status in a foreign country, and the dates of the military member's active duty service. A copy of the new active duty orders or similar documentation shall be provided to the **[Agency]** if the need for leave because of a qualifying exigency arises out of a different active duty or call to active duty status of the same or a different military member. (29 CFR § 825.309.) The **[Agency]** will verify the certification as permitted by the FMLA regulations. (29 CFR § 825.309(d).)

Commentary

Always Request Certification to Prevent Abuse of Leave: *Employers should always request medical certification of the serious medical condition, as well as verification for the servicemember leaves as provided above. The certification and verification rules are one of the few ways that employers can control and/or prevent abuse of leave. Note that the 2015 amendments to the CFRA regulations do not allow employers to request recertification of a serious health condition every six months like the FMLA regulations do. (2 Cal.Code Regs § 11091(b).) As a result, the Policy follows the CFRA regulations.*

806.11 Time to Provide a Medical Certification

When an employee has provided at least 30 days' notice for a foreseeable leave, the employee must provide a medical certification before the leave begins. When this is not possible, the employee must provide the medical certification to the **[Agency]** within the time frame requested by the **[Agency]** (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. (2 Cal.Code Regs § 11091(b)(3); 29 CFR § 825.305(b).)

806.12 Consequences for Failure to Provide an Adequate or Timely Certification

If an employee provides an incomplete medical certification, the employee will be given a reasonable opportunity to cure any such deficiency. (2 Cal.Code Regs § 11091(b)(3); 29 CFR § 825.313(a) & (b).) However, if an employee fails to provide a medical certification within the time frame established in this Policy, the **[Agency]** may delay the taking of FMLA/CFRA leave until required certification is provided, or deny FMLA/CFRA protections following the expiration of the time period to provide an adequate certification. (2 Cal.Code Regs § 11091(b)(3); 29 CFR § 825.313(a).)

Commentary

Document Communications About Deadlines: Both the FMLA and the CFRA regulations cited above require the employer to give a reasonable period of time for an employee to provide a certification for an unforeseeable need for leave. Employers should document their efforts to communicate the certification deadline, and the reasonableness of the deadline given the nature of the request for the leave.

806.13 [Personnel Officer's] Review of the Contents of Medical Certification for Employee's Own Serious Health Condition

(a) **Complete and Sufficient:** The employee must provide a certification for his or her own serious health condition that is complete and sufficient to support the request for leave. A certification is incomplete if one or more of the applicable entries on the certification form have not been completed. A certification is insufficient if the information on the certification form is vague, ambiguous, or not responsive. If the certification is incomplete or insufficient, the **[Personnel Officer]** will give the employee written notice of the deficiencies and seven days to cure, unless a longer period is necessary in light of the employee's diligent, good faith efforts to address the deficiencies. (29 CFR § 825.305(c).)

(b) **Authentication and Clarification:** After giving the employee an opportunity to cure the deficiencies in a medical certification for the employee's own serious health condition, the **[Personnel Officer]** may contact the health care provider who provided the

certification to clarify and/or authenticate the certification. "Authentication" means providing the health care provider with a copy of the certification form and requesting verification that the information on the form was completed or authorized by the health care provider who signed the form. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of the response. The **[Personnel Officer]** may not ask for additional information beyond that required on the certification form. (29 CFR § 825.307(a).)

Commentary

Limitations on Review of Medical Certifications: *The FMLA regulations allow an agency to require that the medical certification be complete and sufficient to support the leave. If the agency's efforts to get a complete and sufficient certification from the employee fail, the agency may seek clarification and authentication from the health care provider as provided in the above Policy. There are two important limitations on the agency's right to have a complete, authenticated and clear certification: 1) only a "human resources professional, leave official, or management official", and not a supervisor, may contact the employee's health care provider (29 CFR § 825.307(a)); and 2) the agency cannot seek to authenticate or clarify a certification from for the serious health condition of a family member because of the CFRA regulation that requires the employer to accept a certification that contains the required information. (2 Cal.Code Regs § 11091(b)(1).)*

806.14 Second and Third Medical Opinions For Employee's Own Serious Health Condition

If the **[Agency]** has a good faith, objective reason to doubt the validity of a certification for the employee's serious health condition, the **[Agency]** may require a medical opinion of a second health care provider chosen and paid for by the **[Agency]**. If the second opinion is different from the first, the **[Agency]** may require the opinion of a third provider jointly approved by the **[Agency]** and the employee, but paid for by the **[Agency]**. The opinion of the third provider will be binding. (29 CFR § 825.307(b) & (c); 2 Cal.Code Regs § 11091(b)(2)(A).) The **[Agency]** must provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee. (29 CFR § 825.307(d); 2 Cal.Code Regs § 11091(b)(2)(D).)

Commentary

While the FMLA regulations allow the employer to get a second and third medical opinion for the family member's serious health condition (29 CFR § 825.307(b) & (c)), the CFRA regulations state that an employer must accept the certification of a family member's serious health condition if it contains all of the required information. (2 Cal.Code Regs § 11091(b)(1).) The 2015 amendments to the CFRA regulations do not allow the employer to seek a second opinion unless the employer has a "good faith, objective reason" to doubt the

validity of the original certification. (2 Cal.Code Regs. § 11091(b)(2)(A).) This Policy above allows for the second and third opinions for the employee only, and includes the good faith language that the CFRA regulations now require.

806.15 Intermittent Leave or Leave on a Reduced Leave Schedule

If an employee requests leave intermittently (a few days or hours at a time) or on a reduced leave schedule for his or her own serious health condition, or to care for an immediate family member with serious health condition, the employee must provide medical certification that such leave is medically necessary. "Medically necessary" means there must be a medical need for the leave and that the leave can best be accomplished through an intermittent or reduced leave schedule. (2 Cal.Code Regs § 11090(e); 29 CFR § 825.202(b).) The **[Agency]** may require an employee who certifies the need for a reduced schedule or intermittent leave to temporarily transfer to an alternate position of equivalent pay and benefits that better accommodates the leave schedule. (2 Cal.Code Regs § 11090(e)(1); 29 CFR § 825.204.)

Commentary

> ***No Intermittent or Reduced Schedule Leave Without a Current Medical Certification**: Intermittent and reduced schedule leave are the most disruptive forms of family and medical leave. These forms of leave are also easily abused. As a result, intermittent or reduced schedule leave should never be given without a medical certification that states that the leave is medically necessary. Nor should the agency agree to allow healthy baby/child bonding leave to be taken on a reduced schedule basis, or to allow the employee greater flexibility than allowed in the CFRA's baby bonding minimum duration requirements. (*See *2 Cal.Code Regs § 11090(d) --The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions.)*

806.16 Employee Notice of Leave

Although the **[Agency]** recognizes that emergencies arise which may require employees to request immediate leave, employees are required to give as much verbal or written notice as possible of their need for leave. (29 CFR § 825.304(a).) If leave is foreseeable, at least 30 days' notice is required. In addition, if an employee knows that he/she will need leave in the future, but does not know the exact day(s) (e.g. for the birth of a child or to take care of a newborn), the employee shall inform his/her supervisor as soon as possible that such leave will be needed. (29 CFR § 825.302(a); 2 Cal.Code Regs § 11091(a)(2) & (3).) For foreseeable leave due to a qualifying exigency, an employee must provide verbal or written notice of the need for leave as soon as practicable, regardless of how far in advance such leave is foreseeable. (29 CFR § 825.302(a).)

Commentary

> ***Does Your Agency Want to Use this Remedy?** If the employee fails to provide timely notice of a foreseeable leave, the employer's remedy is to delay the start of the leave. (29 CFR § 825.304; 2 Cal.Code Regs § 11091(a)(4).) An employer who uses this remedy prolongs the onset of FMLA/CFRA leave. Because it is generally in the employer's interest to expedite the completion of the leave, this remedy may not be helpful for foreseeable leaves. Note that the*

CFRA regulations prohibit an employer from denying an unforeseeable or emergency-need CFRA leave on the basis that the employee did not provide advance notice of the need for the leave. (2 Cal.Code Regs § 11091(a)(4).)

806.17 Reinstatement Upon Return From Leave

(a) **Reinstatement to Same or Equivalent Position:** Upon expiration of leave, an employee is entitled to be reinstated to the position of employment held when the leave commenced, or to an equivalent position with equivalent benefits and pay. Employees have no greater rights to reinstatement, benefits, and other conditions of employment than if the employee had been continuously employed during the FMLA/CFRA period. (2 Cal.Code Regs § 11087(f) & (g); 2 Cal.Code Regs § 11089(a); 29 CFR § 825.214-215; 29 CFR § 825.216.)

(b) **Date of Reinstatement:** If a definite date of reinstatement has been agreed upon at the beginning of the leave, the employee will be reinstated on the date agreed upon. If the reinstatement date differs from the original agreement of the employee and the **[Agency]**, the employee will be reinstated within two business days, where feasible, after the employee notifies the employer of his/her readiness to return. (2 Cal.Code Regs § 11089(c)(1) & (2).)

(c) **Employee's Obligation to Periodically Report on His/Her Condition:** Employees may be required to periodically report on their status and intent to return to work. This will avoid any delays to reinstatement when the employee is ready to return. (29 CFR § 825.311.)

(d) **Fitness for Duty Certification:** As a condition of reinstatement of an employee whose leave was due to the employee's own serious health condition, which made the employee unable to perform his or her job, the employee must obtain and present a fitness-for-duty certification from the health care provider stating that the employee is able to resume work. Failure to provide such certification will result in denial of reinstatement. (Gov. Code § 12945.2(k)(4); 29 CFR § 825.312.)

Commentary

Fitness for Duty Certification Must Be Uniformly Required: *Your agency may only require a fitness for duty certification as a condition of reinstatement if your agency uniformly requires fitness-for-duty certifications from employees returning from work after illness, injury or disability. (Gov. Code § 12945.2(k)(4); 2 Cal.Code Regs § 11091(b)(2)(E); 29 CFR § 825.312(a).) In addition, in order to require a fitness for duty certification, the employer must have notified the employee of this requirement in the family leave designation*

notice and provide the employee a list of the employee's essential job functions. (29 CFR §825.300(d)(3).)

(e) **Reinstatement of "Key Employees":** The **[Agency]** may deny reinstatement to a "key" employee (i.e., an employee who is among the highest paid 10 percent of all employed by the **[Agency]** within 75 miles of the worksite) if such denial is necessary to prevent substantial and grievous economic injury to the operations of the **[Agency]**, and the employee is notified of the **[Agency]**'s intent to deny reinstatement on such basis at the time the employer determines that such injury would occur. (Gov. Code § 12945.2(r)(1); 29 CFR §§ 825.217-219.)

Commentary

Not Useful for Public Agency Employers: *Note that it is nearly impossible for a public agency to deny reinstatement to a key employee because a public agency is not a profit making entity and it is harder to prove substantial and grievous economic injury. The key employee defense to reinstatement is included here for that rare occasion when it may be useful.*

806.18 Required Forms

Employees must complete the applicable forms to receive family and medical care leave. The forms may be found at **[list locations where forms are located.]**

Commentary

Do No Ask for Name of Medical Condition: *If your agency uses the forms that are provided with the FMLA, be sure that you alter the form to not ask for the name of the medical condition or diagnosis because there is no right to know that under California law. (2 Cal.Code Regs § 11087(a)(1) & (2).)*

808 Leave Because of Pregnancy, Childbirth, or Related Medical Condition

808.1 Amount of Leave

An employee who is disabled because of pregnancy, childbirth, or a related medical condition is entitled to an unpaid leave for up to the number of hours she would normally work within four calendar months (one-third of a year or 17 1/3 weeks). (Gov. Code § 12945(a).) For a full-time employee who works 40 hours per week, "four months" means 693 hours of leave entitlement, based on 40 hour per week times 17 1/3 weeks. (2 Cal. Code Regs § 11042(a)(1).) An employee who works less than 40 hours per week will receive a pro rata or proportional amount of leave. (2 Cal. Code Regs § 11042(a)(2).)

Commentary

No Qualification Period for PDL: *Unlike family and medical care leave, there is no qualification period or minimum hours worked requirement for pregnancy disability leave (PDL); an employee of any status is entitled to take it immediately upon hire. (2 Cal. Code Regs § 11037.) The right to PDL leave is in addition to family and medical leave under the CFRA. (2 Cal.Code Regs § 11046(a).) Moreover, the right to PDL is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation for a disability. (Gov. Code § 12940(m); 2 Cal.Code Regs § 11047.) (*See *Policy 206, Reasonable Accommodation and Interactive Process for the Policies applicable for processing a request of a request for accommodation or transfer.) An employer may, however, run the employee's 12 weeks of family leave under the federal FMLA concurrently with PDL leave. (2 Cal.Code § 11045(a).)*

808.2 Notice & Certification Requirements

(a) Notice: Requests for pregnancy disability leave must be submitted in writing with reasonable advance notice of the medical need for the leave. (2 Cal.Code Regs § 11042(c)(1).) All leaves must be confirmed in writing, have an agreed-upon specific date of return, and be submitted to the **[Personnel Officer]**. (2 Cal.Code Regs § 11042(a).)

(b) Certification: The request for pregnancy disability leave must be supported by a written certification from the attending physician stating that: the employee is disabled from working by pregnancy, childbirth or a related medical condition; 2) the date on which the employee became disabled by pregnancy, childbirth or a related medical condition; and 3) the estimated duration or end date of the leave. (2 Cal.Code Regs §§11050(b)(7); 11050(e).)

Commentary

Certification Form in the California Regulations: *The California Code of Regulations contains a form entitled: "Certification of Health Care Provider for Pregnancy Disability leave, Transfer and/or Reasonable Accommodation" that can be used. (*See *2 Cal. Code Regs§ 11050(e).)*

808.3 Compensation During Leave

Pregnancy disability leaves are without pay. However, the employee must first use sick leave, if any. (2 Cal.Code Regs § 11044(b)(1).) Once sick leave is depleted, the employee may elect to

use vacation leave or any other accrued paid time off during the leave. (2 Cal.Code Regs § 11044(b)(2).)

808.4 Benefits During Leave

(a) *Group Health Insurance:* An employee on pregnancy disability leave may continue to receive any group health insurance coverage that was provided before her leave, beginning on the date the pregnancy disability leave begins and continuing for up to four months in a 12-month period, at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. (Gov. Code § 12945(a)(2)(A); 2 Cal. Code Regs § 11044(c).) The **[Agency]** may recover premiums it paid to maintain health coverage if an employee does not return to work following pregnancy disability leave, unless the reason for the failure to return is a circumstance beyond her control or the use of the separate right to 12 weeks of bonding leave under the California Family and Medical Leave Act. (Gov. Code § 12945(a)(2)(A); 2 Cal.Code Regs § 11044(c)(3).)

Commentary

California's PDL law was amended in 2011 to require the employer to maintain and pay for group health insurance for up to four months on the same terms as applied while the employee was working. (Gov. Code § 12945(a)(2)(A).)

(b) *Sick and Vacation Leaves*: Sick and vacation leaves **[do not]** or **[do]** accrue while an employee is on unpaid pregnancy disability leave. (*See* 2 Cal. Code Regs § 11044(d)(1).)

Commentary

California's PDL law requires the unpaid PDL leave to be treated as other types of unpaid leaves for vacation and sick leave accrual. So if your agency allows sick or vacation leave to accrue during periods of unpaid leave, then it must accrue for PDL leave too. You will need to select the policy language above that fits your agency's practices.

(c) *Employee Status during Leave:* The employee retains employee status during the leave. The leave is not a break in service for purposes of longevity or seniority under any collective bargaining agreement or employee benefit plan. Benefits will be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, or other qualifying provisions. (2 Cal.Code Regs § 11044(e).)

808.5 Reinstatement

(a) Upon the expiration of pregnancy leave, the employee will be reinstated to her original or a comparable position, so long as it was not eliminated for a legitimate business reason during the leave. (2 Cal.Code Regs § 11043(c).)

(b) If the employee's original position is no longer available, the employee will be assigned to a comparable, open position. (2 Cal.Code Regs § 11043(c)(2).)

(c) If upon return from leave an employee is unable to perform the essential functions of her job because of a physical or mental disability, the **[Agency]** will initiate an interactive process with the employee in order to identify a potential reasonable accommodation in accordance with these Policies. (*See* Policy 206, Reasonable Accommodation and Interactive Process.)

Commentary

An employee on pregnancy disability leave has no greater right to return than any other employee who had been continuously employed. The employer must reinstate the employee to her original position unless the employer can show, by the preponderance of the evidence, that the employee would not have been employed at the time reinstatement is requested because of legitimate business reasons unrelated to the leave. (2 Cal.Code Regs. 11043(c).)

810 Other Leaves

810.1 Management Leave

On January 1 of each year, employees who are exempt from FLSA overtime will receive **[80]** hours paid management leave. This management leave must be used during the calendar year in which it is received, or it will be lost. Newly hired or newly promoted employees who are exempt from FLSA overtime will receive a prorated amount of Management Leave for the year in which they are hired.

Commentary

There is no requirement under the law to provide FLSA-exempt employees paid management leave. It is a common practice, however, to acknowledge FLSA-exempt employees for working on nights and weekends. Your agency has discretion to provide a lesser amount of leave, or none at all. Thus far, there is no law or regulation that requires management leave to vest like vacation does, but there is a risk that such a law may be enacted in the future.

810.2 Jury Duty Leave/Subpoenaed or Court-Ordered Witness Leave

Any employee, **[including a temporary, seasonal, or extra help employee],** who is summoned to serve on a jury, or subpoenaed or ordered to be a witness, must notify his or her supervisor or department head as soon as possible. Any employee who is released from jury service prior to the end of his or her scheduled work hours must report to work unless otherwise authorized by his or her supervisor. (Gov. Code § 1230; Labor Code § 230; 28 USC § 1875(c).)

810.2.1 Overtime-Eligible Employees

All overtime-eligible employees will be paid for actual work hours missed because of time spent in jury service or court**.** The time spent on jury duty is not work time for purposes of calculating overtime compensation. The **[Agency]** will offset from pay the amount the employee receives from the Court for jury fees.

810.2.2 Overtime-Exempt Employees

All FLSA-exempt employees will continue to receive their normal salary while on jury duty or as serving as a witness only for any work week in which they perform any work duties. (29 CFR § 541.602(a) & (b)(3).) The **[Agency]** will offset the amount from pay the employee receives from the Court for jury fees. (29 CFR § 541.602(b)(3).)

Commentary

Jury or Court Leave is Required: *State and federal laws require an employer to grant any employee – including temporary or seasonal employees – a leave for jury service. (28 USC § 1875(c); Labor Code § 230(a); Gov. Code § 1230.) State law also requires an employer to grant an employee who is a victim of a crime to grant leave to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding. (Labor Code § 230(b).)*

Pay or No Pay? *The FLSA treats overtime-eligible and overtime-exempt employees differently. FLSA overtime-eligible employees are not entitled to pay for time not worked, nor does non-work time count toward FLSA overtime pay. The salary of a FLSA exempt employee, however, cannot be reduced for time spent in jury service. (29 CFR § 541.602(b)(3).) An FLSA-exempt employee, however, need not be paid for any workweek in which the employee performs no work. (29 CFR § 541.602(a).) An agency that wants to treat all employees equally, will pay both exempt and overtime-eligible employees for jury service.*

810.3 Other Court or Administrative Proceeding Appearances

810.3.1 Regarding Agency Duties

Any employee, **[including a temporary, seasonal, or extra help employee],** who is subpoenaed to appear in court in a matter regarding an event or transaction in the course of his or her **[Agency]** job duties, must give his or her supervisor as much advance notice as is possible. The **[Agency]** will determine whether the matter involves an event or transaction in the course of the employee's **[Agency]** job duties. If so, this leave to appear in court will be without loss of compensation, and the time spent will be considered work time. The **[Agency]** will offset the amount from pay the employee receives for witness fees.

Commentary

California law requires any employee – including seasonal or temporary – to be granted time off without pay to appear in court to comply with a subpoena or other court order to appear as a witness. (Labor Code § 230(a).) The salary of a FLSA exempt employee, however, cannot be reduced for time spent "in attendance as a witness." (29 CFR § 541.602(b)(3).) A local agency that grants paid jury leave, however, must provide paid witness leave. In that case, the agency can offset the pay by the amount of witness fees to an employee who is testifying as a non-litigant witness in court. (Gov. Code § 1230(a) & 1230.1.) In order to treat FLSA overtime-eligible and FLSA-exempt employees similarly, the above Policy provides paid leave for both.

810.3.2 Regarding Employee-Initiated Proceedings

Any employee, **[including a temporary, seasonal, or extra help employee],** who is subpoenaed to appear, or appears in court because of civil or administrative proceedings that he or she initiated, is not entitled to receive compensation for time spent related to those proceedings. An employee may request to receive time off without pay, or may use any accrued leave other than sick leave for time spent related to those proceedings. The time spent in these proceedings is not considered work time. Notwithstanding the above, an employee who is testifying or appearing as the designated representative in PERB conferences or hearings, or at a personnel or merit commission is entitled to paid release time. (Gov. Code § 3505.3(a)(2) & (3).)

Commentary

***Employee-Initiated Proceedings are Generally Not Work Time**: FLSA exempt-employees are not entitled to pay to participate in civil or administrative proceedings they initiate. (*Shockley v. City of Newport News *(4th Cir. 1993) 997 F.2d 18, 24.) FLSA overtime-eligible employees are not entitled to pay for time not worked.*

Paid Time When Employees are Acting as Union Representatives: *But, the Meyers-Milias-Brown Act was amended in 2013 to allow for paid release time for employees when they are acting as union representatives at PERB proceedings of any kind or personnel or merit commission hearings. (Gov. Code § 3505.3(a)(2) & (3).)*

810.3.3 Regarding Crime Victim/ Victim Family Member Court Attendance Leave

Any employee, **[including a temporary, seasonal, or extra help employee],** who is a victim of a crime that is a serious or violent felony, or a felony involving theft or embezzlement, may take leave from work to attend judicial proceedings related to that crime, if the employee provides the **[Agency]** a copy of the notice of the scheduled proceeding in advance. If advance notice is not feasible, the employee must provide the **[Agency]**, within a reasonable time after the leave is taken, documentation from the District Attorney, victim's rights office, or court / governing agency that shows that the judicial proceeding occurred when the leave was used. An employee who is an immediate family member of such a crime victim, including: a registered domestic partner; the child of the registered domestic partner; spouse; child; stepchild; brother; stepbrother; sister; stepsister; mother; stepmother; father; or stepfather of the crime victim is also entitled to leave from work to attend judicial proceedings relating to that crime. The leave is unpaid unless the employee elects to use accrued vacation, sick, or other paid leave, or compensatory time off. (Labor Code § 230.2.)

Commentary

California law provides this leave to all employees who are either victims of specified felonies or immediate relatives of a crime victim. (Labor Code § 230.2.)

810.3.4 Regarding Crime Victim/ Family Member Victims' Rights Proceedings Leave

Any employee, **[including a temporary, seasonal, or extra help employee],** who is a victim of a crime listed in Labor Code section 230.5(a)(2)(A), may take leave from work to appear in court to be heard at any proceeding in which the right of the victim is at issue, if the employee provides the employer reasonable advance notice. If advance notice is not feasible, the employee must provide the **[Agency]**, within a reasonable time after the leave is taken, certification from a police report, a district attorney or court, or from a health care provider or victim advocate, that the employee was a victim of any of the crimes listed in Labor Code section 230.5(a)(2)(A). An employee who is a spouse, parent, child, sibling, or guardian of such a crime victim is also a victim who is entitled to this leave if the above notice or certification requirements are met. The leave is unpaid unless the employee elects to use accrued vacation or paid leave, or compensatory time off.

Commentary

California law provides this leave to all employees who are either victims of the crimes specified in Labor Code section 230.5(a)(2)(A), or who are the spouse, parent, child, sibling, or guardian of the victim. (Labor Code § 230.5(f).) This leave law does not permit an employee to use sick leave to receive pay during this leave. (Labor Code § 230.5(e).)

810.4 Leave for Victims of Domestic Violence, Sexual Assault, or Stalking to Obtain Restraining Orders or Injunctive Relief

Any employee, **[including a temporary, seasonal, or extra help employee],** who is a victim of domestic violence, sexual assault, or stalking, may take leave from work to obtain or attempt to obtain any relief, including, but not limited to: a temporary restraining order, restraining order, or other injunctive relief to help ensure the health, safety, or welfare of the employee or his or her child, if the employee provides advance notice of the need for leave. If advance notice is not feasible, the employee must provide any of the following certifications within a reasonable time after the leave: a police report indicating that the employee was a victim; a court order protecting the employee from the perpetrator; evidence from the district attorney or court that the employee has appeared in court; or documentation from a health care provider or counselor that the employee was undergoing treatment for physical or mental injuries or abuse. The leave is unpaid unless the employee elects to use 2014 Healthy Workplaces sick leave (Labor Code § 246.5(a)(2)), accrued vacation or paid leave, or compensatory time off. (Labor Code § 230.5(f).)

Commentary

California law provides all employees who are victims of domestic violence, sexual assault, or stalking, with leave to attempt to obtain restraining orders or injunctive relief from the courts. (Labor Code § 230(c).) Although this leave law does not permit an employee to use sick leave to receive pay during this leave (Labor Code § 230(i)), the later enacted 2014 Healthy Workplace Law does allow an employee to use paid sick leave of up to three days/shifts, or 24 hours, whichever is greater, per year for this purpose. (Labor Code § 246.5(a)(2).)

Effective July 1, 2017, employers are required to provide written notice of these rights to new employees upon hire and to existing employees upon request. (Labor Code § 230.1(h)(1).) The Labor Commissioner has developed a model notice to comply with these requirements. Employers may choose to adopt the Labor Commissioner's model notice as their own notice to employees. Alternatively, employers may develop their own notice. If an employer elects to develop its own notice, the notice must be "substantially similar" to the Labor Commissioner's notice.

810.4.1 Leave for Victims of Domestic Violence, Sexual Assault, or Stalking to Obtain Medical Attention or Counseling or Safety Planning

Any employee, **[including a temporary, seasonal, or extra help employee],** who is a victim of domestic violence, sexual assault, or stalking, may take leave from work to attend to any of the following: obtaining medical attention or psychological counseling; obtaining services from a shelter, program or crisis center; or participating in safety planning or other actions to increase safety, if the employee provides advance notice of the employee's intention to take time off for these purposes. If advance notice is not feasible, the employee must provide any of the following to the **[Agency]** within a reasonable time after the leave: a police report indicating that the employee was a victim; a court order protecting the employee from the perpetrator; evidence from the district attorney or court that the employee has appeared in court; or documentation from a health care provider or counselor that the employee was undergoing treatment for physical or mental injuries or abuse. The leave is unpaid unless the employee elects to use 2014 Healthy Workplaces sick leave (Labor Code § 246.5(a)(2)), accrued vacation or personal leave, or compensatory time off.

Commentary

> ***Only for Employers with 25 or More Employees:*** *This leave only applies to employers who have 25 or more employees and is not mandatory for employers with less than 25 employees. (Labor Code § 230.1(a).) This leave is in addition to the leave that victims of domestic violence, sexual assault, or stalking may receive for the purpose of obtaining restraining orders or injunctive relief. Although this leave law does not permit an employee to use sick leave to receive pay during this leave. (Labor Code § 230.1(e), the 2014 Healthy Workplace Law* ***does*** *allow an employee to use paid sick leave of up to three days/shifts, or 24 hours, whichever is greater, per year for this purpose.) (Labor Code § 246.5(a)(2).)*

810.5 Bereavement Leave

All employees, **[including or except temporary, seasonal, or extra help employees]**, may utilize paid bereavement leave to attend a funeral or memorial service, or to take care of family matters, that are related to the death of a member of immediate family. "Immediate family" consists of the following: employee's spouse, domestic partner, child, stepchild, parent, grandparent, grandchild, brother, sister, mother/father-in-law, son or daughter-in-law, brother or sister-in-law, legal guardian, or custodial child, or the same relatives of a domestic partner. Employees are entitled to up to three days for each death in the immediate family. An employee who utilizes bereavement leave shall notify his/her supervisor or department head of the intent to use such leave.

Commentary

Customize this Policy: *Neither State nor federal law requires an employer to provide bereavement leave – paid or unpaid. But, employers routinely provide it for humanitarian purposes. Your agency can determine how long to grant each bereavement leave; some agencies provide longer leaves for employees to travel out of state or out of the country. This Policy provides paid leave. Your agency can modify this Policy to provide unpaid leave, and to allow the employee to use sick or vacation leave.*

810.6 Military Leave

Military leave will be granted in accordance with state and federal law. An employee requesting leave for this purpose shall promptly provide the department head with a copy of the military orders specifying the dates, site and purpose of the activity or mission. Within the limits of such orders, the department head may determine when the leave is to be taken and may modify the employee's work schedule to accommodate the request for leave.

Commentary

It is a Case-by-Case Analysis: *Due the length and complexity of the military leave laws, drafting a policy that covers all aspects of military leave is extremely difficult and would be very lengthy. State and federal military leave laws provide different rights depending upon the type of military service and/or the branch of armed forces at issue. In each case, a fact-intensive review and legal analysis is required to determine: the amount of leave, whether the leave is paid or not, reinstatement rights, and rights to benefits during leave.*

810.7 School-Related Leave

810.7.1 School or Licensed Day Care Activity Leave

Any employee who is a parent, guardian, stepparent, foster parent, grandparent, or person who stands in loco parentis to one or more children who are in kindergarten or grades 1 through 12, or who are in a licensed child care facility, shall be allowed up to 40 hours each school year, not to exceed eight hours in any calendar month of the school year, to: participate in activities of their child's school or licensed child care facility; find, enroll, or reenroll a child in a school or with a licensed child care provider; or to pick up a child due to a child care provider or school emergency. The employee must provide reasonable advance notice to his/her supervisor of the planned absence. The leave is unpaid unless the employee uses vacation, personal leave or compensatory time off. The employee must provide documentation from the school or licensed child care facility as verification that the employee participated in school or child care facility activities on a specific date and at a particular time. If both parents, guardians or grandparents having custody work for the **[Agency]** at the same **[Agency]** work site, only the first parent requesting will be entitled to leave under this provision. (Labor Code § 230.8.)

Commentary

This leave only applies to employers of 25 or more employees working at the same location. (Labor Code § 230.8(a).) Effective January 1, 2016, the California Legislature extended the reasons for this leave to cover: finding, enrolling or reenrolling a child in school or with a licensed day care provider; and to pick up a child as a result of an emergency relating to a school or a licensed child care provider. (Labor Code § 230.8(a)(1)(A) & (B).) Emergencies are defined as: a request from the school or the child care provider that the child be picked up; behavioral or discipline problems; unexpected closure; or a natural disaster. (Labor Code § 230.8(e)(2).) The January 1, 2016 law also extends the list of employees who can use the leave. (Labor Code § 230.8(e)(1).)

810.7.2 Child Suspension Leave

Any employee who is the parent or guardian of a child in grades 1 through 12 may take time off to go to the child's school in response to a request from the child's school, if the employee gives advance notice to his or her supervisor. A school has the authority to request that the parent attend the child's school if the child has: committed any obscene act; habitually used profanity or vulgarity; disrupted school activities; or otherwise willfully defied the valid authority of school personnel.

Commentary

This leave applies to all employers, regardless of workforce size, and to all employees, regardless of status. (Labor Code § 230.7.) A public school can request a parent to attend the school pursuant to Education Code sections 48900- 48900.1. (Labor Code § 230.7.)

810.8 Paid Administrative Leave

The **[Agency]** has the right to place an employee on leave with full pay for non-disciplinary reasons at any time when the **[Personnel Officer]** has determined that the employee's and/or **[Agency's]** best interests warrant the leave. The employee does not have a right to appeal the decision to be placed on administrative leave with pay.

Commentary

Paid administrative leave is generally used whenever the employee is ready and willing to come to work, but the employer directs the employee to stay home. Unless the employer pays the employee for the forced absence, the leave becomes a pay reduction which will either violate due process for a for-cause employee, or violate the salary test for a white collar overtime exempt employee. Paid administrative leave is commonly used when an

investigation into the employee's misconduct is ongoing. However, paid administrative leave may be considered in various other scenarios and an agency may want to seek advice of legal counsel before placing an employee on paid administrative leave.

810.9 Leave of Absence Without Pay Must Be Authorized By Law or These Policies

Unless authorized by law or an **[Agency]** policy, an employee is not entitled to a leave of absence without pay. An authorized leave of absence without pay is not a break in service for purposes of calculating seniority. Unless required by law, vacation leave credits, sick leave credits, increases in salary, all other paid leaves, holidays and fringe benefits and other similar benefits do not accrue to an employee on unpaid leave. Unless required by law, the **[Agency]** will not maintain contributions toward group insurance or retirement coverage for the employee on such leave. During the period of authorized unpaid leave, all service and leave credits shall be retained at the levels existing as of the effective date of the leave.

Commentary

Do Not Provide Unpaid Leave Unless a Specific Leave Law or Policy Requires It: *Many of the leave laws listed in this section allow an employee to take leave without pay. In that case, the employer is required to provide that leave. In addition, an employer may provide leave without pay as an accommodation for a disability in order to comply with state and federal anti-disability discrimination laws. Some of the state or federal leave laws also require that the employer continue group health benefits – such as Pregnancy Disability Leave or Family and Medical Act leave. Employers are best advised* ***not*** *to provide unpaid unless either: 1) there is a leave law that requires leave without pay; or 2) the leave is to provide a reasonable accommodation.*

Customize: *This Policy states that agency-provided benefits do not accrue while on unpaid leave. If this is not the case in your agency, then replace the following sentence:* ***"Unless required by law or Agency [policy, ordinance, resolution, code], vacation leave credits, sick leave credits, increases in salary, all other paid leaves, holidays and fringe benefits and other similar benefits do not accrue to an employee on unpaid leave." WITH*** *"Vacation leave credits, sick leave credits, increases in salary, and all other paid leaves, holidays and fringe benefits and other similar benefits continue to accrue to an employee on unpaid leave."*

810.10 Industrial Injury Leave

810.10.1 Employees Not Covered by Labor Code Section 4850

Employees, other than those covered by Labor Code section 4850, who are absent from work by reason of an injury or illness covered by Workers' Compensation, shall continue in pay status under the following provisions.

810.10.1.1 Coordination of Benefits

When the employee authorizes, the difference between the amount granted pursuant to such Workers' Compensation and the employee's regular pay will be deducted from the employee's accumulated sick leave, vacation, personal holidays, and compensatory time, if any. The employee will continue in pay status and receive his or her pay until his/her accumulated sick leave, and authorized compensatory time, personal holidays and vacation days, have been depleted to the nearest hour.

810.10.1.2 Accrual of Sick and Vacation Leave Continues While on Paid Leave

During the time the employee is in fully paid status while absent from work by reason of injury or illness covered by Workers' Compensation, he or she shall continue to accrue sick leave and vacation benefits as though he or she were not on leave of absence.

810.10.1.3 Unpaid Leave and Continuation of Health Care Benefits

Any employee subject to this Policy who depletes his or her accumulated sick leave, compensatory time, personal holiday time and vacation days while absent from work by reason of an injury or illness covered by Workers' Compensation may receive an unpaid leave of absence and continuation of health care benefits consistent with state and/or federal law.

810.10.2 Employees Covered by Labor Code Section 4850

Sworn Police and Fire employees covered by Labor Code Section 4850 *et seq.* will be allowed up to one year leave of absence for an industrial injury or illness without loss of salary in lieu of disability payments, consistent with state law. The employee will continue to accrue sick leave and vacation benefits while in paid status.

810.10.2.1 Coordination of Benefits after 4850 Leave

Whenever the injury or illness continues beyond the one-year 4850 leave period, and when the employee authorizes, the difference between the amount granted pursuant to such Workers' Compensation and the employee's pay may be deducted from the employee's accumulated sick and vacation leave, personal holidays, and compensatory time, if any. Thereafter, the employee may receive an unpaid leave of absence and continuation of health care benefits consistent with state and/or federal law.

Commentary

Agencies that do not have police or fire, can delete the provision for sworn law enforcement and fire.

810.11 Time Off to Vote

Any employee, if he or she does not have sufficient time outside of working hours to vote, may request up to two hours of paid leave either at the beginning or end of scheduled working hours

to enable him or her to vote. The employee must request time off to vote from his or her supervisor at least two days prior to election day.

Commentary

California law requires time off to vote for any employee, regardless of status, and requires an employee to provide notice of the need for time off no later than the third day before the election. (Election Code § 14000.)

902 Resignation, Job Abandonment, Layoff and Separation

902.1 Types of Separation

All separations of employees from positions in **[Agency]** employment are designated as one of the following types:

- Probationary Release;
- Release of **[temporary/ seasonal/ extra help]** employee;
- Resignation;
- Retirement;
- Job abandonment;
- Layoff;
- Non-disciplinary separation;
- Disciplinary separation.

902.2 Probationary Release

Probationary employees serving in their initial probationary period with the **[Agency]** may be released at any time during the probationary period as recommended by the **[Department Director/ Department Head/ Personnel Officer],** without cause or reason or notice. A released probationary employee has no right to appeal or to submit a grievance.

Commentary

*If your agency decides to release a probationary employee, it is critical to do so while the employee is still serving the probationary period. Case law generally holds that once the probationary period is over, the employee attains permanent, for-cause status. (*Winter v. City of Los Angeles *(2002) 96 Cal.App.4th 1058 [117 Cal.Rptr.2d 679].)*

902.3 Release of [Temporary/Seasonal/Extra Help] Employees

A **[temporary/ seasonal/ extra help]** employee may be separated at any time, without cause, and without right to any appeal or grievance.

902.4 Resignation

An employee who wishes to resign his or her **[Agency]** employment in good standing must submit written notice of resignation to the **[Department Director/ Department Head/ Personnel Officer]** at least two weeks prior to the planned separation date. The written notice must state the reasons for the resignation. Failure to follow the aforementioned procedure may be cause for denying future employment with the **[Agency]**. A resignation becomes final when the **[Department Director, Personnel Officer]** accepts the resignation in writing. Once a resignation has been accepted, it is final and irrevocable. A resignation can be accepted by the **[Department Director/Department Head/Personnel Officer]** even if it is submitted less than two weeks prior to the planned resignation date.

Commentary

> ***Accept Resignation Immediately and in Writing****: The best practice is to accept a resignation as quickly as possible in writing. This is because contract principles of offer and acceptance apply. A notice of resignation is an offer that can be withdrawn at any time before it is accepted. Accepting a resignation transforms the offer into a binding contract. This Policy directs your agency to accept the resignation in writing so that it is easier for your agency to prove when acceptance occurred. It is usually not preferable to second guess the employee's resignation, offer the employee incentives to not resign, or try to talk the employee out of resigning.*

902.5 Retirement

An employee planning to retire may provide a written notice to the **[Department Director/ Department Head/ Personnel Officer]** prior to the effective date of the retirement. A notice of retirement becomes final when the **[Department Director/ Department Head/ Personnel Officer]** accepts the notice of retirement in writing. Once a notice of retirement has been accepted, it is final and irrevocable.

902.6 Job Abandonment

An employee is deemed to have resigned from his/her position if he or she is absent for five consecutive scheduled work days/shifts without prior authorization and without notification during the period of the absence. The employee will be given written notice, at his or her address of record, of the circumstances of the job abandonment, and an opportunity to provide an explanation for the employee's unauthorized absence. An employee who promptly responds to the agency's written notice, within the timeframe set forth in the written notice, can arrange for an appointment with the **[Department Director/ Department Head/ Personnel Officer]** before final action is taken, to explain the unauthorized absence and failure of notification. An

employee separated for job abandonment will be reinstated upon proof of justification for such absence, such as severe accident, severe illness, false arrest, or mental or physical impairment which prevented notification. No employee separated for job abandonment has the right to a post-separation appeal.

Commentary

*Job abandonment is not equivalent to dismissal for cause according to the California Supreme Court, so therefore, no post-separation appeal is available. (*Coleman v. Dept. of Personnel Admin. *(1991) 52 Cal.3d 1102.) Instead, job abandonment is viewed as a decision on the employee's part to end employment. The written notice of job abandonment should lay out the circumstances of the abandonment much like a notice of intent to terminate, but using non-disciplinary terms. Because job abandonment is viewed as a resignation, a post-abandonment evidentiary appeal is not necessary. In order to prevent separating an employee because of disability, be sure to reinstate any employee who later justifies an absence with evidence of a disability.*

902.7 Layoff

Whenever, in the judgment of the **[Agency's Governing Board or Council]**, a reduction in personnel is necessary for economic or operational reasons, any employee may be laid off or demoted for non-disciplinary reasons.

Commentary

The Governing Body Makes the Layoff Decision: *This Policy gives* ***the governing body*** *the authority to make the decision to layoff employees. The decision to layoff is a fundamental management decision about what services an agency can afford or wants to provide, and how many employees are needed to provide the desired level of services. No single employee is considered in the decision to layoff; instead a layoff is driven by the needs of the agency as a whole and the direction that the governing body has decided to take the agency. Because a layoff is driven by management decisions about agency needs or agency economics, and not about the conduct of any employee, layoffs do not trigger an employee's pre- or post-disciplinary right of appeal.*

Two other factors make it important for the governing body to make the decision that a layoff is necessary. First, legislative actions often carry an immunity from suit that can help avoid potential liability arising from a layoff. Second, for general law cities, the law requires the governing body to make the decision. (See *Gov. Code § 45100.)*

902.7.1 Order of Layoffs

Employees will be laid off in the inverse order of their seniority in their classification in the department. Seniority is determined based on the length of employment in the affected classification in the department, or higher classifications in the department. Length of employment includes all days of employment in attendance at work and on authorized or legally-protected leaves of absence. Length of service does not include unauthorized periods of leave or suspension or layoff. Within each classification, employees will be laid off in the following order: temporary; part-time; probationary; and for-cause status. If two or more employees in a classification to be laid off have the same length of employment, the employee to be laid off will be decided by lottery.

Commentary

This Policy uses seniority in the affected classification to determine who is to be laid off. The legislative bodies of general law cities are required to use "the seniority rule" in putting a layoff into effect. (Gov. Code § 45100.) Using seniority is a benefit because it is a neutral standard that has nothing to do with the particular employee's work performance or conduct. Using seniority as the basis for layoff will help avoid claims of discrimination, bias, or that the layoff decision is a pretext for terminating an under-achieving employee. Using performance evaluation ratings as a basis for layoff is not recommended because of the subjective nature of the evaluation ratings. In addition, using performance evaluation ratings shifts the layoff decision from the agency as a whole to a decision about the worthiness of an individual employee, and could trigger the use of pre-and post-disciplinary due process procedures.

902.7.2 Notification of Layoff

Employees to be laid off will be given **[21 calendar days' notice]** of layoff.

Commentary

Your agency can select a length of time for notice that suits your agency's needs. This Policy suggests a 21-day notice, but your agency can select a longer period of time. A shorter period of time is not advisable because of time needed to review transfers, displacements, and appeals.

902.7.3 Displacement

For-cause employees who are noticed for layoff and who have held for-cause status in a lower classification within the same classification series in the same department, may displace employees in the lower classification provided that the employee seeking to displace has greater

length of employment in the lower classification than the incumbent in the lower classification. Employees in lower classifications will be displaced in inverse order of their length of employment in the classification. Any employee who seeks to displace another must provide the **[Personnel Officer]** with written notice no later than five working days after the date of the notice of layoff.

Commentary

This Policy limits displacement rights to lower classifications in the same department. The logic is that employees in different departments will have different expertise that will not translate into other departments. Your agency can allow agency-wide displacements if experience in a classification in one department is relatively similar.

902.7.4 Transfer

If the **[Personnel Officer]** determines that a for-cause employee who is subject to layoff is qualified to perform the duties in a vacant position, the employee will receive a written notice of option to transfer in lieu of layoff. An employee who does not accept a transfer within 10 days after the date of the written notice, forfeits the option to transfer. An employee who accepts a transfer will be paid the rate applicable to the position into which he or she transfers.

Commentary

There is no legal requirement to allow a transfer in lieu of layoff, but it is a way to retain talent that would otherwise be lost. This Policy avoids favoritism or bias by requiring the transferee to be qualified for the position.

902.7.5 Appeal

An employee who has been noticed for layoff, and who has any questions or concerns about the layoff decision or process may make an appointment to be heard by the **[Personnel Officer]** for an informal pre-layoff review. The employee must request this appeal in writing within five work days from the date of the notice of layoff. The **[Personnel Officer's]** decision is final.

Commentary

Pre-Layoff Review: *Agencies that do not follow a purely seniority based system for layoffs should give employees who are laid off an opportunity to challenge the decision to layoff in light of* Levine v. City of Alameda *(9th Cir. 2008) 525 F.3d 903. In* Levine*, an employee to be laid off claimed that the decision was a pretext and that the real reason for his layoff was that the City Manager did not like him. The appeal provision above allows the agency an*

informal meeting with the employee to assess claims of either pretext or inaccurate seniority calculations and address them before the layoff occurs.

902.8 Non-Disciplinary Separation

Any employee separated because of an inability to accommodate after the reasonable accommodation and interactive process is concluded, will be given a written pre-separation notice of the reasons for the separation, the evidence supporting the decision to separate for non-disciplinary reasons, and an opportunity to respond before the separation takes effect. Any for cause employee has the opportunity for a post-separation appeal as described in Policy 1002, Causes for Discipline and Procedures.

Commentary

> ***Follow the Skelly Letter Process for Inability to Accommodate****: Any employee – regardless of status – should receive a notice of intent identifying the reasons for a separation because of inability to accommodate. The notice should explain all of the Agency's interactive process and reasonable accommodation efforts, and why there was no reasonable accommodation or why providing an accommodation would constitute an undue hardship, or result in a threat to the employee or others. In that way, the agency proves that the reason for separation was not disability, but the lack of any reasonable accommodation.*

902.9 Disciplinary Separation

A for cause employee may be separated for disciplinary reasons pursuant to the policy and procedures in Policy 1002, Causes for Discipline and Procedures.

902.10 Return of City Property

All **[Agency]** property in the employee's possession must be returned prior to separation, including keys, key fobs, identification cards, equipment, credit cards, gas cards, cell phones, pagers, and any other **[Agency]** equipment.

902.11 Job References/Verification of Employment

All reference inquiries and verifications of employment must be referred to and approved by the **[Personnel Officer].** Unless the **[Personnel Officer]** receives a written waiver signed by the employee, the **[Agency]** will release only the employee's dates of employment, last position held, and final salary rate. Department heads and supervisors should not provide information in response to requests for reference checks or verification of employment, unless specifically approved by the **[Personnel Officer]** on a case-by-case basis.

Commentary

It is a best practice to have job references go through the Human Resources Department. We have seen many other department heads release derogatory or unsupported information in response to a reference check. Another best practice is to provide only dates of employment, final job and salary in response to a reference check unless you have a signed waiver from the employee that releases your agency from all liability.

1002 Causes for Discipline and Procedures

1002.1 Causes for Discipline

Employees may be disciplined for, including but not limited to, any of the following causes of discipline:

1. Violation of any department rule, **[Agency]** policy or **[Agency]** regulation, ordinance or resolution;

2. Absence without authorized leave or tardiness;

3. Excessive absenteeism and/or tardiness as defined by the employee's department head, and/or these Policies;

4. Use of leave from work in a manner not authorized or provided for under **[Agency]** policies;

5. Making any false representation or statement, or making any omission of a material fact;

6. Providing wrong or misleading information or other fraud in securing appointment, promotion or maintaining employment;

7. Unsatisfactory job performance;

8. Inefficiency;

9. Damaging any **[Agency]** property, equipment, resource, or vehicle, or the waste of **[Agency]** supplies through negligence or misconduct.

10. Insubordination; or insulting or demeaning the authority of a supervisor or manager;

11. Dishonesty;

12. Theft;

13. Violation of the **[Agency]**'s or a department's confidentiality policies, or disclosure of confidential **[Agency]** information to any unauthorized person or entity;

14. Misuse or unauthorized use of any **[Agency]** property, including, but not limited to: physical property, electronic resources, supplies, tools, equipment, **[Agency]** communication systems, **[Agency]** vehicles or intellectual property;

15. Mishandling of public funds;

16. Falsifying or tampering with any **[Agency]** record, including work time or financial records;

17. Discourteous or offensive treatment of the public or other employees;

18. Abusive conduct, including malicious verbal, visual or physical actions, or the gratuitous sabotage or undermining of a person's work performance.

Commentary

California law requires employers of 50 or more to include, as part of the bi-annual supervisory training on the prevention of harassment, a discussion about abusive conduct. (Gov. Code § 12950.1(b).) The definition of "abusive conduct" requires that the employee act with a malicious intent, which is often difficult to prove. (Gov. Code § 12950.1(g)(2).) As a result, do not charge an employee with abusive conduct unless you have evidence that the employee: 1) intended to act in a manner to cause hurt to another; or 2) acted with reckless disregard of the hurt his or her conduct would cause.

19. Conviction, meaning any judicial determination of guilt, of a crime that has a nexus to the employee's job duties;

20. Unapproved outside employment or activity, or other enterprise that constitutes a conflict of interest with service to the **[Agency]**;

21. Any conduct that impairs, disrupts or causes discredit to the **[Agency]**, to the public service, or other employee's employment;

22. Reckless or unsafe conduct;

23. Working overtime without prior authorization or refusing to work assigned overtime;

24. Carrying firearms or other dangerous weapons while on duty when not required by job duties.

25. Horseplay or fighting.

Commentary

The above causes for discipline set standards of conduct for all employees and is not an exhaustive list of all the grounds that could lead to discipline. Your Agency should modify the grounds to best suit it. Although at-will categories of employees (e.g., probationary,

seasonal, temporary, or extra help) can be held to these standards, your agency generally should not cite a reason for the release of an at-will employee. Do not use the pre- and post-disciplinary due process procedures in this policy to release at-will employees because those procedures only apply to for cause employees. If the reason for the release of an at-will employee is for misconduct that stigmatizes his/her reputation such that it is more difficult to obtain future employment, and the reason has been provided to the employee or made public, the employee may be entitled to a "name clearing" meeting (also known as liberty interest or Lubey *meeting) with the appointing authority before the date of release. (*Lubey v. City and County of San Francisco *(1979) 98 Cal.App.3d 340;* Katzberg v. Regents of the UC *(2002) 29 Cal.4th 300, 305.)*

1002.2 Types of Counseling, Reprimands and Discipline

The following are types of counseling, reprimands and discipline which the **[Agency]** may impose:

(a) **Counseling Memo:** A counseling memo will be provided to an employee to identify: a failure of appropriate conduct or performance issue; the performance the employee is to demonstrate in the future; and consequences for failure to correct the behavior or problem. A counseling memo will be retained in the supervisor's file until the completion of the evaluation year, and then documented in the performance evaluation, as the supervisor deems necessary. A counseling memo is not subject to the discipline or discipline appeal procedures described below. A counseling memo is not considered "punitive action" under the Public Safety Officers Procedural Bill of Rights Act (Government Code §3300, *et seq.*).

(b) **Verbal Reprimand:** A verbal reprimand is a verbal direction from a supervisory employee to discontinue inappropriate conduct or to correct a performance issue. A verbal reprimand will be documented in writing and retained in the supervisor's file until the completion of the evaluation year and then documented in the performance evaluation, as the supervisor deems necessary. A verbal reprimand is not subject to the discipline or discipline appeal procedures described below.

(c) **Written Reprimand:** A written reprimand is written direction from a supervisory employee to discontinue inappropriate conduct or to correct a performance issue. A written reprimand will be retained in the employee's personnel file and documented in the performance evaluation. Unless required by law, a written reprimand is not subject to the discipline or discipline appeal procedures described below. The employee has the right to have his or her written rebuttal attached to the reprimand in the employee's personnel file, if the employee submits the rebuttal to the **[Personnel Officer]** within 14 days after the reprimand is received.

(d) **Suspension Without Pay:** The **[Agency]** may suspend an employee from his/her position without pay for cause. Documents related to a suspension shall become part of the employee's personnel file when the suspension is final and documented in the performance evaluation. A suspension without pay is subject to the discipline and discipline appeal procedures described below. Employees who are exempt from Fair Labor Standards Act (FLSA) overtime will only be suspended as authorized by the FLSA.

Commentary

FLSA –Exempt Employees—Salary Reductions in Full Workweeks or For Major Safety Violations: *Note that FLSA-exempt employees cannot be disciplined via salary reduction. FLSA-exempt employees can only be suspended in the following circumstances: 1) for the entire FLSA-designated work week (29 CFR § 541.602(a)); 2) for one or more full days for violation of a written workplace conduct rule (e.g., violation of harassment, discrimination and retaliation policy); or 3) for one or more full days for a major safety violation (e.g., relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines). (29 CFR § 541.602(b)(4) & (5).)*

(e) **Reduction in Pay or Paid Leave:** The **[Agency]** may reduce an employee's pay or paid leave for cause. A reduction in pay for disciplinary purposes may take one of three forms: 1) a decrease in salary to a lower step within the salary range; 2) a decrease in salary paid to an employee for a fixed period of time; or 3) loss of accrued paid vacation or administrative leave, floating holiday, or compensatory time off. Documents related to a reduction in pay shall become part of the employee's personnel file when the reduction in pay is final and documented in the performance evaluation. A reduction in pay is subject to the discipline and discipline appeal procedures described below. Employees who are exempt from the Fair Labor Standards Act (FLSA) overtime requirements are not subject to pay reduction, except loss of accrued vacation, floating holiday, or administrative leave.

Commentary

FLSA- Exempt Employees – Leave Reductions OK: *But, the FLSA views deductions from paid leave banks as distinctly different from the prohibited deductions from salary. (*Barner v. City of Novato *(9th Cir. 1994) 17 F.3d 1256, 1261.) As a result, your agency can reduce the leave of a FLSA-exempt employee in any increment – one day, five days, 10 days, etc.*

(f) **Demotion:** The **[Agency]** may demote an employee from his or her position to a lower position for cause. Documents related to a demotion shall become part of the employee's personnel file when the demotion is final and documented in the performance evaluation. A demotion is subject to the discipline and discipline appeal procedures described below.

(g) **Dismissal:** The **[Agency]** may dismiss an employee from his or her position for cause. Documents related to the dismissal shall become a part of an employee's personnel file when the dismissal is final. A dismissed employee is entitled to the discipline and discipline appeal procedures described below.

1002.3 Discipline Procedures

The following discipline procedures only apply to the **[Agency]**'s for-cause employees. All employees other than for-cause employees, namely **[temporary, seasonal, extra-help, at-will, probationary]** employees, may be disciplined or separated at will, with or without cause, and without the disciplinary procedures listed below. The following discipline procedures apply only to suspension without pay, reduction in pay, demotion, or dismissal.

Commentary

*A suspension without pay or a pay reduction generally triggers procedural due process. Case law suggests, however, that suspensions of five or fewer days would not trigger disciplinary due process, unless a past practice, MOU, or rule provides otherwise. (*Civil Service Assn v. Local 400 v. City and County of San Francisco *(1977) 22 Cal.3d 552, 562-65.) The above Policy follows common practice and provides disciplinary due process for any length of suspension.*

(a) *"Skelly"* Notice of Intended Disciplinary Action to Employee: A written notice of the intended disciplinary action shall be given to the employee, which will include the following information:

- The level of the intended discipline;
- The specific charges that support the intended discipline;
- A summary of the facts that show that the elements of each charge at issue in the intended discipline;
- A copy of all materials upon which the intended discipline is based;
- Notice of the employee's right to respond to the **[department director]** regarding the intended discipline within **[five]** days from the date of the notice, either by requesting a *Skelly* conference, or by providing a written response, or both;
- Notice of the employee's right to have a representative of his or her choice at the *Skelly* conference; and
- Notice that failure to respond by the time specified constitutes a waiver of the right to respond prior to final discipline being imposed.

Commentary

The California Supreme Court has held that the pre-deprivation Notice of Intended Disciplinary Action, aka Notice of Intent or Skelly *notice, must be accompanied by "a copy of the ... materials upon which the action is based." (*Skelly v. State Personnel Board *(1975) 15 Cal.3d 194, 215.) This does not mean that the employer must produce every potentially relevant document along with the Notice of Intent. "Constitutional principles of due process do not create general rights of discovery." (*Gilbert v. Sunnyvale *(2005) 130 Cal.App.4th 1264, 1280.) All that the employer is required to provide at the* Skelly *pre-deprivation stage*

is a sufficient amount of supporting materials to explain or provide notice of the substance of the employer's supporting evidence so that the employee can adequately respond at his or her Skelly *conference. (*Cleveland Bd. of Educ. v. Loudermill *(1985) 470 U.S. 532, 546;* Brock v. Roadway Ex. *(1987) 481 US 252, 260, 264.) It is best practice to provide the employee all documents with the* Skelly *notice that the employer relied upon in reaching the disciplinary decision and that the employer would need to use as evidence at the evidentiary hearing, should the employee appeal the decision to discipline.*

(b) Response by Employee and *Skelly* Conference: If the employee requests a *Skelly* conference, the **[department director]** or designee will conduct an informal meeting with the employee. During the informal meeting, the employee shall have the opportunity to rebut the charges against him or her and present any mitigating circumstances. The **[department director]** will consider the employee's presentation before issuing the disciplinary action. The employee's failure to attend the conference, or to deliver a written response by the date specified in the *Skelly* notice, is a waiver of the right to respond, and the intended disciplinary action will be imposed on the date specified in the *Skelly* letter.

Commentary

The Skelly *officer hosts the meeting to hear the employee's pre-disciplinary response to the Notice of Intended Disciplinary Action. The same person may make the proposed decision, hear the employee's pre-disciplinary response, and then make a disciplinary decision that is subject to an evidentiary appeal. (*Flippin v. Los Angeles City Board of Civil Service Comm'rs *(2007) 148 Cal.App.4th 272, 282-83; s*ee also Skelly v. State Personnel Board *(1975) 15 Cal.3d 194, 215;* Los Angeles Police Protective Leave v. City of Los Angeles *(2002) 102 Cal.App.4th 85, 93-94.) Thus, there is no constitutional need to assign different managers to issue the Notice of Intent and to host the pre-disciplinary conference. However, it may make sense for an Agency to assign different personnel to issue a proposed notice of discipline and to preside over the* Skelly *conference.*

(c) Final Notice of Discipline: After the *Skelly* conference and/or timely receipt of the employee's written response, the **[department director]** will: 1) take no disciplinary action; 2) modify the intended discipline; or 3) impose the intended disciplinary action. In any case, the **[department director]** will provide the employee with a notice that contains the following:

- The level of discipline, if any, to be imposed and the effective date of the discipline;
- The specific charges upon which the discipline is based;
- A summary of the facts that show that the elements of each charge at issue in the intended discipline;
- A copy of all materials upon which the discipline is based; and
- A reference to the employee's appeal right and deadline to appeal.

(d) Delivery of the Final Notice of Discipline: The final notice of discipline will be sent by mail method that verifies delivery to the last known address of the employee, or delivered to the employee in person. If the notice is not deliverable because the employee has moved without notifying the **[Agency]** or the employee refuses to accept delivery, the effective date of discipline will be the date the post office or delivery service attempted delivery.

1002.4 Discipline Appeal Procedures

The following appeal procedures only apply to the **[Agency]**'s for-cause employees. All employees other than for-cause employees, namely **[temporary, seasonal, extra-help, at-will, probationary]** employees, may be disciplined or separated at will, with or without cause, and without the disciplinary appeal procedures listed below. The following appeal procedures apply only to suspension without pay, demotion, reduction in pay or dismissal.

(a) Request for Appeal Hearing: An employee may submit a written request for appeal to the **[Personnel Officer]** within **[14]** days from: 1) receipt of the final notice of discipline; or 2) the date of attempted delivery by the post office or delivery service of the notice to the last known address of the employee. Failure to file a timely written request for an appeal waives the right to an appeal hearing and any appeal of the discipline.

(b) Appeal Hearing Officer: The appeal hearing officer shall be the **[General Manager, City Manager, or Administrative Officer]** or an individual designated by the **[General Manager, City Manager, or Administrative Officer]** who is selected through **[State Mediation and Conciliation Service (SMCS)] [the California Office of Administrative Hearings (OAH)]** so long as the **[General Manager, City Manager, or Administrative Officer]** did not serve as the *Skelly* officer for the discipline at issue. If the **[General Manager, City Manager, or Administrative Officer]** served as the *Skelly* officer for the discipline at issue, then the appeal hearing officer shall be an individual designated by the **[Governing Body]** who is selected through **[State Mediation and Conciliation Service (SMCS)] [the California Office of Administrative Hearings (OAH)]**.

OR

Appeal Hearing Officer: The appeal hearing officer shall be an individual selected through **[State Mediation and Conciliation Service (SMCS)] [the California Office of Administrative Hearings (OAH)]**.

Commentary

This first option for the appeal hearing officer provides for the general manager, city manager, or administrative officer, or a delegated hearing officer to serve as the appeal

*hearing officer. Oftentimes, the general manager, city manager, or administrative officer will not have the time to hear a multi-day disciplinary appeal, and that the hearing officer duties will be delegated. Accordingly, the first option provides the California Office of Administrative Hearings (OAH) or the State Mediation and Conciliation Service (SMCS) as options for the selection of a designated hearing officer. The OAH has offices in Sacramento, Oakland, Los Angeles, and San Diego. Administrative Law Judges are trained in conducting hearings and are selected in a random rotation by the OAH. The SMCS also provides a panel of arbitrators who may serve as hearing officers if hearing officer duties are delegated. Selecting a designated hearing officer through OAH or SMCS hearing officer reduces the possibility of a claim of bias in the selection. (*See Nightlife Partners, Ltd. v. City of Beverly Hills *(2003) 108 Cal.App.4th 81, 133 Cal.Rptr.2d 234.)*

The second option assumes that the general manager, city manager, or administrative officer will not serve as the appeal hearing officer, and automatically utilizes the OAH or SMCS to select the hearing officer.

(c) Date and Time of the Appeal Hearing: Once the appeal hearing officer has been designated, the **[Personnel Officer]** will set a date for an appeal hearing. The employee shall be notified in writing at least 21 days prior to the hearing of the scheduled date.

(d) Prehearing Notice of Witnesses and Evidence: No later than 10 days before the hearing date, each party will provide the other and the appeal hearing officer a list of all witnesses to be called (except rebuttal witnesses), and a copy of all evidence (except rebuttal evidence) to be submitted at the hearing. The **[Agency]** will use numbers to identify its evidence; the employee will use alphabet letters. Neither party will be permitted to call any witness or evidence that has not been listed, unless that party can show that the party could not have reasonably anticipated the need for the witness or exhibit.

(e) Subpoenas: Upon the request of either party, and upon his or her own motion, the hearing officer will issue subpoenas to compel attendance at the appeal hearing. Each party is responsible for serving his/her/its own subpoenas. **[Agency]** employees who are subpoenaed to testify during working hours will be released with pay to appear at the hearing. **[Agency]** employees who are subpoenaed to testify during non-working hours will be compensated for the time they actually spend testifying.

(f) Continuances: The appeal hearing officer may continue a scheduled hearing only upon good cause shown.

(g) Record of the Appeal Hearing: The hearing shall be recorded, either electronically or by a court reporter, at the option of the **[Agency]**. If the **[Agency]** orders a transcript or makes a transcript of the recording, the **[Agency]** will notify the employee within three

days of ordering or making the transcript, and will provide a copy of the transcript upon receipt of the costs of duplication.

Commentary

A Reliable Record of the Appeal Hearing is Required: *General law cities must comply with Government Code section 45004.1(b), which requires a city or city officer who orders or makes a transcript of the hearing to provide the employee with a copy of the transcript upon receipt of copying charges. Because a court reporter's fees can be expensive, the Policy gives the agency the option of audio recording or hiring a court reporter. The hearing transcript will be a critically important document should the employee challenge the hearing decision to the superior court. Unless your agency has excellent and reliable audio recording equipment, the cost of the court reporter is well worth the money so that there is a reliable record of the proceedings. In addition, if the agency decides to not use a court reporter, because any party to an arbitration is permitted to have a certified shorthand reporter transcribe the hearing, the agency must allow for the employee's certified shorthand reporter to transcribe the hearing if so requested. The resulting transcript will then be deemed the official record of the hearing.*

(h) Employee Appearance: The employee must appear personally before the hearing officer at the time and place set for the hearing. The employee may be represented by any person he or she may select.

(i) Conduct of the Hearing:

1) **Sworn Testimony:** All witnesses shall be sworn in prior to testifying. The hearing officer or court reporter shall request each witness to raise his or her hand and respond to the following: "Do you swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth?"

2) **Evidence:** Hearings need not be conducted according to technical rules relating to evidence and witnesses, but hearings shall be conducted in a manner that the hearing officer decides is the most conducive to determining the truth. The rules dealing with privileges shall be effective to the same extent that they are recognized in civil actions. Irrelevant or unduly repetitious evidence may be excluded. The appeal hearing officer shall determine the relevance, weight and credibility of testimony and evidence.

3) **Exclusion of Witnesses:** During the examination of a witness, all other witnesses, except the parties, shall be excluded from the hearing.

4) **Burden of Proof:** The **[Agency]** has the burden of proof by the preponderance of the evidence.

5) **Authority of Hearing Officer:** The appeal hearing officer shall not have the power to alter, amend, change, add to, or subtract from any of the terms of these Policies.

6) **Professionalism:** All parties and their attorneys or representatives shall not, by written submission or oral presentation, disparage the intelligence, ethics, morals, integrity or personal behavior of their adversaries or the appeal hearing officer.

(j) Presentation of the Case: The parties will address their remarks, evidence, and objections to the appeal hearing officer. The appeal hearing officer may terminate argument at any time and issue a ruling regarding an objection or any other matter. The appeal hearing officer may limit redundant or irrelevant testimony, or directly question the witness. The hearing will proceed in the following order unless the appeal hearing officer directs otherwise:

1) The **[Agency]** is permitted to make an opening statement;

2) The employee is permitted to make an opening statement;

3) The **[Agency]** will produce its evidence;

4) The employee will produce its evidence;

5) The **[Agency]**, followed by the employee, may present rebuttal evidence;

6) Oral closing arguments of no more than **[20]** minutes may be permitted at the discretion of the appeal hearing officer. The **[Agency]** argues first, the employee argues second, and if the **[Agency]** reserved a portion of its time for rebuttal, the **[Agency]** may present a rebuttal.

(k) Written Briefs: Either party may request to submit a written brief and/or a draft decision. The appeal hearing officer will determine whether to allow written briefs or draft decisions, the deadline for submitting briefs, and the page limit for briefs.

(l) Appeal Hearing Officer's Recommended Decision: Within **[60]** days of the conclusion of the hearing, the appeal hearing officer shall make written findings and a recommended decision as to the discipline.

1) If the **[General Manager, City Manager, or Administrative Officer]** was not the appeal hearing officer or the *Skelly* officer he or she shall review the findings and

recommendations of the appeal hearing officer and may then affirm, revoke, or modify the findings, recommendations, or disciplinary action taken. The decision of the **[General Manager, City Manager, or Administrative Officer]** is final. There is no process for reconsideration.

2) If the **[General Manager, City Manager, or Administrative Officer]** was the *Skelly* officer, the **[Governing Body]** shall review the findings and recommendations of the appeal hearing officer and may then affirm, revoke, or modify the findings, recommendations, or disciplinary action taken. The decision of the **[Governing Body]** is final. There is no process for reconsideration.

(m) Proof of Service of the Written Findings and Decision: The **[Agency]** will mail a copy of the final written findings and decision, along with a proof of service of mailing that confirms that each of the parties and each of the parties' representatives were mailed the final written findings and decision. It shall be the responsibility of the employee to inform the **[Agency]** of his/her address. A copy of the decision shall also be provided to the **[Personnel Officer]**.

Commentary

Strict Proof of Service Requirements: *The 90-day statute of limitations only starts running if the agency mails the written findings and decision with a proof of service to the employee's address. (CCP § 1094.6(b);* Donnellan v. City of Novato*, 86 Cal.App.4th 1097 (2001).) It is perfectly fine to include the attorney on the proof of service, but the employee's address also must be listed on the proof of service.*

Challenge by Writ: *Pursuant to Code of Civil Procedure section 1094.6, the parties have 90 days from the date of the proof of service of mailing of the written findings and decision to appeal the **[Agency]**'s decision on the appeal to the Superior Court in and for the County **[name]**.*

1102 Grievance Procedures

1102.1 Definition of a Grievance

A grievance is an alleged violation of a specific provision of these Policies that adversely affects the employee and that contains all of the information listed in the "Statement of the Grievance" below. The following procedure applies to all **[Agency]** employees, unless: the employee is covered by a grievance procedure in a memorandum of understanding; another dispute resolution procedure applies to the dispute; or a discipline policy and procedure applies. The grievance procedure cannot be utilized to challenge the content of a performance evaluation.

Commentary

> ***Definition of "Grievance":*** *This definition limits the scope of the grievance procedure to an alleged violation of these Policies. Employees who are covered by a MOU can use the MOU grievance procedure for alleged MOU violations. This definition prevents the use of the grievance procedure if another dispute resolution procedure applies. By requiring that the employee be aggrieved by the alleged violation, this definition precludes class action grievances. Finally, the definition excludes grievances regarding the content of a performance evaluation; an employee could still grieve the failure to receive a performance evaluation. The agency should not limit the scope of the grievance procedure too much because then the employer will lose the benefit of a grievance procedure – to allow the employer to attempt to resolve issues before they become claims or lawsuits.*

1102.2 Statement of the Grievance

A concern is not a grievance unless the affected employee is able to state each of the following: the date of the alleged violation; the specific provision(s) of these Policies that were allegedly violated; a description of all facts regarding how the alleged violation occurred; and a list of all persons who are witnesses or are involved. The grievant may use an **[Agency]** form to make the Statement of the Grievance. A Statement of the Grievance must be signed by the employee filing the grievance to certify that it is filed in good faith.

Commentary

> ***It is Not a Grievance Without the Facts:*** *This Policy requires the grievant to provide certain categories of facts and information in order to state a grievance. This Policy allows the grievant to use an agency form or to simply state the grievance in any writing, such as email. The goal is to encourage the resolution of complaints in a streamlined manner and with the minimum of process.*

1102.3 Timelines

Failure of the **[Agency]** to comply with the time limits of the grievance procedures allows the grievant to appeal to the next level of review. Failure of the grievant to comply with the time limits of the grievance procedures constitutes settlement and resolution of the grievance on the basis of the last disposition. The parties may extend time limits by mutual written agreement in advance of a deadline.

Commentary

Timelines encourage prompt resolution of complaints. Management's failure to meet a timeline moves the grievance to the next level, while failure of the grievant to timely act constitutes settlement and resolution of the grievance on the basis of the last disposition.

1102.4 Procedures

(a) Step I Informal Resolution with Supervisor: The employee must first work in good faith to resolve the grievance informally through discussion with his/her immediate supervisor no later than **[14]** days after the grievant first became aware of the facts or circumstances resulting in the filing of the grievance.

(b) Step II Department Head: If the employee believes that the grievance has not been resolved through Step I, the employee may submit a written Statement of the Grievance to his/her department head. The employee must submit the Statement of the Grievance within **[28]** days after the grievant first became aware that a grievance has occurred. The department head shall consider, discuss the grievance with the grievant, and/or investigate as he/she deems appropriate, and shall, within **[14]** days of receipt of the written Statement of the Grievance, submit his/her decision in writing to the grievant.

(c) Step III [Personnel Officer]: If the employee believes that the grievance has not been resolved through Step II, the employee may appeal the grievance decision of the department head to the **[Personnel Officer]**. Such appeal must be filed within **[14]** days of the date of the department head's written decision. The **[Personnel Officer]** shall consider, discuss the grievance with the grievant, and/or investigate as he/she deems appropriate, and shall, within **[14]** days of receipt of the written Statement of the Grievance, submit his/her decision in writing to the grievant. The decision of the **[Personnel Officer]** shall be final.

Commentary

Investigation and Documentation in a Separate Grievance File: *It is critical to undertake some level of inquiry or investigation into an alleged grievance in order to determine what occurred. The above Policy gives the decision maker discretion to determine the level of*

discussion and investigation that is necessary for each case. Be sure to document your investigation in a grievance file. In order to avoid retaliation claims, and to promote fairness, all documentation of a grievance is filed in a grievance file, and not in the grievant's personnel file.

1202 Personnel Files

1202.1 Confidential [Agency] Files

The **[Agency]** maintains a personnel file on each employee. Files are kept for at least three years after separation of employment. (Labor Code § 1198.5(c)(1).) A personnel file will contain only material that the **[Agency]** deems necessary and relevant or that is required by law. Personnel files are the property of the **[Agency]**, and access to the information they contain is restricted to protect employee privacy interests.

Commentary

The personnel file is the agency's not the employee's property. It is the agency's legal record of an employee's pay, benefits, work performance, and attendance. Your agency is not required to follow requests from employees to store information in their personnel files.

1202.2 Notification of Changes

Each employee is responsible to promptly notify the **[Personnel Officer]** of any changes in his or her contact and benefits information, including: mailing address; telephone number; persons to contact in emergency; and number and names of dependents.

1202.3 Access to Applicant or Employee Medical Information

All medical information about an employee or applicant is kept in separate medical files and is treated as confidential. Access to employee or applicant medical information shall be strictly limited to only those with a legitimate need to have such information for **[Agency]** business reasons, or if access is required by law, subpoena or court order. In the case of an employee with a disability, managers and supervisors may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations. (2 Cal.Code Regs § 11069(g)(1).)

1202.4 Employee Access to Personnel File

(a) Inspection of File: A current employee may inspect his or her own personnel file, at reasonable times and at reasonable intervals, within 30 days of a written request. A former employee is entitled to inspect his or her personnel records one time per year. (Labor Code § 1198.5(d).) A current or former employee and/or his or her

representative, who wishes to review his or her personnel file should make a written request to the **[Human Resources Department]**. (Labor Code § 1198.5(b)(2)(A).) The inspection must occur in the presence of the **[Personnel Officer]** or designee and: at a location where the employee works and at a time other than the employee's work time (Labor Code § 1198.5(b)(1)); or 2) at another agreed upon location without loss of compensation to the employee. (Labor Code § 1198.5(c)(2).)

(b) Copies: A current or former employee is entitled to receive a copy of his or her personnel records within 30 days after the employer receives a written request. (Labor Code § 1198.5(b)(1).) A current or former employee who wishes to receive such a copy should contact the **[Human Resources Department]** in writing. The **[Agency]** may charge a fee for the actual cost of copying. (Labor Code § 1198.5(b)(1); 1198.5 (b)(2)(A).)

(c) Representative's Inspection: If the current or former employee wishes to have another person/representative inspect his or her personnel file, he or she must provide the person/representative with written authorization. (Labor Code § 1198.5(e).) The **[Human Resources Department]** will notify the employee and/or representative of the date, time and place of the inspection in writing.

(d) No Removal of File Documents: No person inspecting a personnel file is permitted to add or remove any document or other item to/from the personnel file.

Commentary

Labor Code section 1198.5 was amended in 2012 to: allow former employees access to the personnel file; to add time limits to inspection and copying; and to allow representatives to inspect and receive copies. The amendments also limit employee representatives to 50 requests in each calendar month to inspect and receive a copy of personnel records. (Labor Code § 1198.5(p).) While your agency can certainly invoke this 50-request limitation, it is not listed in this Policy so as to not set a floor for requests from representatives.

1202.5 Limitations on Access or Copying of Personnel File

Prior to making a copy of personnel records or allowing inspection, the **[Agency]** may redact the names of nonsupervisory employees. (Labor Code § 1198.5(g).) Under no circumstances will the **[Agency]** provide access or copying of the following categories of personnel file documents: records relating to the investigation of a possible criminal offense; letters of reference; ratings, reports, or records that were obtained prior to employment, prepared by identifiable examination committee members, or obtained in connection with a promotional examination. (Labor Code § 1198.5(h).)

Commentary

Review the File before You Allow Copying or Inspection: *The personnel file is your agency's official record, so it is critical to carefully review a personnel file before copying it or allowing a representative or employee to inspect it. Despite careful filing, an item may be misfiled. For example, drafts of a grievance investigation may be improperly filed in the personnel file, instead of in separate grievance files. To maintain privacy of other employees, your agency can redact the names of nonsupervisory employees from personnel file records prior to inspection or copying. (Labor Code § 1198.5(g).) In addition, the copying and inspection rights do not extend to the particular categories of documents listed in this rule. (Labor Code § 1198.5(h).)*

1204 Limitations on Outside Employment

1204.1 No Outside Employment Without Prior Approval

An employee shall not engage in any paid or self-employment, activity, or enterprise which is inconsistent, incompatible or in conflict with his or her **[Agency]** duties, functions, responsibilities, or that of the department in which he or she is employed at the **[Agency].** In order to avoid perceived or actual conflicts of interest that may arise from outside employment, all employees must obtain written approval from the **[Personnel Officer]** prior to undertaking any outside employment as described in this Policy. (Gov. Code § 1126(a).)

1204.2 Authorization and Appeal Process

(a) Written Request: Any employee who wants to undertake a paid outside employment, activity, or enterprise must submit a written request to his or her department head. The written request must include: the work hours and/or time required; job title or the nature of the activity; the work location; and the supervisor, manager and name of the employer or activity.

(b) Analysis and Decision: The **[Personnel Officer]** will determine if the outside employment, activity, or enterprise is compatible with the employee's employment at the **[Agency]**. If the **[Personnel Officer]** determines such activity is compatible, or would be if any conditions or restrictions applied, he or she will authorize the activity and specify the conditions/ restrictions in writing, give the employee the outside employment authorization, and place a copy of the written authorization in the employee's personnel file.

(c) One Year Authorization: An outside employment authorization is valid only up to one year. Should the employee continue the outside employment, activity, or enterprise for a longer duration, he or she must make another request following the process in this Policy.

(d) Appeal: If the **[Personnel Officer]** denies an employee's outside employment request, the employee may submit a written notice of appeal to the **[City Manager, General Manager, Chief Executive Officer]** within 10 days after the date of the denial. The decision on appeal will be put in Writing, provided within 10 days after the receipt of the appeal, and will be final.

Commentary

California law requires a local agency to adopt rules to regulate incompatible outside activities. (Gov. Code § 1126(c).) Those rules must include an appeal process. (Gov. Code § 1126(c).) Your agency can adjust the decision makers on the initial decision and appeal to suit the size of your agency. It is typical to authorize outside employment for a year at a time.

1204.3 Prohibited Outside Activities

An employee's outside employment, activity, or enterprise may be prohibited if it:

(a) involves the use for private gain or advantage of **[Agency]** time, facilities, equipment, and supplies, or the badge, uniform, prestige, or influence of the **[Agency]** or employment at the **[Agency]**;

(b) involves receipt or acceptance by the employee of any money or other consideration from anyone other than the **[Agency]** for the performance of an act which the employee would be required or expected to render in the regular course of his/her **[Agency]** employment;

(c) involves the performance of an act in other than his/her capacity as a **[Agency]** employee which act may later be subject directly or indirectly to the control, inspection, review, audit, or enforcement by such employee or the department by which he/she is employed; or

(d) involves time demands that would render the employee's performance of his or her regular **[Agency]** employment less efficient or dangerous to the employee.

Commentary

These four factors above are listed in the Government Code as incompatible activities for local agency employees. (Gov. Code § 1126(b).)

1204.4 Changes in Outside Employment Status

The employee must promptly report in writing to the **[Personnel Officer]** any of the following changes that may occur during the year of an authorized outside employment: the outside

employment ends; or the authorized employment changes as to the number of work hours, location, or types of duties**.**

1204.5 Revocation / Suspension of Outside Employment Authorization

Any outside employment authorization may be revoked or suspended during the year it is granted under the circumstances listed below. An employee may appeal the revocation or suspension as provided in this Policy.

(a) The employee's work performance declines; or

(b) An employee's conduct or outside employment conflicts with the conditions of the outside work authorization or is incompatible with the employee's work for the **[Agency].**

1204.6 Use of [Agency] Equipment Prohibited

Under no circumstances may an employee use any **[Agency]** equipment, vehicles, tools, supplies, machines, or any other item that is **[Agency]** property while an employee is engaged in any outside employment, activity or enterprise.

1206 Limitations on Political Activity

1206.1 No Solicitation During Work Hours or [Agency] Offices

[Agency] employees or officers may not solicit or receive political funds or contributions to promote the passage or defeat of any ballot measure that would affect working conditions during the working hours of its officers and employees, or in **[Agency]** offices. (Gov. Code § 3209.)

1206.2 No Targeted Solicitation of [Agency] Officers or Employees

Officers or employees of the **[Agency],** or candidates for elective office of the **[Agency],** may not directly or indirectly solicit political contributions from other officers or employees of the **[Agency]** unless the solicitation is part of a solicitation made to a significant segment of the public which may incidentally include officers from and employees of the **[Agency]**. (Gov. Code § 3205(c).)

1206.3 No Political Activity in Uniform

No **[Agency]** employee or official shall participate in political activities of any kind while in an **[Agency]** uniform or other **[Agency]**-issued clothing. (Gov. Code § 3206.)

1206.4 No Political Activity on [Agency] Property or Work Hours

[Agency] employees and officials are prohibited from engaging in political activity during working hours or on **[Agency]** property. (Gov. Code § 3207.)

Commentary

*Local agencies must be careful not to limit the political activities of employees except as provided above. The California Legislature has determined that the political activities of public employees are a matter of statewide concern, and as a result, charter cities, charter counties, and other local entities cannot make laws that conflict with the Policies above. (Gov. Code § 3201.) Furthermore, public agency employers risk violating an employee's First Amendment rights by taking action because of an employee's exercise of free expression or the employer's mistaken belief that the employee exercised his or her right of free expression. (*Heffernan v. City of Paterson *(2016) 136 S.Ct. 1412.)*

1208 Prohibitions on Drugs and Alcohol In the Workplace

1208.1 Purpose and Scope

The purpose of this Policy is to promote a drug and alcohol-free workplace and to eliminate drug and alcohol-related inefficiencies and risks. This Policy applies to all **[Agency]** employees, whether they are on **[Agency]** property, or they are performing **[Agency]**-related business elsewhere, except as this Policy is superseded by a memorandum of understanding or federally mandated drug and alcohol policies. Compliance with this Policy is a condition of employment. Disciplinary action will be taken against those who violate this Policy.

1208.2 Drug- and Alcohol-Free Awareness Program

The **[Agency]**'s employee assistance provider offers counseling and treatment of drug- or Alcohol-related problems. The employee assistance provider has information about: (a) the dangers of drug or alcohol abuse in the workplace; (b) the penalties that may be imposed for drug or alcohol abuse violations; (c) the **[Agency]**'s Policy of maintaining a drug- and alcohol free workplace; and (d) any available drug or alcohol counseling, rehabilitation or employee assistance programs. (41 USC § 701(a)(1)(B) – federal contractors; 41 USC § 702(a)(1)(B) – federal grant recipients; Gov. Code § 8355(a)(2).)

1208.3 Prohibited Conduct

(a) The manufacture, distribution, sale, dispensation, possession, or use of any controlled substance in either **[Agency]** workplaces or wherever **[Agency]** business is performed. (41 USC §§ 701-702; Gov. Code § 8355(a)(1).)

(b) Working or being subject to call in if impaired by alcohol or any controlled substance.

(c) An employee's failure to notify his/her department head before beginning work when taking medications or drugs which could interfere with the safe and effective performance of duties or operation of **[Agency]** equipment.

(d) An employee's failure to notify the **[Personnel Officer]** of any criminal conviction for a drug violation that occurred in the workplace within five days after such conviction. (41 USC § 701-702.)

(e) An employee's criminal conviction for a drug violation that occurred in the workplace.

Commentary

***Scope of State and Federal Drug Free Workplace laws**: The state and Federal Drug Free Workplace acts require that state or federal contractors or grant recipients publish many of the above rules regarding drugs and drug use in order to provide a drug free workplace. (41 USC §§ 701-706; Gov. Code §§ 8350-8357.) Although these laws only apply to drug use, and to the employees in the particular departments that are providing the contract work or are receiving the grants, many agencies broaden their application to also include alcohol and publish them in their personnel policies in case of receipt of grant funds or state or federal contracts.*

***Employer Responsibilities to Sanction and Report that Are Not Listed Here**: The federal drug free workplace law requires employers who are receiving grants or contracts to: 1) impose sanctions or require participation in a drug abuse assistance program within 30 days for employees who are convicted of a criminal drug statute; and 2) inform the granting agency within 10 days after receiving notice of a workplace drug conviction. (41 USC §§ 701-702.) Those duties are not listed here because they are limited to those agencies that are receiving federal grants or contracts, and because they are agency duties and not employee duties.*

1208.4 Drug and Alcohol Testing

The **[Agency]** has discretion to test applicants and employees for alcohol and drug use under the following circumstances. The **[Agency]** will use an outside laboratory to perform all testing.

(a) **Pre-Employment Testing for External Applicants for Certain Jobs:** Those external applicants who apply for certain jobs where a special need for pre-employment drug and alcohol testing exists must take and pass a drug and alcohol test following a conditional offer of employment. The categories of jobs subject to pre-employment drug and alcohol testing include, but is not limited to:

1) safety sensitive jobs that have public safety implications, such as operating heavy trucks to transport hazardous material, protecting national security, enforcing drug laws, and/or operating natural gas pipelines; and

2) jobs that involve the direct influence over children.

Commentary

*Limitations on Pre-Employment Drug and Alcohol Testing: State and federal case law limits the authority of a local agency to conduct pre-employment drug and alcohol tests. (*Lanier v. City of Woodburn *(9th Cir. 2008) 518 F.3d 1147;* Loder v. City of Glendale *(1997) 14 Cal.4th 846.) As a result of these cases, pre-employment drug or alcohol testing can occur only for external applicants and* only *for jobs where a "special need" exists for drug and alcohol pre-employment testing, including jobs that have a direct influence on children, or are safety-sensitive. Although the courts have not defined the term "special need," the decisions indicate that it is broader than the category of "safety sensitive" jobs. Safety-sensitive jobs involve work that poses a potential danger to the public. The following are examples: police officer; firefighter; DOT-covered employees; and water/wastewater operators; work involving the enforcement of drug laws and operating natural and liquefied natural gas pipelines. Agencies should consult with legal counsel to assess whether a position qualifies as "special need" pre-employment drug testing.*

Conduct Pre-Employment Testing After a Conditional Job Offer: *Even when a pre-employment drug and alcohol test is permissible, an agency should usually not conduct drug testing until it has first extended a conditional offer that is contingent upon passing a medical examination. (*Leonel v. American Airlines, Inc. *(9th Cir. 2005) 400 F.3d 702, 708-712,* opn. amended on denial of rehg. *(9th Cir. 2005) 2005 WL 976985.) Similarly, an agency should not test for alcohol abuse until after a conditional offer because alcoholism is a recognized disability under the state and federal non-discrimination laws. (U.S. EEOC Enforcement Guidance: Medical Examinations and Inquiries (Dec. 1995).)*

(b) **Reasonable Suspicion Testing:** The **[Agency]** may require a blood test, urinalysis, or other drug and/or alcohol screening of those employees who are reasonably suspected of using or being under the influence of a drug or alcohol at work, under the following

circumstances.

1) **"Reasonable suspicion"** to test exists if, based on objective factors, a reasonable person would believe that the employee is under the influence of drugs or alcohol at work. Examples of objective factors, include, but are not limited to: unusual behavior, slurred or altered speech, body odor, red or watery eyes, unkempt appearance, unsteady gait, lack of coordination, sleeping on the job, a pattern of abnormal or erratic behavior, a verbal or physical altercation, puncture marks or sores on skin, runny nose, dry mouth, dilated or constricted pupils, agitation, hostility, confused or incoherent behavior, paranoia, euphoria, disorientation, inappropriate wearing of sunglasses, tremors, or other evidence of recent drug or alcohol use. If [**Agency**] suspects drugs or alcohol may have played a role in an accident involving [**Agency**] property or equipment, that will also constitute reasonable suspicion.

2) **Document and Analysis:** In order to receive authority to test, the supervisor must record the factors that support reasonable suspicion in writing and analyze the matter with the **[department head or Director of Human Resources]**. Any reasonable suspicion testing must be pre-approved by the **[Personnel Officer]**.

3) **Testing Protocol:** If the documentation and analysis show that there is a reasonable suspicion of drug or alcohol abuse at work, and the **[Personnel Officer]** has approved, the employee will be relieved from duty, transported to the testing facility and to his or her home after the test. The employee will be placed on sick or other paid leave until the test results are received.

Commentary

Duty to Bargain with Employee Organizations: *A reasonable suspicion or alcohol testing Policy is not enforceable on employees who are represented by employee organizations unless the employer has first provided notice of the Policy, and opportunity to bargain, and bargaining to impasse, if necessary. (*See Holliday v. City of Modesto *(1991) 229 Cal.App.3d 528.)*

Reasonable Suspicion Factors: *The Policy requires written documentation of all reasonable suspicion factors, and an analysis and discussion with the department head and the human resources department. During the analysis, your agency can contact experts, such as your testing lab or law enforcement department, for input on whether the reasonable suspicion test is met. Your agency's documentation should include a summary of the analysis and the experts consulted.*

Post-Accident Testing: *Whereas for DOT covered employees (e.g. CDL positions) there are specific instances spelled out in the regulations that require automatic post-accident drug and alcohol testing, for this general policy, post-accident testing is limited to instances where reasonable suspicion indicators also exist to support testing.*

Use a Reputable Testing Facility/ Laboratory: *A common strategy for opposing a drug- or alcohol-related disciplinary action is to attack the laboratory test or procedures. Make sure your agency has contracted with a reputable company that uses up to date and best practices in testing procedures (e.g. split samples, chain of custody). A positive test result is only as good as the laboratory that provided it.*

1210 Use of [Agency] Equipment or Resources

1210.1 Policy and Applicability

[Agency] equipment and resources may only be used to conduct **[Agency]** business, except for incidental personal use that is consistent with this Policy. As a result, **[Agency]** equipment and resources are non-public forums. Every **[Agency]** employee is required to adhere to this Policy.

Commentary

*This Policy applies to all agency equipment and resources -- physical or electronic. If agency equipment and resources can be used to communicate in any manner, First Amendment free speech protections may limit a public employer's ability to regulate. This Policy limits the use of agency equipment and resources to business communications in order to prevent agency equipment or resources from becoming a "public" or "designated forum" that would trigger the most stringent First Amendment free speech protections. (*Clark v. Burleigh *(1992) 4 Cal.4th 474, 483 [14 Cal.Rptr.2d 455];* see also Cornelius v. NAACP Legal Defense and Education Fund, Inc. *(1985) 473 U.S. 788, 806 [105 S.Ct. 3439].) The reason for the exception for incidental personal use communications is discussed in the commentary below that section. This Policy does not apply to the use of agency buildings or rooms, since those uses generally also involve the general public.*

1210.2 Agency Equipment or Resources

[Agency] equipment or resources is any **[Agency]**-owned or supplied item or resource, including, but not limited to: intellectual property (e.g., photographs, plans, drawings, formulas, customer lists, designs, formulas), vehicles, telephones, cell phones, pagers, tools, machines, supplies, copy machines, facsimile machines, desks, office equipment, computers (including

hardware and software), file cabinets, lockers, Wi-Fi, internet, intranet, **[Agency]** network, data systems, routers, voice mail, servers, and email or voice mail communications stored in or transmitted through **[Agency]** electronic resources or equipment.

1210.3 No Expectation of Privacy

The **[Agency]** periodically and without prior notice, monitors, reviews, accesses, or retrieves data from its equipment or resources, including electronic communications and content contained in or transmitted through **[Agency]** networks or electronic resources. **[Agency]** employees must provide the agency with the employee's username or password for any **[Agency]** issued equipment or resource. The existence of passwords or delete functions does not restrict the **[Agency's]** access. As a result, **[Agency]** employees have no expectation of privacy in their use of any **[Agency]** equipment or resources.

Commentary

This Policy cautions employees that their use of agency equipment or resources is not private. It is critical for agencies not to encourage or imply privacy in the use of its equipment or resources. For example, establish protocols that give network administrators access to all agency electronic resources. (Labor Code § 980(d).) Do not allow employees to install private locks on desks, doors, cabinets or lockers. Do not allow employees to reprogram electronic locks.

1210.4 Appropriate Use Only -- No Misuse

Employees may only use **[Agency]** equipment or resources in compliance with **[Agency]** policies. Except as authorized by this Policy, employees are expected to avoid any use or communication which is unrelated to **[Agency]** business, destructive, wasteful, or illegal. The **[Agency]** has discretion to restrict or rescind employee access to **[Agency]** equipment or resources. The following are examples of misuse of **[Agency]** equipment or resources:

(a) Any use that violates applicable law and/or **[Agency]** policies, rules or procedures.

(b) Exposing others to material which is offensive, harassing, obscene or in poor taste. This includes information which could create an intimidating, offensive or hostile work environment.

(c) Any use that may create or further a hostile attitude or give offense on the basis of race, color, religion, sex, gender, gender expression, gender identity, national origin, ancestry, citizenship, age, marital status, physical or mental disability, medical condition, genetic information, sexual orientation, veteran status or any other basis protected by law.

(d) Communication of confidential **[Agency]** information to unauthorized individuals within or outside of **[Agency]**.

(e) Unauthorized attempts to access or use **[Agency]** data or break into any **[Agency]** or non-**[Agency]** system.

(f) Theft or unauthorized transmission or copying of paper or electronic files or data.

(g) Initiating or sustaining chain/spam letters, e-mail or other unauthorized mass communication.

(h) Misrepresentation of one's identity for improper or illegal purposes.

(i) Personal commercial or business activities (e.g. "for sale" notices, personal ads, etc.).

(j) Transmitting/accessing obscene material and/or pornography.

(k) E-Commerce.

(l) Online gambling.

(m) Installing or downloading unauthorized software or equipment.

(n) Violating terms of software licensing agreements.

(o) Using **[Agency]** equipment or resources to access and/or use dating web resources, personal social media, or games of any type.

Commentary

The above provision prohibits using agency property or electronic resources to access dating websites, social media or games of any type. Effective in January 1, 2014, California law prohibits employers from asking employees for their personal social media passwords or requesting employees to divulge their personal social media accounts, except in certain circumstances. (Labor Code § 980.) Consistent with this California law that personal social media is personal, this Policy prohibits employees from using agency equipment to access personal social media. This provision does not, however, prevent employees from accessing personal social media through their own devices or cell phones during their break times.

(p) Any unauthorized access to **[Agency]** equipment or resources, including: using keys or key cards; using or disclosing the username or password of another person or employee to gain access to his or her email or other electronic resources; or making **[Agency]** equipment or resources available to others who would otherwise have no authorized access.

(q) Using **[Agency]** equipment or resources to speak on the **[Agency]**'s behalf without authorization.

1210.5 [Agency] Email Address Must be Used for [Agency] Business

The **[Agency]**'s email system is an official communication tool for **[Agency]** business. The **[Agency]** establishes and assigns official email addresses to each employee as the **[Agency]** deems necessary. Employees must send all **[Agency]** communications that are sent via email to and from his or her official **[Agency]** email address. Employees are prohibited from using their private email address (such as Gmail, yahoo, MSN/Hotmail, etc.) when communicating **[Agency]** business via email. Should an email related to **[Agency]** business be sent to an employee's personal email account, the email should be immediately forwarded to the employee's **[Agency]** email account and responded to accordingly.

1210.6 Incidental Personal Use of [Agency] Communications Equipment Permitted

Employees may use **[Agency]** telephones, cell phones, internet access, and e-mail for incidental personal communications provided that the use:

(a) Is kept to a minimum and limited to break times or non-working hours;

(b) Does not interfere or conflict with **[Agency]** operations or the work performance of any **[Agency]** employees;

(c) Allows the employee to more efficiently perform **[Agency]** work;

(d) Is not abusive, illegal, inappropriate, or prohibited by this Policy (for example, no social media use, no electronic dating, no gaming); and

(e) Clearly indicates it is for personal use and does not indicate or imply City sponsorship or endorsement.

Commentary

Incidental personal use of agency communications equipment will inevitably occur. As long as incidental use is kept to a minimum, however, it can enhance employee efficiency. Using on-line banking allows an employee to remain at work, for example, while traveling to a bank does not. In addition, the National Labor Relations Board (NLRB) has held that the National Labor Relations Act (NLRA) requires private sector employers, who have granted their employee's access to the employer's email system, to allow those employees to use the employer's email for concerted activities/ employee-organization activities during non-work

*time. (*Purple Communications, Inc. *(2014) 361 NLRB No. 126.) Although the NLRA does not apply to public sector labor relations, the Public Employee's Relations Board often uses NLRA decisions as guidance in interpreting the public sector labor law. In addition, California law prohibits employers from taking adverse actions against employees for disclosing / communicating about wages and working conditions. (Labor Code §§232 & 232.5.) For all of these reasons, this Policy allows incidental personal use during non-work times.*

1212 Policy Against Violence in the Workplace

1212.1 Safe and Secure Workplace

The **[Agency]** is committed to providing a safe and secure workplace and will not tolerate acts or threats of violence in the workplace. (Labor Code § 6400.) The workplace includes any location where **[Agency]** business is conducted, including vehicles and parking lots. Any violation of this Policy may lead to criminal prosecution, and/or disciplinary action, up to and including termination.

Commentary

California law requires an employer to "furnish employment and a place of employment that is safe and healthful for the employees therein." (Labor Code § 6400.) In addition, each California employer must have an illness and injury prevention plan that includes a plan for workplace security. (8 Cal.Code Regs § 3203.) This Policy is designed to provide standards for employee conduct.

1212.2 Prohibited Behavior

Employees are prohibited from participating in or promoting acts of intimidation, violence, threats, coercion, assault and/or abusive behavior toward any person while in the course of **[Agency]** employment. The **[Agency]** has zero tolerance for any conduct that references workplace violence, even if it was intended to be harmless, humorous, a prank, blowing off steam, or venting.

1212.3 "Workplace Violence"

"Workplace violence" is defined as any conduct that causes an individual to reasonably fear for his or her personal safety or the safety of his or her family, friends, and/or property. Specific examples of workplace violence include, but are not limited to, the following:

(a) Threats or acts of physical harm directed toward an individual or his/her family, friends, associates, or property.

(b) The destruction of, or threat of destruction of **[Agency]** property or another employee's property.

(c) Fighting, challenging another person to fight, or participating in dangerous or threatening horseplay.

(d) Striking, punching, slapping, or assaulting another person.

(e) Grabbing, pinching, or touching another person in an unwanted way whether sexually or otherwise.

(f) Harassing or threatening phone calls.

(g) Surveillance.

(h) Stalking.

(i) Possessing a weapon(s) during work hours unless the **[Agency]** issues the weapon(s) for performance of the job. "Weapon" is defined as a firearm, chemical agent, club or baton, knife, or any other device, tool, or implement that can cause bodily harm if used as a weapon or displayed in such a manner to cause harm or threaten a person with harm.

1212.4 Incident Reporting Procedures

(a) Employees must immediately report to their supervisor or department director whether they have been a victim of, or have witnessed, workplace violence. The supervisor or department director will immediately report the matter to the **[Personnel Officer.]**

(b) The **[Personnel Officer]** or designee will document the incident, including the employee names(s), date/time, location, incident description, witness names and statements, description of unidentified parties, description of the act(s) and/or behavior arising from the incident, action taken, and provide any other relevant information regarding the incident.

(c) The **[Personnel Officer]** or designee will take appropriate steps to provide security, such as:

1) Placing the employee alleged to have engaged in workplace violence on administrative leave, pending investigation;

2) Asking any threatening or potentially violent person to leave the site; or

3) Immediately contacting an appropriate law enforcement agency.

1212.5 Investigation

The **[Personnel Officer]** will see that reported violations of this Policy are investigated as necessary.

1212.6 Prevention

Each department head has authority to enforce this Policy by:

(a) Training supervisors and subordinates about their responsibilities under this Policy;

(b) Assuring that reports of workplace violence are accurately and timely documented and addressed;

(c) Notifying the **[Personnel Officer]** and/or law enforcement authorities of any incidents;

(d) Making all reasonable efforts to maintain a safe and secure workplace; and

(e) Maintaining records and follow up actions as to reports of workplace violence.

1214 Appearance Standards

1214.1 Basis for Standards

These dress code, tattoo, and body piercing appearance standards are designed to promote the **[Agency's]** legitimate and non-discriminatory goals to promote workplace safety and a professional image that is consistent with the employee's job duties and level of public contact.

Commentary

*Appearance standards can impact not only an employee's highly-personal self-image, but also his or her constitutional liberty interests, rights to free speech, religion, and a hostility-free work environment. (*See Anderson v. City of Hermosa Beach *(9th Cir. 2010) 621 F.3d 1051, 1059-1063.) California law allows employers to impose reasonable appearance standards, but must allow employees to dress consistent with their gender identity or gender expression. (Gov. Code §§ 12926(q); 12949.) California law also specifically allows women to wear pants to work. (Gov. Code § 12947.5) Although courts generally uphold more restrictive appearance standards for law enforcement and fire protection personnel, employers cannot impose total bans on piercings and tattoos or religious related clothing. (*Kelley v. Johnson *(1976) 425 U.S. 238 [96 S.Ct. 1440].)*

Because appearance standards are highly personal and implicate a variety of laws and constitutional standards, it is critical to base appearance standards on objective standards and not subjective opinions. Legally enforceable appearance standards must have a rational relationship to: 1) legitimate workplace safety; 2) level of contact with the public; 3) type of work performed; and 4) allow for reasonable accommodation for disabilities, religious expression, and freedom of expression.

1214.2 Dress Code

Employees are required to dress appropriately for the jobs they are performing. The following dress code regulations shall apply to all **[Agency]** employees. If an employee has questions about how these standards apply to him or her, the matter should be immediately raised with his/her supervisor for consideration and determination.

(a) All clothing and footwear must be neat, clean, in good repair, and appropriate for the work environment and functions performed.

(b) Prescribed uniforms and safety equipment must be worn.

(c) Hair must be neat, clean and well-groomed.

(d) Beards, mustaches, and sideburns must be maintained in neat and well-groomed fashion.

(e) Jewelry that does not pierce the skin is acceptable except where it constitutes a health or safety hazard.

(f) Good personal hygiene is required.

(g) Dress must be professionally appropriate to the work setting, particularly if the employee has contact with the public at work.

1214.3 Tattoos

Employees are expected to project a professional appearance while at work and must abide by the standards below. If an employee has questions about how these standards apply to him or her, the matter should be immediately raised with his/her supervisor for consideration and determination.

(a) No tattoos are allowed anywhere on the head, face, or neck.

(b) Any visible tattoos shall not be obscene, sexually explicit, discriminatory to sex, race, religion, or national origin, extremist, and/or gang-related.

(c) No visible tattoos shall be larger than 4 by 6 inches.

(d) Any non-conforming tattoos will be covered with clothing, bandage or makeup while at work, or removed.

1214.4 Piercing

Employees are expected to project a professional appearance while at work and not endanger themselves or others with excessive body piercing. If an employee has questions about how these standards apply to him or her, the matter should be immediately raised with his/her supervisor for consideration and determination.

(a) No objects, articles, jewelry or ornamentation of any kind shall be attached to or through the skin if visible on any body part including the tongue or any part of the mouth except that one set of reasonably-sized pierced earrings may be worn in each lobe.

(b) Any non-conforming piercing shall be removed, covered with a bandage, or replaced with a clear, plastic spacer.