FAIR EMPLOYMENT AND HOUSING COUNCIL
Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

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 2. Particular Employment Practices; Article 11. California Family Rights Act and New Parent Leave Act

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.

§ 11017.1, Consideration of Criminal History in Employment Practices
The purpose of this section is to outline the law governing the consideration of criminal history in employment decisions. The Council's *Consideration of Criminal History in Employment Decisions Regulations* became effective July 1, 2017. That rulemaking action most notably (1) set forth state laws that prohibit employers from utilizing certain criminal background information in hiring, promotion, training, discipline, termination, and other employment decisions and (2) articulated the legal theory of adverse impact and its relationship to the FEHA and criminal history.

Shortly after those regulations went into effect, Governor Brown signed the "Ban the Box" bill into law – AB 1008 (Stats. 2017, ch. 789) – which added Government Code section 12952 to the FEHA. The bill amended the FEHA to make it an unlawful employment practice for all employers – public and private – to seek conviction history information until a conditional offer of employment is made, or to include any question seeking disclosure of an applicant's conviction history on a job application. It further set forth rules and procedures regarding how

employers may consider conviction history, how employers must notify applicants whose conditional offers of employment are being rejected because of conviction history, and how job applicants may respond to the employment denial by providing evidence of rehabilitation or mitigating circumstances. The amendments to section 11017.1 of the regulations primarily reiterate AB 1008's mandates, which represent a broader prohibition on the use of applicants' criminal history than the preexisting regulations.

§ 11017.1, subd. (a) Criminal History before a Conditional Offer of Employment is Made

The Council proposes to (1) reiterate that employers are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after they have made a conditional offer of employment to an applicant and (2) outline the exceptions to that rule. This consolidates Government Code section 12952, subdivisions (a)(1)-(2) and (d). This addition is necessary to clarify the scope of the law. It does not alter any rights or change existing law.

§ 11017.1, subd. (b) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made

The Council proposes to enumerate the types of criminal history that California employers are prohibited from considering, distributing, or disseminating both after a conditional offer has been made and in any other subsequent employment decisions. This consolidates Government Code section 12952, subdivision (a)(3), with pre-existing subdivisions (b), (c)(2), and (c)(3) of the regulations. (Subdivision (c)(1) was rendered moot by AB 1008 because the bill deleted Labor Code section 432.9, which pertained to public employers, since Government Code 12952 applies to both public and private employers.) This addition is necessary to elaborate upon the statute and to clarify its scope. The Council added reference to the Los Angeles Municipal Code to give a more complete picture of relevant local laws. This subdivision does not alter any rights or change existing law.

§ 11017.1, subd. (c)(1) Requirements Where an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History: Direct and Adverse Relationship with Specific Duties of the Job

The Council proposes to add the standard and factors that employers must use when they intend to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history. This is derived from Government Code section 12952, subdivision (c)(1), and makes clear that the direct and adverse relationship standard in the statute is the same as the disparate impact standard for business necessity in pre-existing subdivision (e) of this section of the regulations. The subdivision as a whole is necessary for a complete rendering of the statute. The addition is necessary to make clear that both AB 1008's "direct and adverse relationship" standard and the "job-related and consistent with business necessity" prong of the disparate impact analysis outlined in subdivision (f) of this section require the same degree of nexus between the conviction history and the job position as evidenced by their mutual use of the same *Green v. Missouri Pac. R.R. Co.* (8th Cir.1975) 523 F.2d 1290 factors. This helps provide clarity to employers that they will not be held subject to two different standards when considering whether to rescind a conditional job offer due to an applicant's conviction history.

§ 11017.1, subd. (c)(2) Requirements Where an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History: Written Notice that Conviction History is Disqualifying

The Council proposes to specify what an employer must include in a written notice when it makes a preliminary decision after conducting an individualized assessment that an applicant's conviction history disqualifies the applicant from the employment that was conditionally offered. This is derived from Government Code section 12952, subdivision (c)(2)-(3), and is necessary for a complete rendering of the statute. The Council added one component that is not in the statute: how to calculate the minimum of five days that applicants have to respond to an employer's written notice. This mirrors the calculation described in California Code of Civil Procedure section 1013 and is necessary to avoid disputes over the meaning of the statute's potentially ambiguous use of "five business days."

§ 11017.1, subd. (c)(3) Requirements Where an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History: Consideration of Applicant's Submitted Information and Written Notice to Rescind Offer

The Council proposes to specify what employers must include, after considering information submitted by an applicant, in a written notice notifying an applicant of a final decision to rescind the conditional offer of employment and deny an application based solely or in part on the applicant's conviction history. This is derived from Government Code section 12952, subdivision (c)(4)-(5), and is necessary for a complete rendering of the statute.

§ 11017.1, subd. (d) Disparate Treatment

The Council proposes to move pre-existing subdivision (h) to subdivision (d) to enhance the readability of the regulations since disparate treatment follows naturally from a discussion of AB 1008, particularly AB 1008's incorporation of an individualized assessment requirement. The text of the regulation is the same.

§ 11017.1, subds. (e)-(h) Adverse Impact

The Council proposes to maintain the adverse impact subdivisions of the regulations that were promulgated last year. The Council's only proposed amendments are to make clear that ban-the-box and adverse impact implicate different analyses and to delete any parts that were rendered superfluous by AB 1008, namely its incorporation of a mandatory individualized assessment from subdivision (f).

Article 11, California Family Rights Act and New Parent Leave Act

The Council proposes to change the title of Article 11 from "California Family Rights Act" to "California Family Rights Act and New Parent Leave Act" to better identify its contents. This is not a substantive change. This change is necessary to implement SB 63 (Stats. 2017, ch. 686), which added the New Parent Leave Act (NPLA) to the FEHA in Government Code section 12945.6, which the Council proposes to add to the reference note at the end of each section in Article 11. The Council also proposes to make the regulations gender-neutral, a non-substantive change that implements AB 1556 (Stats. 2017, ch. 799).

The FEHA contains two major categories of family leave provisions: the California Family Rights Act (CFRA) (Gov. Code, § 12945.2) and NPLA (Gov. Code, § 12945.6). CFRA requires

private employers of at least 50 employees and all public employers in California to provide employees up to 12 weeks of unpaid leave in a 12-month period for the employee's own serious health condition, the serious health condition of certain family members, or for baby bonding after the birth or placement of a child for adoption or foster care.

NPLA partially expands the baby bonding component of this entitlement by making it an unlawful employment practice for an employer of 20-49 employees to refuse to allow an eligible employee to take up to 12 weeks of job-protected parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. Like CFRA, NPLA also prohibits an employer from refusing to maintain and pay for coverage under a group health plan during the duration of the leave or retaliating against an employee for exercising their NPLA rights.

Government Code section 12945.6, subdivision (j), mandates the following: "To the extent that state regulations interpreting … [CFRA] … are within the scope of, and not inconsistent with this section or with other state law, including the California Constitution, the council shall incorporate those regulations by reference to govern leave under this section."

§ 11087, Definitions
The purpose of the entire definitions section is to give meaning to technical terms defined throughout CFRA and NPLA and the implementing regulations, and to provide guidance when there is no other applicable section of the regulations.

§ 11087, subds. (d)-(e) "Covered employer" and "Eligible employee"
The Council proposes to clarify that the threshold number of employees for NPLA leave is 20 while the threshold for CFRA leave is 50. This clarification is necessary to delineate a key jurisdictional difference between the two types of leave. While most of the existing regulations in Article 11 apply to NPLA as written, these subdivisions explicitly stated a CFRA-only requirement (50 employees), so it is important to explain the difference here by referring to NPLA's requirement of 20, not 50, employees.

§ 11087, subd. (o) "NPLA"
The Council proposes to add this subdivision which states the acronym for New Parent Leave Act and that the regulations governing CFRA also govern NPLA unless stated otherwise. This subdivision is necessary to avoid needing to repeat "New Parent Leave Act" and to fulfill the statutory mandate of Government Code section 12945.6, subdivision (j).

§ 11089, Right to Reinstatement: Guarantee of Reinstatement; Refusal to Reinstate; Permissible Defenses
The purpose of section 11089 is to implement reinstatement rights and outline defenses under CFRA and NPLA.

§ 11089, subds. (d)(2) and (d)(2)(H) Key Employee Defense
The Council proposes to specify that CFRA's key employee defense does not apply to NPLA. This is necessary to clarify and delineate a significant difference between the two laws. Subdivision (r) of CFRA outlines the key employee defense that is fleshed out in section

11089(d)(2) of the regulations whereby an employer can refuse to reinstate a "key" employee from CFRA leave to the employee's same or comparable position if certain criteria are met. The otherwise parallel NPLA does not contain that same provision, so it is necessary to amend the key employee subdivisions of the regulations to state that NPLA does not have a key employee provision since the CFRA regulations would otherwise be applicable to NPLA per Government Code section 12945.6, subdivision (j).

§ 11092, Terms of CFRA Leave
The purpose of this section is to specify employers' and employees' rights and responsibilities during and immediately following CFRA and NPLA leave.

§ 11092, subd. (b)(1) Use of Accrued Paid Time Off During Leave
The Council proposes to specify that an employer does not have the right to require an employee to use accrued paid time off during an otherwise unpaid portion of a NPLA leave, though an employee may elect to do so. This is necessary to clarify and delineate a significant difference between the two laws. Subdivision (e) of CFRA permits employers to require employees to use any accrued vacation time or other paid accrued time off that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave. The otherwise parallel NPLA does not contain that same provision, so it is necessary to amend the mandated use of accrued vacation time or other paid accrued time off subdivision of the regulations to state that NPLA does not have that same provision since the CFRA regulations would otherwise be applicable to NPLA per Government Code section 12945.6, subdivision (j).

§ 11093, Relationship between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave<u>; Relationship between CFRA Leave and NPLA Leave</u>
The purpose of this section is to explain the relationship between CFRA leave and other leave entitlements under FEHA. The Council proposes to change the title to better reflect the addition of NPLA.

<u>§ 11093, subd. (f) Relationship Between CFRA Leave, FMLA Leave, and NPLA Leave</u>
The Council proposes to add this subdivision to explain the relationship between CFRA leave, FMLA leave (the federal analog to CFRA), and NPLA leave, namely that while the first two typically run concurrently, NPLA is a separate and distinct entitlement only available to employees of employers with 20-49 employees or to employees of larger employers who are employed at a location where there are between 20-49 employees of the employer within 75 miles of their workplace. The NPLA statute states that fact in a more roundabout manner in subdivision (c): "This section shall not apply to an employee who is subject to both Section 12945.2 and the federal Family and Medical Leave Act of 1993." The addition of subdivision (f) to section 11093 of the regulations is necessary to clarify that the fact that NPLA does "not apply to an employee who is subject to both Section 12945.2 and the federal Family and Medical Leave Act of 1993" is tantamount to NPLA only being applicable to employees of employers with 20-49 employees and who are therefore not CFRA- or FMLA-eligible and to clarify that employers do not have to provide both NPLA leave and "baby bonding" leave under CFRA to the same employee.

§ 11094, Retaliation and Protection from Interference with CFRA and NPLA Rights
The purpose of this section is to implement CFRA and NPLA's prohibition against retaliation and interference with CFRA and NPLA rights, including their unlawful waiver. The Council amended the title for clarity.

§ 11094, subd. (a)(1) Avoiding CFRA and NPLA through Workforce Allocation
The Council proposes to clarify that the threshold number of employees for NPLA leave is 20 while the threshold for CFRA leave is 50. This clarification is necessary to delineate a key jurisdictional difference between the two types of leave. While most of the existing regulations in Article 11 apply to NPLA as written, this subdivision explicitly stated a CFRA-only requirement (50 employees), so it is important to explain the difference here by referring to NPLA's requirement of 20, not 50, employees.

§ 11094, subd. (e) Laws Prohibiting Retaliation in Addition to CFRA
The Council proposes to clarify that, like CFRA and FEHA, NPLA prohibits retaliation. This implements subdivision (h) of NPLA – "It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section." This clarification is necessary because while subdivision (j) of NPLA describes the applicability of CFRA regulations to NPLA, this particular subdivision of the regulations is structured in a manner that would require NPLA to be explicitly listed in order to maintain parallel construction and ultimately ensure that there is an NPLA retaliation cause of action.

§ 11095, Notice of CFRA and NPLA Rights and Obligations
The purpose of this section is to specify employers' notice requirements in order to ensure that employees receive the information necessary to exercise their CFRA and NPLA rights. The Council amended the title for clarity.

§ 11095, subd. (d) Text of Notice
Within the notice entitled "FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE," the Council proposes to add NPLA leave, particularly by clarifying that the threshold number of employees for NPLA leave is 20 while the threshold for CFRA leave is 50. This is necessary to integrate NPLA into the existing notice and delineate a key jurisdictional difference between the two types of leave.

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.