

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. Note that 29 CFR Part 30 is significantly more comprehensive than A.B. 2358. In other words, A.B. 2358 covers **only a sliver** of the many requirements in 29 CFR Part 30.

2. Summary of New Requirements in A.B. 2358

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 (Unique to A.B. 2358)

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 regarding their obligations under A.B. 2358. 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, even if the contractor no longer employs apprentices? 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 (Derived from 29 CFR Part 30)

The following are issues that are derived from 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)).

Example:

- (a) Each program must conduct orientation and periodic information sessions for apprentices, instructors, and employees of the apprenticeship program to inform

and remind such individuals of the apprenticeship program's equal employment opportunity policy.

(b) For the purposes of this section, orientation for instructors and employees of the apprenticeship program must occur within the first two weeks of employment, and orientation for apprentices of the apprenticeship program must occur within five business days the apprentice is registered as an apprentice.

(c) For the purposes of this section, periodic information sessions must be conducted for apprentices, instructors, and employees of the apprenticeship program once each calendar year.

- **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 that the program "maintain records 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).

Example derived from 29 CFR 30.12:

(a) General obligation. Each program must collect such data and maintain such records as DAS finds necessary to determine whether the program has complied or is complying with the requirements of Labor Code section 3073.9. Such records must include, but are not limited to records relating to:

(1) Selection for apprenticeship, including applications, tests and test results, interview notes, bases for selection or rejection, and any other relevant records.

(2) Information relative to the operation of the apprenticeship program, including but not limited to job assignments in all components of the occupation as required under section 212(a)(1) of title 8 of the California Code of Regulations, promotion, demotion, transfer, lay-off, termination, rates of pay, other forms of

compensation, conditions of work, hours of work, hours of training provided, and any other personnel records relevant to equal employment opportunity complaints filed with DAS, the Administrator, or other enforcement agencies;

(3) Requests for reasonable accommodation and the interactive process to arrive at a reasonable accommodation; and

(4) Any other records pertinent to a determination of compliance with these regulations, as may be required by DAS.

(b) Maintenance of Records. The records required under Labor Code section 3073.9 and any other information relevant to compliance must be maintained for five years from the date of the making of the record or the personnel action involved, whichever occurs later, and must be made available upon request to DAS or other authorized representatives in such form as DAS may determine is necessary to enable it to ascertain whether the sponsor has complied or is complying with Labor Code section 3073.9. Failure to preserve complete and accurate records as required by Labor Code section 3073.9 constitutes noncompliance.

(c) Confidentiality and use of medical information.

(1) Any information obtained pursuant to this plan regarding the medical condition or history of an applicant or apprentice must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(A) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or apprentice and necessary accommodations;

(B) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(C) Government officials engaged in enforcing this plan, the laws administered by Department of Fair Employment and Housing, or the Fair Employment and Housing Act, must be provided relevant information on request.

(2) Information obtained under this plan regarding the medical condition or history of any applicant or apprentice may not be used for any purpose inconsistent with Labor Code section 3073.9 and its implementing regulations.

(d) Access to records. Each sponsor must permit access during normal business hours to its places of business for the purpose of conducting on-site evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material DAS deems relevant to the matter under investigation and pertinent to compliance with this part. The program must also provide DAS access to these materials, including electronic records, off-site for purposes of conducting evaluations and complaint

investigations. Upon request, the program must provide DAS information about all format(s), including specific electronic formats, in which its records and other information are available. Information obtained in this manner will be used only in connection with the administration of Labor Code section 3073.9 or other applicable equal employment opportunity laws.

- *Content of Apprenticeship Program's Internal Procedures:* The requirements for an apprenticeship program's internal procedures to ensure apprentices are not discriminated or harassed also raise similar concerns. Again, could model policies, guidelines, or other implementation tools be helpful? (§ 3079.3(c)(4)(C)) Should the existing regulations in 8 CCR 212 on program standards also be amended to require inclusion of internal procedures to ensure the program is free of discrimination?

Example:

§212. Content of Apprenticeship Program Standards.

Apprenticeship programs shall be established by written apprenticeship standards which must be approved by the Chief DAS under Section 212.2. In order to be approved, the standards must cover all work processes within the apprenticeable occupation. The standards must contain:

(a) A statement of:

(1) the occupation(s) and an outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(2) the parties to whom the standards apply, the program sponsor's labor market area, as defined by Section 215 appendix 2(l), for purposes of meeting equal employment opportunity goals in apprenticeship training and the program's geographic area of operation as defined by section 205(n);

(3) the duties of the apprentice;

(4) the apprentice's working conditions unique to the program;

(5) the progressively increasing wage, employee benefits and other compensation of the apprentice, as set by Section 208;

(6) the ratio of apprentices to journeymen, or the number of apprentices to be employed and the method used to determine the ratio whether by job site, workforce, department or plant;

(7) the local education agency which has agreed to provide the related and supplemental instruction, and a description of the courses to be provided;

(b) Provisions for:

(1) establishment of an apprenticeship committee, if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program. An apprenticeship program's standards or rules may provide for a period of probation which may not be for more than the combination of 1,000 hours of employment and 72 hours of related instruction;

(4) determining the qualifications of employers if other than single employer programs and an orientation, workshop, or other educational session for employers to explain the apprenticeship program's standards and the operation of the apprenticeship program;

(5) determining the qualifications of apprentice applicants and fair and impartial treatment of applicants for apprenticeship selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215;

(6) the incorporation of the provisions of the standards into the apprentice agreement either directly or by reference;

(7) a procedure to be utilized for the recording and maintenance of all records concerning apprenticeship and otherwise required by law including a system for recording the apprentice's worksite job progress and progress in related and supplemental instruction and a system for the periodic review and evaluation of the apprentice's progress in job performance and related instruction;

(8) discipline of apprentices for failure to fulfill their obligations on-the-job or in related instruction, including provisions for fair hearings;

(9) terminating, or recommending the cancellation of, apprentice agreements in accordance with section 207;

(10) recommending issuance of State Certificates of Completion of Apprenticeship pursuant to Section 224;

(11) training and supervision, both on the job and in related instruction, in first aid, safe working practices and the recognition of occupational health and safety hazards;

(12) training in the recognition of illegal discrimination and sexual harassment, ***including the antiharassment and antidiscrimination training required under Labor Code section 3073.9, subdivision (c)(4)(A);***

(13) procedures to ensure that its apprentices are not harassed or discriminated against on any of the bases protected by the Fair Employment and Housing Act, and to ensure that its apprenticeship program is free from intimidation and retaliation;

(14) establishment and implementation of procedures for handling and resolving internal complaints about harassment or discrimination as required under Labor Code section 3073.9, subdivision (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.

Example derived from 29 CFR 30.3:

To ensure that outreach and recruitment efforts extent to all persons available for apprenticeship within the apprenticeship program’s relevant recruitment area, the program must:

(A) Develop and update annually a list of current recruitment sources that will generate referrals from all demographic groups within the relevant recruitment area. Examples of relevant recruitment sources include: The public workforce system's One-Stop Career Centers and local workforce investment boards; community-based organizations; community colleges; vocational, career and technical schools; pre-apprenticeship programs; and Federally-funded, youth job-training programs such as YouthBuild and Job Corps or their successors;

(B) Identify a contact person, mailing address, telephone number, and email address for each recruitment source; and

(C) Provide recruitment sources advance notice, preferably 30 days, of apprenticeship openings so that the recruitment sources can notify and refer candidates. Such notification must also include documentation of the program’s equal opportunity pledge specified in subdivision (d) of Labor Code section 3073.9.

- *Enforcement Actions – What Constitutes “Failure?”*: Section 3079.3(i) 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.

Example:

(a) Any interested person may file a complaint against a program sponsor that alleges noncompliance with Labor Code section 3073.9 and any of its implementing regulations. Upon his or her own initiative, the Administrator may also issue a complaint when there is cause to believe that there is a failure to comply with the requirements of Labor Code section 3073.9 and any of its implementing regulations.

(b) All such complaints must be filed within the time period specified in Government Code section 12960 for the filing of complaints alleging employment discrimination.

(c) The Administrator of Apprenticeship or his or her designated representative shall investigate any complaint that alleges noncompliance with Labor Code section 3073.9 or any implementing regulations. The Administrator may also hold hearings. All investigations and hearings under this section shall be conducted in accordance with Section 202, except the Administrator need not issue a written decision. In lieu of, or in addition to a written decision, the Administrator may direct the Chief to conduct an evaluation in accordance with Labor Code section 3073.1.

(b) If the Chief has information that a program has failed to comply with the requirements of Labor Code section 3073.9 and any of its implementing regulations, the Chief shall so notify the program in writing by electronic mail, or by mail if the program does not have an electronic mail address on file. The notice shall specify the failure and include any supporting information. The program may submit a response no later than 30 days of service of the notice. The Chief shall consider the response, and if he or she deems the response inadequate, may initiate an evaluation in accordance with Labor Code section 3073.1.

(c) Notwithstanding subdivision (b) above, the Chief may initiate random evaluations to ensure compliance with the provisions of Labor Code section 3073.9. No program shall be selected for random evaluation under this subdivision more than once in a 3-year period. This subdivision does not limit the Chief’s authority to select programs for random evaluation more frequently for other purposes.

- *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.

Example:

§212.3. Apprenticeship Program Self-Evaluation and Monitoring.

(a) Each apprenticeship program shall annually prepare and submit a Self-Assessment Review as well as a Program Improvement Plan to the Chief DAS; provided, however, that a program is not required to submit a Review and a Plan in the first year of its existence.

(b) The Self-Assessment Review shall contain an objective and critical appraisal of the following items at a minimum:

- (1) curriculum and instruction;
- (2) supervision and management;
- (3) individual apprentice training plans;
- (4) use of competent and qualified personnel;
- (5) utilization of facilities, equipment and material;
- (6) community, business and industry involvement;
- (7) recruitment, assessment and placement;
- (8) program promotion;
- (9) program accountability;
- (10) safety and drug-free environmental training; and
- (11) training in the recognition of sexual harassment and illegal discrimination, ***including the antiharassment and antidiscrimination training required under Labor Code section 3073.9, subdivision (c)(4)(A).***

- *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?

Example: See above in Enforcement Actions section.

- *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?

Example: See above in Enforcement Actions section.