



STATE OF CALIFORNIA

ERIK SKINNER, INTERIM CHANCELLOR

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**CALIFORNIA COMMUNITY COLLEGES  
CHANCELLOR'S OFFICE**

1102 Q STREET, SUITE 4554  
SACRAMENTO, CA 95811-6549  
(916) 445-8752  
<http://www.cccco.edu>

**OFFICE OF GENERAL COUNSEL**

Thuy T. Nguyen, *Interim General Counsel/  
Vice Chancellor*  
Jake Knapp, *Deputy Counsel*  
Peter V. Khang, *Deputy Counsel*

DATE: June 17, 2016

TO: Chief Executive Officers (Chancellor/Presidents and Superintendents/Presidents)  
Presidents of Boards of Trustees  
Community College Attorneys  
Chief Human Resources Officers  
Chief Instructional Officers  
Academic Senate Presidents  
Equal Employment Opportunity & Diversity Committee Chairs  
Other Interested Parties

FROM: Thuy Thi Nguyen   
Interim General Counsel / Vice Chancellor

SUBJECT: **Legal Opinion 16-04: Sixteenth Advisory on Proposition 209 and Equal Employment Opportunity**

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The purpose of this Legal Opinion is to provide legal guidance on developments in Proposition 209 and Equal Employment Opportunity ("EEO") laws since the last Chancellor's Office Legal Opinion on Proposition 209 in 2002. This Opinion also addresses questions raised by faculty, classified professionals, and administrators on faculty diversity during various statewide EEO trainings and webinars that the Office of General Counsel conducted this academic year.

Federal and state employment laws are categorized into two areas: non-discrimination laws and equal employment opportunity (inclusionary) laws – two sides of the same coin. On one side of the coin, the Chancellor's Office, particularly the Office of the General Counsel, monitors non-discrimination laws and handles appeals of student discrimination complaints. On the other side of the coin, the Chancellor's Office also oversees the EEO laws in Title 5 of the California Code of Regulations related to inclusionary hiring practices and has authority to monitor and withhold funds if the Office believes there are patterns of discrimination and non-compliance with certain regulatory provisions.<sup>1</sup>

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<sup>1</sup> All regulatory references of "Title 5" are to Title 5 of the California Code of Regulations.

This Opinion focuses on race<sup>2</sup> and gender diversity in several areas of employment since Proposition 209 prohibits preferences based on those protected classes in public employment. In certain areas, the law has been fully developed and is unequivocal. Nevertheless, interpretation of the law also requires an assessment of the risk of increased litigation, and we advise consulting with local legal counsel to ensure proper implementation and risk assessment.

This Opinion is organized to address issues related to pre-hiring, hiring, and post-hiring processes for all employees:

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- E. The Board of Trustees has a role in promoting EEO

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<sup>2</sup> This Opinion will refer to race, color, ethnicity and national origin as “race” for simplicity purposes.

1. Board must ensure that an EEO Officer is designated to implement EEO requirements
2. Board is not required to be trained before hiring of CEO, but it is an indicator of institutional commitment to diversity
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## I. FEDERAL AND STATE EEO LAWS

### A. Proposition 209 prohibits preference based on race and gender

#### 1. *20-year history of case law on Proposition 209*

Proposition 209 was a 1996 ballot measure that amended the California Constitution to prohibit preferential treatment based on race (color and ethnicity), gender, and national origin in public employment, education, and contracting. The law provides, in part, that “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” (Cal. Const., art. I, § 31, subd. (a).)

Since its passage in November of 1996, a number of legal cases have been adjudicated by the courts to define the scope of Proposition 209. (See Addendum A for summary of the case law on Proposition 209.)

These cases provide the legal framework in which courts have interpreted the provisions of Proposition 209. The courts have consistently held that state and local public agencies’ policies and procedures that give special scoring advantage to minority and women applicants in employment and contracting violate Proposition 209. In some instances, the courts have found that these public agencies have not met the burden of arguing historical racial discrimination to justify race-based remedies or that certain race-based practices were too overreaching. They also nullified policies that set hiring goals and timetables for women and minorities (also known as racial, gender quotas).<sup>3</sup>

The courts, nevertheless, also provided guidance on what could still be done to achieve diversity. The courts:

- Preserved outreach efforts to disseminate information about public employment, education, and contracting. Government Code sections 11139.6 and 11139.7 further specifies that focused outreach is legal. (See discussion below on *Recruitment and other remedies after conducting analysis*.)
- Upheld monitoring programs that collect and report data concerning the participation of women and minorities in government programs.
- Found that the term “affirmative action” is not an “illegal” term. The problem with continued use of the term is that it is misunderstood by many.
- Provided a framework for the federal funding exception to Proposition 209, stating that the policy must be narrowly tailored to comply with federal objectives and that a government entity need only present substantial evidence it would lose federal funding (versus obtaining a federal adjudication that the race-based remedy was necessary).

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<sup>3</sup> *Coalition for Economic Equity v. Wilson* (1997) 122 F.3d 692; *Kidd v. State* (1998) 62 Cal.App.4th 386; *Hi-Voltage Wire Works v. City of San Jose* (2000) 24 Cal.4th 537; *American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207; *Coral Construction Company v. City and County of San Francisco* (2010) 50 Cal.4th 315; *Coalition to Defend Affirmative Action v. Brown* (2012) 674 F.3d 1128; and *Cesar Baez v. California Public Employees’ Retirement System* (2015) 236 Cal.App.4th 836.

- Stated that Proposition 209 does not preclude all consideration of race by government entities, upholding a school district's ability to consider the racial composition of the students to achieve diversity in the schools.
- Provided a strict-scrutiny legal framework for future Proposition 209 challenges, that race-and gender-based remedial measures (beyond data collection and outreach) are necessary by showing: (1) the public agency's purposeful discrimination against a certain group; (2) that the purpose of the program was to remedy that particular discrimination; (3) that the policy is narrowly tailored and (4) that a race-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.

**2. *Proposition 209 does not prohibit "diversity," faculty internship programs, focused outreach, or other EEO efforts***

After the passage of Proposition 209 almost twenty years ago, many people were under the false belief that obligations toward equal employment opportunities were eliminated.

For instance, some were under the belief that the term "diversity" was prohibited by Proposition 209. As reflected in state statute and Title 5, community colleges are still obligated to achieve diversity through equal employment opportunities. Title 5, section 53024.1 states that "[e]stablishing and maintaining a richly diverse workforce is an on-going process." Title 5, section 53001(b) defines "diversity" to mean "a condition of broad inclusion in an employment environment that offers equal employment opportunity for all persons. It requires both the presence, and the respectful treatment, of individuals from a wide range of ethnic, racial, age, national origin, religious, gender, sexual orientation, disability and socio-economic backgrounds."

Despite the Chancellor's Office Legal Opinion in 2002 that stated otherwise, some districts eliminated faculty diversity internship programs with the belief that such programs were prohibited by Proposition 209. Similar to the operation of *Puente* and *Umoja* programs for students, faculty diversity internship programs may still operate within the legal parameters of Proposition 209 as long as the programs are inclusive of all ethnicities, races, and gender.

Some districts stopped conducting focused outreach to ethnic and gender publications, again, believing that such activities were prohibited by Proposition 209. As discussed in this opinion, not only are such activities allowed under Proposition 209 cases, California Government Code section 11139.6 explicitly creates an obligation to engage in focused outreach. This statutory requirement applies to all public entities, including community colleges, and even provides examples of focused outreach to women publication and minority conferences. (See discussion below on *Recruitment and other remedies after conducting analysis*.)

**B. Federal EEO law**

**1. *Proposition 209 exception: loss of federal funds***

Proposition 209 prohibits racial and gender preference, unless compliance with Proposition 209 would result in the loss of federal funding: "Nothing in this section shall be interpreted as prohibiting

action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.”<sup>4</sup>

Some have inquired whether California community colleges could trigger this exception in Proposition 209 due to possible loss of federal funds.

In *C & C Construction Incorporated v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, a construction company brought suit against SMUD for its policy of outreach to and preference of minority contractors. The Third District Court of Appeals held that to justify race-based discrimination under the maintaining of federal funding exception to Proposition 209, a state governmental agency need not obtain a federal adjudication that race-based discrimination was necessary. The court found in this case that SMUD’s outreach policies were more discriminatory than necessary to meet the conditions for receipt of federal funding.

Although it struck down the policy, the court nevertheless provided a framework for the federal funding exception to Proposition 209. It determined that a government entity need only present substantial evidence that it would lose federal funding and that the policy was narrowly tailored to comply with federal objectives.

Under the Office of Federal Contract Compliance Programs and Executive Order 11246<sup>5</sup>, state entities that enter into contracts with the federal government to perform services exceeding \$10,000 in value are subject to the Department of Labor’s policies regarding affirmative action in employment. Such federal contractors must have affirmative action plans showing an effort to hire women, minorities, veterans, and disabled employees in order to compete for federal contract procurement. The Department of Labor audits businesses and state entities for compliance with federal EEO laws and has clarified that Executive Order 11246 overrides state law in this matter.

Further, the Department acknowledges the conflict and notes on its website that, “While Proposition 209 is enforceable in California, it does not affect the application of Executive Order 11246. If a conflict develops for a contractor who is subject to both Executive Order 11246 and Proposition 209, the requirements of Executive Order 11246 should prevail under the U.S. Constitution’s Supremacy Clause – the Executive Order is federal law and Proposition 209 is state law. Therefore, federal contractors in the State of California must comply with the Executive Order and its affirmative action requirements.”<sup>6</sup> Where a state entity has a qualifying contract, the OFCCP exempts smaller departments within the entity that are not directly implicated by the terms of the contract from federal EEO requirements. However, regulations expressly state that state educational and medical institutions may not receive compartmentalized exemptions in this manner.<sup>7</sup>

Under the Department of Labor’s definition of a federal contractor, the California Community Colleges may also be categorized as a federal contractor based on numerous of contracts to perform services for the federal government.

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<sup>4</sup> Cal. Const. art. I, § 31

<sup>5</sup> Equal Employment Opportunity, 30 Fed.Reg. 12319

<sup>6</sup> See OFCCP’s FAQ on Jurisdiction. <https://www.dol.gov/ofccp/regs/compliance/fags/juristn.htm#Q9>

<sup>7</sup> 41 C.F.R. § 60-1.5

The University of California Office of the President (UCOP) produced guidelines in 2015 regarding compliance with federal EEO requirements for affirmative action.<sup>8</sup> The UCOP guidelines explain: “Even under Proposition 209, the University has an obligation to comply with affirmative action regulations for federal contractors that apply to all employment programs, including academic personnel. Federal affirmative action regulations and University policy require that all campuses develop and maintain a written affirmative action program covering staff, faculty, and all other academic employees.” UCOP further advises its universities:

If there are university diversity programs that apply for or receive federal funds and must use race- or gender-based criteria to become or remain eligible for the federal funding program, those programs are exempt from Proposition 209’s prohibition on granting preferences on the basis of race or gender. Federal funding programs that require preferences based on race or gender are rare, so administrators who believe preferential actions may be required in order to receive the federal funding should consult with university counsel.<sup>9</sup>

However, UCOP’s position is that “[a]ccording to the Federal regulations, an affirmative action program is a management tool designed to ensure equal employment opportunity” (versus race- or gender-preferences).<sup>10</sup>

As Chancellor’s Office Legal Opinion in 2002 states:

The *Connerly* decision did not address federal program requirements. (*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16.) Districts should continue to comply with the requirements of their federal contracts.

This Legal Opinion affirms the 2002 opinion that districts must comply with their federal contracts. However, this Legal Opinion is not prepared to definitively opine on whether the many California community colleges that are federal contractors under the Department of Labor’s definition are therefore able to trigger the exception to Proposition 209 due to possible loss of federal funds. Before proceeding, districts are highly advised to consult with local legal counsel to determine whether they are in fact a federal contractor, whether their current EEO plans are different from federal regulations, and whether there is risk of legal challenge.

## **2. Unconscious bias evidence in federal discrimination lawsuits**

Research suggests that employers are vulnerable to unconscious stereotypes when making decisions regarding hiring and promotion. These stereotypes may then operate largely independent of the intent of an individual.<sup>11</sup> Yet, whether an action is intentional or unintentional, the act yields a belief of discrimination and unfairness for minority job applicants. Courts recognize that even where a

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<sup>8</sup> Office of the General Counsel, University of California, *Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209*, p. 3. <http://www.ucop.com/general-counsel/files/guidelines-equity.pdf>

<sup>9</sup> *Id.* at p. 5

<sup>10</sup> *Id.* at p. 22

<sup>11</sup> Lee, Audrey J., *Unconscious Bias Theory in Employment Discrimination Litigation*, (2005) 40 Harv.C.R.-C.L. L.Rev. 481.

showing of intent is required, non-intentional discrimination has the same damaging effect on the workforce.

There are two distinct types of discrimination claims that can be made under Title VII of the Civil Rights Act of 1964:<sup>12</sup> disparate treatment and disparate impact. Disparate treatment claims allege that an employer treated an applicant or employee differently because of his/her membership in a protected class. Disparate impact occurs when a company or agency has a general employment policy that is facially neutral, but in application has a discriminatory effect against members of a protected class.

Under disparate impact claims, plaintiffs are not required to prove intent, yet they must show that the organization's employment practices cannot be justified by job-relatedness or business necessity. Courts have become gradually more receptive to circumstantial evidence in disparate impact claims where statistics, expert testimony, and anecdotal evidence clearly signal that an organization's policy may consciously or unconsciously discriminate against members of a protected class.

The 2011 Supreme Court's opinion in *Wal-Mart* illustrates the highest court's divided view on a disparate impact claim.<sup>13</sup> In this case, the plaintiff filed a class action employment discrimination suit against Wal-Mart based on the claim that the company's policies created a hostile work environment for women that resulted in less pay for similar work and slower promotion times than male employees. To support the group's claim, they utilized company-wide statistical evidence that demonstrated overall higher success of men in the company, as well as a social science expert witness who attested to the way in which the culture and policies within the company were conducive to discrimination against women. The district court found that the evidence was sufficient to "raise an inference of discrimination." A majority of the Supreme Court ultimately reversed the decision, but it was on an issue separate from the merits of the discrimination claim, which deeply divided the court.

The Supreme Court issued a plurality opinion of four justices, written by the late-Justice Scalia, who stated that plaintiffs failed to show Wal-Mart engages in "a pattern or practice of discrimination." While the social science expert witness on unconscious bias was permitted to testify on the nature of Wal-Mart employment practices as being the type that are vulnerable to gender bias, the four justices were unconvinced due to his concession that he could not calculate specifically "whether 0.5 percent or 95% of the employment decisions at Wal-Mart might be determined by stereotyped thinking."

However, four justices also issued an opinion, written by Justice Ginsberg, that gave weight to the inferences derived from the severe disparity in Wal-Mart's gender employment statistics, and the expert testimony on the nature of unconscious bias. Justice Ginsberg notes that "[m]anagers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes." Justice Ginsburg disagreed with Justice Scalia's notion that evidence of discretionary practices and overall disparate employment statistics alone are not enough to meet the plaintiff's burden of proof under a disparate impact claim.

Following Justice Scalia's death and the changing composition of the court, it is unclear whether future discrimination cases will be held to such a narrow standard of causation in disparate impact

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<sup>12</sup> 42 U.S.C. § 2000e-2.

<sup>13</sup> *Walmart Stores, Inc. v. Dukes* (2011) 564 U.S. 338.

cases. Four dissenting Justices in *Wal-Mart* were willing to accept unconscious bias as evidence of causation without the need to prove intent at any phase of the litigation.

Additionally, Supreme Court Justice Anthony Kennedy (who joined Justice Scalia's opinion in *Wal-Mart*) recently invoked the concept of unconscious bias as the basis for a disparate impact claim under the Fair Housing Act when he noted that "[r]ecognition of disparate-impact liability under the Federal Housing Act also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract the *unconscious prejudices* and disguised animus that escape easy classification as disparate treatment."<sup>14</sup> In other words, evidence of unconscious bias is weighed differently in disparate treatment cases, which is why disparate impact liability exists to recognize unconscious bias in explaining disparate results.

This suggests that if *Wal-Mart* were decided today, the result may have been different. Again, it is currently an open question as to the weight of circumstantial and direct evidence signaling the presence of conscious or unconscious bias, both in federal and state courts.

Title 5, section 53003(c)(4) requires members of the search committee be trained on bias prior to serving on the committee. Districts should consider conducting effective unconscious bias training in light of the trend of consideration of such unconscious bias findings in litigation.

### **C. State EEO law**

#### **1. Education Code, Title 5, and Indicators of Institutional Commitment to Diversity**

State law requires community colleges to have "a work force that is continually *responsive to the needs of a diverse student population* [which] may be achieved by ensuring that all persons receive an equal opportunity to compete for employment and promotion within the community college districts and by *eliminating barriers* to equal employment opportunity."<sup>15</sup> The Education Code further defines "educational equity" as being achieved "not only through a diverse and representative student body and faculty but also through educational environments in which each person, regardless of race, gender, gender identity, gender expression, sexual orientation, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential."<sup>16</sup>

The Board of Governors has established a set of regulations in Title 5 that addresses both the appeals process for discrimination complaints AND equal employment opportunity (inclusionary employment practices) regulations. Title 5, section 53024.1 acknowledges that "establishing and maintaining a richly diverse workforce is an on-going process that requires continued institutionalized effort." The EEO regulations are found in subchapter 1, chapter 4 of title 5. (See Appendix B for the full subchapter.) The EEO regulations have several major components:

- EEO Plan every three years or less.
- EEO and diversity advisory committee to develop and implement EEO plan.

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<sup>14</sup> *Texas Dept. of Hous. and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, at p. 2512 (*emphasis added*).

<sup>15</sup> Ed. Code, § 87100, *emphasis added*.

<sup>16</sup> Ed. Code, § 66010.2, subd. (c).

- Training for selection committees and EEO advisory committee.
- Ability to reject finalists if it is necessary to ensure EEO.
- Collection of data.
- Framework for analysis of data.
- Remedies.

Title 5, section 53024.1 also requires districts to locally develop and implement on a continuing basis, indicators of institutional commitment to diversity. The regulation delineates seventeen (17) examples of indicators. For example, an indicator of district commitment to diversity is the training of board of trustees on the elimination of bias at least once every election cycle. Another example identified in Title 5 is a district conducting campus climate surveys on a regular basis and utilizing the information to implement concrete measures to create a more welcoming campus culture.

Although the examples delineated in title 5, section 53024.1 are not mandatory, the Chancellor may require these activities if the Chancellor has concerns pursuant to title 5, section 53024.2(b)(2) as explained below.

## **2. Chancellor's Office role**

Title 5, section 53026 requires every district to establish a process for any person to file a complaint for violation of any of the EEO requirements under subchapter 1 (EEO), chapter 1 of title 5. (This EEO complaint is different from the unlawful discrimination complaint regulations.) The district must immediately forward a copy of the EEO complaint to the Chancellor who may require the district to provide a written investigation report within 90 days. If the Chancellor finds that a district's efforts have been insufficient, the Chancellor may direct the district to submit a revised EEO Plan within 120 days.

In addition to the Chancellor's ability to require revision of EEO plans subsequent to an EEO complaint, title 5, section 53024.2(b) specifically enables the Chancellor to conduct two additional reviews for non-compliance with title 5, section 53006 and/or section 53024.1.

One area for review by the Chancellor is the district's non-compliance with Title 5, section 53006, which, in summary, requires a district to:

- Determine if "significant underrepresentation of a monitored group may be the result of non job-related factors" based on data collected; and
- Implement additional measures designed to address the "significant underrepresentation" of a monitored group.

"Significant underrepresentation" is defined under title 5, section 53001 as any monitored group for which the percentage of persons from that group employed by the district in any job category is below eighty percent (80%) of the projected representation for that group in the job category in question. (See further discussion below regarding calculation of "significantly underrepresentation".)

The other area for review is title 5, section 53024.1 which requires the EEO Plan and Strategies Component to identify and implement on a continuing basis "indicators of institutional commitment to diversity." Although the section delineates possible indicators that the Chancellor may deem as

indication of such commitment, the list is not mandatory. However, a district is required to identify indicators of institutional commitment diversity in its EEO Plan.

Effective December 2015, the Chancellor's Office has also changed the EEO Fund allocation under title 5, section 53030 to require districts to meet multiple methods of achieving EEO (including having an EEO Plan) in order to receive annual EEO funding. Title 5, section 53033 also requires districts to submit employee demographic data under title 5, section 53004 as a prerequisite to receipt of EEO funds.

**D. Districts may go beyond federal and state EEO laws**

Title 5, section 53006(d) states that "nothing in this subchapter shall be construed to prohibit a district from taking any other steps it concludes are necessary to ensure equal employment opportunity, provided that such actions are consistent with the requirements of federal and state constitutional and statutory nondiscrimination law." For instance, districts may conduct focus groups to study its hiring process or require implicit bias testing as a criterion for serving on a hiring committee.

## II. PRE-HIRING

### A. Districts are required to collect longitudinal data, identify any significantly underrepresented group, and conduct adverse impact analysis

Districts are required to collect longitudinal data on their hiring processes and analyze them to identify whether there is a “significantly underrepresented group” and any possible “adverse impact”. (A chart summarizing the steps is posted on the last page of this Legal Opinion.)

Title 5, section 53003(c)(6) requires community colleges to collect and analyze longitudinal data. The EEO plan must include “longitudinal analysis of the district’s employees and applicants, broken down by number of persons from monitored group status in each of the job categories . . . to determine whether additional measures are required pursuant to section 53006 and to implement and evaluate the effectiveness of those measures.”

Proposition 209 does not prohibit data collection based on ethnicity, race, or gender. The proponents of Proposition 209 unsuccessfully tried to seek passage of Proposition 54 in 2003. If passed, Proposition 54 would have prohibited state and local governments from using racial classifications. Supporters of the measure said it was the first step towards a “colorblind” society, while opponents felt that it would make it more difficult for the state to provide services and identify and correct racial disparities. Since Proposition 54 failed, collection of racial data is not a violation of law.

#### **1. *Title 5’s 80% rule: Districts are required to identify any “significantly underrepresented groups,” which exist where actual representation is below 80% of projected representation, using numerical data***

Title 5, section 53001 defines “significantly underrepresented group” as any monitored group for which the percentage of persons from that group employed by the district in any job category listed in title 5, section 53004(a) is below eighty percent (80%) of the projected representation for that group in the job category in question. Those job categories in title 5, section 53004(a) are:

- Executive/administrative/managerial;
- Faculty and other instructional staff;
- Professional nonfaculty;
- Secretarial/clerical;
- Technical and paraprofessional;
- Skilled crafts; and
- Service and maintenance.

Title 5 does not define what constitutes “projected representation”. It is a local decision. A district may identify “projected representation” based on one or more factors such as:

- Student demographics at the college or district;
- Community demographics of the district’s service area;
- Labor market availability for each of the five job category or job classification; and/or
- Previous demographics of applicants.

These projections do not serve as hiring goals/quotas, but instead are the numbers used to assess whether the district has a “significantly underrepresented group”. This also does not mean that the existence of a “significantly underrepresented group” is proof that discrimination has occurred. Instead by determining that a group is “significantly underrepresented,” districts would be obligated to review and amend their current policies and practices where appropriate.

**2. EEOC’s 4/5<sup>th</sup> rule: Districts are also required to determine whether there is any “adverse impact” based on Equal Employment Opportunity Commission’s (EEOC) 4/5<sup>th</sup> rule of thumb**

Title 5, section 53001(a) defines “adverse impact” as:

[A] statistical measure (such as those outlined in the Equal Employment Opportunity Commission's ‘Uniform Guidelines on Employee Selection Procedures’) is applied to the effects of a selection procedure and demonstrates a disproportionate negative impact on any group protected from discrimination pursuant to Government Code section 12940.

Title 5, section 53024(d) further references the EEOC guidelines: “Selection testing for employees shall follow procedures as outlined in the Equal Employment Opportunity Commission's ‘Uniform Guidelines on Employee Selection Procedures’.”

The Equal Employment Opportunity Commission’s “Uniform Guidelines on Employee Selection” were established as guidance for monitoring potential discriminatory hiring practices and include the adverse impact concept.<sup>17</sup> Adverse impact is generally measured under the 4/5<sup>th</sup> rule of thumb. It is when selection in hiring works to the disadvantage of members of a race, sex, or ethnic group.

The EEOC’s 4/5<sup>th</sup> rule applies to all screening or selection techniques in order to ensure that they do not have an adverse impact on any group defined in terms of ethnic group identification, gender, or other protected classes. This means that each point in a hiring process where the elimination of candidates occurs should be monitored for adverse impact.

The following is how the EEOC explains this 4/5<sup>th</sup> (“adverse impact”) calculation. Under the EEOC Uniform Guidelines, adverse impact occurs when the selection rate for any group is less than 4/5<sup>th</sup> or 80% of the selection rate for the group with the highest rate.

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<sup>17</sup> See link to Equal Employment Opportunity Commission’s “Uniform Guidelines on Employee Selection” [https://www.eeoc.gov/policy/docs/qanda\\_clarify\\_procedures.html](https://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html)

Four step process to calculating adverse impacts under the EEOC's 4/5<sup>th</sup> rule

- (1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applications from that group).
- (2) Observe which group has the highest selection rate.
- (3) Calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).
- (4) Observe whether the selection rate for any group is substantially less (i.e., less than 4/5ths or 80%) than the selection rate for the highest group.

Example:

Applicants	Hired	Selection Rate Percent Hired
80 White	48	48/80 or 60%
40 Black	12	12/40 or 30%
24 Hispanic	6	6/24 or 25%

- The Black selection rate (30%) is half or 50% of the White selection rate (60%). Since 50% is less than 4/5 (80%), adverse impact is indicated.
- The Hispanic rate (25%) is 42% of the White selection rate (60%). Since 42% is less than 4/5 (80%), adverse impact is indicated.

The EEOC Uniform Guidelines require users to produce evidence of validity when the selection procedure adversely affects the opportunities of a race, sex, or ethnic group for hire, transfer, promotion, retention, or other employment decision. No validation is required if there is no adverse impact.

If adverse impact is determined, it means that the district should assess why certain groups were eliminated at a substantially higher rate than were other groups. If the higher rate of elimination was not based on job-related factors, the process may not continue until the problem is remedied.

This does not mean that the existence of an adverse impact through such calculation is proof that discrimination has occurred. The EEOC's 4/5<sup>th</sup> rule is a rule of thumb – not a legal definition. It is a statistical tool established by the EEOC to arrive at whether there is an initial inference of adverse impact. The final determination of adverse impact is not purely arithmetic, as other factors may be relevant. As the EEO Guidelines explains:

The 4/5<sup>th</sup> rule of thumb speaks only to the question of adverse impact, and is not intended to resolve the ultimate question of unlawful discrimination. Regardless of the amount of difference in selection rates, unlawful discrimination may be present, and may be demonstrated through appropriate evidence. The 4/5<sup>th</sup> rule merely establishes a numerical basis for drawing an initial inference and for requiring additional information.

The EEOC Guidelines further alludes to the fact that unlawful discrimination may still have occurred (whether or not there is a finding of adverse impact under the EEOC's 4/5<sup>th</sup> rule), and that districts must be wary of unlawful discrimination or disparate treatment. Title 5, section 59300 et seq. lays out the unlawful discrimination process by which an employee may file a discrimination complaint through the Chancellor's Office, the Department of Fair Employment and Housing, and/or the EEOC. Districts are required to investigate claims of unlawful discrimination in a timely manner and work in conjunction with EEOC if a claim is filed with that particular entity.

Districts should refer to the entire EEOC guidelines, or contact the EEOC with questions related to the EEOC adverse impact analysis.

In sum, Title 5 requires both analyses: the data should be analyzed for "significantly underrepresented" groups, and the district should also conduct an "adverse impact" analysis. Findings under either analysis do not mean that unlawful discrimination (disparate treatment or disparate impact) has occurred, but it should prompt districts to analyze the reasons or causes as further discussed below.

**B. Recruitment and other remedies after conducting analysis**

The district must analyze its hiring processes by studying the district's longitudinal data to date and applicant pool for each position. Based on the analysis, a district may decide to conduct additional outreach to ensure that recruitment efforts provide an opportunity for participation to a wide diversity of potential applicants.

Then, once applications have been screened, the district should conduct an EEOC's 4/5<sup>th</sup> (adverse impact) analysis. A finding of adverse impact at this stage gives rise to an obligation to assess whether there are non-job related factors and to take effective steps to address the problem which may include further outreach focused on the group specifically found to be underrepresented or adversely impacted.

Title 5, section 53006 states that where [district data review] identifies that significant underrepresentation of a monitored group may be the result of non-job related factors in the employment process, a district shall "review recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group." California Government Code section 11139.6 specifically states that the California Constitution (referring to Proposition 209) "does not prevent governmental agencies from engaging in inclusive public sector outreach and recruitment programs that, as a component of general recruitment, may include, but not be limited to, focused outreach and recruitment of minority groups and women if any group is underrepresented in entry level positions of a public sector employer." The types of focused outreach include, but are not limited to placement of job announcements in:

- General circulation newspapers, general circulation publications, and general market radio and television stations, including electronic media.
- Local and regional community newspapers.
- Newspapers, publications, and radio and television stations that provide information in languages other than English and whose primary audience is residents of minority and low-income communities.

- Publications, including electronic media that are distributed to the general market and to newspapers; publications; and radio and television stations whose primary audience is comprised of minority groups or women.
- Recruitment booths at job fairs or conferences oriented to both the general market and the economically disadvantaged, as well as those events drawing a significant participation by minorities or women.

Government Code section 11139.6(d) specifically states, “It is the intent of this section to allow public sector employers to conduct outreach efforts with a goal of supplementing word-of-mouth recruitment that should result in increasing diversity of the public sector workforce.” In other words, general recruitment could solely be word-of-mouth and website posting, and the minority and women media buys, for instance, could serve to supplement as focused outreach – a flexibility that may be useful for districts with limited recruitment budgets.

**C. Job announcements**

**1. *Job descriptions for faculty and administration must identify sensitivity to diversity as a job requirement***

Title 5, section 53022 states that for academic and administrative positions, “job requirements shall include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, gender identity, sexual orientation, and ethnic backgrounds of community college students.” In other words, candidates who do not demonstrate sensitivity to and understanding of diversity would be screened out of the pool as not meeting the minimal requirement of the position.

**2. *Districts should be aware of potential “exclusionary effect” unintentionally produced by the manner in which job descriptions and postings are created***

Once a district conducts analysis of its data as legally required and determines a need to re-evaluate its hiring processes, the district should evaluate how it develops its job description and conducts job postings. Title 5, section 53006(b)(4) & (6) requires districts to:

- a) Review each locally established “required,” “desired” or “preferred” qualification being used to screen applicants for positions in the job category.
- b) Determine that the qualifications are job-related and consistent with state and federal laws.

Even after determining that the qualifications are “job-related” and do not violate the law, districts can only continue to use such qualification standards if there are no alternatives that have “less exclusionary effect.” (Title 5, section 53006(b)(6).)

Districts need to assess “exclusionary effect” – that is, a policy or practice that may not be intentional or on its face exclusionary, but has the effect of being exclusionary. This does not mean that the existence of an exclusionary effect is proof that unlawful discrimination or disparate impact has occurred.

For example, one possible reason for why a monitored group is significantly underrepresented in faculty is the written preferred job requirement of a doctorate degree for faculty (or a general practice of preferring faculty applicants with doctorate degrees even though the posted qualification is master's degree). A doctorate requirement locally could be masking unconscious bias, or may have the effect of excluding (intentionally or unintentionally) applicants from significant underrepresented monitored groups who may be otherwise qualified due to comparable experience.<sup>18</sup>

The Academic Senate for California Community Colleges, in its February 2016 Rostrum publication on faculty diversity, wrote:

“Colleges may also wish to reexamine the traditional criteria by which candidates have been evaluated. In many cases, candidates have been looked on more favorably for holding more advanced degrees or even because of where they obtained their degrees. However, doctoral degrees are not required for faculty in the community college system, and in fact doctoral training may in many cases have very little relevance to the work faculty do with community college students.”

Another example is job posting of an “equivalency” allowance for career technical education faculty. Education Code section 87359 and title 5, section 53430 enable faculty applicants who do not possess the minimum qualifications to be hired if they possess “qualifications that are at least *equivalent* to the minimum qualifications (*emphasis added*).” Some districts may post the minimum qualifications for the faculty position, and briefly mention “or equivalency” but do not explain what that means. Posting the “equivalency” allowance without a full, lay-person explanation could result in candidates self-screening and declining to apply for the position when in fact, if given the opportunity to evaluate their work experience and educational background, they would have qualified under an “equivalency” review.

As a district reviews its data and determines there is significant underrepresentation (Title 5's 80% rule) and/or adverse impact (EEOC's 4/5<sup>th</sup> rule), districts should review written policies and common practices that may have an exclusionary effect (whether intentional or not).

**D. Screening/Selection committee**

**1. *Districts may require selection committee to be racially and gender diverse.***

Title 5, section 53024(e) states, “[W]henver possible, screening committees shall include a diverse membership which will bring a variety of perspectives to the assessment of applicant qualifications (*emphasis added*).”

State law clearly enables districts to have policies that require diverse membership of its screening committee. Such diverse membership may include representatives from community and student groups, along with different employee groups with varying subject matter expertise. Diverse membership could also include racial and gender diversity. Title 5's only caveat is “whenever possible,”

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<sup>18</sup> Morse, et. al. “A Commitment to Success for All: Hiring Faculty to Serve the Needs of Our Diverse Students.” Academic Senate for California Community Colleges. February 2016. <http://www.asccc.org/content/commitment-success-all-hiring-faculty-serve-needs-our-diverse-students>

speaking to the possibility that it may not be practical to achieve full diversity, including racial and gender diversity.

However, districts may go beyond federal and state EEO laws and strictly require diverse membership of its search committee. Title 5, section 53006(d) states that “nothing in this subchapter shall be construed to prohibit a district from taking any other steps it concludes are necessary to ensure equal employment opportunity, provided that such actions are consistent with the requirements of federal and state constitutional and statutory nondiscrimination law.” One such state law is Proposition 209, and the question is whether Proposition 209 prohibits a district’s policy that also requires racial and gender diversity for its search committee.

In *American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207, the court upheld the district’s policy of voluntary integration, which involved placing students into non-neighborhood schools based on aggregate factors that include the socio-economic, education, and racial composition of their neighborhoods, under Proposition 209. (See Appendix A describing the case.)

In requiring racially and gender-balanced screening committees, one can analogize to the *Berkeley Unified* case to conclude that the practice is likely also permissible under Proposition 209. There is a compelling interest in having a diverse search committee as expressed in title 5, section 53024(e), and a district may further find that a diverse search committee also eliminates barriers to employment (for example, perception of bias) for applicants. In screening committees, the responsibility of serving on a committee is distributed based on the overall composition of the committee, including racial and gender characteristics in the aggregate. When using the “overall characteristics” of committee composition, it may be permissible for search committees to consider one member to serve over another. Additionally, regardless of race or gender, qualified employees are always eligible to be appointed to serve on subsequent search committees.

Equally important is that Title 5 speaks to the critical nature of search committees as part of advancing equal employment opportunity. Title 5, section 53024(f) provides the board of trustees (or its designee) with the “right to reject all candidates and to order further review by the screening committee or to reopen the position where necessary to further achievement of the objectives of the equal employment opportunity plan or to ensure equal employment opportunity.” For instance, if the board finds the finalists for a nursing teaching position are all female and the search committee constitutes all female reviewers, the board may reject all the candidates and order the reopening of the process to further EEO. Although Title 5 is silent on this point, one may argue that since the board has the authority to reject all candidates even after finalists have been identified, an argument can be made that local boards have broad authority to ensure that selection committees eliminate barriers to equal employment opportunities and therefore, have diverse membership. Districts should consult with their local counsel before reconstituting any committees consistent with this Opinion.

**2. *It is not a violation of law for districts to provide the selection committee with data about the department or data (in aggregate form) about the applicant pool***

Racial and gender data breakdown is often taken into consideration in two main regards: 1) composition of the current workforce (even department) in which the search committee is considering applications for; and 2) demographics of the applicants for a position under consideration.

**a. Providing the search committee of the demographics to determine the current workforce is not a violation of Proposition 209**

A district may want to provide a search committee with various information about the department for which the committee is hiring. Information such as how the current workforce is able to address the diverse needs of its students, for instance, is relevant to helping the committee formulate questions that would better solicit a candidate's ability to answer the diversity question.

The information could be shared as long as there is a clear purpose for presenting the committee with such data and that such purpose was not to convey a message to a committee that it should give consideration to an impermissible factor in its decision.

**b. Providing the selection committee of the demographics of the applicants is not a violation of Proposition 209 or non-discrimination laws, if the purpose is not to imply that the committee must select applicants from a particular racial or gender group**

The information about applicants' race and gender is to be used only in research and monitoring for effectiveness in providing equal opportunity. The information does not bear on any candidate's qualifications or have relevance to job-related qualifications.

Where adverse impact has been found within the selection process, the regulations require the EEO Officer (or his/her designated EEO representative on the screening committee) to monitor and discuss the overall composition of the applicant pool and criteria or procedures that have caused an adverse impact, so long as confidential information about individuals is not disclosed. This analysis could be useful to a screening committee as it proceeds from paper screening, interviews, and final recommendations as part of the committee's self-monitoring of adverse impact (possibly caused by many factors such as unconscious bias or exclusionary effect of selection criterion). The sharing of the information when an adverse impact is found has relevance regarding the presence of an adverse impact and how to remedy the situation within the process and as immediately as possible.

Nevertheless, there could be risk involved in sharing demographic data of applicants and districts should consult with local legal counsel before proceeding.

**3. Screening committees are required to be trained in four specific areas, though the frequency of the training is a local decision**

Title 5, section 53003(c)(4) states that district must identify in its EEO Plan "a process for ensuring that district employees who participate on screening or selection committees receive training, prior to their participation." The training must include, minimally:

- The requirements of Title 5 and of state and federal nondiscrimination laws;
- The educational benefits of workforce diversity;
- The elimination of bias in hiring decisions; and
- Best practices in serving on a selection or screening committee.

Title 5 does not identify how frequently these training must occur, only that the process for ensuring training is occurring be identified in the district's EEO Plan. Thus, a district should identify in its

EEO plan whether it requires employees be trained prior to each committee it serves on, or every year or two (for instance).

Consistent with title 5, sections 53026 and 53024.2(b), the Chancellor may require a specific timeline and/or frequency of training as part of its oversight authority during district EEO compliance review.

**E. The Board of Trustees has a role in promoting EEO**

**1. *Board must ensure that an EEO Officer is designated to implement EEO requirements***

Title 5, section 53020 states that “[t]he governing board of each community college district is ultimately responsible for proper implementation of this [EEO] subchapter at all levels of district and college operation and for making measurable progress toward equal employment opportunity by the methods described in the district’s equal employment opportunity plan.” Specifically, the regulations require the governing board, upon the recommendation of the chief executive officer, to designate an EEO Officer to oversee the day-to-day implementation of the EEO requirements in Title 5.

**2. *Board is not required to be trained before hiring of CEO, but it is an indicator of institutional commitment to diversity***

Title 5, section 53003(c)(4) states that “district employees” must be trained before serving on screening committee. In this regard, members of the board of trustees are not employees and therefore, are not required to be trained.

However, Title 5, section 53024.1(g) states that one indicator of an institutional commitment to EEO is the training of boards: “The district’s board of trustees receives training on the elimination of bias in hiring and employment at least once every election cycle.” Thus, districts may voluntarily agree to have boards be trained before hiring its CEO or regularly every election cycle, and reflect such self-imposed requirement in its EEO plan as is the case for all other screening committees.

Even though it is not a mandatory requirement, consistent with Title 5, sections 53026 and 53024.2(b), the Chancellor may place such requirement on certain districts under compliance review.

**3. *Board is required to approve an EEO plan every three years, or as frequently as required***

Title 5, section 53003 requires the governing board to develop and adopt a written district EEO plan to implement its EEO program once every three years and revise as deemed necessarily. Title 5, section 53024.2(a)(2) further requires that the district certify annually to the State Chancellor that the district has reviewed and updated, as needed, the Strategies Component of the EEO Plan.

Title 5, section 53003(c)(5) also requires that the EEO plan include a process for providing annual written notice to appropriate community-based and professional organizations concerning the district’s plan and the need for assistance from the community and such organizations to recruit applicants.

**4. Board has a right to reject the finalists**

Title 5, section 53024(f) affirms the local board's ultimate authority to make all final hiring decisions, including hiring recommended by a screening committee. Section 53024(f) states, "This includes the right to reject all candidates and to order further review by the screening committee or to reopen the position where necessary to further achievement of the objectives of the equal employment opportunity plan or to ensure equal employment opportunity."

Furthermore, Section 53024(f) reminds the local boards that "a consistent pattern of not hiring qualified candidates from a monitored group who are recommended by screening committees may give rise to an inference that the selections are not consistent with the objectives of equal employment opportunity."

### III. HIRING

#### A. Role of EEO officer

Each district is required to have an identified EEO Officer to “oversee the day-to-day implementation of the requirements set for in this subchapter [EEO].” (Cal. Code Regs., tit. 5, § 53020.)

The EEO plan shall designate a single officer, who may be the EEO Officer, who shall be given authority and responsibility for receiving complaints filed pursuant to title 5, section 53026 – that is, complaints for violation of the EEO regulations. This single officer is required for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored as required by title 5, sections 53023 and 53024.

In addition to a district-wide EEO Officer, some districts have an EEO representative on every search committee and people have inquired about the role of the EEO representative. A district may designate EEO representatives, and even delegate the legal responsibilities to the EEO representatives. The presence of a person such as an EEO representative who is available during search committee meetings to monitor for potential discrimination is not prohibited by law. However, the EEO Officer designated by the Board pursuant to title 5, section 53020 is still accountable for compliance of EEO regulations. It is a local decision as to how a district defines the role of the EEO representative on a search committee.

Title 5, section 53020(c) states that “[a]ny organization or individual, whether or not an employee of the district, who acts on behalf of the governing board with regard to the recruitment and screening of personnel is an agent of the district and is subject to all of the [EEO] requirements of this subchapter.” A district’s administrative structure created by any delegation of authority to the EEO Officer or others (such as an EEO representative on a search committee) must be described in the district’s EEO plan submitted pursuant to title 5, section 53003 and shall be designed in such a manner so as to ensure prompt and effective implementation of the requirements of the EEO regulations.

Title 5 does not dictate whether an EEO representative, if provided, should have a voting or non-voting role on a search committee. As to an EEO representative voting, we assume the voting is based on job qualifications without regard to an applicant’s status in terms of ethnic group identification, gender, disability, religion, age, sexual orientation, political affiliation, or any similar applicant characteristic that would generally have no bearing on the job. Provided care is taken to avoid voting or making decisions which are influenced by such factors, EEO representative may continue to vote if so authorized by district policy.

From the Chancellor’s Office perspective, what is important is whether the various functions required in Title 5 are met, either by the EEO officer or his/her EEO representatives. Who is evaluating the applicant pool for adverse impact? Who is evaluating at each step of the hiring process (e.g., after pool has been constituted, after paper screening, after first interviews, and after final interviews) to determine whether there is bias or adverse impact? Who is in charge of identifying subjective hiring factors that are not job-related or not identified in job descriptions (e.g., unwritten preference for doctorate degrees)? Who ensures that all members are trained prior to serving on the committee? Who is in charge of pointing out possible explicit or implicit bias by members of the screening committee, and the process for reporting such conduct?

If the Chancellor's Office conducts compliance reviews pursuant to title 5, sections 53026 and 53024.2(b), it could inquire, for instance, whether EEO representatives are trained on how to conduct adverse impact and identify implicit bias; whether the EEO representative reports to a supervisor for that department that is hiring and could have conflicts; and whether the EEO Officer has adequately prepared the EEO representative on his/her role on the committee and reporting requirements to the EEO Officer.

**B. The Diversity question in applications and interviews**

Some districts have a diversity question in its hiring process (whether as a requirement to fill out in the written application and/or a question during the interviews). State law requires that sensitivity to the diversity of the students is a job requirement for academic and administrative positions pursuant to title 5, section 53022.

However, it does not require that such job requirement be in the form of a single question during an interview or weaved in two or more questions, nor does it require that the question be graded differently. This is a local decision. Since it is a job requirement, state law treats "sensitivity to diversity" as similar to a minimum requirement. Thus, one who does not meet the diversity requirement would not have met the minimum requirement and not be qualified for the position (similar to not having a driver's license to be a driver for the colleges).

**C. Hiring processes**

Many districts have inquired whether state law prohibits follow-up questions during interviews, for example, as presumably follow-up questions allow for a more in-depth inquiry on the candidate's experience with diverse students and employees. Hiring practices around the types of question, the time set aside for interviews, the requirement of asking the same question for every candidate, and the grading rubric of paper screening and interviews are not set forth in state law, but instead are local practices. State law requires the evaluation of each process to determine if there are non job-related practices that could have adverse impact on underrepresented monitored groups.

#### **IV. POST-HIRING TOPICS**

##### **A. Retention and promotion**

Title 5 section 53006(a) identifies the phases of the employment process include but are not limited to recruitment, hiring, retention, and promotion. Thus, districts need to evaluate if there is significant underrepresentation of a monitored group (i.e., Title 5's 80% rule) and conduct adverse impact analysis (i.e., EEOC's 4/5<sup>th</sup> rule) in all these employment junctures. This includes employee attrition, faculty tenure, and seniority rights in hiring pools.

##### **B. Faculty diversity internship programs**

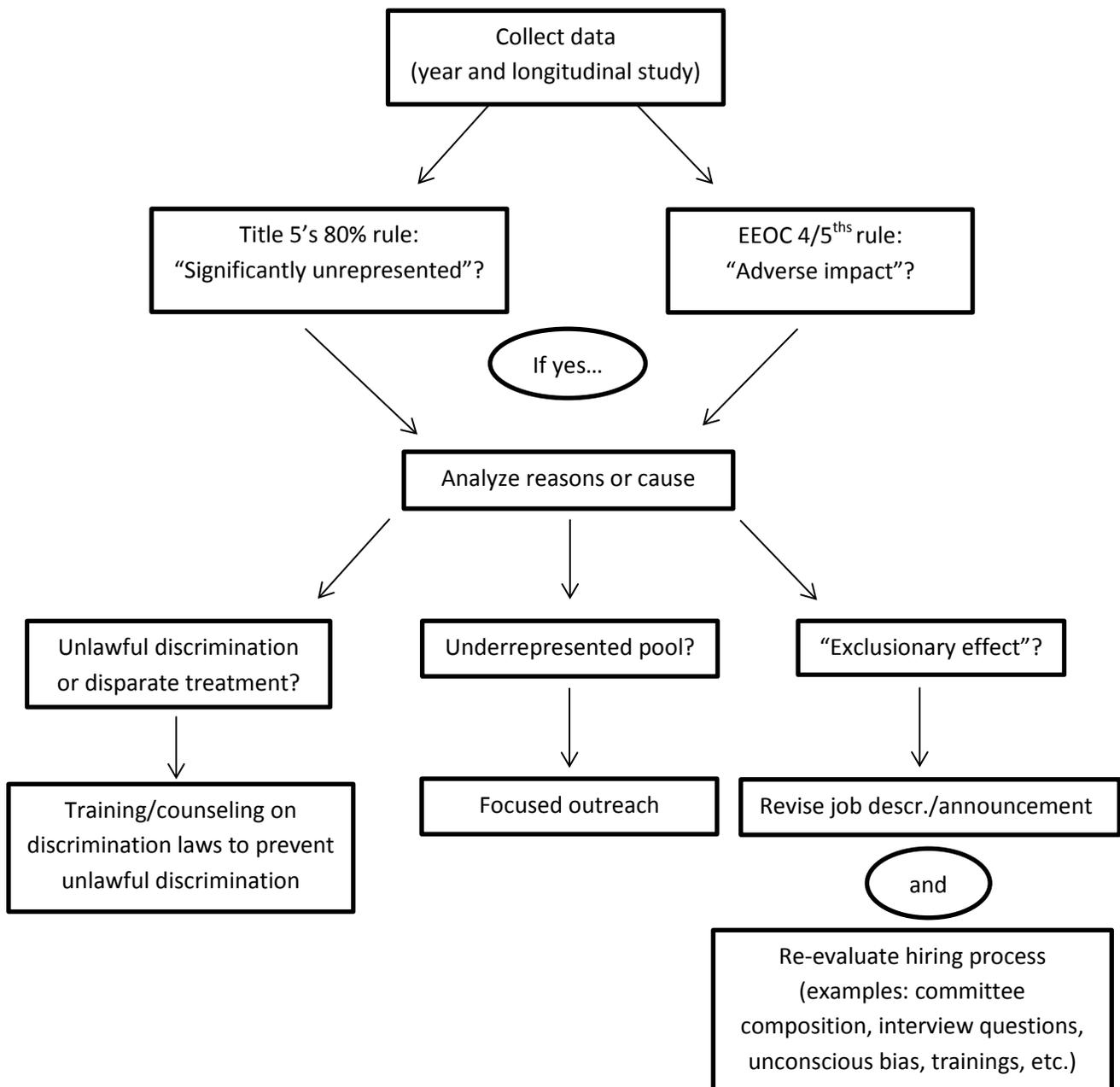
Proposition 209 and the subsequent *Connerly* decision did not prohibit faculty internship programs, even ones with a focus in diversifying the faculty ranks. There is no reason that faculty internship programs should be changed. There has never been authority to limit participation in such programs to any particular group, other than groups defined by educational qualifications.

##### **C. Leadership succession programs**

Similarly, leadership succession programs with an emphasis on diversifying management, as long as they do not limit participation based on race and gender, are not prohibited by Proposition 209.

### V. CONCLUSION

Education Code section 87100 and Title 5 require community colleges to have a richly diverse workforce that addresses the needs of our diverse student population. This legal obligation does not change due to Proposition 209. Instead, it requires focusing on equal employment opportunities to eliminate barriers in employment – barriers such as lack of focused outreach, a non-welcoming culture, and implicit and explicit bias. Such effort to eliminate barriers require a proactive, intentional effort by colleges, and require various institutional discipline such as review of job descriptions to avoid exclusionary effect, analysis of significant underrepresentation and adverse impact to ensure recruitment efforts and hiring processes are not unintentionally discriminatory, and effective training of committee members to self-regulate unconscious bias.



## ADDENDIX A: 20-Year Chronology of Proposition 209 Case Law

*Coalition for Economic Equity v. Wilson* (1997) 122 F.3d 692: This action was filed one day after the passage of Proposition 209 and was the first to challenge the provision as a violation the federal Equal Protection and Supremacy Clauses of the U.S. Constitution. The Ninth Circuit Court of Appeals declined to review the law under any heightened scrutiny, and deferred to the electorate in holding that Proposition 209 did not classify individuals on the basis of race or gender. The court also concluded that Proposition 209 is not preempted by federal law, because while the EEOC encourages some forms of affirmative action under Title VII, this provision does not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

*Kidd v. State* (1998) 62 Cal.App.4th 386, 72 Cal.Rptr.2d 758: Plaintiffs challenged the State Personnel Board's policy of “supplemental certification,” which allowed certain minority and female applicants for positions in the state civil service to be considered for employment even though they did not place in the top three ranks of the list of eligible candidates. The Third District Court of Appeals held that this type of affirmative action, awarding employment to minority candidates who were not equally qualified, but objectively less qualified than non-minority candidates, is a violation of Proposition 209.

*Hi-Voltage Wire Works v. City of San Jose* (2000) 24 Cal.4th 537, 101 Cal.Rptr.2d 653, 12 P.3d 1068: A general contracting firm brought suit against a city, alleging that a municipal program that required contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include minority and women subcontractors in their bids, constituted a violation of Proposition 209's guarantee against giving preferential treatment to any individual based on race or gender. The Supreme Court of California found for the plaintiffs and struck down the city's ordinance, on the grounds that Proposition 209 is constitutional, and that the city's program violates the provision on its face by granting preference to minorities and women, while leaving no alternative methods for contractors to provide explanations to account for a lack of diversity in a firm. The court noted that the holding was limited to the program in question and recognized that voters intended to preserve outreach efforts to disseminate information about public employment, education, and contracting not predicated on an impermissible classification.

The court affirmed that outreach is allowable by stating, “[a]lthough we find the City's outreach option unconstitutional under section 31, we acknowledge that outreach may assume many forms, not all of which would be unlawful.” (*Hi-Voltage Wire Works v. City of San Jose, supra*, 24 Cal.4th 537, 565.) Government Code Section 11139.6 and 11139.7 further specifies that focused outreach is legal. See discussion below on outreach, recruitment.

*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 112 Cal.Rptr.2d 5: Plaintiff brought a suit arguing that affirmative action programs applicable to the State Lottery Commission, the sale of state bonds, the state civil service, state community colleges, and state contracting were in violation of Proposition 209. The court struck down several of these programs that gave preference in hiring and contracting based on race and gender. However, the court upheld monitoring programs that collected and reported data concerning the participation of women and minorities in government programs. The court noted that “government has a compelling need for such information in order to address lingering discrimination and to develop appropriate legislative and administrative actions, such as ‘race-neutral and gender-neutral remedies.’” Government programs that collect racial data do not implicate

Proposition 209 so long as they do not discriminate against or grant preference to any individual or group based on race or gender.

The invalidation of the statutes and the decision itself required an immediate review of Board of Governors' regulations that also address affirmative action employment. The statutes that were found to be unconstitutional are cited as authority in the Board's regulations that address community college hiring processes. The ability to cite to these statutes as authority was effectively removed by the Court of Appeal. Although the Board has broad regulatory authority, the designation of other clear bases for Board regulations in employment and nondiscrimination strengthen the regulations. Alternate statutory authority exists to justify, and even require, regulatory action to ensure nondiscrimination and diversity in employment practices. The decision also challenged certain specific portions of the Board's existing regulations, asserting that they also suffer from constitutional deficiencies. The focus of the criticism was on the setting of goals and timetables for women and minorities, and on any aspect of the regulations that required different treatment for women and minorities or the consideration of race or gender in decision-making. The specific criticism of the regulations also triggered the need to immediately address problems identified by the Court.

*C & C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, 18 Cal.Rptr.3d 715: A construction company brought suit against SMUD for its policy of outreach to and preference of minority contractors. Proposition 209 prohibits racial and gender preference, except where action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.<sup>19</sup> The Third District Court of Appeals held that to justify race-based discrimination under the maintaining of federal funding exception to Proposition 209, a state governmental agency need not obtain a federal adjudication that race-based discrimination was necessary. The court found in this case that SMUD's outreach policies were more discriminatory than necessary to meet the conditions for receipt of federal funding. However, the court also provided a framework for the federal funding exception to Proposition 209. The court concluded that, "that in order to discriminate based on race, the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination." (*C&C Const. Inc., Sacramento Mun. Utility Dist., supra*, 122 Cal.App.4th 284, 298.)

*American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207, 90 Cal.Rptr.3d 789: A conservative non-profit group brought suit against a school district, arguing that its goal to achieve social diversity by using neighborhood demographics when assigning students to schools was in violation of Proposition 209. The policy expressly considered the racial composition of the student's neighborhood, in addition to other socioeconomic and education-related factors to achieve diversity in schools. The Court of Appeals upheld the school district's policy, and clarified that Proposition 209 was not intended by voters to preclude all consideration of race by government entities. Specifically, the court stated that, "[t]he [Proposition 209] ballot pamphlet materials reinforce our view that section 31 was not intended to preclude all consideration of race by government entities but rather was intended to prohibit only those state programs and policies that discriminate against or grant preferential treatment to any individual or group on the basis of race." (*ACRF v. Berkeley Unif. School Dist.*, *supra*, 172 Cal. App.4<sup>th</sup> 207, 220.)

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<sup>19</sup> Cal. Const. art. I, § 31

*Coral Construction Company v. City and County of San Francisco* (2010) 50 Cal.4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279: Construction companies brought suit against San Francisco for its policy of accepting female and minority contractors' bids as lower than what was actually offered. The Supreme Court of California held that San Francisco's preferential policy was a violation of Proposition 209, even though the city argued that the policy was justified by presenting evidence of the construction industry's long-standing pattern of discrimination against women and minorities. The court then presented a framework for future Proposition 209 defendants to prove that remedial measures are necessary by showing: (1) the city's purposeful discrimination against a certain group; (2) that the purpose of the city's program was to remedy that particular discrimination; (3) that the ordinance is narrowly tailored and (4) that a race-and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.

*Coalition to Defend Affirmative Action v. Brown* (2012) 674 F.3d 1128: Plaintiffs were high school and college students who filed a suit arguing that Proposition 209 violates the Equal Protection Clause by unfairly excluding minorities from higher education. Plaintiffs asserted that the *Wilson* decision only determined that Proposition 209 was facially neutral, and the decision did not foreclose the argument that the law violates equal protection as applied. The Ninth Circuit Court of Appeals determined that the *Wilson* court had adequately contemplated the burden that the law's application might carry, and upheld the former decision.

## **APPENDIX B**

### **TITLE 5: EEO REGULATIONS**

#### **§ 53000. Scope and Intent.**

(a) This subchapter implements and should be read in conjunction with Government Code sections 11135-11139.5, Education Code sections 66010.2, 66030, and chapter 4.5 of part 40 of title 3, commencing with section 66250; Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12100 et seq.) and the Age Discrimination Act (42 U.S.C. § 6101). Nothing in this subchapter shall be construed to conflict with or be inconsistent with the provisions of article 1, section 31 of the California Constitution or to authorize conduct that is in conflict with or is inconsistent with such provisions.

(b) The regulations in this subchapter require steps to promote faculty and staff equal employment opportunity which are in addition to and consistent with the nondiscrimination requirements of state or federal law. Therefore, compliance with these regulations or approval of the district's equal employment opportunity plan pursuant to section 53003 does not imply and should not be construed to mean that a district has necessarily complied with its obligations under any other applicable laws or regulations. The Chancellor shall assist districts in identifying other applicable state or federal laws which may affect district equal employment opportunity or nondiscrimination policies.

#### **§ 53001. Definitions.**

As used in this subchapter:

(a) Adverse Impact. "Adverse impact" means that a statistical measure (such as those outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures") is applied to the effects of a selection procedure and demonstrates a disproportionate negative impact on any group protected from discrimination pursuant to Government Code section 12940. A disparity identified in a given selection process will not be considered to constitute adverse impact if the numbers involved are too small to permit a meaningful comparison.

(b) Diversity. "Diversity" means a condition of broad inclusion in an employment environment that offers equal employment opportunity for all persons. It requires both the presence, and the respectful treatment, of individuals from a wide range of ethnic, racial, age, national origin, religious, gender, sexual orientation, disability and socio-economic backgrounds.

(c) Equal Employment Opportunity. "Equal employment opportunity" means that all qualified individuals have a full and fair opportunity to compete for hiring and promotion and to enjoy the benefits of employment with the district. Equal employment opportunity should exist at all levels in the seven job categories which include executive/administrative/managerial, faculty and other instructional staff, professional nonfaculty, secretarial/clerical, technical and paraprofessional, skilled crafts, and service and maintenance. Equal employment opportunity also involves:

(1) identifying and eliminating barriers to employment that are not job related; and

(2) creating an environment which fosters cooperation, acceptance, democracy, and free expression of ideas and is welcoming to men and women, persons with disabilities, and individuals from all ethnic and other groups protected from discrimination pursuant to Government Code section 12940.

(d) Equal Employment Opportunity Plan. An “equal employment opportunity plan” is a written document in which a district's work force is analyzed and specific plans and procedures are set forth for ensuring equal employment opportunity.

(e) Equal Employment Opportunity Programs. “Equal employment opportunity programs” means all the various methods by which equal employment opportunity is ensured. Such methods include, but are not limited to, using nondiscriminatory employment practices, actively recruiting, monitoring and taking additional steps consistent with the requirements of section 53006.

(f) Ethnic Group Identification. “Ethnic group identification” means an individual's identification in one or more of the ethnic groups reported to the Chancellor pursuant to section 53004. These groups shall be more specifically defined by the Chancellor consistent with state and federal law.

(g) In-house or Promotional Only Hiring. “In-house or promotional only” hiring means that only existing district employees are allowed to apply for a position.

(h) Monitored Group. “Monitored group” means those groups identified in section 53004(b) for which monitoring and reporting is required pursuant to section 53004(a).

(i) Person with a Disability. “Person with a disability” means any person who:

(1) has a physical or mental impairment as defined in Government Code section 12926 which limits one or more of such person's major life activities;

(2) has a record of such an impairment; or

(3) is regarded as having such an impairment.

A person with a disability is “limited” if the condition makes the achievement of the major life activity difficult.

(j) Reasonable Accommodation. “Reasonable accommodation” means the efforts made on the part of the district in compliance with Government Code section 12926.

(k) Screening or Selection Procedure. “Screening or selection procedure” means any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques, including but not limited to, traditional paper and pencil tests, performance tests, and physical, educational, and work experience requirements, interviews, and review of application forms.

(l) Significantly Underrepresented Group. “Significantly underrepresented group” means any monitored group for which the percentage of persons from that group employed by the district in any job category listed in section 53004(a) is below eighty percent (80%) of the projected representation for that group in the job category in question.

**§ 53002. Policy Statement.**

The governing board of each community college district shall adopt a policy statement setting forth the district's commitment to an equal employment opportunity program. This statement may also incorporate the nondiscrimination policy statement required pursuant to subchapter 5 (commencing with section 59300) of chapter 10 of this division, and other similar nondiscrimination or equal employment opportunity statements which may be required under other provisions of state and federal law.

**§ 53003. District Plan.**

(a) The governing board of each community college district shall develop and adopt a district-wide written equal employment opportunity plan to implement its equal employment opportunity program. Such plans shall be submitted to the Chancellor's Office. The Chancellor's Office retains the authority to review district plans on a case-by-case basis.

(b) Each district shall review its EEO Plan at least once every three years and revise as determined necessary. Any revised EEO Plan shall be submitted to the Chancellor's Office, which retains the authority to review such revisions on a case-by-case basis.

(c) In particular, the plan shall include all of the following:

(1) the designation of the district employee or employees who have been delegated responsibility and authority for implementing the plan and assuring compliance with the requirements of this subchapter pursuant to section 53020;

(2) the procedure for filing complaints pursuant to section 53026 and the person with whom such complaints are to be filed;

(3) a process for notifying all district employees of the provisions of the plan and the policy statement required under section 53002;

(4) a process for ensuring that district employees who participate on screening or selection committees receive training, prior to their participation. Training shall include, but need not be limited to:

(A) the requirements of this subchapter and of state and federal nondiscrimination laws;

(B) the educational benefits of workforce diversity;

(C) the elimination of bias in hiring decisions; and

(D) best practices in serving on a selection or screening committee;

(5) a process for providing annual written notice to appropriate community-based and professional organizations concerning the district's plan and the need for assistance from the community and such organizations in identifying qualified applicants. "Written" notice may include mailings and electronic communications;

(6) a process for gathering information and periodic, longitudinal analysis of the district's employees and applicants, broken down by number of persons from monitored group status, in each of the job categories listed in section 53004(a) to determine whether additional measures are required pursuant to section 53006 and to implement and evaluate the effectiveness of those measures. Each district, based on its size, demographics and other unique factors shall determine the appropriate time frame for periodic review, and reflect this in its EEO Plan;

(7) to the extent data regarding potential job applicants is provided by the State Chancellor, an analysis of the degree to which monitored groups are underrepresented in comparison to their representation in the field or job category in numbers of persons from such groups whom the Chancellor determines to be available and qualified to perform the work required for each such job category and whether or not the underrepresentation is significant;

(8) methods for addressing any underrepresentation identified pursuant to paragraph (7) of this subdivision; and

(9) a process for developing and implementing strategies, as described in section 53024.1, necessary to demonstrate on-going, institutional commitment to diversity and equal employment opportunity, as defined in sections 53001(c) and (e).

(d) The plans submitted to the Chancellor shall be public records.

(e) Each community college district shall make a continuous good faith effort to comply with the requirements of the plan required under this section.

**§ 53004. District Evaluation and Report to Chancellor.**

(a) Each district shall annually collect employee demographic data and shall monitor applicants for employment on an ongoing basis in order to evaluate the implementation of its equal employment opportunity plan and to provide data needed for the analyses required by sections 53003, 53006, 53023, and 53024. Each district shall annually report to the Chancellor, in a manner prescribed by the Chancellor, this data for employees at each college in the district. Each employee shall be reported so that he or she may be identified as belonging to one of the following seven job categories:

(1) executive/administrative/managerial;

(2) faculty and other instructional staff;

(3) professional nonfaculty;

(4) secretarial/clerical;

(5) technical and paraprofessional;

(6) skilled crafts; and

(7) service and maintenance.

(b) For purposes of the data collection and report required pursuant to subdivision (a) of this section, each applicant or employee shall be afforded the opportunity to identify his or her gender, ethnic group identification and, if applicable, his or her disability. A person may designate multiple ethnic groups with which he or she identifies, but shall be counted in only one ethnic group for reporting purposes. Chinese, Japanese, Filipinos, Koreans, Vietnamese, Asian Indians, Hawaiians, Guamanians, Samoans, Laotians, and Cambodians are to be counted and reported as part of the Asian/Pacific Islander group as well as in separate subcategories. However, in determining whether additional steps are necessary to ensure that monitored groups have not been excluded on an impermissible basis, analysis of the separate subgroups is not necessary.

#### **§ 53005. Advisory Committee.**

Each community college district shall establish an Equal Employment Opportunity Advisory Committee to assist the district in developing and implementing the plan required under section 53003. This advisory committee shall include a diverse membership whenever possible.

This advisory committee shall receive training in all of the following:

- (a) the requirements of this subchapter and of state and federal nondiscrimination laws;
- (b) identification and elimination of bias in hiring;
- (c) the educational benefits of workforce diversity; and
- (d) the role of the advisory committee in carrying out the District's EEO plan.

#### **§ 53006. Additional Measures to Support Diversity and Ensure Equal Employment Opportunity.**

(a) Districts shall review the information gathered pursuant to section 53003, subdivision(c)(6) to determine if significant underrepresentation of a monitored group may be the result of non job-related factors in the employment process. For the purposes of this subdivision, the phases of the employment process include but are not limited to recruitment, hiring, retention and promotion. The information to be reviewed shall include, but need not be limited to:

- (1) longitudinal analysis of data regarding job applicants, gathered pursuant to section 53003(c)(6), to identify whether over multiple job searches, a monitored group is disproportionately failing to move from the initial applicant pool, to the qualified applicant pool;
- (2) analysis of data regarding potential job applicants, to the extent provided by the State Chancellor, which may indicate significant underrepresentation of a monitored group; and
- (3) analysis pursuant to section 53003(c)(7) to determine whether the group is significantly underrepresented.

(b) Where the review described in subdivision (a) identifies that significant underrepresentation of a monitored group may be the result of non-job related factors in the employment process, districts shall

implement additional measures designed to address the specific area of concern. These additional measures shall include the following:

(1) review its recruitment procedures and identify and implement any additional measures which might reasonably be expected to attract candidates from the significantly underrepresented group;

(2) consider various other means of reducing the significant underrepresentation which do not involve taking monitored group status into account, and implement any such techniques which are determined to be feasible and potentially effective;

(3) determine whether the group is still significantly underrepresented in the category or categories in question after the measures described in (1) and (2) have been in place a reasonable period of time; and

(4) review each locally established "required," "desired" or "preferred" qualification being used to screen applicants for positions in the job category to determine if it is job-related and consistent with:

(A) any requirements of federal law; and

(B) qualifications which the Board of Governors has found to be job-related throughout the community college system, including the requirement that applicants for academic and administrative positions demonstrate sensitivity to the diversity of community college students; or

(5) discontinue the use of any locally established qualification that has not been found to satisfy the requirements set forth in paragraph (4) of this subdivision;

(6) continue using qualification standards meeting the requirements of paragraph (4) of this subdivision only where no alternative qualification standard is reasonably available which would select for the same characteristics, meet the requirements of paragraph (4) and be expected to have a less exclusionary effect; and

(7) consider the implementation of additional measures designed to promote diversity that are reasonably calculated to address the area of specific need.

(c) For purposes of this section, "a reasonable period of time" means three years, or such longer period as the Chancellor may approve, upon the request of the equal employment opportunity advisory committee and the chief executive officer, where the district has not filled enough positions to appreciably affect its work force in the job category in question.

(d) Nothing in this subchapter shall be construed to prohibit a district from taking any other steps it concludes are necessary to ensure equal employment opportunity, provided that such actions are consistent with the requirements of federal and state constitutional and statutory nondiscrimination law.

#### **§ 53020. Responsibility; Delegation of Authority; Complaints.**

(a) The governing board of each community college district is ultimately responsible for proper implementation of this subchapter at all levels of district and college operation and for making measurable progress toward equal employment opportunity by the methods described in the district's equal employment opportunity plan. In carrying out this responsibility, the governing board, upon the

recommendation of the chief executive officer, shall ensure that an equal employment opportunity officer is designated to oversee the day-to-day implementation of the requirements set forth in this subchapter.

(b) The administrative structure created by any delegation of authority to the equal employment opportunity officer or others shall be described in the district's equal employment opportunity plan submitted pursuant to section 53003 and shall be designed in such a manner so as to ensure prompt and effective implementation of the requirements of this subchapter. The plan shall also designate a single officer, who may be the equal employment opportunity officer, who shall be given authority and responsibility for receiving complaints filed pursuant to section 53026, for ensuring that such complaints are promptly and impartially investigated, and ensuring that selection procedures and the applicant pool are properly monitored as required by sections 53023 and 53024.

(c) Any organization or individual, whether or not an employee of the district, who acts on behalf of the governing board with regard to the recruitment and screening of personnel is an agent of the district and is subject to all of the requirements of this subchapter.

#### **§ 53021. Recruitment.**

(a) Except as otherwise provided in this section, community college districts shall actively recruit from both within and outside the district work force to attract qualified applicants for all vacancies. This shall include outreach designed to ensure that all persons are provided the opportunity to seek employment with the district. The requirement of open recruitment shall apply to all full-time and part-time vacancies in all job categories and classifications, including, but not limited to, faculty, classified employees, categorically funded positions, and all executive/administrative/managerial positions. Recruitment for full-time faculty and educational administrator positions shall be at least statewide and, at a minimum, shall include seeking qualified applicants listed in the California Community Colleges Equal Employment Opportunity Registry and posting job announcements with the Registry. Recruitment for part-time faculty positions may be conducted separately for each vacancy or by annually establishing a pool of eligible candidates, but in either case full and open recruitment is required consistent with this section.

(b)(1) "In-house or promotional only" recruitment shall not be used to fill any vacancy for any position described in subdivision (a) except when the position is being filled on an interim basis for the minimum time necessary to allow for full and open recruitment; provided however, that no interim appointment or series of interim appointments exceeds two years in duration.

(2) Where in-house or promotional only recruitment is utilized to fill a position on an interim basis pursuant to subdivision (b)(1), all district employees shall be afforded the opportunity to apply and demonstrate that they are qualified.

(3) The job announcement for the interim position shall comply with section 53022 and the selection process shall be consistent with the requirements of this subchapter.

(c) For purposes of this section, a vacancy is not created, and the requirements of subdivisions (a) and (b) do not apply, when:

(1) there is a reorganization that does not result in a net increase in the number of employees;

- (2) one or more lateral transfers are made and there is no net increase in the number of employees;
- (3) a position which is currently occupied by an incumbent is upgraded, reclassified, or renamed without significantly altering the duties being performed by the individual;
- (4) the faculty in a division or department elect one faculty member to serve as a chairperson for a prescribed limited term;
- (5) the position is filled by a temporary, short-term, or substitute employee appointed pursuant to Education Code sections 87422, 87480, 87482.5(b), 88003, 88106 or 88109;
- (6) a part-time faculty member is assigned to teach the same or fewer hours he or she has previously taught in the same discipline without a substantial break in service. For purposes of this section, "a substantial break in service" means more than one calendar year or such different period as may be defined by a collective bargaining agreement; or
- (7) an individual not currently employed by the district, who is specially trained, experienced, and competent to serve as an administrator, and who satisfies the minimum qualifications applicable to the position, is engaged to serve as an administrator through a professional services contract. No appointment or series of appointments pursuant to this provision may exceed a period of two years.

**§ 53022. Job Announcements and Qualifications.**

Job announcements shall state clearly job specifications setting forth the knowledge, skills, and abilities necessary to job performance. For faculty and administrative positions, job requirements shall include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, gender identity, sexual orientation, and ethnic backgrounds of community college students. Job specifications, including any "required," "desired" or "preferred" qualifications beyond the state minimum qualifications (set forth in subchapter 4, commencing with section 53400 of this chapter) which the district wishes to utilize, shall be reviewed before the position is announced, to ensure conformity with the requirements of this subchapter and state and federal nondiscrimination laws.

**§ 53023. Applicant Pool Review.**

- (a) The application for employment shall provide for self-identification of the applicant's gender, ethnic group identification and, if applicable, his or her disability. This information shall be kept confidential and shall be used only in research, monitoring, evaluating the effectiveness of the district's equal employment opportunity program, or any other purpose specifically authorized in this subchapter, or by any applicable statute or regulation.
- (b) After the application deadline has passed, the composition of the initial applicant pool shall be recorded and reviewed by the Chief Human Resources Officer or designee.

All initial applications shall be screened to determine which candidates satisfy job specifications set forth in the job announcement. The group of candidates who meet the job specifications shall constitute the "qualified applicant pool."

(c) The composition of the qualified applicant pool shall be reviewed and compared to the composition of the initial applicant pool. If the Chief Human Resources Officer or designee finds that the composition of the qualified applicant pool may have been influenced by factors which are not job related, appropriate action will be taken. This applicant pool data shall be reviewed in conducting the analysis described in section 53006(a).

#### **53024. Screening and Selection Procedures.**

(a) All screening and selection techniques, including the procedure for developing interview questions, and the selection process as a whole, shall be:

(1) provided to the Chancellor upon request;

(2) designed to ensure that for faculty and administrative positions, meaningful consideration is given to the extent to which applicants demonstrate a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, gender identity, sexual orientation, and ethnic backgrounds of community college students. "Meaningful consideration" means that candidates shall be required to demonstrate sensitivity to diversity in ways relevant to the specific position;

(3) based solely on job-related criteria; and

(4) designed to avoid an adverse impact, as defined in section 53001(a), and monitored by means consistent with this section to detect and address any adverse impact which does occur for any monitored group.

(b) A district may not designate or set aside particular positions to be filled by members of any group defined in terms of ethnic group identification, race, color, national origin, religion, age, gender, disability, ancestry or sexual orientation, or engage in any other practice which would result in discriminatory or preferential treatment prohibited by state or federal law. Nor may a district apply the district's equal employment opportunity plan in a rigid manner which has the purpose or effect of so discriminating.

(c) Seniority or length of service may be taken into consideration only to the extent it is job related, is not the sole criterion, and is included in the job announcement consistent with the requirements of section 53022.

(d) Selection testing for employees shall follow procedures as outlined in the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures."

(e) Whenever possible, screening committees shall include a diverse membership which will bring a variety of perspectives to the assessment of applicant qualifications.

(f) Notwithstanding any other provision of this division, the governing board or its designee shall have the authority to make all final hiring decisions based upon careful review of the candidate or candidates recommended by a screening committee. This includes the right to reject all candidates and to order further review by the screening committee or to reopen the position where necessary to further achievement of the objectives of the equal employment opportunity plan or to ensure equal employment opportunity. However, a consistent pattern of not hiring qualified candidates from a

monitored group who are recommended by screening committees may give rise to an inference that the selections are not consistent with the objectives of equal employment opportunity that are required by this subchapter.

**§ 53024.1. Developing and Maintaining Institutional Commitment to Diversity.**

Establishing and maintaining a richly diverse workforce is an on-going process that requires continued institutionalized effort. Districts shall locally develop, and implement on a continuing basis, indicators of institutional commitment to diversity. Such indicators may include, but are not limited to the examples listed in this section. Appropriate steps will depend on the unique circumstances of each institution, and not every example listed in this section is appropriate for every institution. Nothing in this list is mandatory, unless a district is directed to adopt specific measures by the Chancellor pursuant to section 53024.2(b)(2).

- (a) The district conducts surveys of campus climate on a regular basis, and implements concrete measures that utilize the information drawn from the surveys.
- (b) The district conducts exit interviews with employees who voluntarily leave the district, maintains a data base of exit interviews, analyzes the data for patterns impacting particular monitored groups, and implements concrete measures that utilize this information.
- (c) The district provides training on elimination of bias in hiring and employment.
- (d) The district provides cultural awareness training to members of the campus community.
- (e) The district maintains a variety of programs to support newly-hired employees such as mentoring, professional development, and leadership opportunities.
- (f) The district has audited and/or maintains updated job descriptions and/or job announcements.
- (g) The district's board of trustees receives training on the elimination of bias in hiring and employment at least once every election cycle.
- (h) The district timely and thoroughly investigates all complaints filed under this chapter, and all harassment and discrimination complaints filed under subchapter 5 (commencing with section 59300) of chapter 10 of this division, and takes appropriate corrective action in all instances where a violation is found.
- (i) The district timely complies with the requirements of Government Code section 12950.1 (Stats. 2004, ch. 933 [AB1825]), and includes all forms of harassment and discrimination in the training.
- (j) The district's publications and website convey its diversity and commitment to equal employment opportunity.
- (k) The district's mission statement conveys its commitment to diversity and inclusion, and recognition that a diverse and inclusive workforce promotes its educational goals and values.

(l) The district's hiring procedures require applicants for all positions to demonstrate sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, gender identity, sexual orientation, and ethnic backgrounds of community college students in a manner specific to the position.

(m) District staff members serve as resources, consultants, mentors and/or leaders to colleagues at other districts in the areas of EEO and diversity enhancement.

(n) The district maintains updated curricula, texts, and/or course descriptions to expand the global perspective of the particular course, readings or discipline.

(o) The district addresses issues of inclusion/exclusion in a transparent and collaborative fashion.

(p) The district attempts to gather information from applicants who decline job offers to find out why, records this information, and utilizes it.

(q) The district conducts longitudinal analysis of various employment events by monitored group status such as: hiring, promotion, retention, voluntary resignation, termination, and discipline.

**§ 53024.2. Accountability and Corrective Action.**

(a) Districts shall certify annually to the State Chancellor that they have timely complied with all of the following:

(1) recorded, reviewed and reported the data required regarding qualified applicant pools;

(2) reviewed and updated, as needed, the Strategies Component of the district's EEO Plan;

(3) investigated and appropriately responded to formal harassment or discrimination complaints filed pursuant to subchapter 5 (commencing with section 59300) of chapter 10 of this division.

(b) Upon review of a district's certification, data reports, or any complaint filed under this subchapter, the State Chancellor may review a district's EEO Plan and Strategies Component pursuant to section 53024.1 for the required indicia of institutionalized and on-going efforts to support diversity and/or a district's compliance with section 53006. Where the State Chancellor finds that a district's efforts have been insufficient, he/she will inform the district of his/her specific area(s) of concern, and direct the district to submit a revised EEO Plan within 120 days. Upon review of the revised EEO plan, the State Chancellor will either:

(1) determine the revisions are sufficient, and provide a deadline by which the district must provide proof that the new measures have been implemented; or

(2) if the Chancellor finds that the revised plan is still lacking, he/she will direct the district to implement specific measures from those listed in section 53024.1, and provide a timeline for doing so.

**§ 53025. Persons with Disabilities.**

(a) Districts shall ensure that applicants and employees with disabilities receive reasonable accommodations consistent with the requirements of Government Code sections 11135 et seq. and 12940(m), section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Such accommodations may include, but are not limited to, job site modifications, job restructuring, part-time work schedules, flexible scheduling, reassignment to a reasonably equivalent vacant position, adaptive equipment, and auxiliary aids such as readers, interpreters, and notetakers. Such accommodations may be paid for with funds provided pursuant to article 3 (commencing with section 53030) of this subchapter.

**§ 53026. Complaints.**

Each community college district shall establish a process permitting any person to file a complaint alleging that the requirements of this subchapter have been violated. A copy of the complaint shall immediately be forwarded to the Chancellor who may require that the district provide a written investigative report within ninety (90) days. Complaints which also allege discrimination prohibited by Government Code sections 11135 et seq. shall be processed according to the procedures set forth in subchapter 5 (commencing with section 59300) of chapter 10 of this division.

**§ 53027. Applicability to Districts Operating on the Merit System.**

Nothing in this subchapter shall be construed to conflict with or be inconsistent with the provisions of article 3 (commencing with section 88060) of chapter 4 of part 51 of the Education Code which apply to districts operating a merit system for classified employees.

**§ 53030. Equal Employment Opportunity Fund Allocation.**

Resources provided to the Board of Governors for the purpose of promoting equal employment opportunity in hiring and promotion within the system shall be placed in an Equal Employment Opportunity Fund and shall be allocated consistent with the following:

- (a) A portion of the fund, but not more than 25 percent, shall be set aside to provide technical assistance, service, monitoring, and compliance functions.
- (b) That portion of the funds not allocated pursuant to subdivision (a) may be allocated to the districts in the following categories:
  - (1) an amount proportional to the full-time equivalent students of each district to the total full-time equivalent students for all districts;
  - (2) an equal dollar amount to each district;
  - (3) an amount related to success in promoting equal employment opportunity. Multiple methods of measuring success shall be identified by the Chancellor working through the established Consultation Process.

(c) funds provided pursuant to this section may be used for:

- (1) outreach and recruitment;
- (2) in-service training on equal employment opportunity;
- (3) accommodations for applicants and employees with disabilities pursuant to section 53025; and
- (4) other activities to promote equal employment opportunity.

**§ 53033. Failure to Report.**

Any district failing to provide the data required under section 53004 is not in compliance with this subchapter. Equal Employment Opportunity funds for any given fiscal year, other than those under section 53030(a), shall not be granted unless the district provides the data no later than March 31st of the preceding fiscal year or receives an extension of the deadline from the Chancellor.

**§ 53034. Required Report.**

Districts shall submit a report on the use of Equal Employment Opportunity funds to the Chancellor's Office no later than September 30th of the fiscal year following the use of the funds. Until such time as a data element to calculate the staffing rate of persons with disabilities has been integrated into the report required under section 53004, districts will report that rate by a separate survey conducted, as directed by the Chancellor's Office.