



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 3411	NCR Number: 21-02	Publication Date: February 12, 2021	Effective Date: To Be Announced
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INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of Section 3411 of the California Code of Regulations, Title 15, Crime Prevention and Corrections, Division 3, Chapter 1, regarding the incorporation of new Prison Rape Elimination Act language and defining mandatory reporting requirements.

PUBLIC COMMENT PERIOD

The public comment period will close on **April 2, 2021**. Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than **April 2, 2021**.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each Department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev.5/19), Certification of Posting, shall be returned to RPMB by mail or email. See Department Operations Manual Section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to Renee Rodriguez, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2217, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Shannon Stark, Division of of Adult Institutions, at (916) 324-6688.

Original signed by

JEFF MACOMBER
Undersecretary, Operations
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or Department), proposes to amend Sections 3411 into Title 15, Division 3, Chapter 1, regarding the incorporation of new Prison Rape Elimination Act language, and defining mandatory reporting requirements.

PUBLIC COMMENT PERIOD

The public comment period begins **February 12, 2021** and closes on **April 2, 2021**. Any person may submit written comments by mail addressed to the primary contact person listed below, or by email to rpmb@cdcr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

No public hearing is scheduled for these proposed regulations; however, pursuant to Government Code Section 11346.8, any interested person or their duly authorized representative may request a public hearing, no later than 15 days prior to the close of the written comment period.

CONTACT PERSONS

Primary Contact

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Program Contact

Shannon Stark
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Division of Adult Institutions

AUTHORITY AND REFERENCE

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as: Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons. **PC Section 5058.3** authorizes the Director to certify in a written statement filed with Office of Administrative Law that operational needs of the Department require adoption, amendment, or repeal of regulation on an emergency basis.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Changes to these regulations are necessary to implement, interpret and comply with 28 Code of Federal Regulations (CFR) Section 115.17, Hiring and Promotion Decisions.

This action will:

Amend Section 3411, Reporting of Arrest or Conviction, Change in Weapons or Driving Status, to include regulatory language associated with standards in Section 115.17(a), which creates mandatory reporting requirements for certain types of incidents and establishes a continuing duty, on the part of employees and contractors, to report such instances, should they occur after their initial employment.

For additional benefit analysis, please see “Results of the Economic Impact Assessment”.

DOCUMENTS INCORPORATED BY REFERENCE

Not applicable

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

The regulation changes will save the Department from litigation, and ensure the Department’s compliance with the Federal standards in 28 CFR Section 115.17, Hiring and Promotion Decisions.

EVALUATION OF INCONSISTENCY / INCOMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

Pursuant to Government Code 11346.5(a)(3)(D), the Department has determined the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Department has concluded that these are the only regulations that concern the Reporting of Arrest or Conviction, Change in Weapons or Driving Status.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency: *None*
- Cost to any local agency or school district that is required to be reimbursed: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The Department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The Department has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because the proposed regulations place no obligations or requirements on any business.

EFFECT ON SMALL BUSINESSES

The Department has determined that the proposed regulations will not affect small businesses. This action has no significant adverse economic impact on small business because they place no obligations or requirements on any business.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The Department has determined that the proposed regulation will have no effect on the creation of new, or the elimination of existing, jobs or businesses within California, or effect the expansion of businesses currently doing business in California. The Department has determined that the proposed regulation will have no effect on worker safety or the state's environment. These regulations may benefit the welfare of California residents by helping to make CDCR institutions safer for inmates, staff, and visitors. Additionally, safer institutions may provide an environment more conducive to rehabilitation, thereby reducing recidivism.

CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative considered by the Department or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed during the written comment period.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The Department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the Department's contact person. The proposed text, ISOR, and Notice of Proposed Regulations will also be made available on the Department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the Department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this Notice. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text, with the changes clearly indicated, available to the public for at least 15 days before the Department adopts, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The Department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

In the following text, underline indicates additional text and ~~striketrough~~ indicates deleted text.

Title 15. Crime Prevention and Corrections
Division 3. Adult Institutions, Programs and Parole
Chapter 1. Rules and Regulations of Adult Operations and Programs
Subchapter 5. Personnel

Article 2. Employees (Ref & Annos)

Sections 3390 through 3410.2 remain unchanged.

Section 3411 is amended to read:

3411. Reporting of Arrest, ~~or~~ Conviction, Civil or Administrative Adjudication, Change in Weapons or Driving Status.

(a) If an employee is arrested or convicted of any violations of law, the employee must promptly notify the institution head or appropriate ~~d~~Director/assistant secretary of that fact. Misconduct which impairs an employee's ability to do ~~his or her~~ their job, or affects or involves the department, may be cause for disciplinary action. Suspension, revocation, or restrictions to an employee's driving privilege ~~that~~ which prohibit the employee from performing any of their job duties, shall be reported to the institution head or appropriate ~~d~~Director/assistant secretary. An employee shall also report any change in eligibility to own, possess and have custody/ or control of any firearm or other weapon authorized by the department.

(b) An employee or contractor has a continuing duty to report, and shall promptly notify the institution head, or appropriate Director, if any of the following occur:

- (1) Have engaged in sexual abuse in any prison, jail, lockup, community confinement facility, juvenile facility, or other institution (as defined in Title 42 U.S.C., Section 1997)
- (2) Have been convicted of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse; or
- (3) Have been civilly or administratively adjudicated of engaging or attempting to engage in sexual activity in the community facilitated by force, overt or implied threats of force, or coercion; or if the victim did not consent or was unable to consent or refuse.

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; and Sections 921, 922 and 926, Title 18, United States Code. Section 115.7, Title 28, Code of Federal Regulations.

Sections 3412 through 3416 remain unchanged.

INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (CDCR or the Department) proposes to add to the California Code of Regulations, Title 15, Division 3, Chapter 1, Subchapter 5, Article 2, Section 3411 to clearly define mandatory reporting requirements under the Department's Prison Rape Elimination Act policy.

Background

CDCR has been aggressive in implementing the federal Prison Rape Elimination Act (PREA), Public Law 108-79, codified at Title 34 United States Codes (USC) Section 30301 and the sections following. CDCR's first step was the creation of the PREA Program to address allegations of sexual assault made by offenders against both offenders and staff. In 2005, the California Legislature passed the Sexual Abuse in Detention Elimination Act (AB 550), Chapter 303, codified at Penal Code Section 2635 and the Sections following.

In 2006, CDCR successfully implemented its PREA Policy. Development and review of the policy and procedures involved both internal and external stakeholders including: State Assemblyperson Goldberg's Office, staff from Stop Prisoner Rape (now known as Just Detention International), a consultant from the University of California – Irvine, and CDCR staff from the Division of Adult Institutions, Division of Juvenile Justice, Office of Legal Affairs, Office of Internal Affairs, Office of Labor Relations, Office of Victim and Survivor Services, Office of Financial Services and staff from various institutions.

CDCR's response to sexual violence in prisons included policies, procedures, and training. This rule making action:

- Established a zero tolerance policy;
- Required mandatory training of all staff, and
- Provided education for offenders, consisting of literature related to prevention and reporting, posters, a video about PREA, voluntary classes on PREA and information related to the issue of sexual abuse and rape.

The federal statute directs the Attorney General of the United States to publish a final rule adopting "national standards for the detection, prevention, reduction, and punishment of prison rape". On May 12, 2012, the Federal Department of Justice issued a final rule adopting national standards (regulations) to prevent, detect, and respond to prison rape, as required by the Prison Rape Elimination Act of 2003.

Federal law provide that:

A state whose Governor does not certify full compliance with each of the PREA standards is subject to the loss of 5% of any Department of Justice grant funds that "may provide amounts to States for prison purposes", unless the Governor submits an assurance that such 5% will be used only for the purpose of adopting and achieving full compliance with each standard in future years. (34 USC 30307, subd. (e)(2)(A).) A Governor's certification applies to all facilities in the State under the operational control of the State's executive branch, including facilities operated by private entities on behalf of the State (34 USC 30307, subd. (e)(2).)

In May 2014, California's Governor submitted the first "assurance" to the federal Department of Justice that CDCR would continue to work on developing and implementing policy to ensure full compliance with the PREA standards and eventually submit a certification that CDCR is in full compliance. Every year since 2014, the Governor has continued to submit an "assurance" to the federal Department of Justice.

In May 2015, CDCR promulgated new regulations to meet the federal PREA standards and developed major modifications to its Department Operations Manual. As a result of recent mandatory PREA audits, the Department has determined there is a need to amend its regulation to further incorporate the requirement of PREA standard, 28 Code of Federal Regulations (CFR) Section 115.17, Hiring and Promotion Decisions. The reporting requirement for employees has existed since 2015, when internal forms were modified. A recent audit concluded that CDCR's policy does not explicitly notify employees and contractors of their continuing duty to report, to their hiring authority, all situations identified in the PREA standard 28 CFR Section 115.17(a). The additional language to Section 3411 will address that deficiency.

CONSIDERATION OF ALTERNATIVES:

The Department must determine that no reasonable alternatives considered, or otherwise identified and brought to the Department's attention, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Currently, no reasonable alternatives have been brought to the Department's attention that would alter the Department's initial determination.

ECONOMIC IMPACT ASSESSMENT:

In accordance with Government Code Section 11346.3(b), CDCR has made the following assessments regarding the proposed regulations:

Creation of New or the Elimination of Existing Jobs within the State of California

The Department has determined that the proposed regulations will not have an impact on the creation of new, or the elimination of existing, jobs within California.

Creation of New, Expansion, or the Elimination of Existing Businesses Currently Doing Business in the State of California

The Department has determined the proposed regulations will not have an impact on the creation of new, expansion, or elimination of existing businesses currently doing business in California.

Benefits to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The Department has determined the proposed regulations may benefit the health and welfare of California residents by reducing the number of victims of sexual assault or violence who will eventually return to the community. The Department has determined the proposed regulations

will have no impact on worker safety or the state's environment as they affect the internal management of prisons only.

Significant Adverse Economic Impact on Business

The Department has made an initial determination the proposed regulations will not have a significant statewide adverse economic impact on business.

BENEFITS OF THE REGULATIONS:

The regulation changes will save the Department from litigation, and ensure the Department's compliance with the Federal standards in 28 CFR section 115.17, Hiring and Promotion Decisions.

MATERIALS RELIED UPON:

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE 11346.2(b)(1):

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 5. Personnel.

Article 2. Employees.

Section 3411. Reporting of Arrest or Conviction, Change in Weapons or Driving Status.

Section 3411 is being modified to include regulatory language associated with standards in 28 CFR Section 115.17(a), which creates mandatory reporting requirements for certain types of incidents and establishes a continuing duty, on the part of employees and contractors, to report such instances, should they occur after their initial employment. Additionally, the term assistant secretary is being deleted. It is no longer reflects the correct title of the persons in these positions, requiring staff notification.