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HR

# CSBA Sample Board Policy

All Personnel

BP 4030(a)

## NONDISCRIMINATION IN EMPLOYMENT

Note: The following Board policy and accompanying administrative regulation are **mandated** pursuant to Government Code 11138 and 2 CCR 11023. The California Fair Employment and Housing Act (FEHA) (Government Code 12900-12996) prohibits districts and district employees from harassing or discriminating against employees and job applicants on the basis of actual or perceived race, color, ancestry, national origin, age, religious creed, marital status, pregnancy, physical or mental disability, medical condition, genetic information, military and veteran status, sex, sexual orientation, gender, gender identity, or gender expression. Pursuant to Government Code 12940, these protections apply to employees, job applicants, persons who serve in an unpaid internship or other limited-duration program to gain unpaid work experience, volunteers, and independent contractors.

The same or similar protections are available to employees and job applicants under various provisions of federal law, including Title VI of the Civil Rights Act of 1964 (42 USC 2000d-2000d-7), Title VII of the Civil Rights Act of 1964 (42 USC 2000e-2000e-17), Title IX of the Education Amendments of 1972 (20 USC 1681-1688), the Americans with Disabilities Act (42 USC 12101-12213), Section 504 of the Rehabilitation Act of 1973 (29 USC 794), and the Genetic Information Nondiscrimination Act (42 USC 2000ff-2000ff-11).

For policy addressing sexual harassment of and by employees, see BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment.

The Governing Board is determined to provide a safe, positive environment where all district employees are assured of full and equal employment access and opportunities, protection from harassment and intimidation, and freedom from any fear of reprisal or retribution for asserting their employment rights in accordance with law. For purposes of this policy, *employees* include job applicants, interns, volunteers, and persons who contracted with the district to provide services, as applicable.

*(cf. 1240 - Volunteer Assistance)*

*(cf. 3312 - Contracts)*

*(cf. 3600 - Consultants)*

*(cf. 4111/4211/4311 - Recruitment and Selection)*

Note: 2 CCR 11027.1, as added by Register 2018, No. 20, provides a definition of "national origin" for the purpose of implementing state nondiscrimination laws.

No district employee shall be discriminated against or harassed by any coworker, supervisor, manager, or other person with whom the employee comes in contact in the course of employment, on the basis of the employee's actual or perceived race, color, ancestry, national origin, age, religious creed, marital status, pregnancy, physical or mental disability, medical condition, genetic information, military and veteran status, sex, sexual orientation, gender, gender identity, gender expression, or association with a person or group with one or more of these actual or perceived characteristics.

*(cf. 0410 - Nondiscrimination in District Programs and Activities)*

**NONDISCRIMINATION IN EMPLOYMENT** (continued)

Note: 2 CCR 11028, as amended by Register 2018, No. 20, prohibits inquiry into an employee's immigration status or discrimination on the basis of such status, unless the district provides clear and convincing evidence that it is required to do so in order to comply with federal immigration law. Districts should consult legal counsel as necessary.

The district shall not inquire into any employee's immigration status nor discriminate against an employee on the basis of immigration status, unless there is clear and convincing evidence that it is necessary to comply with federal immigration law. (2 CCR 11028)

Note: The following items illustrate unlawful discriminatory practices as specified in Government Code 12940. Labor Code 1197.5 prohibits the payment of different wage rates to employees for similar work based on sex, race, or ethnicity and prohibits the use of prior salary history by itself to justify any disparity in compensation under the bona fide factor exception.

Discrimination in employment based on the characteristics listed above is prohibited in all areas of employment and in all employment-related practices, including the following:

1. Discrimination in hiring, compensation, terms, conditions, and other privileges of employment

*(cf. 4151/4251/4351 - Employee Compensation)*

*(cf. 4154/4254/4354 - Health and Welfare Benefits)*

2. Taking of an adverse employment action, such as termination or the denial of employment, promotion, job assignment, or training
3. Unwelcome conduct, whether verbal, physical, or visual, that is so severe or pervasive as to adversely affect an employee's employment opportunities, or that has the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile, or offensive work environment

Note: Item #4 below addresses the specific practices prohibited under Government Code 12940 or 2 CCR 11006-11086 in relation to certain protected categories. For example, because "sex" as defined in Government Code 12926 includes pregnancy, childbirth, breastfeeding, or related medical conditions, any of these conditions may be the basis for an employee's sex discrimination claim. As the specific prohibitions are too numerous to list in policy, it is recommended that district legal counsel be consulted when questions arise as to any specific claim.

4. Actions and practices identified as unlawful or discriminatory pursuant to Government Code 12940 or 2 CCR 11006-11086, such as:
  - a. Sex discrimination based on an employee's pregnancy, childbirth, breastfeeding, or any related medical condition or on an employee's gender, gender expression, or gender identity, including transgender status

## NONDISCRIMINATION IN EMPLOYMENT (continued)

*(cf. 4033 - Lactation Accommodation)*

*(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)*

- b. Religious creed discrimination based on an employee's religious belief or observance, including religious dress or grooming practices, or based on the district's failure or refusal to use reasonable means to accommodate an employee's religious belief, observance, or practice which conflicts with an employment requirement

*(cf. 4119.22/4219.22/4319.22 - Dress and Grooming)*

- c. Requirement for a medical or psychological examination of a job applicant, or an inquiry into whether a job applicant has a mental or physical disability or a medical condition or as to the severity of any such disability or condition, without the showing of a job-related need or business necessity

*(cf. 4119.41/4219.41/4319.41 - Employees with Infectious Disease)*

- d. Failure to make reasonable accommodation for the known physical or mental disability of an employee, or to engage in a timely, good faith, interactive process with an employee who has requested such accommodations in order to determine the effective reasonable accommodations, if any, to be provided to the employee

*(cf. 4032 - Reasonable Accommodation)*

Note: Retaliation against complainants or other participants in the grievance procedures is prohibited by Government Code 12940 and 34 CFR 110.34. In addition to the general prohibition against retaliation, Government Code 12940 provides that an employee who requests accommodation for a physical or mental disability or religious belief is protected from retaliation as specified below. CSBA recommends that this protection be extended to all protected characteristics, as provided below.

The Board also prohibits retaliation against any district employee who opposes any discriminatory employment practice by the district or its employees, agents, or representatives or who complains, testifies, assists, or in any way participates in the district's complaint process pursuant to this policy. No employee who requests an accommodation for any protected characteristic listed in this policy shall be subjected to any punishment or sanction, regardless of whether the request was granted. (Government Code 12940; 2 CCR 11028)

Note: Pursuant to Government Code 12964.5, as added by SB 1300 (Ch. 955, Statutes of 2018), the district is prohibited from requiring an employee, in exchange for a raise or bonus or as a condition of employment or continued employment, to sign a nondisparagement agreement or similar document that would deny the employee the right to disclose information about unlawful acts in the workplace or requiring an employee to release the right to file a claim or civil action against the district.

## **NONDISCRIMINATION IN EMPLOYMENT (continued)**

No employee shall, in exchange for a raise or bonus or as a condition of employment or continued employment, be required to sign any document that releases the employee's right to file a claim against the district or to disclose information about harassment or other unlawful employment practices. (Government Code 12964.5)

Complaints concerning employment discrimination, harassment, or retaliation shall immediately be investigated in accordance with procedures specified in the accompanying administrative regulation.

Note: Pursuant to 2 CCR 11019, in certain instances, an employee's (especially a supervisor's) knowledge or notice of prohibited conduct of another employee or individual may subject the district to liability. Therefore, it is recommended that the district require its employees with knowledge of harassment or discrimination to report the incident to the appropriate district authorities. In addition, Government Code 12940, as amended by SB 1300, provides that a district may be responsible for harassment of employees by nonemployees where the district knows or should have known of the conduct and failed to take immediate and corrective action, taking into consideration the extent of the district's control and other legal responsibility that the district may have with respect to the conduct of those nonemployees. Also see BP/AR 4119.11/4219.11/4319.11 - Sexual Harassment.

See the accompanying administrative regulation for requirements related to the identification of the employee who will be responsible for compliance with the nondiscrimination laws.

Any supervisory or management employee who observes or has knowledge of an incident of prohibited discrimination or harassment, including harassment of an employee by a nonemployee, shall report the incident to the Superintendent or designated district coordinator as soon as practical after the incident. All other employees are encouraged to report such incidents to their supervisor immediately. The district shall protect any employee who reports such incidents from retaliation.

Note: Government Code 12940 and 2 CCR 11023 require districts to take all reasonable steps to prevent prohibited discrimination and harassment, including, but not limited to, dissemination of the district's policy on the prevention of harassment, discrimination, and retaliation. In addition, Government Code 12950 requires districts to post, in prominent and accessible locations on district premises, posters developed by the California Department of Fair Employment and Housing (DFEH), which are available on DFEH's web site. For further information on prevention strategies, see the accompanying administrative regulation.

The Superintendent or designee shall use all appropriate means to reinforce the district's nondiscrimination policy, including providing training and information to employees about how to recognize harassment, discrimination, or other related conduct, how to respond appropriately, and components of the district's policies and regulations regarding discrimination. The Superintendent or designee shall regularly review the district's employment practices and, as necessary, shall take action to ensure district compliance with the nondiscrimination laws.

## **NONDISCRIMINATION IN EMPLOYMENT (continued)**

Any district employee who engages in prohibited discrimination, harassment, or retaliation or who aids, abets, incites, compels, or coerces another to engage or attempt to engage in such behavior in violation of this policy shall be subject to disciplinary action, up to and including dismissal.

*(cf. 4118 - Dismissal/Suspension/Disciplinary Action)*

*(cf. 4218 - Dismissal/Suspension/Disciplinary Action)*

### *Legal Reference:*

#### EDUCATION CODE

200-262.4 Prohibition of discrimination

#### CIVIL CODE

51.7 Freedom from violence or intimidation

#### GOVERNMENT CODE

11135 Unlawful discrimination

11138 Rules and regulations

12900-12996 Fair Employment and Housing Act, especially:

12940-12952 Unlawful employment practices

12960-12976 Unlawful employment practices; complaints

#### PENAL CODE

422.56 Definitions, hate crimes

#### CODE OF REGULATIONS, TITLE 2

11006-11086 Discrimination in employment, especially:

11013 Recordkeeping

11019 Terms, conditions and privileges of employment

11023 Harassment and discrimination prevention and correction

11024 Sexual harassment training and education

11027-11028 National origin and ancestry discrimination

#### CODE OF REGULATIONS, TITLE 5

4900-4965 Nondiscrimination in elementary and secondary education programs

#### UNITED STATES CODE, TITLE 20

1681-1688 Title IX of the Education Amendments of 1972

#### UNITED STATES CODE, TITLE 29

621-634 Age Discrimination in Employment Act

794 Section 504 of the Rehabilitation Act of 1973

#### UNITED STATES CODE, TITLE 42

2000d-2000d-7 Title VI, Civil Rights Act of 1964, as amended

2000e-2000e-17 Title VII, Civil Rights Act of 1964, as amended

2000ff-2000ff-11 Genetic Information Nondiscrimination Act of 2008

2000h-2-2000h-6 Title IX of the Civil Rights Act of 1964

6101-6107 Age discrimination in federally assisted programs

12101-12213 Americans with Disabilities Act

#### CODE OF FEDERAL REGULATIONS, TITLE 28

35.101-35.190 Americans with Disabilities Act

#### CODE OF FEDERAL REGULATIONS, TITLE 34

100.6 Compliance information

104.7 Designation of responsible employee for Section 504

*Legal Reference continued: (see next page)*

## NONDISCRIMINATION IN EMPLOYMENT (continued)

### *Legal Reference: (continued)*

CODE OF FEDERAL REGULATIONS, TITLE 34 (continued)

104.8 Notice

106.8 Designation of responsible employee and adoption of grievance procedures

106.9 Dissemination of policy

110.1-110.39 Nondiscrimination on the basis of age

### COURT DECISIONS

Thompson v. North American Stainless LP, (2011) 131 S.Ct. 863

Shephard v. Loyola Marymount, (2002) 102 Cal.App.4th 837

### *Management Resources:*

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING PUBLICATIONS

California Law Prohibits Workplace Discrimination and Harassment

Transgender Rights in the Workplace

Workplace Harassment Guide for California Employers

Your Rights and Obligations as a Pregnant Employee

U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS

Notice of Non-Discrimination, August 2010

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLICATIONS

EEOC Compliance Manual

Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 1999

### WEB SITES

California Department of Fair Employment and Housing: <http://www.dfeh.ca.gov>

U.S. Department of Education, Office for Civil Rights: <http://www.ed.gov/about/offices/list/ocr>

U.S. Equal Employment Opportunity Commission: <http://www.eeoc.gov>

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