

Assembly Bill 2358 (2018)

Background and Issues for Possible Rulemaking

1. Background

Codified at Labor Code section 3073.9, Assembly Bill 2358 (2018) expressly prohibits discrimination in any *building and construction trades program* on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age for individuals over forty years of age, military or veteran status, or sexual orientation. (Lab. Code, § 3073.9(a).) A.B. 2358 became effective on January 1, 2019 and required all existing programs to come into compliance with its provisions before July 1, 2019.

A.B. 2358 supplements the protections already in place under Labor Code section 3073.6, which makes it a *misdemeanor* to engage in willful discrimination in recruitment or apprenticeship on the basis of enumerated protections under Government Code section 12940(a), and which are identical to the protected categories under A.B. 2358.

A.B. 2358 also supplements the anti-discrimination requirements of FEHA, which previously applied to apprenticeship training programs only with five or more “employees,” including apprentices. Unlike FEHA, A.B. 2358 has *no size threshold* for its protections to apply, and therefore ensures that even the smallest apprenticeship programs will be covered by its anti-discrimination protections.

Finally, A.B. 2358 goes beyond existing law by requiring a series of specific, “affirmative steps” that building and construction trades apprenticeship programs must take to prevent discrimination and promote equal opportunity.

Nearly all of A.B. 2358’s requirements are derived from the recently amended federal regulations at 29 CFR Part 30. There is a parallel proposal to incorporate 29 CFR Part 30 in its entirety into a revised CalPlan.

2. Summary of New Requirements

Specific Prohibitions against Discrimination

No building and construction trades program, regardless of size, may discriminate against any apprentice or applicant for apprenticeship on any of the FEHA protected categories with regard to *all* of the following:

- Recruitment, outreach, and selection procedures (§ 3073.9(a)(1))
- Hiring or placement, upgrading, periodic advancement, promotion, demotion, transfer, layoff, termination, right of return from layoff, and rehiring (§ 3073.9(a)(2))

- Rotation among work processes (§ 3073.9(a)(3))
- Imposition of penalties or other disciplinary action (§ 3073.9(a)(4))
- Rates of pay or any other form of compensation and changes in compensation (§ 3073.9(a)(5))
- Conditions of work (§ 3073.9(a)(6))
- Hours of work and hours of training provided (§ 3073.9(a)(7))
- Job assignments (§ 3073.9(a)(8))
- Leaves of absence, sick leave, or any other leave (§ 3073.9(a)(9))
- *Any other benefit, term, condition, or privilege associated with apprenticeship* (§ 3073.9(a)(10))

Affirmative Steps to Prevent Discrimination

Each building and construction trades program, regardless of size, must:

- Designate a person of authority to oversee compliance with equal opportunity commitments (§ 3073.9(c)(1)(A)-(C))
- Make facilities and apprenticeship activities available without regard to protected characteristics (§ 3073.9(c)(1)(B))
- Establish and implement minimum procedures for handling and resolving internal complaints about harassment or discrimination (§ 3073.9(c)(4)(C)(i)-(iv))
- Publish equal opportunity pledge in standards and post pledge on bulletin boards (§ 3073.9(c)(2)(A)-(B))
- Provide annual notice to contractor of program's commitment to equal opportunity and of contractor's obligation to ensure that apprentices it employs are not harassed or discriminated (§ 3073.9(c)(2)(D))
- Conduct orientation and periodic information sessions for apprentices, instructors, and apprenticeship program employees to inform them of the equal employment opportunity policy and provide specified mandatory training (§ 3073.9(c)(2)(C))
- Maintain records necessary to demonstrate compliance with A.B. 2358, including records of complaints, and make them available to the DAS upon request (§ 3079.3(c)(4)(E))
- Implement measures to ensure that its outreach and recruitment efforts for apprentices extend to all persons available for apprenticeship within the apprenticeship program's relevant recruitment area without regard to the protected characteristics. (§ 3079.3(c)(4)(E))
- Require that apprentices, instructors, and employees of the apprenticeship program take the necessary action to aid the apprenticeship program in meeting its nondiscrimination obligations. (§ 3079.3(c)(2))

Enforcement Mechanism

The three means of enforcement of A.B. 2358 are (§ 3079.3(g)):

- A DAS evaluation under Labor Code section 3073.1;
- A complaint to the Administrator of Apprenticeship under 8 CCR § 201; and
- Deregistration of a program under 8 CCR § 212.4

3. Area That May Need Clarification (Building Trades Specific)

The following is an issue specific to A.B. 2358/building trades that may need clarification, and are unique to A.B. 2358 (i.e. not modeled after the federal regulations).

- *Contractor Annual Notice Requirements:* A.B. 2358 requires that “annual notice” be given to any contractor that employs apprentices. What is meant by a contractor that employs apprentices? For example, if an apprenticeship program dispatched once to a contractor three years ago, must the program give the contractor annual notice? Also, what does “annual” mean in terms of the time when the notice must be sent out? If a program dispatches apprentices to a new contractor, 364 days later is it time for the next anti-discrimination notice? A regulation could clarify. Also, the content of a “model” notice could be helpful. (§ 3079.3(c)(2)(D)).

4. Areas That May Need Clarification (Applicable Also to CalPlan)

The following are issues that need clarification apply both to A.B. 2358 and to the proposed amendments to the CalPlan, which track the amendments to the federal regulations.

- *Orientation & Periodic Information Sessions:* A.B. 2358 requires that anti-discrimination information be conveyed at “orientation” and “periodic” information sessions, but does not specify when the “orientation” must occur or what frequency is considered to be “periodic.” Clarifying guidance would be helpful. (§ 3079.3(c)(2)(C)).
- *Content of Mandatory Anti-Discrimination Trainings:* The requirements regarding what must be covered during the mandatory anti-discrimination trainings are broad. Guidance would be helpful. (§ 3079.3(c)(4)(A))
- *Recordkeeping Requirements:* The recordkeeping requirements only specify documents “necessary to demonstrate compliance” but do not specify what that means. Some regulatory guidance could be helpful. For example: What records would a program need to show that a training was conducted? Do the participants names need to be listed? Do participants need to sign their names? Need there be records of the information or materials delivered at the training? (§ 3079.3(c)(4)(E))

- One source that may prove to be a useful reference are the recordkeeping requirements under FEHA at 2 CCR § 11013, which cover the recordkeeping requirements for employment records.
 - Another useful model may be the anti-sexual harassment training and recordkeeping requirements at 2 CCR § 11024.
 - The amended federal regulations on which A.B. 2358 is based could also be a useful starting point. (29 CFR § 30.12).
- *Content of Apprenticeship Program's Internal Procedures:* The requirements for an apprenticeship program's internal procedures also raise similar concerns. Again, could model policies, guidelines, or other implementation tools be helpful? (§ 3079.3(c)(4)(C))
 - *Outreach and Recruitment:* The requirement for outreach and recruitment efforts is particularly vague. "[I]mplement measures to ensure that its outreach and recruitment efforts for apprentices extend to all persons available for apprenticeship within the apprenticeship program's relevant recruitment area." (§ 3079.3(c)(4)(2)(E)) Some clarification may be helpful, and the federal regulations at 29 CFR § 30.3 can serve as a guide.
 - *Enforcement Actions – What Constitutes "Failure?":* Section 3079.3(g) states: "Failure to comply with the requirements of this section *may* be grounds for an audit." What counts as a failure? A mere allegation? Does the failure have to be legally and/or factually established through a complaint process? May random audits (absence of any alleged failure) be conducted for A.B. 2358 violations? Clarifying guidance could be helpful.
 - *Updating regulations – "Self-Assessments" under 8 CCR § 212.3:* 8 CCR § 212.3 requires apprenticeship programs to submit annual Self-Assessment Reviews which must contain at minimum, "an objective and critical appraisal" of "training in the recognition of sexual harassment and illegal discrimination." There is a question of whether the items in the self-assessments should be updated in light of A.B. 2358's new "anti-discrimination" and "affirmative steps" requirements. If they are not updated, then it would seem the self-assessment would only cover A.B. 2358's training requirements.
 - *Clarifying who may file an A.B. 2358 Complaint under 8 CCR § 201:* Can the Administrator of Apprenticeship "upon his/her own initiative" issue a complaint?
 - *Statute of Limitations for Filing an A.B. 2358 Complaint under 8 CCR § 201:* It is important to clarify and/or establish what the statute of limitations is for filing a complaint to enforce A.B. 2358's requirements pursuant to 8 CCR § 201 – is it 30 days? 180 days? 3 years as in FEHA actions?