

**TITLE 2. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
CONSIDERATION OF CRIMINAL HISTORY IN
EMPLOYMENT DECISIONS REGULATIONS**

[Notice published June 17, 2022]

NOTICE OF PROPOSED RULEMAKING

The Fair Employment and Housing Council (Council) of the Department of Fair Employment and Housing (DFEH) proposes to amend section 11017.1 of Title 2 of the California Code of Regulations after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

The Council will hold a public hearing starting at **1:00 p.m. on August 10, 2022**, at the following location:

**1515 Clay Street, Second Floor, Room 11
Oakland, CA 94612**

At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Council requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

The meeting facilities are accessible to individuals with physical disabilities. Anyone who requires an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in the meeting, should contact Brenda Valle-Balderrama, DFEH ADA Coordinator, at (844) 541-2877 (voice or via relay operator 711) or TTY (800) 700-2320 or via email: Brenda.Valle-Balderrama@dfeh.ca.gov or accommodations@dfeh.ca.gov as soon as possible or at least 72 hours before the meeting.

WRITTEN COMMENT PERIOD

Any interested person, or their authorized representative, may submit written comments relevant to the proposed regulatory action to the Council. The written comment period closes on **August 10, 2022 at 5:00 p.m.** The Council will consider only comments received by the end of that day. Written comments can be mailed to:

Fair Employment and Housing Council
c/o Rachael Langston, Senior Fair Employment and Housing Counsel
Department of Fair Employment and Housing
2218 Kausen Dr #100
Elk Grove, CA 95758
Telephone: (916) 478-7251

Comments may also be submitted by e-mail to FEHCouncil@dfeh.ca.gov.

AUTHORITY AND REFERENCE

Government Code section 12935(a) authorizes the Council to adopt these proposed regulations. The proposed regulations implement, interpret, and make specific section 12900 et seq. of the Government Code.

INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW

This rulemaking action clarifies, makes specific, and supplements existing state regulations interpreting the Fair Employment and Housing Act (“FEHA”) set forth in Government Code section 12900 et seq. As it relates to employment, the FEHA 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. The Fair Chance Act (Gov. Code § 12952), which is part of FEHA, specifies limitations on employers who seek to consider criminal history information.

In compliance with the Administrative Procedure Act, the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The overall objective of the proposed regulations is to provide clarity regarding compliance with the Fair Chance Act and other provisions of FEHA which may make it unlawful to consider criminal history in employment decisions where such consideration has an adverse impact on persons based on characteristics protected under FEHA. This action has the specific benefit of ensuring that employees, applicants, and employers better understand their respective rights and obligations with regard to the consideration of criminal history in the employment context, in turn reducing litigation costs and the burden on the courts. Ultimately, the proposed action furthers the mission of the DFEH by protecting Californians from employment discrimination.

The proposed amendments specifically do the following: (1) add an introduction providing an overview of the regulation and the intersecting laws discussed therein; (2) clarify that posting recruitment materials indicating that individuals with criminal histories will not be considered for hire is prohibited by the Fair Chance Act; (3) add references to DFEH forms that provide additional guidance for employers in the process of considering conviction history following a conditional offer of employment; (4) provide additional explanations and examples regarding evidence that an applicant or employee may provide an employer during the individualized assessment process to demonstrate rehabilitation and/or mitigation; (5) add further explanation regarding the meaning of “adverse impact”; (6) clarify that an employer applying for the Work Opportunity Tax Credit (“WOTC”) must nevertheless comply with this regulation and the FEHA, and provide guidance on how an employer can apply for WOTC while maintaining such compliance; (7) modify subheadings and reorganize subsections and paragraphs to ensure clarity and continuity throughout the regulation.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Council has made the following initial determinations:

Mandate on local agencies and school districts: None.

Cost or savings to any state agency: No additional costs or savings beyond those imposed by existing law.

Cost to any local agency or school district, which must be reimbursed in accordance with Government Code sections 17500 through 17630: None.

Other nondiscretionary cost or savings imposed on local agencies: No additional costs or savings beyond those imposed by existing law.

Cost or savings in federal funding to the state: None.

Cost impacts on a representative private person or businesses: No additional costs or savings beyond those imposed by existing law. Therefore, the agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Results of the economic impact assessment/analysis: The Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs within the state, the creation of new businesses or the elimination of existing businesses within the state, or the expansion of businesses currently doing business within the state. To the contrary, adoption of the proposed amendments is anticipated to benefit the health and welfare of California residents and businesses and improve worker safety 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. These regulations would not affect the environment.

Statewide adverse economic impact directly affecting businesses and individuals: The Council has made an initial determination that the proposed action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

Significant effect on housing costs: None.

Small Business Determination: The Council anticipates that the regulations will not create additional costs or savings beyond those imposed by existing regulations. Similarly, the Council has determined that there is no impact on small businesses as a result of this proposed action because these regulations primarily serve to clarify existing law.

Business Report: The Council has determined that the proposed regulations do not require a report to be made.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Council must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the Council's attention would be more effective in carrying out the purpose for which this action is proposed, or 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 has thus far not become aware of a better alternative and invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Rachael Langston, Senior Fair Employment and Housing Counsel
Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
Telephone: (916) 478-7251
E-mail: rachael.langston@dfeh.ca.gov

The backup contact person for these inquiries is:

Mariel Block, Senior Fair Employment and Housing Counsel
Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758
Telephone: (916) 478-7251
E-mail: mariel.block@dfeh.ca.gov

Please direct requests for copies of the proposed text (express terms) of the regulations, the Initial Statement of Reasons, any modified text of the proposed regulations, or other information upon which the rulemaking is based, should other sources be used in the future, to Rachael Langston at the above address.

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE

The Council will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above Elk Grove address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, and the Initial Statement of Reasons. Copies may be obtained by contacting Rachael Langston at the address or phone number listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Council may adopt the proposed regulations substantially as described in this notice. If the Council makes modifications that 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 Council adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Rachael Langston at the address indicated above. The Council will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available on the Council's webpage: <http://www.dfeh.ca.gov/fehouncil/>.

Copies also may be obtained by contacting Rachael Langston at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, the text of the regulations, any modified texts, and the Final Statement of Reasons can be accessed through the Council's webpage at <http://www.dfeh.ca.gov/fehouncil/>.

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