

Consultation Council Digest

Title: Proposed Revisions to Title 5: Equal Employment Opportunity Regulations

Date: November 18, 2010 draft

Contact: Randy Rowe, ACHRO/EEO Representative

Re: To provide the Consultation Council with background information and proposed revisions to Title 5: Equal Employment Opportunity (EEO) Regulations

Background

Impetus for Proposed Revisions

Proposition 209, passed by California voters in 1996, prohibits public institutions from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin. The broad interpretation given Prop. 209 by the California Supreme Court effectively outlawed the use of affirmative action plans in California community colleges. At the time, the Board of Governors directed staff to develop new regulations that would comply with the law but would maintain the maximum effort of achieving diversity in hiring. The Chancellor's Office responded with amended regulations in August 12, 2002, replacing affirmative action with equal employment opportunity, "EEO" planning and hiring requirements. Thus, the revised Title 5 EEO regulations retained certain proscribed pre-Proposition 209 approaches and practices.

These approaches have raised two concerns for community college human resource (HR) and EEO professionals. First, they have become dated. For nearly ten years the system has been without valid and accurate availability data, which are necessary to comply with the certification process of initial applicant pools required in the current regulations. Despite numerous efforts and the expenditure of tens of thousands of dollars, it has not been possible to develop valid and reliable data. Nor does the development of such data appear probable within the context of today's demographics and mobile society. Second, this process has also raised significant concern among district human resources directors that stopping a recruitment for lack of diversity could constitute a Proposition 209 violation.

Therefore, the current revision process aimed to modernize the regulations in terms of legal constraints, methods and a focus on districts' practices, while retaining the commitment to increasing the inclusion of traditionally underrepresented groups in employment in California's community college system.

Summary of Process

Approximately three years ago, community college HR and EEO professionals brought their concerns to the Chancellor's Office about the outdated terminology, methodologies and potential for legal liability in the current regulations. Together, the field and Chancellor's Office developed a collaborative effort to share information and gather statewide feedback on the law and current regulations, best practices for promoting, and accurately measuring and assessing employee diversity, and how to design regulations that would best serve California's dynamic and growing community college student population.

Under this process, the statewide EEO and Diversity Advisory Committee (led by the Chancellor's Office and comprised of representatives from constituent groups including HR/EEO, faculty and classified staff) formed a task force to draft new regulatory language. The task force, like the Advisory

Committee, included the Chancellor's Office and included constituent groups. After extensive consultation with professionals in the field, the Task Force established broad goals and principles for Title 5 revisions. Then, a writing team assembled from among its members began its work. The primary goals charged to the writing team were to develop new EEO strategies that would:

- better align with the current legal and social context;
- provide HR and EEO professionals with better tools which are legal and methodologically sound, and practice-oriented; and
- continue to demonstrate and expect meaningful and effective efforts to maximize diversity and identify and eliminate barriers to the employment opportunities for underrepresented groups.

After the writing team developed an initial draft, with extensive feedback from the Title 5 Task Force and Chancellor's Office, it was shared with HR and EEO professionals throughout the state in a series of regional meetings. In addition, the representative from the Academic Senate and members of the writing team shared an overview of the proposed regulations at the Senate's Diversity and Equity Institute, as well as during the 2010 spring plenary session. Over the past three years, representatives from the field and the Chancellor's Office have also prepared joint presentations for each ACHRO conference to provide updates and solicit feedback. After further refinement of the draft regulations, based on all of this information, staff in the Chancellor's Office reviewed the regulations for legal, policy, and potential mandated cost claims. The product of these efforts is what is presented here to the Consultation Council.

Overview of Revisions

Central to the revisions is how data is collected and used. Under the current regulations, data is collected in snapshots, relies on questionable external data, and is potentially used to make specific hiring decisions. This has generated the legal concerns referenced above, and left much unanswered in terms of the very essence of equal employment opportunity and district practices. Further, common factors residing outside of district control (e.g., pipeline effects and economic climate) remained indistinguishable from factors amenable to district influence and control.

Thus, these regulations constitute a paradigm shift. The traditional approach has been to hold districts accountable for outcomes, measured by comparisons to external reference groups. The proposed approach holds districts accountable for implementing practices designed to increase diversity and eradicate barriers to underrepresented groups. Under the proposed model, districts have both the independence and the responsibility to design and implement strategies that make sense for their particular communities. It emphasizes, and expects, systematic self-evaluation of practices that are focused at the district level. It is expected that data is still collected and important. However, how it is collected and used is different. Instead of relying on a single specific test or set of numbers, a more systematic and integrated design allows districts to measure and assess diversity from various angles and through various means relative to known populations. Districts are provided with the flexibility to utilize practices that best meet the needs of their diverse populations, as well as an opportunity to optimize available resources. Chancellor's Office oversight is secondary, in that it is triggered by a district's failure to take responsibility for developing and implementing EEO strategies on its own.

Aside from technical changes, below is an overview of the substantial changes and associated rationales.

Current regulations	Proposed regulations
<p>Remedy for discrimination: Pool certifications are based on comparison of diversity of applicants with expected rates in availability data provided by Chancellor’s Office and from the qualified applicant pool. Where analysis indicates underrepresentation due to flaws in hiring process, districts are required to re-recruit before hiring.</p>	<p>Remedy for discrimination: Modernization of methodology to include multiple strategies for optimal flexibility for local solutions and preventative practices. <i>Which</i> strategies to use is optional. However, implementing diversity/EEO plans and meaningful strategies is required. Rationale: Avoid overreliance on a single measure; allow for district flexibility and increased validity/reliability. Replaces costly and time consuming certification process with practices aimed at prevention and a broader array of lawful strategies designed to maximize diversity rather than react to underrepresentation.</p>
<p>Sources of accountability: EEO plans reviewed and approved by Chancellor’s Office. Applicant pools are required to be certified.</p>	<p>Sources of accountability: Chancellor’s Office may impose from among the multiple strategies <i>if</i> they find a pattern of discrimination complaints or other indicators that a district is not employing effective practices, and <i>after</i> the district has been given notice and an opportunity to correct. Rationale: Recognizes limited resources/staff in the Chancellor’s Office, as well as provides for advance disclosure of more specific practices which might be required should problems be identified.</p>
<p>EEO for persons with disabilities: Goals and timetables allowed because preferential treatment on the basis of disability is not prohibited by Prop 209. Thus, disability treated differently from other monitored groups.</p>	<p>EEO for persons with disabilities: Disabled applicants are treated consistently with all other applicants, and afforded the benefits and protections of all other protected groups under the law, as well as the proactive practices-based approaches districts are to utilize to maximize diversity. Of course, this is in addition to all rights specifically afforded to disabled applicants under the American Disabilities Act and Fair Employment & Housing Act. Rationale: By employing a consistent approach for applicants in ALL underrepresented groups, the regulations are more consistent, coherent, practical and cost effective. It also eliminates the tension of requiring different treatment of one group within regulations designed by their very name to ensure equal treatment. Further, because</p>

	<p>the Task Force sees the revisions as offering more effective and modern approaches to diversity, this revision does not reflect a diminished commitment to expanding opportunities for disabled applicants</p>
<p>Allowable interim appointments: One year, with additional year based on “business necessity”</p>	<p>Allowable interim appointments: 2 years, without a required showing of business necessity. Rationale: One-year limit is not workable because the recruitment process for leadership positions takes so long. Business necessity, as defined in the regulation, is a standard that is virtually impossible to meet rendering the extension possibility extremely unlikely. A cleaner approach is to allow two years with no extensions,</p>

Conclusion

The proposed regulations present an exciting opportunity for California’s Community Colleges. The Task Force acknowledges and thanks Tosh Shikasho, Steve Bruckman, and Jonathan Lee for helping to envision and design this process and fully embracing it from beginning to end.

Further, this inclusive and collaborative process has done what it is supposed to do create a product that reflects the best thinking of professionals from constituent groups and memorializes our common ground. The end result is a vision of EEO that works for the 21st Century. It is fitting that California Community Colleges take the lead to chart this course.