

Affirmative Action in CSU Employment

Permissible Action in the Wake of Prop. 209

Pursuant to federal law, the CSU—a federal contractor—is required to institute Affirmative Action Programs to create a diverse faculty.



*"Injustice anywhere is a threat to justice everywhere."
— Martin Luther King*

The California Faculty Association has produced this brochure as a guide to assist our colleagues, faculty and administrators, through the myriad twists and turns involved in faculty hiring decisions. It is the goal of this brochure to provide clarity for those serving on department hiring committees and panels in understanding what is permitted in a post-Prop 209 environment.

Since its passage in 1996, Proposition 209 has been one of the most misunderstood and widely referenced of all California's modern propositions. The actual proposition was no more than a few sentences long. However, given its use and application, one would surmise that it was much larger. This controversial proposition and its impact on Affirmative Action policy and practice, has been cited as both the reason to support and the reason to oppose, the use of race and ethnicity in faculty hiring decisions.

This brochure serves to address the confusion and misinformation that surrounds the issue of Affirmative Action as it is applied to faculty hiring in higher education. Faculty (and administrators) should view this document as an aspirational (and hopefully inspirational) one that supports the expansion of possibilities available for meeting the much sought goal of diversity within our departments and campuses. Contrary to popular belief, Affirmative Action as a principle is not "dead" in California. In fact, the principle is embodied in ideals such as equality, equity, justice and fairness, and is a requirement for participation in federal government programs from which California receives aid and funds.

We are pleased and proud that our union, the California Faculty Association, has maintained its commitment to those ideals, and we take this opportunity to acknowledge the work of our statewide Affirmative Action Committee (from this point known as the Council for Affirmative Action), our campus colleagues, the CFA Board of Directors and all those who stood up and demanded that justice be served and insisted that this document be available to faculty.

Yours in union,

*Cecil E. Canton, Chair
CFA Affirmative Action Committee
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I. PROPOSITION 209

Proposition 209 (Prop 209) was passed by California voters in November 1996, and it amended the California Constitution by adding the following provision (codified as Article 1, Section 31): The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. However, nothing in this Section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.



II. QUESTIONS CREATED BY PROP 209

Despite the brevity of the provision, Prop 209 has created more questions than answers. Indeed, many people assume that Prop 209 eliminated all Affirmative Action programs and that all race or gender-conscious programs are now unlawful. That, however, is simply not true. In fact, quite to the contrary, the CSU has an *obligation* to continue its efforts to remedy the underutilization of women and minorities in employment.

This brochure explains what Prop 209 prohibits, what it permits, and how to establish programs to increase the diversity of the CSU faculty that comply with federal and state law.

III. PROPOSITION 209—AN OVERVIEW

In a nutshell, Prop 209 prohibits any voluntary action on the part of any State agency to initiate programs designed to increase the presence of women and minorities in state employment. Prop 209, however, by its own explicit words contains a “Safe Harbor” provision. The Safe Harbor provision provides that, if an entity has obligations under federal law to establish or maintain an affirmative action program or risk federal funding, the entity may continue to meet its federal obligations without violating Prop 209.

This Safe Harbor provision makes it clear that a State agency or subdivision may maintain an affirmative action program if it risks losing federal funds by not so maintaining such a program. Thus, the next logical question in any analysis regarding permissible action under Prop 209 is whether or not an entity is required to take certain action to maintain eligibility for federal funds. In other words, the analysis must focus on whether or not an entity is a “government contractor.” The CSU is a government contractor.

1. OBLIGATIONS OF GOVERNMENT CONTRACTORS

Presidential Executive Order 11246 requires government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment. In order to comply with this federal mandate, each contractor must create an “affirmative action program” (AAP) so that, over time, each contractor’s workforce will reflect the gender, racial, and ethnic profile of the labor pools from which the contractor recruits and selects. AAPs must contain the following (1) a diagnostic component, which includes a number of quantitative analyses designed to evaluate the workforce of the contractor and compare it to the composition of the relevant labor pools; (2) an action-oriented component, namely those steps that the contractor will take to address any underutilization; and (3) an auditing component, namely an internal auditing and reporting system to ensure progress toward achieving the workforce that would be expected in the absence of discrimination.

Thus, the AAP is meant to be a tool in an employer's arsenal to help identify and eliminate the effects of discrimination in employment.

2. OTHER PERMISSIBLE ACTIONS

It is important to note that, even if an agency does not have any obligations under federal law to establish and maintain an affirmative action plan, state agencies can still engage in race or gender "conscious" activities, such as true outreach efforts (discussed more fully below) without violating the prohibitions of Prop 209.

In addition, Prop 209 does not prohibit the development and dissemination of a diversity policy. Any such policy must not establish racial or gender preferences but rather should emphasize the value of each individual, require that employees treat each other with respect, appreciate all cultures and heritages different from one's own, and should discourage discrimination against any particular race or gender.

IV. OBLIGATIONS OF THE CSU

Because each campus of the CSU is a federal contractor, each is required to draft an AAP. These AAPs must identify groups that are underutilized on the various campuses in all job categories and set forth an "action-oriented plan" to remedy any underutilization.

In addition, even if the CSU were not swept into the "Safe Harbor" provision of Prop 209 (which they are), Prop 209 would not prohibit the CSU from engaging in outreach and recruiting efforts designed to broaden the pool of potential applicants to help increase the diversity of the faculty.

V. OBLIGATIONS OF FACULTY HIRING COMMITTEES

Before undertaking any recruiting efforts, all faculty hiring committees should review their campus' AAP so that they are aware of the pledge of the CSU to remedy the underutilization of women and minorities on the various campuses. Specifically, an analysis of the AAP will identify the particular underutilized groups on each individual

campus. In addition, by consulting the AAP, the committees will become familiar with the actions that their own campus administrators have recommended to improve and increase targeted recruitment efforts to reach women and minority groups.



Source: ACLU

A. OUTREACH AND RECRUITING EFFORTS

As discussed, the CSU has the obligation pursuant to federal law to undertake particular actions designed to increase the applicant pool so that the underutilization of women and minorities on the various campuses is ameliorated and the diversity of the faculty is increased. Some examples of permissible outreach include the following:

- ◎ Participation in job fairs—hosting and cosponsoring
- ◎ Establishment of an internship program
- ◎ Participation in job banks, internet programs, and other programs designed to promote outreach
- ◎ Participation in scholarship programs
- ◎ Establishment of training programs
- ◎ Establishment of mentoring programs

- ◎ Sponsorship of events to inform and educate the public about employment opportunities
- ◎ Participation in other activities reasonably calculated to further the goal of disseminating information regarding employment opportunities

VI. QUESTIONS AND ANSWERS

QUESTION: Our Department wants to develop a Diversity Policy. Does such a Policy violate Prop 209?

ANSWER: No. Prop 209 does not prohibit the development and dissemination of a Diversity Policy. Any such Policy should emphasize the value of each individual, require that employees treat each other with respect, mandate that employees appreciate all cultures and heritages different from one's own, and must prohibit discrimination against any particular race or gender.

QUESTION: Where can a hiring committee obtain a copy of the Affirmative Action Plan for a particular CSU campus?

ANSWER: The Equal Employment Officer for each campus will be able to provide the hiring committee with the latest version of the Plan. This Plan will identify the particular underutilized groups on each individual campus. In addition, by consulting the Plan, the committees will become familiar with the actions that their own campus administrators have recommended to improve and increase targeted recruitment efforts to reach women and minority groups.

QUESTION: Our Hiring Committee wants to place an "affirmative action" representative on the Committee to ensure that the hiring process is inclusive. Is such a

representative on a Committee permissible?

ANSWER: It is not, per se, unlawful to have an “Affirmative Action” representative on a Hiring Committee. Such a person can be designated to serve on the Committee to ensure that the policies and goals enumerated in the campus Affirmative Action Plan are met. This person, however, could not support the hiring of a candidate solely because of that candidate’s race or gender.

QUESTION: Our Hiring Committee would like to advertise in publications that are targeted to reach particular underrepresented groups. Is such action permissible?

ANSWER: The case law on this issue continues to evolve. What is clear is that outreach efforts that are designed to increase the size of the applicant pool are not prohibited by Prop 209. The difficulty, however, is that exact boundaries of permissible “targeted outreach” have not been drawn by the courts. At this point, any outreach should be directed to reach a broad group. Be sure that advertising is directed at the public at large, as well as placed in targeted publications. Also, the most prudent course of action would be to advertise in publications that target the underrepresented groups (as identified by the campus Affirmative Action Plan) on that campus. In sum, Hiring Committees should attempt to cast a wide net, advertising in a multitude of publications, to encourage a qualified, diverse faculty pool to apply for available positions.

QUESTION: What other types of outreach can our College engage in?

ANSWER: As with the law on targeted advertising, the case law

on this issue continues to evolve. Again, outreach efforts that are designed to increase the size of the applicant pool are not prohibited by Prop 209. Such activities could include the following: job fairs, internship programs, job training, and informational events. These activities must be designed to encourage a qualified, diverse faculty pool to apply for available positions.

VII. CONCLUSION

As discussed, the myth that Prop 209 prohibits all affirmative action activities is just that—a myth. In fact, to the contrary, the CSU has an obligation as a government contractor to implement and maintain an Affirmative Action Plan. In addition, notwithstanding the presence of Prop 209, all state agencies (whether or not they are “government contractors”) are permitted to engage in true “outreach” activities, namely activities that increase the applicant pool, without violating Prop 209. Thus, although some may try to argue that Prop 209 has created a darkened sky, in reality, it casts a mere shadow. Indeed, the CSU can, nay must, remain committed to recruiting and hiring a diverse faculty.

