

FAIR EMPLOYMENT AND HOUSING COUNCIL PROPOSED AMENDMENTS TO FAIR EMPLOYMENT AND HOUSING ACT REGULATIONS

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapters 2 and 5. Discrimination in Employment; Contractor Nondiscrimination and Compliance

Articles 1, 2, 65, 6A, 8, 9; 1, 2, 4, 5

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed regulation or amendment and the reason it is necessary are described herein. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification. Many changes are not explained below as they are non-substantive, which includes correcting grammatical or formatting errors, renumbering and/or relettering provisions, deleting unnecessary citations that are apt to change in the future, and/or clarifying complicated concepts in simpler terms and/or eliminating jargon.

Subchapter 2. Discrimination in Employment

Article 1. General Matters

§ ~~11005.1~~ 10500. Department of Fair Employment and Housing - Conflict of Interest Code

The purpose of this section is to promote transparency and good governance by requiring different classes of employees to disclose potential financial conflicts of interest, as is required by the Political Reform Act and the Department's incorporation of the Fair Political Practices Commission's standard conflict of interest code. The Council proposes to renumber the Department of Fair Employment and Housing's (DFEH) Conflict of Interest Code in order for it to be contained within the Department's procedural regulations (Cal. Code Regs., tit. 2, § 10000 et seq.) rather than within the substantive regulations (Cal. Code Regs., tit. 2, § 11000 et seq.) that interpret and supplement the laws the Department enforces. This change is necessary to avoid the

implication that the Fair Employment and Housing Council is one and the same, rather than an autonomous unit within, the Department of Fair Employment and Housing, and to ensure that the Department, which has the greatest amount of insight into its own operations, can better regulate itself. This is not a substantive change.

§ 11006, Statement of Policy and Purpose

The purpose of this section is to outline the objectives and scope of the FEHA. The Council proposes to add military and veteran status as a basis upon which employment discrimination is prohibited. This change is necessary to conform the regulations to the FEHA, as amended by AB 556 (Stats. 2013, ch. 691), which added military and veteran status as a protected basis to the FEHA's employment provisions. It is not a policy declaration any different than that which the statute already contains.

§ 11008, Definitions

The purpose of this section is to define terms used throughout the "Discrimination in Employment" subchapter of the regulations. The Council proposes to add the definition of "unpaid interns and volunteers." This change is necessary to implement, interpret, and make specific recent additions to the FEHA expanding who is protected made by AB 1443 (Stats. 2014, ch. 302). These amendments would not alter rights or change existing law beyond what the newly enacted statute dictates. Additionally, the public is encouraged to submit comments regarding proposed amendments to the definition of "employee" in subdivision (c). The Council will subsequently propose an amendment and give notice, if public comment compels an amendment.

§ 11009, Principles of Employment Discrimination

The purpose of this section is to describe common employment law doctrines and theories of liability. The Council proposes to replace "respondent," a term closely associated with the former administrative adjudication of FEHA claims, with "an employer or other covered entity." This change is necessary to reinforce that the DFEH no longer initiates litigation in the administrative forum and instead files suit directly in superior court, and to clarify parties' duties as related to their role in employment. The Council also proposes to add subdivision (c), which addresses the standard for proving discrimination under Government Code section 12940, subdivision (a). This change is necessary to effectuate and clarify the California Supreme Court's holding in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, which has caused confusion among practitioners. The Council also proposes to add subdivision (d), which would explain that a victim of human trafficking may have a separate right of action under the FEHA, independent of other provisions of California law covering human trafficking. The addition of this subdivision is declarative of existing law and is not a substantive change. Rather, it is necessary to highlight an underutilized employment law remedy for an alarmingly common human rights abuse.

Article 2. Particular Employment Practices

§ 11019, Terms, Conditions and Privileges of Employment

The purpose of this section is to address employment topics not exclusively tied to one specific protected basis. These topics are: harassment; physical appearance, grooming, and dress standards; and reasonable discipline. The Council proposes to add to the subdivision regarding harassment that an employee who harasses a co-employee may be personally liable for the harassment, regardless of whether the employer knew or should have known of the conduct and/or failed to take appropriate corrective action. This is not a policy declaration any different than that which the statute already contains. Rather, it is necessary to reinforce an important point that may

be overlooked in Government Code section 12940, subdivision (j)(3), and to flesh out an otherwise thorough discussion of harassment jurisprudence that precedes the addition.

§ 11023, Harassment and Discrimination Prevention and Correction

The Council proposes to add a new section detailing: (a) employers' duty to prevent and correct harassment and discrimination; (b) the required contents of harassment and discrimination policies; and (c) the dissemination and translation of such policies. The purpose of this section is to elaborate upon the aforementioned topics, which are sparsely addressed in Government Code sections 12940, subdivision (k), and 12950, and ultimately to quell harassment and discrimination. This amendment is necessary to provide guidance to employers who want to obey the law, but otherwise derive scant guidance from the Government Code. The new section 11023 would distill a large amount of disjointed case law and "best practices" into a concise, user-friendly regulation that would eliminate ambiguity and the need to research a vast amount of fragmented information on one's own.

§ ~~11023~~-11024, Sexual Harassment Training and Education

The purpose of this section is to address the more nuanced rules regarding sexual harassment prevention training and education that is mandated by Government Code section 12950.1. Covered topics are definitions, training requirements, training objectives and content, remedies for failure to comply with training requirements, and compliance guidance. The Council proposes to expound upon rules about trainers' maintenance of records, employers' maintenance of records, the meaning of "effective interactive training," examples of materials that ensure "supervisors remain engaged in the training," who may qualify as a trainer, and course content. This amendment is necessary to flesh out rules that otherwise do not speak for themselves (e.g. what records to maintain and for how long) and to clarify previously unclear rules and formatting. Additionally, the Council proposes to add, as an objective of the training, that trainees learn the negative effects of abusive conduct in the workplace and to explain what that entails. This change is necessary to implement, interpret, and make specific recent additions to the FEHA, made by AB 2053 (Stats. 2014, ch. 306), mandating the inclusion of abusive conduct as a component of sexual harassment training. These amendments, as it relates to abusive conduct, would not alter rights or change existing law beyond what the newly enacted statute dictates.

Article 4. National Origin and Ancestry Discrimination

§ 11028, Specific Employment Practices

The purpose of this section is to address employment practices that are unique to national origin and ancestry discrimination, including English-only policies and citizenship requirements. The Council proposes to add that "[i]t is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver's license issued under section 12801.9 of the Vehicle Code" and how that relates to both an employer's requiring a driver's license and federal law. This change is necessary to conform the regulations to AB 1660 (Stats. 2014, ch. 452), which added the following to Government Code section 12926, subdivision (v): "National origin' discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code." Because the parameters of the driver's license program for a "person who is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law" (Vehicle Code section 12801.9, subdivision (a)) is not well-defined, the Council strives to clarify in more concrete terms the practical effect that AB 1660 would have on

employers, namely reiterating the mandate that discrimination based on the new type of driver's license is strictly prohibited.

Article 6-5. Sex Discrimination

§ 11029, General Prohibition Against Discrimination on the Basis of Sex

The purpose of this section is to broadly address the FEHA's prohibition of sex discrimination in the workplace, including the prohibition's statutory source, statement of purpose, and the incorporation of general regulations from Articles 1 and 2. The Council proposes to clarify that the FEHA protects everyone from sex discrimination, not just females, and to elaborate upon the types of prohibited conduct, including differential treatment, pay disparity, stereotyping, conduct of a sexual nature, and the creation of a hostile work environment. After "individuals," replacing "of the female sex" with "by virtue of their sex" is necessary to ensure the understanding that all sexes are covered by the FEHA's prohibition against sex discrimination. While this is not a change in the law, it is an important rephrasing that would replace an overly specific category with a more appropriate broad one, thus eliminating the stereotype that only women are victims of sex discrimination. Similarly, the addition of other types of prohibited behavior is necessary to provide more guidance to employers and employees about conduct that constitutes unacceptable behavior, again elaborating upon a narrow premise ("historically been relegated to inferior jobs") with more concrete examples.

§ 11030, Definitions

The purpose of this section is to define sex and gender constructs within the meaning of the FEHA. The Council proposes to modify the definitions of "sex" and "sex stereotype" and add the definitions of "gender identity," "gender expression," and "transgender." These changes are necessary to implement, interpret, and make specific recent additions to the FEHA's protected bases made by SB 559 (Stats. 2011, ch. 261) and AB 887 (Stats. 2011, ch. 719). These amendments would not alter rights or change existing law.

§ 11031, Defenses

The purpose of this section is to describe defenses specific to employment discrimination on the basis of sex, most prominently Bona Fide Occupational Qualification (BFOQ). The Council proposes to add that it is no defense to a complaint of harassment based on sex that the alleged harassing conduct was not motivated by sexual desire, consistent with Government Code section 12940, subdivision (j)(4)(C). This amendment is necessary to conform the regulation to the statute, which was recently amended by SB 292 (Stats. 2013, ch. 88), to clarify existing law as it relates to sexual desire and complaints of harassment based on sex.

§ 11034, Terms, Conditions, and Privileges of Employment

The purpose of this section is to address specific prohibited conduct to which sex discrimination in employment may give rise, including discrimination in compensation; fringe benefits; lines of progression; dangers to health, safety, or reproductive functions; working conditions; and physical appearance, grooming, and dress standards. The Council proposes to add a new section about substantive sexual harassment law, which has developed over the years through case law. This amendment is necessary because this brief distillation of the law would provide much needed guidance to employers and employees in an easy-to-understand format. The Council also proposes to add citations to the reference section to the most impactful precedential sexual harassment case law.

Article 6A. ~~Sex Discrimination:~~ Pregnancy, Childbirth, or Related Medical Conditions

§ 11035, Definitions

The purpose of this section is to define terminology about pregnancy, childbirth, and related medical conditions used in the FEHA and the Council's regulations. Regarding pregnancy disability leave, the Council proposes to change the definition of "four months" to "the equivalent of four months of the employee's normally scheduled work months." As it exists now, the definition of four months states: "the number of days the employee would normally work within four calendar months (one-third of a year equaling 17 1/3 weeks), if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee's normal work month." The change is necessary to replace an earlier attempt at clarification by the Council's predecessor, the Fair Employment and Housing Commission. The former Commission created the current rule at the end of 2012, and the brief amount of time that has passed has proven the attempted clarification to be confusing in practice. The proposed change is necessary to clarify existing law and eliminate the need for complex calculations when an employee wishes to take four months of continuous leave.

§ 11042, Pregnancy Disability Leave

The purpose of this section is to elaborate upon the FEHA's four-month pregnancy disability leave entitlement applicable to all employers, address employers' leave policies that may be more generous, and explain when denial of leave constitutes an unlawful employment practice. The Council proposes to simplify the definition of "four months" and elaborate upon situations when "four months" compels more complicated calculations, like for employees whose "schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked," and for employees taking pregnancy disability leave intermittently or on a reduced-work schedule.

As discussed above, changing the definition of "four months" from "17 1/3 weeks" is necessary to avoid a needlessly confusing definition for continuous leave. It is necessary, however, to maintain the "17 1/3 weeks" definition for employees taking leave on an intermittent basis or on a reduced-work schedule. The additional rules for intermittent or reduced-work schedule leave flesh out potential complicating contingencies and ensure that employees' right to take and use non-continuous pregnancy disability leave is as equal as possible to those employees taking four consecutive months. Also, the Council proposes to add that "[e]mployees are eligible for up to four months of leave per pregnancy, not per year." While this is not a substantive change, it is necessary for clarification, since pregnancy disability leave is sometimes conflated with other types of leave that limit time off based on a set amount of time rather than an event meriting its own leave period.

§ 11044, Terms of Pregnancy Disability Leave

The purpose of this section is to explain how pregnancy disability leave relates to paid leave, accrued time off, continuation of group health coverage, other benefits, seniority accrual, and employee status. The Council proposes to rephrase an employer's obligation to maintain and pay

for health coverage during pregnancy disability leave. This change is necessary to clarify the current phrasing by replacing it with a more direct instruction, which also expressly reinforces that the mandate is set forth in Government Code section 12945. This rewording is declarative of existing law and is not a substantive change.

§ 11046, Relationship Between CFRA and Pregnancy Leaves

The purpose of this section is to explain how two distinct leaves, one under the California Family Rights Act (CFRA) and the other, pregnancy disability leave, work in tandem with one another. The Council proposes to delete reference to pregnancy disability leave as equaling “17 1/3 weeks” and to replace it with “four months.” As explained above, this change is necessary to avoid confusion and to restore the regulatory language to the terminology used in the statute. Also, since CFRA explicitly uses weeks to describe its leave entitlement (12 weeks) and pregnancy disability leave uses months (4 months), it is imprecise to express the combined total as 29 1/3 workweeks, as the current regulation does. Thus the Council also proposes changing “29 1/3 workweeks” to “four months plus twelve workweeks” for clarity and accuracy.

§ 11049, Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, To Transfer and To Take Pregnancy Disability Leave

The purpose of this section is to explain the notice requirements regarding the right to take pregnancy disability leave, including employers’ obligation to notify employees, notice content, the consequences of failure to provide notice, and notice distribution. The Council proposes to elaborate upon electronic posting of the notice by requiring that notices be “posted electronically in a conspicuous place or places where employees would tend to view it in the workplace.” The proposed addition conforms the electronic posting requirement to the physical posting requirement, i.e., that notice be conspicuous. This change is necessary to ensure that employers who post electronic notices instead of physical ones do not place the notice where employees are unlikely to view it. Additionally, the Council proposes to clarify the translation requirement to make clear that the notice must be translated into “every language that is spoken by at least 10 percent of the workforce.” The change is necessary because existing language implies that the notice need only be translated into one language.

§ 11051, Employer Notices

The purpose of this section is to provide examples of pregnancy disability leave notices that employers may use. In both Notice A and Notice B, the Council proposes to use “17 1/3 weeks” to define four months only when leave is taken incrementally. As explained in detail above, this change is necessary to avoid confusion and to restore the regulatory language to the terminology used in the statute. Additionally, in Notice B, the Council proposes to add that “CFRA leave guarantees reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under the law.” While this change is declarative of existing law, it is necessary to emphasize that pregnancy disability leave and CFRA leave have two different entitlements to reinstatement – the former to the same position and the latter to the same or a comparable position. The change is necessary because existing regulatory language does not indicate that it is permissible to restore an employee to a comparable position after CFRA leave, as permitted by statute, and incorrectly groups together the reinstatement guarantees under both laws as if they were identical.

Article 8. Religious Creed Discrimination

§ 11060, Establishing Religious Creed Discrimination

The purpose of this section is to define “religious creed” and to explain how to prove religious creed discrimination. The Council proposes to add that religious creed “encompasses all aspects of religious belief, observance, and practice, including religious dress and grooming practices, as defined by Government Code section 12926.” This change is necessary to conform the regulation to Government Code section 12926, subdivision (q), as recently amended by AB 1964 (Stats. 2012, ch. 287).

§ 11062, Reasonable Accommodation

The purpose of this section is to give examples of reasonable accommodations for an employee’s or applicant’s religious beliefs or practices and to provide a partial list of factors to consider when determining whether a religious accommodation would pose an undue hardship. The Council proposes to add that “[u]nless expressly requested by an employee, an accommodation is not reasonable if it requires segregation of an employee from customers or the general public.” This change is necessary to conform the regulation to Government Code section 12940, subdivision (1)(2), as recently amended by AB 1964 (Stats. 2012, ch. 287). Moreover, the Council proposes to clarify the rules regarding dress standards and add grooming standards. This change is necessary to conform the existing regulatory language (“shall be flexible enough to take into account religious practices”), which is vague, to Government Code section 12926, subdivision (q), which prescribes more specific standards that make the regulation inconsistent, and also to conform the regulation to the statute as recently amended by AB 1964 (Stats. 2012, ch. 287).

Article 9. Disability Discrimination

§ 11065, Definitions

The purpose of this section is to define the many technical terms used in discourse about disability discrimination. Within the definition of “assistive animal,” the Council proposes to define “support animal.” This addition is necessary because while this section, in the context of dogs, gives precise definitions of “guide dog,” “signal dog,” and “service dog,” with a cross reference to the relevant Civil Code section, the definition of “support dog” is vague. Because any dog, or other animal for that matter, can provide “emotional or other support,” a more precise definition is needed to prevent abuse and give proper guidance. So in addition to deleting the vague “or other” to now just read “emotional support” in the context of dogs, the new definition of support animal leaves intact that the animal “provides emotional support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities, such as major depression.” However, the enhanced definition clarifies that a support animal “*may* constitute a reasonable accommodation in certain circumstances” (emphasis added) and expressly states that “what constitutes a reasonable accommodation requires an individualized analysis.” This amendment is necessary to preclude a blanket rule permitting all support animals in the work place and to encourage employers and employees to engage in an interactive process to determine whether a particular support animal is in fact reasonable and appropriate in a particular work setting.

§ 11066, Establishing Disability Discrimination

The purpose of this section is to provide guidance on the burden of proof for disability discrimination and denial of reasonable accommodation in disability cases. The Council proposes the necessary deletion of subdivision (b), which has been overruled by *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, and no longer provides the proper burden of proof. The Council proposes to instead add the appropriate burden of proof at section 11009, subdivision (c), in the

Article entitled “General Matters,” because it is applicable to all types of discrimination, not just disability discrimination cases. Also, while the Council’s regulation would provide some guidance for litigators, the Evidence Code, Code of Civil Procedure and case law thoroughly describe burdens of proof; the Council’s intent is to summarize and contextualize rather than supplant existing law regarding burdens of proof.

Subchapter 5. Contractor Nondiscrimination and Compliance

Article 1. General Matters

Article 2. Regulations Applicable to Construction Contracts

Article 3. Regulations Applicable to Service and Supply Contracts

§§ 11100 through 11132

The purpose of these sections is to provide detailed guidance regarding nondiscrimination programs and obligations for those who contract with the State . The Council proposes to delete all references to affirmative action and in some cases replace its mention with optional good faith outreach. This amendment is necessary because in November 1996, California voters approved Proposition 209, also known as the “California Civil Rights Initiative” or “CCRI,” which added article 1, section 31 to the State Constitution, effectively banning the State from engaging in affirmative action. In addition to making the regulations consistent with the California Constitution, the Council also proposes to state that the federal government may have different rules, and to clarify that the bases upon which state contractors are prohibited from discriminating are the same bases upon which the FEHA prohibits workplace discrimination.

Article 4. OCP Review Procedures

Article 5. OCP Enforcement Proceedings

§§ ~~11123-10250~~ through ~~11141-10258~~

The purpose of these sections is to address the role and functioning of the DFEH’s Office of Compliance Programs (OCP). The Council proposes to renumber the regulations pertaining to OCP in order for them to be contained within the Department’s procedural regulations (Cal. Code Regs., tit. 2, § 10000 et seq.) rather than within the substantive regulations (Cal. Code Regs., tit. 2, § 11000 et seq.) that interpret and supplement the laws the Department enforces. This change is necessary to ensure that the Department, which has the greatest amount of insight into its own operations, can better regulate itself. This is not a substantive change.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing regulations without imposing any new burdens, and will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments clarify existing law and regulations without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations, and reducing litigation costs for businesses.