

Alert | Labor & Employment



July 2025

Beyond Bias: California Sets a New Standard for Regulating AI in the Workplace

As employers around the globe are increasingly looking to leverage AI and AI-adjacent automation in their **recruiting and personnel processes**, California has stepped onto the scene. On June 27, 2025, the California Civil Rights Council approved several changes to the regulations issued under the California Fair Employment and Housing Act (FEHA)¹, expressly targeting employment discrimination risks arising from AI and other automated decision systems (FEHA regulations). The new rules take effect Oct. 1, 2025, and have the potential to significantly impact hiring and personnel processes across the state.

This GT Alert provides a general overview of key requirements and practical impacts that California employers should consider before the regulations take effect later this year.

Key Takeaways

The FEHA prohibits discrimination, harassment, and retaliation in hiring and personnel decisions based on protected categories such as race, national origin, religion, age, disability, sex, gender, and sexual orientation. In amending the FEHA regulations, the **Civil Rights Council** sought to “increase[] clarity on how existing antidiscrimination laws apply to the use of artificial intelligence in employment decisions.”

¹ The full final text of the Civil Rights Council’s changes to the Code of Regulations are available on its [website](#). Citations to the Code of Regulations below are to the approved regulations effective Oct. 1, 2025.

These changes fall into four general categories: (1) expanded definitions, (2) substantive provisions concerning pre-employment practices, (3) substantive provisions concerning discrimination, and (4) record-keeping requirements.

1. Expanded Definitions

The updated FEHA regulations include new definitions and modify existing ones.

Most prominently, the changes add a broad definition of the term “automated-decision system” (ADS), along with several sub-definitions.² An ADS is defined as a computational process making decisions or facilitating human decision-making regarding employment benefits.³ The FEHA regulations provide several examples of the types of tasks an ADS can perform, including tools that⁴:

- Screen resumes or applications;
- Rank or score candidates;
- Analyze facial expressions, voice, or behavior in interviews;
- Make predictive assessments about an applicant or employee;
- Measure skills, reaction-time, and/or other abilities or characteristics;
- Target job ads or other recruiting materials to specific groups; and/or
- Use games, puzzles, or assessments to evaluate traits like personality or aptitude.

The FEHA regulations also adopt another new definition—“agent”—which includes “any person acting on behalf of an employer, directly or indirectly, to exercise a function traditionally exercised by the employer or any other FEHA-regulated activity,” such as recruiting, screening, hiring, promoting or making other employment-related decisions, including when activities and decisions are conducted in whole or in part through the use of an ADS.⁵ Any agent of an employer is also an “employer” for purposes of FEHA.⁶

The term “proxy” was also added and refers to a characteristic or category closely correlated with a FEHA-protected characteristic. The use of this term is intended to clarify how automated systems may indirectly discriminate by relying on variables that serve as stand-ins or substitutes for protected characteristics (e.g., using zip codes as a proxy for race or national origin).

2. Pre-Employment and Hiring Practices

The FEHA regulations already included various provisions relating to pre-employment practices, including non-discrimination in recruitment, pre-employment inquiries, applications, and interview or other screening methods. All pre-employment practices now expressly cover those conducted using an ADS.⁷ As an example, employers must ensure that an ADS does not disadvantage individuals with disabilities or religious needs. This may require, for example:

- Modifying assessments where an ADS assesses skills or abilities, and an applicant has a disability;

² Cal. Code Regs., tit. 2, § 11008.1.

³ Cal. Code Regs., tit. 2, § 11008.1(a).

⁴ *Id.*

⁵ Cal. Code Regs., tit. 2, § 11008(a).

⁶ *Id.*

⁷ See, e.g., Cal. Code Regs., tit. 2, § 11016(a)(2); see also Cal. Code Regs., tit. 2, § 11016(b)(1), (c)(5), (d)(1).

- Providing alternative formats; and
- Ensuring accessibility in interviews and testing.

In addition, the FEHA regulations reinforce California’s Fair Chance Act by making it clear that employers cannot use an ADS to inquire into or obtain information about an applicant’s criminal history prior to extending a conditional offer of employment.⁸

3. Substantive Provisions on Discrimination

Employers may not use an ADS or selection criteria that results in discrimination based on any protected characteristics (e.g., race, gender, age, disability, religion, national origin).⁹ This includes indirect discrimination through proxies (e.g., ZIP code, speech patterns, facial analysis). Notably, employers are also now directly responsible for the actions of their agents, including for example, recruiters, staffing firms, or other third-party vendors when they use AI tools on their behalf—even if those vendors are independent from the organization. This means that liability for discrimination can attach wherever an agent misuses (or misapplies) AI in hiring, promotions, compensation, or other personnel decisions on behalf of the employer.

The FEHA regulations make clear that employer efforts to ensure non-discrimination in the context of AI-assisted hiring and personnel processes may serve as a defense to any legal claims if the employer takes certain steps. Specifically, “anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the result of such testing or other effort, and the response to the results,” are delineated as relevant to any claim or defense concerning discrimination from the use of an ADS.¹⁰ Of course, the corollary to this potential defense is that the *lack* of such proactive efforts may work against an employer that is challenged for the use, either directly or indirectly, of an ADS.

4. Recordkeeping and Preservation Requirements

In line with its other changes, employer recordkeeping requirements now include any ADS data or other personnel data generated using AI, such as screening algorithms, input data, scoring outputs, and related documentation.¹¹

All ADS and related data must be preserved for at least four years—doubling the previous two-year requirement.

Practical Considerations for California Employers

While the true impact of the new FEHA regulations remains to be seen, employers would be well-advised to catalog where and how any ADS and other AI tools are used in hiring, screening, and employment decisions to help ensure that the practices conform with the new FEHA regulations. Since employers may be at greater risk if they fail to take proactive steps to “avoid unlawful discrimination” through well-documented anti-bias testing or similar, proactive efforts, employers should consider implementing and documenting: (1) regular audits of AI and algorithmic processes for disparate impact (including reviewing

⁸ Cal. Code Regs., tit. 2, § 11017.1(a)(1).

⁹ Cal. Code Regs., tit. 2, §§ 11028(b), (m) [national origin and ancestry]; 11032(b)(4), 11033(f), 11038(b) [sex, pregnancy, and childbirth]; 11056(a) [marital status]; 11063(b) [religious discrimination]; 11070(a), 11072(b) [disability discrimination]; 11076(a), 11079(b) [age discrimination].

¹⁰ See, e.g., Cal. Code Regs., tit. 2, § 11009(f).

¹¹ Cal. Code Regs., tit. 2, § 11013(c).

third-party vendor tools for compliance); (2) responsive updates based on test results; and (3) detailed records of anti-bias efforts.

Employers should also consider requiring transparency and disclosure from vendors regarding their AI use, contractually delineating responsibility for such practices and compliance with the new regulations (including anti-bias testing), ensuring that the vendors are complying with record-keeping requirements, and, if possible, having the vendor indemnify the employer for the vendor's use of an ADS or AI.

Companies should educate their own employees responsible for personnel management and related decisions on the new FEHA regulations and risks of ADS misuse, emphasize the importance of individualized assessments and documentation, and require human oversight and decision-making with respect to all personnel actions.

Finally, employers should also ensure that their document retention and preservation policies comply with the expanded recordkeeping requirements, both in terms of the data preserved and the length of time it is retained.

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