

ATTACHMENT C

FAIR EMPLOYMENT AND HOUSING COUNCIL REGULATIONS REGARDING NATIONAL ORIGIN DISCRIMINATION

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

Subchapter 2. Discrimination in Employment

Article 4. National Origin

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/or 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, substantive regulation or amendment and the reason it is necessary are described below. 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.

§ 11027.1, Definitions

The purpose of this section is to describe what relationships or characteristics the phrase “national origin” applies to as it is used in the FEHA’s general prohibition on discrimination in employment – Government Code section 12940. This addition is necessary to clarify what actions by employers may encompass national origin discrimination and therefore flesh out an otherwise opaque term. Specifically, “the individual’s or ancestors’ actual or perceived place of birth or geographic origin, national origin group or ethnicity” is included because it is an amalgamation of various dictionaries’ definition of “national origin.” Every other relationship or characteristic is included in the non-exhaustive list because they can be used as proxies for “actual or perceived place of birth or geographic origin, national origin group or ethnicity” and therefore be used to discriminate based on national origin. For example, while language and accent are not themselves national origins, speaking Irish Gaelic or speaking with a brogue may be indicative of one’s Irish national origin and therefore are characteristics upon which employers may not discriminate. Since there are so many cultures and customs and thus national origins, it would be impossible to enumerate every relationship or characteristic; therefore, the Council used a non-exhaustive list to illustrate the fact that proxies for national origin may be

tantamount to national origin.

§11028, Specific Employment Practices

The purpose of this section is to specify with further precision what types of acts in the employment context constitute discrimination based on national origin. This section previously only discussed English-only rules in the workplace. The Council proposes to revise and significantly expand upon that prior subsection to provide clarity regarding language restrictions in the workplace, and to add a number of other subsections regarding acts that may constitute national origin discrimination in the workplace. The section is necessary to provide employers with a guide as to acts that may unknowingly constitute discrimination on the basis of an individual's national origin.

§11028, subd. (a) Language Restrictions

The Council proposes to add this subdivision as a redrafting of the existing language regarding English-only rules in the workplace. The Council proposes to both clarify and significantly expand upon the existing regulation in order to make clear that both English-only rules, and other language restrictions, are unlawful unless narrowly tailored and consistent with business necessity, and the employer has effectively notified employees regarding the time of the language restriction and consequences for violating the restriction. This clarification is consistent with the scrutiny of policies that create a disparate impact on a protected basis in other contexts. The Council also proposes to add language making clear that English-only rules are never lawful during an employee's non-work time. This subdivision is necessary to clarify the circumstances under which language restrictions are and are not permissible, and to conform California law to federal law, specifically Title VII of the Civil Rights Act of 1964, which sets the minimum standards that states must follow. The U.S. Equal Employment Opportunity Commission (EEOC) details the relevant law in its November 18, 2016, publication titled *EEOC Enforcement Guidance on National Origin Discrimination* (https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_ftnref111).

Specifically, federal law has a general prohibition on English-only rules in 29 C.F.R. § 1606.7. Next, the affirmative defense of business necessity comes from section 11010 of the Council's existing regulations as well as ample case law, such as *El v. Se. Pa. Trans. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007). Similarly, the instruction that "[i]t is not sufficient that the employer's policy merely promotes business convenience or is due to customer preference" reiterates established case law. *Gedom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (holding that customer preference did not justify discriminatory policy when that preference was unrelated to job performance). Finally, regarding the proposed regulation stating that "English-only rules are never lawful during an employee's non-work time", the EEOC guidance states that "[b]ecause language-restrictive policies may be applied only to those specific employment situations for which they are needed to promote safe and efficient job performance or business operations, blanket rules requiring employees to speak English (or another language) at all times are presumptively unlawful." Since the federal law sets the lower limit of rights for state law, the Council proposes to reiterate the federal law in its regulations.

§11028, subd. (b) Accent Discrimination

The Council proposes to add this subdivision to make clear that discriminating against an

applicant or employee based upon the individual's accent is unlawful national origin discrimination, unless the accent materially interferes with an individual's ability to do the job. This subdivision is necessary to clarify California law, and to conform California law to federal law, which employers must also follow. Specifically, in *Fragante v. City and County of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), the Ninth Circuit held that “[a]n adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job performance.” Given that one's accent and national origin “are obviously inextricably intertwined,” the Court stated that district courts should take “a very searching look” at claims that an employee's accent materially interferes with job performance. *Id.* As with other affirmative defenses, employers have the burden of proof in this instance.

§11028, subd. (c) English Proficiency

The Council proposes to add this subdivision to make clear that an applicant or employee may not be discriminated against based upon their English proficiency unless English proficiency is necessary for the position, and the requirement is narrowly tailored to the position. This subdivision is necessary to clarify California law, and to conform California law to federal law. *See, e.g., Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 280-81 (11th Cir. 1989). This would address situations such as when an employer suddenly requires an experienced, limited-English-proficient janitor to take a written English exam and threatens termination if the employee is not able to pass the exam. This provision seeks to clarify that this English proficiency requirement is lawful only if written English at the level and of the type required by this exam is actually necessary for the janitor to be able to successfully carry out her job responsibilities. This notion comports with the framework for analysis of disparate impact discrimination in other contexts and also serves as guidance of the types of pretext for intentional discrimination that could manifest in the context of national origin discrimination.

§11028, subd. (d) Foreign Training

The Council proposes to add this subdivision to make clear that national origin discrimination includes denying an individual employment opportunities because the individual was trained or educated outside the United States, or requiring an individual to be foreign trained. This subdivision is necessary to clarify the sometimes overlooked fact that having received foreign training or education often goes hand-in-hand with an individual's national origin and serves as a reminder regarding disparate impact discrimination and of the types of pretext for intentional discrimination that could manifest in the context of national origin discrimination.

§11028, subd. (e) Retaliation

The Council proposes to add this subdivision to make clear that an employer or other covered entity may not retaliate against an individual because of that individual's opposition to national origin discrimination or participation in proceedings alleging national origin discrimination. Because retaliation is already prohibited by section 11021 of the Council's existing regulations, this subdivision is necessary to reiterate existing law in the context of national origin discrimination.

§11028, subd. (f) Immigration-related Practices

The Council proposes to add this subdivision to emphasize that all of the provisions of the Fair Employment and Housing Act and these regulations apply to individuals regardless of their immigration status, and that immigration status may not be used as a basis for discrimination by

an employer unless the employer shows clear and convincing evidence that federal law requires it to do so. This is necessary to clarify and consolidate existing state law – Civil Code section 3339, Government Code section 7285, and *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407.

The proposed regulation also makes clear that retaliation may include threatening to contact immigration authorities and the definition of “undocumented worker.” The former is necessary to make clear that such discrimination based on immigration status is a subset of discrimination based on national origin and reiterate the prohibition on retaliation mentioned above. The latter is necessary to give meaning to a previously used term using an amalgamation of various dictionaries’ definitions and common usage.

§11028, subd. (h) Citizenship Requirements

The Council proposes to add text to this subdivision clarifying that those citizenship requirements that are a pretext for discrimination on the basis of national origin are impermissible. This addition is necessary to clarify an accidental omission from the existing regulation and conform it to federal law. *See, e.g., Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) (stating that Title VII “prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”)

§11028, subd. (i) Human Trafficking

The Council proposes to add this subdivision in order to make it clear that certain activities that constitute human trafficking also violate the FEHA on the basis of national origin. This addition is necessary in order to make the regulation consistent with previously promulgated regulations (2 CCR § 11009(d)) and highlight the potential overlap of the Department’s authority over the FEHA and human trafficking cases (Civil Code section 52.5). *See also, EEOC Enforcement Guidance on National Origin Discrimination* (https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#_ftnref111), *citing EEOC v. Global Horizons, Inc.*, 7 F. Supp. 3d 1053 (D. Haw. 2014) (finding contractor liable under Title VII for discrimination and retaliation, where Thai nationals brought to the U.S. under the H-2A visa program were required to pay high recruitment fees, paid less than non-Thai workers, made to work less desirable jobs, forced to live in deplorable conditions, and subjected to abuses on the farms, including physical violence, humiliation, heavy surveillance, and threats of being shot, deported, or arrested).

§11028, subd. (j) Harassment

The Council proposes to add this subdivision in order to make clear that an employer may not harass an applicant or employee on the basis of that applicant or employee’s national origin. This addition is a restatement of the general harassment standard contained in section 11019(b) of the Council’s existing regulations and is necessary to make clear that that provision applies on the basis of national origin and in the contexts addressed in these regulations.

§11028, subd. (k) Height and Weight Requirements

The Council proposes to add this subdivision to make clear that, unless an employer has a permissible defense, it is unlawful to impose height and/or weight requirements upon applicants or employees. This subdivision is necessary to make clear that height and/or weight requirements can result in discrimination on the basis of national origin, as there are height and weight characteristics associated with particular national origin groups that create disparate impacts on

the basis of various national origins. This provision also serves to clarify a potential pretext for intentional discrimination in this context.

§11028, subd. (l) Recruitment and Job Segregation

The Council proposes to add this subdivision to make clear that it is unlawful for an employer to seek, request, or refer applicants or employees based on their national origin, or to assign positions, facilities, or geographic areas of employment based on national origin, unless an employer has a permissible defense. This subdivision is necessary to make clear that segregating applicants on the basis of their national origin is generally an unlawful practice. This subdivision also implements federal law, which employers also must follow. *See, e.g., EEOC v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990) (finding that EEOC presented sufficient evidence of discrimination when, inter alia, it showed that Black applicants were required to undergo a burdensome application process but White applicants were simply referred by their relatives, friends, or neighbors who currently were part of the all-White workforce) and 42 U.S.C. § 2000e-2(a)(2) (“It shall be an unlawful employment practice for an employer...to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s...national origin).

The Council proposes to include the “permissible defenses” language because there could be instances where there is a legitimate, non-discriminatory purpose (or a “bona fide occupational qualification”) for the employer to seek, request, or refer an employee based on her national origin. For example, an employer might seek an employee of a particular national origin where the employee’s job responsibilities would include providing sensitive “know your rights” trainings to recently arrived refugees of that same national origin group who would be more inclined to participate in the training if it was conducted by a member of their national origin group.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, 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 determined that no reasonable alternative it considered, or that 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 law without imposing any new burdens, will not adversely affect small businesses.

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

The proposed amendments describe and clarify the Fair Employment and Housing Act 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; the expansion of businesses currently doing business within the State; or worker safety and the environment because the regulations centralize and codify existing law, clarify terms, and make technical changes without affecting the supply of jobs or ability to do business in California. To the contrary, adoption of the proposed amendments 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.