

**FAIR EMPLOYMENT AND HOUSING COUNCIL  
REGULATIONS REGARDING CRIMINAL HISTORY, THE CALIFORNIA FAMILY RIGHTS ACT, AND  
THE NEW PARENT LEAVE ACT**

FINAL 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

***UPDATED INFORMATION [Government Code Section 11346.9(a)(1)].***

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. 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 veteran status of any person. More specifically, two bills from 2017 – AB 1008 and SB 63 – added new sections to the FEHA that respectively “ban the box” by prohibiting employers from seeking criminal history information until a conditional offer of employment is made and enact the New Parent Leave Act (NPLA), thereby expanding parental leave rights at employers of 20-49 employees.

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.

The Council heard public comment on the originally proposed text at a public hearing in Los Angeles on April 4, 2018. The Council further solicited public comment on four modified texts at four subsequent meetings: June 21, 2018, in Oakland; August 17, 2018, in Sacramento; October 19, 2018, in Los Angeles; and December 10, 2018, in Oakland.

The following list summarizes the Council’s notable amendments to the originally proposed text:

- Withdrawing sections 11017.1, 11088, 11089, 11090, 11091, 11092, 11093, 11094, and 11096 and only proceeding with sections 11087, 11095, and 11097.
- Revising sections 11095 and 11097 in response to public comments to add clarifying language regarding when NPLA applies and the requirements associated with that Act.

- Revising the authority and reference notes for sections 11087, 11095, and 11097 to remove the unnecessary reference to the cited subdivision of Government Code section 12935.
- Adding clarification around AB 1008's conditional offer process where union hiring halls and labor contractors are utilized in section 11017.1(a)(3);
- Clarifying the reference to conviction history reports that need to be furnished by employers during the notice process in connection with a preliminary decision to rescind a conditional offer in section 11017.1(c)(2)(B); and
- Adding specific references to NPLA and NPLA-specific requirements to aid in the clarity of the combined California Family Rights Act (CFRA) and NPLA provisions in sections 11087-11097.

***DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].***

The proposed regulations do not impose any mandate on local agencies or school districts.

***ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].***

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

***ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].***

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.

***NONDUPLICATION STATEMENT [1 CCR 12].***

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as "authority" or "reference" for the proposed regulations and the duplication or overlap is necessary to satisfy the "clarity" standard of Government Code section 11349.1(a)(3).

**COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].**

**Article 2:**

Comment: California Government Code Section 12935 does provide the FEHC with authority to adopt regulations that interpret and apply all sections of the Fair Employment & Housing Act (FEHA). However, that authority is limited to the statutory language of FEHA and must not conflict with the language of the statute. When interpreting FEHA, California seeks guidance from Title VII, as the language and intent of both statutes are similar. (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97.) While FEHA grants FEHC authority to adopt regulations that prohibit discrimination in employment in general, nothing within FEHA grants the FEHC authority to impose particular mandates on employers for a specific practice of utilizing criminal history in employment decisions. Additionally, there is no statutory authority for FEHC to interpret the Civil Code or the Labor Code with regard to the relevancy of criminal convictions based upon the time that has passed, as it seeks to do in the proposed regulations. Finally, as set forth in the comments submitted to the FEHC during the rulemaking process, the proposed regulations actually contradict case law interpreting Title VII with prohibiting bright-line policies that exclude individuals with certain convictions and, therefore, is in conflict with the intent of FEHA.

Council response: The Council disagrees with this comment. Government Code section 12935(a) grants the Council broad rulemaking authority over the Fair Employment and Housing Act (the statute refers to it as “this part”). The substance of the regulations are consistent with both statutory text and applicable legal precedents. Also, the regulation does not create the “bright-line” the comment suggests. The regulation provides only a “rebuttable presumption” and the Council acknowledges that utilizing older criminal history may be allowable in certain specific circumstances. The federal precedents addressing this issue identify the diminishing relevance of dated criminal history and California Civil Code Section 1786.18 provides legislative guidance regarding the appropriate marker for such a presumption.

Comment: Assembly Bill No. 1008 (AB 1008) was introduced on February 16, 2017 and approved by the Governor on October 14, 2017. AB 1008 amended the Government Code to add section 12952 which imposes various mandates regarding conviction history. Section 12952 includes: (1) a requirement that employers consider the factors of the nature and gravity of the offense or conduct, the time passed since the conviction, and the nature of the job sought; (2) to conduct an individualized assessment; and (3) to allow the employee to respond and mitigate any criminal history information. If the FEHC had statutory authority to promulgate these regulations that include these new mandates on employers with regard to the use of criminal history in employment decisions, there would be no need for the Legislature to amend the Government Code and implement section 12952.

Council response: The Council disagrees. Government Code section 12935(a)(1) vests the council with authority to adopt regulations relating to “this part,” which includes sections 12900-12996. Because AB 1008 was codified in section 12952, the legislature placed it squarely within the Council’s jurisdiction.

Comment: Imposing these additional burdens, specified definitions, and onerous standards on employers with employment selection policies that include criminal background checks will likely create a disincentive to inquire into such information during the hiring, selection or promotion process in order to avoid a claim of discrimination under FEHA. This disincentive, however, will increase the risk of an employer being sued for negligent hiring. California exposes employers to liability for hiring an individual that the employer “knew or should have known” had a dangerous propensity and that danger materializes itself in the employment relationship. (*See Phillips v. TLC Plumbing Co.* (2009) 172 Cal.App.4th 1133; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828.) Employers are put in a terrible position because they must do their due diligence to prevent negligent hiring, but with these additional requirements, preventing negligent hiring is made nearly impossible.

Council response: This comment appears to take issue with AB 1008 itself, as the overall process described in the comment is embodied in the statutory text. The regulations are intended to assist employers in their efforts to comply with the process the statutory text requires.

Comment: Thank you for the opportunity to submit comments on the Fair Employment and Housing Council’s (“Council”) proposed amendments to section 11017.1 of Title 2 of the California Code of Regulations, addressing the consideration of criminal history in employment decisions. We strongly support the addition of provisions to clearly and accurately incorporate the requirements and restrictions of section 12952 of the California Government Code (also known as the “California Fair Chance Act”), which became law in 2017 via Assembly Bill 1008. Removing barriers for people who are formerly incarcerated will reduce recidivism, promote public safety, and allow formerly incarcerated workers opportunities to obtain permanent, stable, and better paying jobs.

We commend the Council for its actions to implement strong regulations to reduce discrimination against people of color in California, who are disproportionately denied job opportunities because of employment-related conviction background checks. Thanks to the regulations adopted in 2017, the California Fair Chance Act, local fair chance ordinances, and the state’s consumer protection laws, the roughly one in three Californians with an arrest or conviction record will face fewer barriers to employment across the state. Further clarifying the regulations and harmonizing them with the newly enacted California Fair Chance Act will serve to further combat discrimination against people with records that, unfortunately, remains all too common.

The Council’s proposed regulations incorporate the additional requirements of AB 1008 without diluting the important worker protections that the Council put in place via its 2017 regulations, which clarified the state law protections for job applicants with records while also

guiding California employers in their efforts to more fairly evaluate an applicant's conviction record. Importantly, the proposed regulations clarify how to calculate the "five business days" during which a job applicant must be allowed to respond to a preliminary denial notice; highlight that employers may be subject to local fair chance ordinances in addition to state law; and helpfully provide examples of evidence of rehabilitation efforts and mitigating circumstances that an applicant may provide to the employer in response to a notice of preliminary decision to rescind the conditional job offer.

The Council's proposed regulations will go a long way toward restoring hope and opportunity for the nearly one in three Californians who have an arrest or conviction record and will also improve employer compliance with the law.

Council response: The Council appreciates the feedback.

Comment: We urge the Council to incorporate the following protections and clarifications into the final regulations:

- (1) Establish a rebuttable presumption that the employer failed to adequately conduct an individualized assessment unless the employer recorded that assessment in writing.
- (2) Clarify that an employer is required to identify the source of the conviction history information on which it bases a decision to revoke a conditional offer—even if the employer did not obtain that information from a conviction history report.
- (3) Clarify that the bar against inquiring into a job applicant's conviction history before a conditional offer includes internet searches performed to uncover online evidence of conviction or arrest history.
- (4) Provide additional examples of evidence of mitigating circumstances and rehabilitation efforts to assist job applicants and employers.
- (5) More clearly state that employers may be required to comply with the stronger provisions of local ordinances, where applicable, and provide additional examples from existing ordinances.
- (6) Delete the word "Permitting" from the subheading of subsection (g) because it incorrectly summarizes the law on this point.
- (7) Clarify that a job applicant shall be permitted five additional business days to respond to a preliminary denial notice if he or she is challenging the factual accuracy of the conviction history.
- (8) Provide clearer and more detailed guidance with regard to local fair chance hiring laws.

Council response: All of these suggestions are elaborated upon and responded to below. (1) is the second comment under section 11017.1(c)(1). (2) is the second comment under section 11017.1(c)(2). (3) is the first comment under section 11017.1(a)(1). (4) is the first comment under section 11017.1. (5) is the third comment under section 11017.1(c)(2). (6) is the second comment under section 11017.7(g). (7) is the fourth comment under section 11017.1(c)(2). (8) is the second comment under section 11017.1(d).

Comment: Our comments relate to the proposed regulation's treatment of Government Code section 12952(d)'s exclusion of four enumerated types of employment from section 12952's general prohibition against inquiries into an applicant's criminal history before an employer has extended that applicant a conditional job offer. In particular, we are concerned that the regulations as presently drafted could erroneously be interpreted in places as exempting hiring in those job categories from the FEHA's general requirement that the adverse impact of a facially neutral selection device upon a protected classification be justified by business necessity. One such example is at proposed section 11017.1(c)(1).

As the Council is aware, the three factors enumerated there were set out in *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158 (8th Cir. 1977), a Title VII decision whose analysis of business necessity in the criminal records context has been nearly universally adopted, including by the U.S. Equal Employment Opportunity Commission in its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions (No. 915.002, April 25, 2012). Because of section 11017.1(c)(1)'s use of "*conditionally offered*," however, the proposed regulations could lend themselves to the interpretation that for FEHA purposes, the *Green* factors and the business necessity standard apply only to hiring decisions where a conditional offer was made—i.e., not to hiring decisions for the positions specified in proposed section 11017.1(a)(2)(A)-(D). No court interpreting *Green* that we are aware of has so limited the application of its factors, and we presume this is a result the Council would not intend.

Another point at which the proposed regulations could lead to an unintended result is at section 11017.1(f)(1), which requires application of the business necessity test "[i]f *the policy* of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act" (emphasis added). The regulations, however, nowhere specify what "the policy" is. If "the policy" is understood to refer to the consideration of criminal records after a conditional offer has been made—and the near-exclusive focus of proposed section 11071.1 is, in fact, on how post-offer consideration of criminal records is to take place—this phrasing could suggest, again by negative inference, that the business necessity analysis is inapplicable to the jobs enumerated at § 11017.1(a)(2)(A)-(D).

Finally, similar ambiguity could be claimed to be discernible from the broad phrasing of § 11017.1(a)(2)'s statement that "[t]he prohibition against inquiring about or using any criminal history before a conditional offer of employment offer has been made does not apply in [the positions specified in subsections (A)-(D)]." In particular, though it is unlikely, it might be argued that "[t]he prohibition against . . . using any criminal history" is a reference to the *Green* factors, set out in subsection (c), and/or to the discussion in subsection (f) of the constraints on employer practices necessitated by the business necessity standard. As discussed above, those factors and constraints apply to all criminal record inquiries, not just those subsequent to a conditional offer of employment.

In light of these potential misinterpretations, we propose the Council insert language to clarify the meaning of those provisions. This could be accomplished by inserting language in section 11017.1(a) stating that nothing in these regulations should be understood as weakening existing legal requirements applicable to criminal inquiries undertaken in connection with the jobs enumerated at section 11017.1(a)(2)(A)-(D), including without limitation that any such inquiries must be justified by business necessity if shown to adversely impact protected

categories of applicants. In addition, the Council may wish to add clarifying language to some of the provisions noted above. For example, section 11017.1(c)(1) could be revised by inserting “applied for or” after “If an employer intends to deny an applicant the employment position they,” and section 11017.1(f)(1) could be revised by inserting “before or after extending a conditional offer of employment” after “If the policy or practice of considering criminal convictions.”

Council response: The Council agrees that neither Government Code section 12952 nor these regulations alleviate the obligations of employers to comply with federal law. However, the Council does not believe that adding the proposed language would aid in the clarity of the regulations, which are implementing state law. Moreover, the concepts of adverse impact and business necessity are detailed at length in Sections 11017.1(e) and (f) respectively and their use of the term “applicants” confirms their applicability during the hiring process. And neither of the provisions indicate or imply that the categories statutorily exempted from compliance with Government Code section 12952 are not subject to the adverse impact and business necessity legal principles.

#### **Section 11017.1:**

Comment: The current version of section 11017.1 of Title 2 of the California Code of Regulations (as adopted in 2017) advises employers to conduct an individualized assessment for any adverse employment action taken because of a worker’s conviction record. Thus individualized assessments are recommended (in order to establish job-relatedness and consistency with business necessity) not just for hiring decisions, but also for decisions to terminate or not promote a worker because of his or her record. The proposed regulations insert a discussion of individualized assessments as required by AB 1008, and the Council proposes to delete the current discussion of individualized assessments from the regulations. (Cal. Code Regs., tit. 3, § 11017.1(e)(2)(B).) Unfortunately, that deletion may have the unintended effect of signaling that individualized assessments are only necessary during hiring (and for employers not exempted from AB 1008). Therefore, we recommend that the Council revise its deletions and make clear that individualized assessments are still typically necessary for all employers and for nonhiring decisions in order to comply with the California Fair Employment and Housing Act (FEHA).

The California Fair Chance Act requires covered employers to conduct an individualized assessment when considering a job applicant’s conviction history as part of a hiring decision. However, subdivision (d) of the FCA makes exceptions for several categories of employment positions, for which employers are not required to comply with the Fair Chance Act, including the law’s requirement that they conduct an individualized assessment. Nevertheless, those employers are required to comply with FEHA’s requirement of establishing that a decision based on an applicant’s record is “job-related and consistent with business necessity” even for the exempted positions, and thus those employers ought be advised to conduct an individualized assessment for all positions even when the Fair Chance Act does not require them to do so. Similarly, the requirements of AB 1008 apply to only hiring decisions, whereas

the other requirements of FEHA pertain to all adverse employment actions, including lack of promotion or termination.

Therefore, we recommend the Council revise its proposed regulations to make clear that employers — even those employers who are not covered by the California Fair Chance Act — must comply with FEHA’s requirements (and are advised to conduct an individualized assessment) when making hiring decisions and taking other adverse employment actions based on conviction and arrest record information.

Council response: The Council agrees that neither Government Code section 12952 nor these regulations alleviate the obligations of employers to comply with federal law. However, the Council does not believe that adding the proposed language would aid in the clarity of the regulations, which are implementing state law. Moreover, the concepts of adverse impact and business necessity are detailed at length in Sections 11017.1(e) and (f) respectively and their use of the term “applicants” confirms their applicability during the hiring process. And neither of the provisions indicate or imply that the categories statutorily exempted from compliance with Government Code section 12952 are not subject to the adverse impact and business necessity legal principles.

#### **Section 11017.1(a):**

The employment of Studio Teachers is highly regulated under California law. (See, 8 California Code of Regulations ("CCR") § 11755-11755.4.) Among other requirements, a Studio Teacher must possess one or more specified teaching credentials issued in accordance with the strict requirements of the California Education Code, as well as a specialized certification issued by the state's Labor Commissioner. (8 CCR § 11755.)

As a condition of being credentialed, like any other regulated California teacher, a Studio Teacher is required to submit to an extensive background investigation conducted by the California Commission on Teacher Credentialing. (Cal. Ed. Code § 44340 et. seq.) This includes a criminal background check conducted in conjunction with the California Department of Justice, through the Live Scan fingerprinting process. (Cal. Ed. Code §§ 44340 and 44341; <https://www.ctc.ca.gov/credentials/fee-and-fingerprint>.) This criminal background investigation is necessary because the Education Code restricts the right of persons who have been convicted of certain crimes from holding a teaching credential. (See, e.g., Cal. Ed. Code §§ 44423.6(a) (teaching credential shall be revoked when the ability of the credential holder to associate with minors been limited as a term or condition of probation or sentencing resulting from a criminal conviction in California, another state, or the United States), 44424(a) (teaching credential shall be revoked when the credential holder is convicted of specified violent or serious felonies) and 44425(a)(credential shall be revoked when the credential holder is convicted Of enumerated controlled substance offenses).

Of significance, unlike a teacher employed in a traditional classroom setting, a Studio Teacher generally is employed by a Producer on a freelance, short-term basis, and a single Studio Teacher may be employed by multiple Producers over the course of a year. Therefore, in order to ensure that there is a qualified pool of Studio Teachers who may be called upon on

very short notice to work on productions, an "availability list" or "roster" of qualified, certified Studio Teachers was established, listing those Studio Teachers who may be dispatched for employment immediately upon request. Further, because the exigencies of production often do not provide sufficient time for a criminal background check to be conducted during the period between when a Studio Teacher is dispatched and when she or he must commence services, Studio Teacher will undergo, as part of a collective bargaining agreement, a background check as a condition of being placed on, and remaining on, the availability list. The agreed-upon background check, which includes a criminal conviction check and a sex offender registry search, is conducted by Contract Services Administration Trust Fund in accordance with all applicable laws, including the federal Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act. CSATF has been designated in the collective bargaining agreement in recognition of the fact that Studio Teachers, unlike teachers in a school, may teach for a variety of employers for very short periods of time — sometimes as short as a single day. If each employer were directly responsible for the conduct of background checks, studio teachers would not be able to be hired when needed, and production would be delayed. In addition, Producers would need to conduct, and studio teachers would be subjected to, repetitive and duplicative background checks.

Although the criminal background investigations agreed upon in the collective bargaining agreement are conducted as a condition of being placed on the availability list or roster, rather than after traditional conditional offers of employment have been made, we believe that these criminal background investigations are consistent with the exceptions set forth in California's newly enacted "ban-the-box" law, California Government Code section 12952.

First, section 12952(d)(1) provides that the restrictions imposed by section 12952(a) do not apply with respect to "a position for which a state or local agency is otherwise required by law to conduct a conviction history background check." Here, the Commission on Teachers Credentialing is expressly required by the Education Code to conduct a conviction history background investigation on every credentialed teacher, including Studio Teachers. (See Education Code section 44423.60.)

Second, section 12952(d)(4) provides that the restrictions imposed by section 12952(a) do not apply with respect to "a position where an employer or agent thereof is required by any state, federal, or local law to restrict employment based on criminal history." As noted above, the Education Code specifically precludes the employment of teachers, including Studio Teachers, who have been convicted of certain crimes.

We note that these exceptions are included in the Council's draft regulations at 2 CCR section 11017.1 We believe the practice of background checks on Studio Teachers is consistent with the language of (A) and (D). Therefore, we request that the following underscored language be added to subsections (A) or (D) to clarify that background checks conducted by CSATF on Studio Teachers are covered by one of these exceptions.

(A) Where the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check, including a position requiring a credential issued by the California Commission on Teacher Credentialing;

...

(D) Where the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history, including a position requiring a credential issued by California Commission on Teacher Credentialing. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

Council response: The Council appreciates the predicament detailed in this comment and elected to address the broader issue of hiring in the context of union hiring halls, employee pools, and availability lists at Section 11017.1(a)(3). The commenter subsequently communicated that the finalized proposed text addressed their concerns.

### **Section 11017.1(a)(1):**

Comment: The text of AB 1008 includes language broadly prohibiting an employer from “inquir[ing] into or consider[ing] the conviction history of the applicant . . . until after the employer has made a conditional offer of employment to the applicant.” (Gov. Code § 12952(a)(2).) As the law makes plain, employers may not obtain a conviction history report until after conditionally offering a job to the applicant. Employers may not immediately realize, however, that obtaining and considering conviction history through less formal means would also constitute an unlawful employment practice. Therefore, we urge the Council to insert language in the regulations clarifying that informal inquiries, such as internet searches performed to uncover online evidence of conviction history, are unlawful if performed before a conditional offer of employment.

The clear purpose of the California Fair Chance Act is to ensure that employers consider job applicants on their merits and extend a conditional offer of employment before learning of and considering conviction history information about the applicant. The law is intended to reduce the effect of the stigma of a conviction record on an applicant’s job prospects and thus increase the likelihood of employment among the population with records. (See section 1 of AB 1008 (2017) [describing the many benefits of employing people with arrest and conviction records and how the stigma of a record undermines that population’s employment prospects].) Internet or public record searches performed by the employer to uncover conviction history information before a conditional offer would thwart that intended effect of AB 1008.

Clarification on this point would assist with clearly advising employers as to their responsibilities. Some confusion has emerged in other states that have adopted similar laws. For example, the New Jersey agency tasked with implementing rules pursuant to New Jersey’s ban-the-box law received and rejected a request from a large law firm to clarify that the law did not bar internet and other public record searches concerning an applicant’s record at the start of the hiring process. Instead, the agency clarified that the law in fact barred such internet and other public records searches concerning an applicant’s record because allowing them would “render the law meaningless.” (N.J. Labor & Workforce Development, Div. of Wage & Hour Compliance, The Opportunity to Compete Act Rules, 47 N.J.R. 3034(a) (Dec. 7, 2015), [http://services.statescape.com/ssu/Regs/ss\\_8587520069162890957.htm](http://services.statescape.com/ssu/Regs/ss_8587520069162890957.htm) [addressing internet

searches in the agency response to comments 3 and 4].) Compliance with the law would be enhanced by clarifying that the California Fair Chance Act prohibits even informal internet searches for conviction history before a conditional offer.

We recommend that the Council amend this proposed section as follows:

(1) Except in the circumstances addressed in subsection (2), employers and other covered entities (“employers” for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Consequently, employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet search, until after a conditional employment offer has been made to the applicant.

Council response: The Council agrees with this comment and addressed internet searches in the final language: “Consequently, employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant.”

### **Section 11017.1(b):**

Comment: This proposed section suggests that Labor Code section 432.7 imposes a blanket prohibition on all employers with regard to the consideration of arrests that do not result in a conviction. However, Labor Code section 432.7 actually provides several exceptions to when arrests that do not result in a conviction may be inquired into by an employer. Specifically, Labor Code section 432.7(a) states “nothing in this section shall prevent an employer from asking an employee or applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance.” Labor Code section 432.7(f)(1) also states that nothing in this section shall prohibit a health facility as defined in section 1250 of the Health and Safety Code from asking an applicant who will have regular access to patients about arrests under section 290 of the Penal Code. It also does not prohibit a health facility from asking an applicant who will have regular access to drugs and medication to disclose an arrest under any section specified in section 11590 of the Health and Safety Code.

Additionally, proposed section 11017.1(b)(3) misstates the use of juvenile court records. Labor Code section 432.7 provides exceptions when the information “concerns an adjudication by the juvenile court in which the applicant has been found by the court to have committed a felony or misdemeanor offense specified in paragraph (1) that occurred within five years preceding the application for employment.” While some of the exceptions are mentioned later in proposed subdivision (g), that subdivision seems to address decisions made after the hiring process. Accordingly, to the extent the FEHC is relying upon Labor Code section 432.7 to recite existing law regarding the consideration of criminal history in employment decisions, we respectfully request the FEHC to include all provisions in Labor Code section 432.7 upfront to avoid any unnecessary confusion.

Further, proposed section 11017.1(b)(6) causes more confusion by specifically spelling out additional limitations required by local ordinances in San Francisco and Los Angeles.

Providing these specific examples is confusing because these are not the only cities with local laws and ordinances that provide additional limitations. We recommend that the examples be removed in order to prevent confusion and potential misstatement of the local ordinances. We suggest that the proposed regulation simply state “Employers may also be subject to local laws or city ordinances that provide additional limitations.”

Council response: The Council agrees with a portion of the comment addressing Labor Code section 432.7 and added specific references to the exceptions in subsection (b)(1). The portion of the comment addressing section 11017.1(b)(4) [referenced in the comment as (b)(3)] significantly overstates the breadth of the exception, which applies only to a specific employment context. However, the Council added language in the first sentence of subsection (b) that acknowledges that there are limited exceptions and also included a reference to Labor Code 432.7 in (b)(4) so that readers can review the statutory text of the Labor Code provision in its totality. The Council disagrees that the examples provided in section 11017.1(b)(6) cause confusion. To the contrary, they serve as a reminder to the regulated community to be aware of potential applicable local ordinances. The examples provided include two of the largest cities in the state and, in the case of Richmond, a local ordinance with features that are fundamentally different than the other laws and ordinances addressing this topic.

#### **Section 11017.1(b)(7):**

Comment: When read in its entirety, this proposed section states that employers are never allowed to use investigative consumer reports such as background checks. Proposed Section 11017.1(b)(7) states, “Employers in California are prohibited from considering, distributing, or disseminating information regarding the following 3 types of criminal history” and then it lists consumer reports as prohibited information. This is an overly broad regulation. Employers are still permitted to utilize background check information and consumer reports, they just cannot consider this information until after an offer of employment has been made. (Government Code § 12952(b).) If the proposed regulations simply mean to state that investigative consumer reports, such as background checks, are subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. §§ 1681, et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code Sections 1786, et seq.) then this proposed section should not be included here and should be its own section.

Council response: The Council disagrees that the language of subsection (b)(7) implies that investigative consumer reports such as background checks are prohibited. Nevertheless, the Council added additional language to further clarify that properly limited background checks are permissible, provided they also comply with the state and federal laws addressing consumer and credit reports.

#### **Section 11017.1(c)(1):**

Comment: Proposed section 11017.1(c)(1) requires an employer to conduct an “individualized assessment” of the circumstances or qualifications of the applicants or employees excluded by the conviction screen. There is no authority for this mandate. EEOC Guidance is informative, but not binding authority and the court in *El v. SEPTA* (3rd Cir. 2007) 479 F.3d 232, 245 specifically rejected a request to interpret such a mandate for individualized assessments under Title VII, responding “[w]e decline to go so far.” Even if EEOC Guidance were binding authority, the proposed language is insufficient as it fails to include additional language from the EEOC Guidance that states “[i]f the individual does not respond to the employer’s attempt to gather additional information about his background, the employer may make its employment decision without the information.” Therefore, we respectfully request the FEHC to delete this section from the proposed regulations.

Council response: The Council disagrees with this comment. The authority for the requirement of an individualized assessment when an employer intends to revoke a conditional offer derives directly from the statutory text of Government Code section 12952(c)(1).

Comment: The text of the California Fair Chance Act (FCA) requires an employer who intends to deny a job applicant a position of employment because of the applicant’s conviction history to conduct an individualized assessment of whether the applicant’s conviction history has a direct and adverse relationship with the duties of the job, including by considering three enumerated factors. (Gov. Code § 12952(c)(1)(A).) Because of the difficulty of proving a negative—such as establishing that an employer did not individually assess a job applicant and his/her conviction record—we urge the Council to insert language in the regulations establishing a rebuttable presumption that the employer failed to make an individualized assessment if the employer did not record it in writing.

A job applicant who believes that an employer violated the Fair Chance Act by failing to make an individualized assessment when considering his or her record may file a complaint with the Department of Fair Employment and Housing (and in court after obtaining a right to sue). A question of fact would then emerge as to whether the employer conducted the individualized assessment. If required to prove a negative, however, the applicant would face an extremely difficult task. A simpler and more logical approach would be to require the employer to come forward with any written evidence of the individualized assessment, and, if none exists, to presume that no individualized assessment was conducted. That presumption could, of course, be rebutted through adequate other evidence that an individualized assessment was in fact made.

The text of AB 1008 supports establishing such a rebuttable presumption. The purpose of the Fair Chance Act is to ensure that people with records have a fair chance to work and that employers consider their conviction records through a fair process. To be sure, AB 1008 does not require employers to commit the results of an individualized assessment to writing, and thus an employer’s failure to record an individualized assessment in writing would not constitute a *per se* violation of the FCA. (Gov. Code § 12952(c)(1)(B).) The rebuttable presumption described above, however, merely clarifies the standards for proving whether an

individualized assessment occurred and constitutes a simple and logical extension of the statutory text.

Therefore, we recommend that the Council amend its proposed regulation section 11017.1, subdivision (c) to establish the rebuttable presumption described above. We suggest that the language establishing the presumption be inserted between section 11017.1, subdivisions (c)(1) and (c)(2) and read as follows:

Although an employer is not required to commit the results of this individualized assessment to writing, an employer's failure to maintain written record of the individualized assessment is presumptively sufficient to establish that the employer did not conduct an adequate individualized assessment.

Council response: The Council declines to include the proposed language. The statute requires that only certain communications addressing criminal history be in writing: (1) a preliminary decision that the applicant's conviction history disqualifies the applicant from employment and (2) a final decision to deny an application solely or in part because of the applicant's conviction history. The Council cannot legislate an additional writing requirement. While the Council did not include the rebuttable presumption requested, it acknowledges that the lack of a writing may be significant evidence that an employer has failed to conduct the individualized assessment in the absence of convincing testimony or circumstantial evidence to the contrary.

#### **Section 11017.1(c)(2):**

Comment: This proposed section sets forth the notice requirements regarding the disqualification of an applicant based on conviction history. First and foremost, the FEHC's clarification that it is five business days upon "receipt" of the notice is very helpful, but the additional notice requirements go far beyond the scope of Government Code section 12952.

Section 12952 only requires five business days to respond to the notice of disqualification. However, the proposed section provides two to four times that amount of time (10 calendar days in some instances and 20 calendar days in others). These conflicting time periods will only cause confusion and expose employers to frivolous litigation based on conflicting notice requirements. Furthermore, with these additional requirements, a position could remain unfilled for weeks, greatly halting the hiring process and harm both the potential employee and the employer alike. Causing even more confusion, the proposed section bounces back and forth between calendar days and business days. This section should be revised to mirror Government Code section 12952 and simply provide the same five business day deadline to respond.

Council response: The Council disagrees with this comment to the extent it implies that the regulation deviates from the statutory requirement of allowing the applicant five business days to respond to the notice of disqualification. To the contrary, the regulation clarifies when an applicant will be deemed to have received the notice for purposes of commencing the five business days allowed for response. The regulation mirrors California's "mailbox rule," codified at California Code of Civil Procedure section 1013.

Comment: The California Fair Chance Act requires an employer to provide a job applicant with written notice of the employer’s preliminary decision to rescind a conditional job offer because of the applicant’s conviction history. (Gov. Code section 12952(c)(2).) The California Fair Chance Act requires an employer to provide a job applicant with written notice of the employer’s preliminary decision to rescind a conditional job offer because of the applicant’s conviction history. That notice must include (A) notice of the conviction(s) leading to the preliminary decision, (B) “[a] copy of the conviction history report, if any,” and (C) an explanation of the applicant’s right to respond with additional evidence, such as evidence challenging the accuracy of the conviction history report. (*Id.*) We urge the Council to insert language in the regulations clarifying that, if an employer does not rely on a conviction history report and instead gathers information about the job applicant in some other manner, that the employer must identify the source of the conviction history information on which it bases its preliminary decision to rescind the conditional offer of employment.

AB 1008 requires employers to delay conviction inquiries and background checks until after a conditional offer. After a conditional offer, an employer may obtain a conviction history report or obtain conviction history information through another method as allowed by law. For example, the employer could potentially ask the job applicant to self-disclose his or her conviction record, search the internet for information pertaining to the job applicant’s record, or learn of an applicant’s conviction history through some other means.

The text of the Fair Chance Act expressly requires an employer to provide a copy of any conviction history report utilized. The purpose of that provision is clear—to notify the job applicant what information is being used against him or her, so that he or she may meaningfully respond. If employers are not required to disclose the source of conviction history information *other than* traditional conviction history reports, the result would undercut the intent of the law—how could a job applicant dispute the accuracy or validity of a record that has not been identified? Because of that nonsensical result, the Council should clarify through regulation that employers must identify the source of any conviction history information on which the employer based its decision to rescind the conditional offer of employment.

We recommend that the Council amend this section as follows:

(c)(2)(B) A copy of the conviction history report utilized or relied upon by the employer, if any. The employer must also clearly identify any other source of conviction history information utilized or relied upon by the employer.

Council response: The Council agrees with this comment and added additional language clarifying that the term “criminal history report” is to be interpreted broadly and includes the results of internet searches, newspaper articles, and other writings beyond formal consumer and credit reports.

Comment: We commend the Council for including language in section 11017.1, subdivision (c)(2)(C) of the proposed regulations that seeks to clarify what evidence job applicants with a conviction record may submit to an employer to establish rehabilitation or mitigating circumstances in response to an employer’s preliminary notice of intent to rescind the conditional job offer. The proposed regulations specifically list three examples: “length and

consistency of the employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; and rehabilitation efforts such as education and training.” Other examples, however, would assist job applicants seeking to respond to such a preliminary notice and demonstrate their fitness. We therefore urge the Council to more fully articulate what information job applicants may submit to an employer to establish rehabilitation.

In addition to the important examples included in the proposed regulations, the Council should expressly list several other key considerations to ensure that applicants prepare compelling and effective responses to inform the employer’s final decision. Additional examples would also benefit employers, ensuring that they receive the most pertinent information so that they can make fully formed decisions and don’t mistakenly reject job applicants who can demonstrate sufficient rehabilitation.

In its seminal guidance on the use of arrest and conviction records by employers, the U.S. Equal Employment Opportunity Commission (EEOC) articulated a comprehensive list of mitigating factors. (Equal Emp’t Opportunity Comm’n, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, No. 915-002 (2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (“EEOC Guidance”).) The additional factors set forth by the EEOC—including employment or character references from employers and community leaders as well as evidence of positive performance in prior jobs—were also incorporated into the Los Angeles regulations implementing the city’s fair chance ordinance. (City of L.A., Rules and Regulations Implementing the Fair Chance Initiative for Hiring (Ban the Box) Ordinance 7 (Jan. 22, 2017), available at <https://bca.lacity.org/fair-chance>.)

We urge the Council to incorporate into the regulations a more comprehensive list of mitigating factors.

Council response: In response to the comment, the Council added the additional example of being bonded under a federal, state, or local bonding program. Examples involving employment history and rehabilitation efforts were already sufficiently addressed in the existing examples provided in the provision.

Comment: The Fair Chance Act sets forth the minimum amount of time that an employer must give a job applicant to respond to a preliminary notice of intent to rescind the conditional job offer. Job applicants must be allowed five business days, and, in certain circumstances, “the applicant shall have five additional business days to respond to the notice.” (Gov. Code §b12952(c)(3).) Section 11017.1, subdivision (c)(2)(C) of the proposed regulations, however, leave out the word “business” when specifying that the job applicant must be allowed additional time to respond in those specific circumstances. Because that omission may cause confusion, we recommend that the Council amend its proposed regulation section 11017.1, subdivision (c)(2)(C) to insert the word “business” and make clear that job applicants “shall be permitted no less than five additional business days to respond to the notice before the employer’s decision to rescind the employment offer becomes final.”

Council response: The Council agrees with this comment and made the requested addition.

### **Section 11017.1(d):**

Comment: Proposed section 11017.1(d) imposes a disparate treatment clause. This proposed section lacks clarity and will create confusion amongst employers. For example, the phrase “substantially motivated by a basis enumerated in the Act” is unclear. Is this section trying to say that an employer cannot treat employees or applicants differently because of their conviction history? If so, that is the basis of the Act and Government Code section 12952. Thus, there is no need for this section and it only causes confusion. Accordingly, we respectfully request the FEHC to delete this section from the proposed regulations.

Council response: The disparate treatment clause was in the existing regulations at Section 11017.1(h) and was merely moved to 11017.1(d) for better clarity and organization in light of the various updates and amendments made in the present rulemaking. While the regulations largely address disparate impact principles, it is important to underscore that disparate treatment is prohibited in this context as well. Inclusion of the provision addressing it creates clarity and does not invite confusion.

Comment: We commend the Council for including language in section 11017.1, subdivision (b)(6) of the proposed regulations that informs employers that they may be required to comply with certain stricter provisions of local fair chance ordinances, where such ordinances and stricter provisions exist. However, some of that information is a bit out of place within subdivision (b) of the proposed regulations; as a result, employers and workers may overlook this important information. Thus, we recommend that the Council relocate some of that information within the regulations and more clearly state that employers may be required to comply with the stronger provisions of local ordinances, where applicable. The Council should also supplement the list of stricter local requirements to include a few additional provisions of San Francisco and Los Angeles law that go beyond the requirements of AB 1008. Moreover, because there is significant overlap between the state and local fair chance laws, we recommend that the Council ensure that the Department of Fair Employment and Housing attempts to coordinate with the local enforcement agencies to efficiently maximize enforcement.

The California Fair Chance Act states that “[t]he remedies under this section shall be in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law, including any local ordinance.” (Gov. Code § 12952(e).) The law thus expressly requires employers to comply with local laws and regulations that are more stringent than AB 1008. As a result, informing employers and workers about stricter local requirements through the Council’s regulations is entirely appropriate and advisable.

Subdivision (b) of the proposed regulations lists criminal record information that employers may not consider at any time during the hiring process. Within subdivision (b)(6), the Council sagely notes that San Francisco employers may be required to comply with a restrictions against considering older convictions and infractions. The proposed regulations then describe a provision of Los Angeles law that requires employers to perform a written

individual assessment and provide a copy to the job applicant. That is crucial information for Los Angeles employers and workers, and including it in the regulations will help with compliance and awareness of this provision. We suggest, however, that the Council move the discussion of the L.A. provision elsewhere in the regulations because it does not relate to the topic of subdivision (b): records that employers may not consider at any time during the hiring process.

We recommend that the Council create an additional subdivision within section 11017.1—located between subdivisions (c) and (d) of the proposed regulations—that provides more detail about employer obligations with regard to local ordinances. For example, both the San Francisco and Los Angeles ordinances require employers to include certain language in job advertisements, display specific postings at worksites, and maintain all relevant documents for a minimum of three years after an adverse employment action based on a worker’s conviction history. (See Article 49, San Francisco Police Code; Article 9, Chapter 18, Los Angeles Municipal Code.)

In addition to the several local requirements that are more stringent than the California Fair Chance Act, there is much overlap between the requirements of state and local fair chance law. In many cases, an injured job applicant in Los Angeles or San Francisco could file a complaint with either the local enforcement agency or the Department of Fair Employment and Housing. While potential exists for inefficient duplication of investigation and enforcement efforts, the state and local agencies could alternatively benefit from sharing information and coordinating their investigations and other follow-up measures to maximize their respective enforcement resources. Job applicants with records would benefit from coordinating enforcement agencies that are able to, for example, direct the individual to pursue his or her complaint in the jurisdiction that would be most beneficial for the individual’s specific case. Employers would also benefit from such an arrangement because they could avoid facing two simultaneous but separate investigations into the same incident. Requiring the state and local agencies to coordinate would reflect the spirit of AB 1008, which the legislature clearly intended to build upon local laws in order to maximize the rights and remedies available to job applicants with conviction records.

Therefore, we recommend that the Council amend its proposed regulation section 11017.1 to insert an additional subdivision that emphasizes employer obligations with regard to local ordinances and requires enforcement agency coordination. We suggest that the Council insert this subdivision between section 11017.1, subdivisions (c) and (d) and that it read as follows:

Employers may be subject to local laws or city ordinances that provide additional limitations or requirements related to employer consideration of conviction records when making employment decisions. For example, San Francisco and the City of Los Angeles have both adopted ordinances applicable to private employers. With limited exceptions, before rescinding a conditional offer of employment, Los Angeles private employers with ten or more employees are required to perform a written assessment that effectively links the specific aspects of an applicant’s criminal history with risks inherent in the duties of the employment position and to provide the applicant with a copy of the written assessment in its notice regarding the preliminary decision to rescind the offer of employment. (Article 9, Chapter 18, Los Angeles Municipal Code). Covered employers in San Francisco and Los Angeles are also required to include specific language in their job advertisements explaining that the employer will consider applicants with records; display specific informational postings at worksites; and maintain all

pertinent documents related to an applicant's job application for a period of three years. (Article 49, San Francisco Police Code; Article 9, Chapter 18, Los Angeles Municipal Code). The Department of Fair Employment and Housing shall attempt to enter into joint work-sharing agreements in localities that have ordinances or regulations that limit employer consideration of criminal history in order to ensure the best possible remedy for the claimant under the strongest protection available.

Council response: The Council appreciates the commendations contained in the comment, but does not think that relocating the provision addressing local ordinances would improve the overall organization or clarity of the regulations. The portions of the comment addressing enforcement agency coordination are procedural in nature and outside the scope of these regulations and the Council's authority.

**Section 11017.1(e):**

Comment: This proposed section sets forth the basis for which an applicant or employee may prove "adverse impact" with regard to criminal convictions. The referenced support for this language is the EEOC Guidance. First, the EEOC Guidance regarding how the agency conducts investigations is not binding or persuasive authority for which to develop evidentiary standards for discrimination cases in civil litigation. (See *Vance v. Bell State University* (2013) 133 S.Ct. 2434, 2461; *Young v. United Parcel Service, Inc.* (2015) 135 S.Ct. 1338; *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480; *El v. SEPTA* (3rd Cir. 2007) 479 F.3d 232, 244.) Second, although the EEOC Guidance indicates that national conviction statistics provide a basis for the EEOC to conduct an investigation, it does not reference nor include the proposed language for purposes of a plaintiff applicant or employee proving "adverse impact" in civil litigation. Third, there is no definition in the EEOC Guidance or any other cited legal authority for the term "persuasive basis." This is not a known or established evidentiary standard and will create confusion in its application in civil litigation. Finally, the statement "consideration of other forms of criminal convictions, not enumerated above," is not clear. What other types of criminal convictions is FEHC referring to? If there are specific convictions not discussed in the Act, they need to be set forth here. Accordingly, we respectfully request the FEHC to delete this section.

Council response: This comment appears to be addressing language in the existing regulations that was not modified in this rulemaking and is thus outside the scope of this rulemaking. The "adverse impact" language addressed in the comment was the product of significant public comment and revision in a prior rulemaking. The Council also disagrees with the commenter's implication that the regulations are inconsistent with federal and state precedents. The existing regulations are supported both by the available federal and state precedents addressing this issue and by state statutory law.

Comment: We submit that there should be a new subsection "(e)" to this regulation which provides:

Where there is a collectively bargained procedure for a criminal background check for studio teachers, as defined in 8 CCR 11755, which includes a procedure for a teacher to be subjected to a criminal background check prior to being placed on a preferential availability list or roster and

periodically thereafter and that procedure provides for written notice to the teacher of an adverse result of such a criminal background check, an opportunity to respond and the opportunity for the teacher to seek recourse through a collectively bargained grievance process, compliance with that availability list or roster procedure satisfies the requirements of Government Code Section 12952.

Although studio teachers, as defined, do not squarely fit within the exemptions from the requirements of Government Code section 12952(d)(1) or (d)(4), they are subject to extensive background check requirements by the California Commission on Teacher Credentialing (see Education Code section 44423.6(a)) and, under 8 CCR section 11755.3, have a legal “responsibility for caring and attending to the health, safety, and morals of minors under sixteen (16) years of age for whom they have been provided” by the employer of the minor “while such minors are engaged or employed in any activity pertaining to the entertainment industry. . .”

Thus, in our view, studio teachers are not subject to the exemption in Government Code section 12952(d)(1) because the government agency required to conduct the background check is the California Commission on Teacher Credentialing and not a state or local agency acting as a direct or indirect employer. And studio teachers are not subject to the exemption in Government Code section 12952(d)(4) because studio teachers do not teach in a school and, thus, their employers are production companies, not schools required by law to conduct a background check.

Nevertheless, IATSE-represented studio teachers have agreed in collective bargaining to an annual background check by Contract Services Administration Trust Fund, a trust fund established to, among other things, administer an "availability list" or roster of studio teachers entitled to contractual priority in hiring by signatory entertainment industry employers. This process takes into account the serious concerns reflected in statutory requirements that schools verify the absence of disqualifying criminal convictions for those holding teaching credentials and the intermittent nature of employment in the motion picture, television and new media sectors of the entertainment industry. Accounting for the intermittent nature of studio teacher employment is particularly important because, unlike teachers in a school, many studio teachers teach for a variety of employers for very short periods of time—sometimes as short as a single day. Thus, if each employer were required or allowed to conduct background checks, studio teachers, especially those who had not worked for an employer in the recent past, would not be able to be hired when needed. This would endanger the minors who need the supervision and education provided by studio teacher. Moreover, such a system would subject studio teachers to having to provide each of potentially dozens of employers each year with responses to the same erroneous information and it would require greater policing of the background check process by the studio teachers and their unions that the background checks, which often include credit checks, do not adversely affect him or her.

Moreover, under the availability list placement and removal procedure, removal from the availability list can be challenged in arbitration. Thus, while it varies in some respects from the statutory protocol, the availability list/roster procedure is more protective of employee rights than the statutory procedure.

For the foregoing reasons, IATSE submits that the exemption of studio teachers from the protections of Government Code section 12952 is not warranted, but that the Council

should find that where there is a collectively bargained procedure for a criminal background check for studio teachers, as defined in 8 CCR 11755, which includes a procedure for a teacher to be subjected to a criminal background check prior to being placed on a preferential availability list or roster and periodically thereafter and that procedure provides for written notice to the teacher of an adverse result of such a criminal background check, an opportunity to respond and the opportunity for the teacher to seek recourse through a collectively bargained grievance process, compliance with that availability list or roster procedure satisfies the requirements of Government Code section 12952.

Council response: The Council appreciates the predicament detailed in this comment and elected to address the broader issue of hiring in the context of union hiring halls, employee pools, and availability lists at Section 11017.1(a)(3). The commenter subsequently communicated that the finalized proposed text addressed their concerns.

### **Section 11017.1(f):**

Comment: The proposed regulations seek to completely re-define “job-relatedness” and “business necessity.” The origin of the proposed standards for job-relatedness and business necessity is the EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (EEOC Guidance on Arrests and Convictions) which were based, in part, upon an 8th Circuit Court of Appeals decision and a 3rd Circuit Court of Appeals decision. (See EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964; *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975); and *El v. SEPTA*, 479 F.3d 232 (3rd Cir. 2007).)

EEOC guidance is just that – guidance. It does not have the force of law and courts do not always give deference to EEOC Guidance as exhibited in recent decisions. (See *Vance v. Bell State University* (2013) 133 S.Ct. 2434, 2461; *Young v. United Parcel Service, Inc.* (2015) 135 S.Ct. 1338; *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480.) Moreover, neither the *Green* case nor the *El* case referenced in the EEOC Guidance on Arrests and Convictions support the extensive language in the proposed regulations defining “job-relatedness” or “business necessity.”

In *Green* specifically, the court analyzed an employer policy that prohibited the hiring of anyone who was convicted of a crime other than a minor traffic offense to determine if it violated Title VII. In its analysis, the Court simply recited the standard set forth in *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, that the employer must show that the employment practice in question is justified by business necessity, defined as a practice that is related to job performance. The Court never sets forth any special or particular list of factors that an employer must consider when developing a policy regarding criminal convictions or a mandate to individually assess all applicants with a criminal background.

Similarly, in *El v. SEPTA*, the court determined whether an employer’s decision to terminate an employee based upon a 40-year-old homicide conviction was discrimination

under Title VII. In reviewing the EEOC's Compliance Manual with regard to criminal convictions, the Court stated:

The EEOC has spoken to the issue in its Compliance Manual, which states that an applicant may be disqualified from a job on the basis of a previous conviction only if the employer takes into account: (1) The nature and gravity of the offense or offenses; (2) The time that has passed since the conviction and/or completion of the sentence; and (3) The nature of the job held or sought. (Citations omitted) The EEOC clarifies that 'nature and gravity of the offense' means for employers to consider the circumstances of that offense." *El*, 479 F.3d at 244. See also *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993) (rejecting the EEOC guidance regarding English-Only guideline and stating "[w]e will not defer to 'an administrative construction of a statute where there are 'compelling indications that it is wrong.' (citations omitted).

Given the lack of legal authority supporting these proposed regulations, and the existing authority under *El, supra*, rejecting the approach to interpret Title VII as requiring the standards set forth in the regulations, we respectfully request the FEHC to withdraw the proposed regulations.

Council response: This comment appears to be addressing language in the existing regulations that was not modified in this rulemaking and is thus outside the scope of this rulemaking. The "job related and consistent with business necessity" language addressed in the comment was the product of significant public comment and revision in a prior rulemaking. The Council also disagrees with the commenter's implication that the regulations are inconsistent with federal and state precedents. The existing regulations are supported both by the available federal and state precedents addressing this issue and by state statutory law.

#### **Section 11017.1(f)(2):**

Comment: This proposed section states that any bright-line disqualification policy for a conviction that is more than seven years old is presumed to be insufficiently tailored to be job-related and consistent with business necessity for an affirmative defense, unless the employer can prove otherwise. Such a prohibition on bright-line disqualification standards was specifically rejected by the court in *El, supra*. As previously discussed, in *El v. SEPTA* the court determined whether an employer's decision to terminate an employee based upon a 40-year-old homicide conviction was discrimination under Title VII.

In reviewing the EEOC's Guidance with regard to criminal convictions, the court stated: "The EEOC's Guidelines, however, do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a **lifetime ban** . . . In addition, it does not appear that the EEOC's Guidelines are

entitled to great deference.” (*El, supra*, 479 F.3d at 244, emphasis added; see also *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480 [rejecting the EEOC Guidance regarding English-Only guideline and stating “[w]e will not defer to ‘an administrative construction of a statute where there are ‘compelling indications that it is wrong,’” citations omitted].)

Thereafter, the court in *El* **rejected** the employee’s request to issue any holding that Title VII prohibits a bright-line policy with regard to criminal convictions or that an employer must individually assess each applicant’s circumstances. The court stated “[w]e decline to go so far.” (*Id.* at 25, emphasis added.)

Accordingly, creating a presumption that any bright-line policy that disqualifies an applicant who has a conviction that is more than seven years old is discriminatory and lacks any legal authority. As set forth in *El, supra*, not even the EEOC Guidance speaks to this issue.

Moreover, neither California Civil Code section 1786.18 nor Labor Code section 432.7 provides any authority for the FEHC to presume that a conviction that is more than seven years old is insufficiently tailored to be job-related or a business necessity. While California Civil Code section 1786.18 precludes an investigative consumer reporting agency from containing convictions that are more than seven years old, there is no authority referenced to preclude an employer from seeking this information from an applicant or employee.

In fact, as referenced by the court in *El, supra*, a conviction for murder that is 40 years old may very well be job-related and within the definition of business necessity. Surely there are plenty of other convictions such as pedophilia that remain relevant to some industries even after seven years has passed.

Finally, when crafting Labor Code Section 432.7 regarding employer requests for criminal history information of an applicant, the California Legislature certainly could have spoken to the consideration of the convictions that are over seven years old, yet did not. Accordingly, we respectfully request the FEHC to delete this section from the regulations.

Council response: This comment appears to be addressing language in the existing regulations that, while relocated, was not substantively modified in this rulemaking and is thus outside the scope of this rulemaking. The “bright-line” disqualification policies and the seven year presumption were the product of significant public comment and revision in a prior rulemaking. The federal precedents addressing this issue identify the diminishing relevance of dated criminal history and California Civil Code section 1786.18 provides legislative guidance regarding the appropriate marker for such a presumption. The regulation provides only for a “rebuttable presumption” and the Council acknowledges that utilizing older criminal history may be allowable in certain specific circumstances.

### **Section 11017.7(f)(3):**

Comment: This proposed section states that the employer must provide notice to the employee of the disqualifying conviction and an opportunity to present evidence that the information is factually inaccurate. First, there is no authority for such a proposal. Even the EEOC Guidance only requires such notice and an opportunity to respond if the employer has a policy that disqualifies an applicant on the basis of criminal convictions. Second, what is a “reasonable opportunity,” and how long does the employer need to conduct this analysis before discharging, laying off, or declining to promote the individual? Third, if the applicant or employee lacked other qualifying credentials for the position, does the employer still need to conduct this additional review? Finally, what standard does the employer utilize to determine if the information is factually accurate or inaccurate?

What if the employer has two competing documents – one that states the employee has been convicted of a crime that is job-related and consistent with business necessity, and another document provided by the employee or applicant indicating the applicant has not been convicted? In this situation is the employer liable for discrimination if it ultimately determines that the employee or applicant has failed to present sufficient evidence that the information is factually inaccurate? Based on these concerns, we respectfully request the FEHC to delete this section from the regulations for further consideration.

Council response: This comment appears to be addressing language in the existing regulations that, while relocated from (3)(B), was not substantively modified in this rulemaking and is thus outside the scope of this rulemaking. Moreover, the comment inaccurately states that the individualized assessment process detailed in the provision is required by the regulation. To the contrary, the provision acknowledges that either bright-line policies or individualized assessments can be permissible avenues of determining that the disqualifying criminal history is job related and consistent with business necessity.

#### **Section 11017.7(g):**

Comment: This proposed section discusses the federal and state regulations that prohibit individuals with certain criminal records from holding particular positions or mandate specific screening processes. This section should be moved to the beginning of proposed section 11017.1 in order to provide clarification for employers in determining when section 11017.1 does or does not apply to the specific employer, applicant or current employee. Moving section 11017.7(g) would also help clarify proposed section 11017.1(b). As previously discussed, proposed section 11017.1(b) misstates Labor Code section 432.7 by suggesting that Labor Code section 432.7 imposes a total prohibition on all employers with regard to the consideration of arrests that do not result in a conviction, which it does not.

Thus, we respectfully request the FEHC to move section 11017.7(g) for clarity and, as previously stated, correct section 11017.1(b) so it does not misstate the Labor Code.

Council response: The Council disagrees that relocating this provision would improve the organization or clarity of the regulations. The Council did include additional language regarding Labor Code section 432.7 exceptions in response to this comment and other comments.

Comment: Both the California Fair Chance Act and the current version of section 11017.1 of Title 2 of the California Code of Regulations (as adopted in 2017) decisions include provisions that limit employer liability when a federal or state law restricts employment based on conviction history. Subdivision (a)(2)(D) of the proposed regulations clearly articulates the employer liability exceptions under the Fair Chance Act, and subdivision (g) of the proposed regulations (currently subdivision (f) of section 11017.1 of Title 2 of the California Code of Regulations) describes the instances in which an employer is entitled to a rebuttable defense to an adverse impact claim under FEHA.

In order to ensure that employers properly interpret and implement these related provisions, we urge the Council to make a minor correction to the heading of subdivision (g) of the proposed regulations, which currently reads: “Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.” That heading is currently at odds with the content of that subdivision and should be adjusted to make clear that the rebuttable defense applies only when a federal or state law or regulation *requires* consideration of a worker’s criminal history—not to situations in which a licensing law or regulation merely permits consideration of an individual’s record.

This change to the heading would more accurately reflect the text of the subdivision, which limits the rebuttable defense to situations in which a law mandates or requires certain limitations: “Compliance with federal or state laws or regulations that *mandate* particular criminal history screening processes, or *requiring* that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.” (Emphasis added.) In addition, the Council’s “final statement of reasons,” issued in support of the current regulations in 2017, explained that changes to the subdivision were made “to clarify that the rebuttable defense addressed applies to ‘mandatory’ criminal history screening.” The provision was clearly not intended to apply to the much broader set of laws and regulations that merely permit consideration of an arrest or conviction record (including a broad array of occupational licensing laws). Correcting the subheading will enhance clarity and allow for improved implementation.

We recommend that the Council amend its proposed regulation section 11017.1, subdivision (g) so that the heading reads as follows:

“Compliance with Federal or State Laws, Regulations, or Licensing Requirements ~~Permitting or~~ Requiring Consideration of Criminal History.”

Council response: This comment addresses existing regulatory language that was not revised in this rulemaking and is thus outside the scope of this rulemaking. The Council disagrees with the comment's position that changing the heading of this provision would promote clarity or be more accurate. The heading is consistent with the scope of text of the provision, which addresses both examples of laws that mandate consideration of criminal history and also examples of laws that merely permit such use. The comment is correct that only compliance with laws mandating a particular screening process constitutes a rebuttable presumption, but that proposition is already adequately and clearly stated in the final sentence of the regulation.

**Article 11:**

Comment: My comment/suggestion is regarding the New Parent Leave Act (NPLA). I am only touching on one area and that is what type of paid leave an employee is allowed to use when taking such leave. Under the CFRA, an employee cannot use sick time for purposes of bonding with a child, for example, which makes perfect sense because neither the employee nor the baby is sick. Otherwise we'd be looking at a Care for Family CFRA leave. So under the CFRA, the employee can utilize vacation or PTO paid leave for compensation while they are out on leave for baby. It seems the NPLA allows for an employee to use sick time, which does not make sense. My proposal/suggestion is to very specifically state in the FEHA that under the NPLA, an employee is ONLY allowed to use PTO or vacation, but NOT sick time, to mirror the CFRA, as that would make perfect sense and be consistent and fair.

Council response: This comment appears to be requesting a statutory amendment that is beyond the authority of the Council. However, use of accrued paid time off in the CFRA and NPLA context is addressed extensively in the regulations at Section 11092.

**Section 11087(d):**

Comment: This proposed section defines "covered employer" under the California Family Rights Act (CFRA) and the New Parent Leave Act (NPLA). However, the definition causes confusion with regards to when the regulation is referring to covered employers under NPLA versus CFRA. In order to alleviate confusion, this section should provide separate definitions for "covered employers" under each regulation, or at least clearly denote each specific Act. Employers should not be left to decipher what sections apply to them and we respectfully request the FEHC to edit this section accordingly. For example, we suggest that the proposed language include the following (additions in italics):

(d) "Covered employer" means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs 20 or more persons for purposes of the NPLA, or 50 or more persons *for the purposes of CFRA* within

any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 20 employees (for the purposes of NPLA) or 50 employees (for the purposes of CFRA) work at the same location or work full-time. “Employer” as used in these regulations means “covered employer.”

Council response: The Council agrees and has added the recommended text to clarify which type of leave applies to which employers based on number of employees.

**Section 11087(o):**

Comment: This proposed section creates a catchall provision that states whenever CFRA is referenced, NPLA also applies, unless stated otherwise. As previously discussed, this causes great confusion and means the employer is left to decipher when NPLA does or does not apply. We suggest that proposed section 11087 specifically reference NPLA where it is applicable in order to prevent further confusion.

Also, we recommend that any time the regulation states “20 or 50” that clarification is added. We recommend that FEHC change that language to state “20 or more employees for the purposes of NPLA, or 50 or more employees for the purposes of CFRA.” Many employers having to implement NPLA do not have their own legal counsel defining all of these terms for them — they are busy trying to run their businesses and so clarifying language is essential.

Council response: The Council ultimately agrees with each of these recommendations and addressed the comment by limiting the definition of “NPLA” and cross-referencing the relevant employee number coverage thresholds throughout the text.

**Section 11088(c):**

Comment: NPLA differs from CFRA regarding limitations on entitlement. NPLA actually states, “The employer may, but is not required to, grant simultaneous leave to both of these employees.” (Government Code section 12945.6(e).) However, with regards to CFRA, the code does not permit the employer the right to deny simultaneous leave; it simply states that the employer may limit the leave to a combined total of 12 workweeks in a 12-month period between the two parents. (Government Code section 12945.2.) This difference needs to be spelled out in Article 11 to prevent confusion for smaller employers governed by the NPLA. Once again, this highlights the confusion caused by the catchall provision of proposed section 11087(o).

Council response: The Council agrees and clarified the text by adding that “[i]f both parents are eligible for NPLA leave but are employed by the same employer, that employer may limit the leave to a combined total of 12 workweeks in a 12-month

period between the two parents. The employer may, but is not required to, grant simultaneous leave to both of the employees.”

**Section 11089(a)(1):**

Comment: This proposed section discusses reinstatement of employment after leave. However, NPLA and CFRA differ with regards to when the employer must guarantee reinstatement. CFRA imposes the burden on the employer to inform the employee of the guarantee of reinstatement to the same or comparable position upon granting the CFRA leave. (Government Code section 12945.2.) NPLA differs in that the guarantee of reinstatement must be made on or before the request for leave is made, or the employer is deemed to have refused to allow the leave. (Government Code section 12945.6.) Therefore, this section needs to be revised to highlight the difference between CFRA and NPLA so employers know how to properly comply. Once again, this highlights the confusion caused by the catchall provision of proposed section 11087(o).

Council response: The comment incorrectly paraphrases the NPLA’s timing requirement for guarantees of reinstatement. The guarantee must occur on or before the commencement of the leave, not on or before the request for leave is made. Nevertheless, the Council clarified the text by adding that “[f]or purposes of the NPLA, an employer must provide a guarantee of reinstatement to the same or a comparable position that the employee held on or before the commencement of the leave.”

**Section 11090(a):**

Comment: This proposed section discusses how CFRA leave does not need to be taken in one continuous period of time. If the section 11087(o) catchall provision is applied, this section would state that NPLA also does not need to be taken in one continuous period of time. However, this is inaccurate because Government Code section 12945.6 is silent on the issue. There is no mention of whether leave under NPLA has been taken continuously or not. Government Code section 12945.6 (NPLA) simply permits an employee to “take **up to** a total of 12 workweeks in any 12-month period for family care and medical leave.” (Emphasis added.) In contrast, Government Code section 12945.2(p) (CFRA) specifically states that, “Leave provided for pursuant to this section may be taken in one or more periods.” If this language was intended, it would have been included in section 12945.6 when enacted. FEHC does not have the authority to take interpretative liberty with Government Code section 12945.6 and this proposed provision goes beyond the requirements of NPLA. Therefore, this section needs to specify the difference between CFRA and NPLA regarding continuity of leave in order to prevent confusion.

Council response: The Council agrees with the portion of the comment indicating that specified references to the NPLA aid in the clarity of the regulations. However, the

Council disagrees with the comment's assertion that the NPLA's silence on this issue means that the leave needs to be taken in one continuous period. Rather, the Council interprets the NPLA mechanics on this to be consistent with the CFRA and notes the NPLA's explicit incorporation of the CFRA regulations where they are not inconsistent with the NPLA statutory provisions.

**Section 11090(b):**

Comment: This proposed section discusses how CFRA and FMLA may run concurrently. If the catchall provision of section 11087(o) discussed above is applied, this section would state that NPLA, CFRA and FMLA will run concurrently. However, this is not true. Employers who employ between 20 and 49 employees are merely governed by NPLA — these employers are not governed by CFRA or FMLA because those statutes only apply to employers with 50 or more employees. Thus, NPLA, CFRA and FMLA do not run concurrently. This section needs to be revised in order to clarify this distinction.

Council response: The Council agrees and addressed the issue by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate.

**Section 11090(c)(2):**

Comment: This proposed section discusses how CFRA leave allows for intermittent reduced work schedules. Again, if the catchall provision of section 11087(o), discussed above, is applied, this section would state that the NPLA also allows for intermittent reduced work schedules. However, this is inaccurate because Government Code section 12945.6 is silent on the issue. As discussed in the previous sections, there is no mention of whether leave under NPLA has be taken continuously or not. Government Code section 12945.6 (NPLA) simply permits an employee to “take *up to* a total of 12 workweeks in any 12-month period for family care and medical leave.” (Emphasis added). In contrast, Government Code section 12945.2(p) (CFRA) specifically states that “[l]eave provided for pursuant to this section may be taken in one or more periods.” As previously discussed, FEHC does not have the authority to take interpretative liberty with Government Code section 12945.6 and this proposed provision goes beyond the bounds of NPLA. Therefore, this section needs to again specify the difference between CFRA and NPLA regarding continuity of leave in order to prevent confusion.

Council response: This comment addresses existing statutory text that was not modified and is thus outside the scope of this rulemaking. In any event, the Council addressed the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate.

### **Section 11091:**

Comment: This proposed section discusses the notice requirements for CFRA leave but it needs to be revised to provide clarity. If the catchall provision of section 11087(o), discussed above, is applied, this section would state that NPLA provides medical leave. NPLA does not provide medical leave; it only offers leave to bond with a new child within one year of the child's birth, adoption or foster care placement. Section 12945.6(j) provides a type of catchall provision allowing the FEHC to incorporate regulations by reference to CFRA, but it is not applicable here because the statements are inconsistent with NPLA leave. Section 12945.6(j) states, "To the extent that state regulations interpreting the Moore-Brown-Roberti Family Rights Act, also known as the California Family Rights Act (Sections 12945.2 and 19702.3), 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." (Emphasis added.)

We recommend that there be a separate section addressing notice requirements for NPLA because of the continued reference to "medical" and "medical emergency." For example, proposed section 11091(b) is not at all relevant to NPLA. This section discusses required medical certifications for the serious health condition of a child, parent, spouse and employee. These provisions are not applicable to NPLA because as previously stated, NPLA does not provide medical leave. Clarification should be made or this proposed section will cause great confusion to employers and employees alike.

Based on these concerns, we respectfully request the FEHC to delete this section from the regulations and provide a separate notice requirement section for NPLA.

Council response: The Council agrees that NPLA leave does not include leave for medical reasons. The Council addressed the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate. Accordingly, the Council revised subdivision (a) regarding advance notice to expressly include NPLA, but left NPLA out of subdivision (b) since that subdivision pertains to medical certification.

### **Section 11092(b)(1):**

Comment: This proposed section discusses an employee's right to use accrued paid time off during NPLA. The proposed section states that an employer is not allowed to require an employee to use accrued paid time off, but the employee may elect to do so. This is inaccurate because the statute actually states that an "employee shall be entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave." (Government Code section 12945.6(1) [sic] .) Therefore, the code is silent regarding whether or not the employer can require the employee to use paid time off. It simply states that this issue needs to be negotiated with the employer. Therefore, the

employee “shall” be permitted to use paid time off, but the statute is silent on whether the employer can require them to do so and this section needs to be revised to clarify the difference.

Council response: The CFRA explicitly grants employers the right to require employees to utilize accrued vacation or other paid time off. Government Code section 12945.2(e). By contrast, the NPLA references only the employee’s entitlement to utilize such accrued vacation or paid time off, not an employer entitlement to require that it be used. Government Code section 12945.6(a)(1). The Council declines to assume that this substantive difference in statutory text was unintended and thus the regulations reflect the different entitlements with respect to use of accrued vacation and other paid time off.

#### **Section 11093(a):**

Comment: This section discusses which rights are separate and distinct from CFRA. In order to clarify that NPLA is also separate and distinct, we recommend that the following phrase be added: “and distinct from the right to take NPLA under Government Code section 12945.6.”

Council response: The Council agrees and incorporated this suggestion by slightly rewording it to “[t]he right to take a CFRA leave under Government Code section 12945.2 and the right to take NPLA under Government Code section 12945.6 are separate and distinct” for enhanced clarity.

#### **Section 11093(f):**

Comment: Proposed section 11093(f) discusses the relationship between CFRA, FMLA and NPLA; however, the way it is drafted causes further confusion. This section seems to confuse “covered employer” with “covered employee.” In order to simplify this section, we recommend that it state that “an employee works for a covered employer as defined by Government Code sections 12495.2 or 12495.6.”

However, if the language drafted is going to be used, there needs to be clarification that an employer may be a “covered employer,” but the employee may still not be eligible for CFRA or NPLA because the employee is not a covered employee. Based on the number of employees within a 75-mile radius, an employer may meet the threshold requirements, while an employee still does not qualify. For example, a company may have over 20 employees total; thus, they must comply with NPLA. However, the specific employee claiming NPLA may not be entitled to it because they work at a location that has 5 employees and no other additional employees within a 75-mile radius. Therefore, this proposed provision needs to clarify the difference between covered employer and covered employee.

Council response: The provision accurately and clearly references the respective coverage requirements for both the employee and the employer and the Council disagrees that the language is confusing or inaccurate. The Council did however make several linguistic edits to enhance the grammar and clarity of the provision.

**Section 11094:**

Comment: Proposed section 11094 discusses retaliation and employee protections regarding interference with CFRA and NPLA rights. NPLA and CFRA leave should be separately addressed. For example, subdivision (a) only references CFRA, but in subdivision (a)(1), CFRA and NPLA are referenced. This causes confusion because it appears that the intent is to have NPLA apply anytime CFRA is mentioned, but then specifically stating that NPLA applies in subdivision (a)(1) makes it unclear whether it applies throughout. As previously discussed, we recommend that NPLA and CFRA are always referenced separately to prevent these issues.

Council response: The Council agrees and addressed the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate. Accordingly, the Council added "NPLA" numerous times to emphasize each subdivisions' applicability to both CFRA and NPLA.

**Section 11095:**

Comment: Proposed section 11095 discusses the employer's notice requirements regarding NPLA leave. Here, the issue is once again not specifically stating that NPLA leave is covered by proposed section 11095. Without this clarifying language, employers are left to try and decipher these regulations.

Council response: The Council agrees and addressed the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate. Accordingly, the Council added "NPLA" numerous times to emphasize each subdivisions' applicability to both CFRA and NPLA.

Comment: Regarding proposed family and medical leave and pregnancy disability leave notice, CFRA leave should be its own with employer eligibility and employee eligibility discussed separately. Then, NPLA leave should be its own section where employer and employee eligibility are again discussed separately. Doing this will provide clarity where an employer is a "covered employer," but the employee is not eligible for leave. As previously discussed, a company may have between 20 and 49 employees; thus, the company must comply with NPLA. However, the specific employee claiming NPLA may not be entitled to NPLA leave because they work at a location that has 5 employees and no other additional employees work within a 75-

mile radius. By expressly stating in the notice requirement when NPLA applies versus when CFRA applies will benefit the employee and the employer.

Council response: The Council addressed the crux of the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate. The references to NPLA were added where appropriate and the amended language accurately and sufficiently references employer and employee coverage where applicable.

Comment: We recommend using a check the box approach to simplify the notice for employers and employees making these provisions even clearer.

Council response: The Council disagrees with this suggestion. While checkboxes are easily incorporated into forms, such as the one in section 11097, they are less useful in notices that do not call for its audience to mark them. With slight modifications, this notice has existed for many years and significantly changing it may confuse individuals who are accustomed to it, particularly because it is already written in a succinct fashion.

Comment: This proposed section needs to be revised because it currently misstates the law. If NPLA is supposed to be inferred every place CFRA is mentioned, this section again states that NPLA provides medical leave. NPLA does not provide medical leave; it only offers leave to bond with a new child within one year of the child's birth, adoption or foster care placement. Therefore, the discussion of notice and certification requirements needs to be revised to clarify what is required for NPLA leave and what is required for CFRA leave.

Council response: The Council agrees and addressed the issue by removing the catchall provision from section 11087(o) and explicitly enumerating what NPLA covers.

#### **Section 11097:**

Comment: This section provides the form that employers may use when requesting health care provider information. This section states, "For leaves involving serious health conditions, the employer may utilize the following Certification of Health Care Provider form or its equivalent." However, since NPLA does not include medical leave, this section should instead clarify, "For leaves involving serious health conditions under CFRA or FMLA, the employer may utilize the following Certification of Health Care Provider form or its equivalent." This way employers know not to utilize this form for NPLA leave.

Council response: The Council agrees and added "under CFRA or FMLA."

#### ***COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].***

**General:**

Comment: The California Chamber of Commerce and signatories to its letter resubmit the same comment from the 45-day comment period.

Council response: The Council’s responses to those comments are above.

Comment: The National Employment Law Project (NELP) and organizations that submitted abbreviated versions of NELP’s letter resubmit the same comment with one addition from the 45-day comment period.

Council response: The Council’s responses to those comments are above, with the exception of the first comment, which is new and addressed below in section 11017.1(a)(3). Comment #2 in this 15-day comment period letter is the same as comment #2 in the 45-day comment period letter; comment #3 corresponds to comment #6; comment #4 corresponds to comment #1; comment #5 corresponds to comment #8; and comment #6 corresponds to comment #4.

**Article 11:**

Comment: California courts have observed the DFEH's limited authority by holding that administrative agencies may not "under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute" ... Nowhere in the history of the NPLA is there any indication that the legislature was concerned with either the need to allow employees to choose whether to use their PTO or reinstating key employees.

Council response: The Council disagrees. The necessity of each regulation is outlined in the Initial Statement of Reasons as well as throughout this document when relevant. Government Code section 12935(a)(1) vests the council with authority to adopt regulations relating to “this part,” which includes sections 12900-12996. Because SB 63 (NPLA) was codified in section 12945.6, the legislature placed it squarely within the Council’s jurisdiction. The distinctions in the regulations related to the use of PTO and key employees reflect differences in the respective statutory texts of the CFRA and the NPLA.

**Section 11017.1(a)(3):**

Comment: As currently written, the text is confusing. It is not entirely clear whether the new language constitutes an effort to close or create a loophole for staffing and “temp” agencies. One confusing aspect of subsection (a)(3) is the terminology. An “agent of an employer” is a broad term that includes any employee or worker as well as any individuals hired to act on behalf of an employer. Moreover, in joint employer relationships, the “agent of an employer”

may also qualify as an employer. Referring specifically to “hiring halls” and “availability lists” is also confusing, as it is unclear whether the Council seeks to single out those arrangements or refers more broadly to hiring arrangements at all types of staffing or placement firms. Because of this confusion, we suggest the Council insert some definitions for the terminology it uses. One helpful example appears in subsection (a) of section 2810.3 of the Labor Code, which defines and uses the terms “client employer” and “labor contractor.” We have incorporated those definitions into our proposed language, which appears below.

Perhaps least clear are sentences three and four of the proposed text. While we hope the third sentence is intended to warn labor contractors that they are unlikely to be able to conduct a meaningful individualized assessment upon placing workers into pools that are not sufficiently specific, we nevertheless worry that the sentence could be read differently. More specifically, we worry that it may be read as informing labor contractors that they need not conduct a meaningful conditional offer at that stage of the process because it is an impossible task. Furthermore, the phrasing leaves open what labor contractors must do to comply with the law if they utilize broad worker pools. In many cases, the labor contractor may not lawfully be able to rescind a conditional offer at that stage of the hiring process. Instead, the Council appears to imply that, if the pool were too broad to allow for a meaningful individualized assessment when the worker was selected for it, the labor contractor must wait until after placing a worker in a specific position with a client employer before conducting an individualized assessment and rescinding an offer based on conviction history. It would be helpful to both employers and workers for the proposed text to lay out this scenario more clearly.

The proposed language also leaves open what process labor contractors must employ when selecting workers from a sufficiently specific pool of workers. Presumably, if a labor contractor declines to assign a worker from a pool to a position with a client employer because of his/her conviction history, the labor contractor must notify the worker and conduct an individualized assessment. However, as currently written, the regulations leave open the possibility that a labor contractor might select workers with records for a pool (after a conditional offer) but then decline to assign them to positions with client employers because of their records. (This may be because a client employer informed the labor contractor that it does not want workers with records or because of the labor contractor's own bias.) Such a process would impermissibly sidestep the requirements of the Fair Chance Act. The fourth sentence is especially confusing because it appears unnecessary. That sentence provides that a client employer need not extend a conditional offer and conduct an individualized assessment if the client employer neither asks about nor considers conviction history information. That fact is true for any employer in any hiring situation—a California employer can avoid the need for a conditional offer and individualized assessment by neither asking about nor considering conviction history. Although the fourth sentence sets forth that broadly applicable fact, the proposed text does not address whether a client employer must extend a conditional offer and conduct an individualized assessment if it either receives conviction history information from a labor contractor or conducts its own background check. While that requirement may seem obvious, client employers would no doubt prefer to be able to consider conviction history without restriction as long as the labor contractor previously

extended a conditional offer and conducted an individualized assessment. Moreover, we have heard from advocates and workers that some client employers indeed conduct extra screening and reject workers referred by labor contractors because of their conviction record.

When revising the proposed text to enhance clarity, we encourage the Council to ensure that neither placement firms/labor contractors nor client employers are permitted to consider conviction history information, and potentially rescind a job offer, without first extending a conditional job offer and then conducting a meaningful individualized assessment. Also important is to remain mindful of the purposes of the Fair Chance Act: (i) delaying consideration of an applicant's record to allow him/her first to be considered on his/her merits; (ii) informing the applicant when s/he is rejected because of his/her record; and (iii) ensuring the employer conducts an individualized assessment, which means both that the employer considers commonsense factors and the applicant has an opportunity to respond. The second and third of these purposes is lost when loopholes are created for labor contractors and/or client employers.

When refining subsection (a)(3), we also urge the Council to keep in mind certain realities about the employment services industry, including "temp" work.<sup>6</sup> It is among the fastest growing sectors in the country, and the number of temp workers has reached an all-time high in recent years. The industry especially impacts marginalized and vulnerable workers, who are particularly susceptible to violations of labor and employment law. Especially important is understanding the nature of contracted work in the modern workforce—it is often not temporary, as placement agencies increasingly staff permanent jobs, or else temporary positions are used as a trial run for conversion to a permanent position. Because a vast quantity of workers will be affected by the practices of labor contractors and client employers, the Council should take care to make the regulatory language applicable to such hiring as clear as possible.

With those goals and realities in mind, we suggest the following language be inserted to replace the text of subsection (a)(3):

(3) A labor contractor and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(A) A labor contractor may not decline to admit a worker to a pool, or decline to refer a worker to a position with a client employer, because of the worker's record unless the labor contractor has complied with the procedures and requirements outlined in section 11017.1 of these regulations. Because subsection (c) requires that an individualized assessment must include consideration of the nature of the job sought, labor contractors are unlikely to satisfy the requirements of subsection (c) when placing applicants into a pool of workers from which individuals may be assigned to a variety of positions.

(B) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) through (c), unless exempted pursuant to subsection (a)(2). A client employer violates this section by instructing labor contractors to refer only workers without conviction records, unless exempted by subsection (a)(2).

(C) For purposes of section 11017.1 of these regulations:

(i) "Employer" includes a labor contractor and a client employer.

(ii) "Client employer" means a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(iii) "Labor contractor" means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

Council response: The Council agrees with the crux of this comment and made various edits that address the concerns raised in the comments, including: 1) adding definitions of "employer," "client employer," and "labor contractor"; and 2) fleshing out in new detailed paragraphs similar to those recommended in the comments that the same requirements of delayed review of criminal history, notice to the applicant, and individualized assessments are applicable in the context of labor contractors, hiring halls, and availability lists.

Comment: In my reading of the current draft regulations the phrase "conditional offer" is used in two substantially different ways because they depend on two very different "conditions." The first use ("conditional offer of employment") is the situation in which the employer itself is doing both the screening and the hiring. The employer first evaluates the applicant's skills and capacity for the position, and makes a "conditional offer" to the individual for a particular job. Then, if it desires, it conducts a criminal history check. In this case, an offer for employment has been made and the "condition" in the "conditional offer" is whether or not the employer still wants to hire the person based upon the criminal history information it discovers.

The second use ("conditional offer of inclusion on the hiring hall and/or availability list" in Section 11017.1(a)(3)) is when the employer is relying on an intermediary or agent to solicit interested applications in the work, do any necessary screening, and maintain a list of qualified applicants so that the employer can select from that list to provide an actual job for an individual on short notice. In this case, for purposes of the everyday meaning of "conditional offer of employment," the effective "condition" in this "conditional offer" is whether or not the employer will select that particular individual from the list for an actual job. In my view, it is not until the employer makes a selection from the list that any "offer of employment" has been extended. Therefore, while the intermediary or agent may limit or "condition" any particular applicant's inclusion on the list, getting on the list does not guarantee any employment at all, so getting on the list does not constitute a "conditional offer of employment."

It is also clear that the various situations in which employer is rely on intermediaries or agents to pre-screen applicants for potential work positions are very diverse. My understanding is that traditionally union hiring halls pre-screen primarily (or exclusively) to determine that an individual has the professional and technical skills and credentials to perform a particular job, e.g. an electrician. I believe that there are now many different kinds of what used to be called "temp agencies," some in which the temp agency might formally be the "employer" in the sense of receiving the worker's work hours and cutting a check to the worker while the person actually performs work at a completely separate corporation, and others that operate differently.

Because I believe the issues raised in these situations in which employer is rely on intermediaries or agents to pre-screen applicants for potential work positions are very technical

and specific to certain kinds of employment situations, my suggestion is that regulations be framed explicitly under a/the section dealing with joint employer liability. This placement would facilitate making the necessary distinctions (when such liability would apply and when it would not) and provide necessary notice and clarity to the regulated community. In addition, based upon the concerns that the agents and employers could intentionally or otherwise attempt to contract out of their obligations under the law or avoid liability under the law, placement of these regulations in this section offers the opportunity to make explicit the legal limitations on such contracts between the agents and employers. Alternatively, I notice that the table of contents for employment regulations includes sections for “labor organizations” and “employment agencies.” Perhaps placing the regulations in those sections would facilitate making the necessary distinctions (when such liability would apply and when it would not) and provide necessary notice and clarity to the regulated community.

Council response: The Council agrees with the crux of this comment and made various edits that address the concerns raised in the comments, including: 1) adding definitions of “employer,” “client employer,” and “labor contractor”; and 2) fleshing out in new detailed paragraphs similar to those recommended in the comments that the same requirements of delayed review of criminal history, notice to the applicant, and individualized assessments are applicable in the context of labor contractors, hiring halls, and availability lists. The Councilmember who provided these comments ultimately agreed with the approach of addressing this through the new expansive labor contractor/hiring hall provisions rather than through language attempting to address joint-employment standards more generally and voted to approve the amended language.

Comment: We fully support the addition of the new subsection 11017.1 (a) (3) to Title 2 of the California Code of Regulations. This language will greatly assist the entertainment industry with respect to the maintenance of collectively bargained availability lists for studio teachers and insure that there is a pool of available, qualified persons to educate and protect the welfare of child performers. While the proposed language makes clear that an otherwise permissible, properly delimited criminal background check may be conducted once a conditional offer of placement on an availability or hiring hall list has been made, it is silent with respect to any such criminal background checks that may be conducted thereafter. In this regard, we request that subsection 11017.1 (a) (3) be revised to clarify that, once someone has been placed on an availability or hiring hall list, periodic criminal background checks may be conducted as a condition of remaining on such list. Accordingly, we propose adding the following underscored language to subsection 11017.1 (a) (3):

"(3) Where an agent of an employer makes determinations about which individuals or applicants shall be included or retained on a hiring hall and/or availability list for a particular position or type of position the agent must comply with the procedures and requirements outlined in Sections 11017 .1 of these regulations. This includes but is not limited to the process of making a conditional offer of inclusion or, where there is an applicable periodic retention determination, retention on the hiring hall and/or availability list

before inquiring about or using any criminal history that may lawfully be considered given the position or type of position and conducting an individualized assessment before any decision to rescind a conditional offer based on criminal history is made. Consequently, agents that are making determinations about a hiring hall and/or availability list that is applicable to a broad range of different positions will be unlikely to meet the individualized assessment components of the requirements. When selecting individuals for hire from the hiring hall and/or availability list, an employer does not need to separately undergo the conditional offer process outlined in 11017.1(a)-(c) of these regulations, provided that the employer has not separately inquired about or considered criminal history information in the course of selecting applicants or individuals from the hiring and/or availability list."

Council response: The Council agrees with this comment and added additional language to include criminal history reviewed in connection with determining continued inclusion in a pool or on an availability list.

**Section 11089(d)(2):**

Comment: The key employee defense should apply to NPLA too because of Government Code section 12945.6(j) ("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.)

Council response: The Council disagrees. CFRA and NPLA are two distinct types of leaves and the statutory text of the NPLA does not include the equivalent of the CFRA key employee provision. The Council declines to assume that this substantive difference in statutory text was unintended by the legislature and thus the regulations reflect the differences in the statutory texts with respect to the key employee exception.

**Section 11092(b):**

Comment: The Council endorsed the belief that restricting employers from requiring employees to use their PTO/vacation time during NPLA leaves and requiring employers to reinstate key employees is consistent with the statute. The council's reasoning is flawed. The intent of the NPLA was to extend the protections offered under the CFRA to employees of smaller businesses, not to alter the structure of this leave. Rather, the NPLA provides a narrowly tailored version of the CFRA to small business employees.

Council response: The CFRA explicitly grants employers the right to require employees to utilize accrued vacation or other paid time off. Government Code section 12945.2(e). By contrast, the NPLA references only the employee's entitlement to utilize such accrued vacation or paid time

off, not an employer entitlement to require that it be used. Government Code section 12945.6(a)(1). The Council declines to assume that this substantive difference in statutory text was unintended by the legislature and thus the regulations reflect the different entitlements with respect to use of accrued vacation and other paid time off.

**Section 11092(b)(1):**

Comment: Regulation section 11092(b)(1) states "[a]n employer does not have the right to require an employee to use accrued paid time off during an otherwise unpaid portion of NPLA leave, though an employee may elect to do so." This sentence should be deleted, and that the regulations should clarify that there is no difference here between the CFRA and the NPLA. The NPLA is silent on this issue, but the CFRA specifically allows employers to require the use of paid time off during CFRA leave. Given the legislative mandate to adopt CFRA regulations, and the lack of DFEH authority to enlarge the statute, this language must be deleted. Not only is there no true inconsistency upon which to base this language, but Government Code Section 11342.2 requires that these regulations be consistent with the NPLA. Further, this language does nothing to provide employees access to protected leave for bonding with new children.

Council response: The CFRA explicitly grants employers the right to require employees to utilize accrued vacation or other paid time off. Government Code section 12945.2(e). By contrast, the NPLA references only the employee's entitlement to utilize such accrued vacation or paid time off, not an employer entitlement to require that it be used. Government Code section 12945.6(a)(1). The Council declines to assume that this substantive difference in statutory text was unintended by the legislature and thus the regulations reflect the different entitlements with respect to use of accrued vacation and other paid time off.

***COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].***

**General:**

Comment: The California Chamber of Commerce and signatories to its letter resubmit many of the same comments from the 45-day and first 15-day comment periods.

Council response: The Council's responses to those comments are above. New comments are addressed below.

Comment: We want to express our appreciation to the Council for its attention to our concerns.

Council response: The Council appreciates the feedback.

**Section 11017.1(a):**

Comment: This language goes well beyond the statutory authority of Government Code Section 12952 and should be struck from the proposed regulations. Specifically, “Worker’s record” is not a known legal term or established evidentiary standard and will create confusion in its application in civil litigation. This term should be replaced with “conviction history report” as provided in Government Code Section 12952. Furthermore, the proposed language states, “Because subsection (c) requires that an individual assessment must include consideration of the nature of the job sought, labor contractors or union hiring halls are unlikely to satisfy the requirements of subsection (c)” but the proposed regulations do not explicitly state that this relieves them of liability or a duty to try and comply with subsection (c). FEHC’s intent with this language needs to be made explicit. Additionally, the definitions of “client employer” and “labor contractor” are already provided in Labor Code Section 2810.3. Yet, the definitions used in these proposed regulations are different from those definitions. For purposes of legal accuracy and to avoid confusion, the exact definitions of “client employer” and “labor contractor” from Labor Code Section 2810.3 should be utilized.

Council response: The Council changed the reference from a worker’s record to the more specific and accurate reference to a worker’s criminal history in response to this comment. With respect to subsection (c), the language means what is intended, since it is not the case that labor contractors or union hiring halls are relieved of the duty to comply with Government Code section 12952. With respect to the definitions of “client employer” and “labor contractor”, the substance of the definitions matches the Labor Code definitions. The specific language was modified slightly so that the definitions would be clearer in light of the context of these regulations. In any event, the Council added the term “only” to avoid any potential confusion regarding the specific definition language.

**Section 11017.1(a)(3):**

Comment: As currently written, the text does not make clear that, like background checks conducted for initial placement in a pool or availability list, background checks subsequently conducted to ensure continued eligibility for the pool or availability list are unlikely to comply with the law if the workers may be assigned to a variety of positions. Based on the councilmembers’ comments during the Council’s August 17, 2018 meeting, the Council appears to intend for subsequent background checks to be treated similarly to initial background checks. Therefore, we suggest small changes be made to the text and organization of subsections (a)(3)(A) and (a)(3)(B) to avoid any potential confusion.

In addition, the use of the work “periodic” is problematic because a labor contractor of union hiring hall could violate the law by conducting even a single subsequent background check that does not comply with the requirements of section 11017.1. Therefore, we suggest that the Council replace the word “periodically” with “subsequently.”

The Council could achieve this additional clarity is through the following modifications to subsections (a)(3)(A) and (a)(3)(B):

(A) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, continue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's record unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations.

~~(i) Because subsection (c) requires that an individualized assessment must include consideration of the nature of the job sought, labor contractors or union hiring halls are unlikely to satisfy the requirements of subsection (c) when considering a worker's eligibility for initial or continued inclusion placing applicants into a pool of workers or availability list from which individuals may be assigned to a variety of positions.~~

~~(ii)(B) If a labor contractor or union hiring hall that periodically subsequently conducts any inquiries into criminal history to maintain the eligibility of a workers already admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When conducting a subsequent inquiry, labor contractors or union hiring halls are is unlikely to satisfy the requirements of subsection (c) if they it disqualifies a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for initial entry into the pool in the first place.~~

The above modifications would require that subsections (a)(3)(C) and (a)(3)(D) be re-lettered as subsections (a)(3)(B) and (a)(3)(C), respectively.

Council response: The Council generally agrees with these comments and added additional language that addresses subsequent or periodic background checks. The Council also replaced the term "periodically" with "subsequently" as proposed in the comment.

**Section 11017.1(b):**

Comment: We appreciate the Council's changes to this section; however, Section 11017.1(b) still misstates Labor Code Section 432.7. While some of the Section 432.7 exceptions are mentioned later in proposed subdivision (g). This subdivision seems to address decisions made after the hiring process. Accordingly, to the extent the FEHC is relying upon Labor Code Section 432.7 to recite existing law regarding the consideration of criminal history in employment decisions, we respectfully request that the FEHC include all provisions in Labor Code Section 432.7 upfront to avoid any unnecessary confusion.

For example, proposed Section 11017.1(b)(3) misstates the use of juvenile court records. Labor Code Section 432.7 provides exceptions when the information "concerns an adjudication by the juvenile court in which the applicant has been found by the court to have committed a felony or misdemeanor offense specified in paragraph (1) that occurred within five

years preceding the application for employment.” Yet, Section 11017.1(b)(3) makes no reference to these exceptions.

Further, proposed Section 11017.1(b)(6) causes more confusion by specifically spelling out additional limitations required by local ordinances in San Francisco and Los Angeles. Providing these specific examples is confusing because these are not the only cities with local laws and ordinances that provide additional limitations. We recommend that the examples be removed in order to prevent confusion and potential misstatement of the local ordinances. We suggest that the proposed regulation simply state **“Employers may also be subject to local laws or city ordinances that provide additional limitations.”**

There is no authority for proposed Section 11017.1(b)(7). Section 11017.1(b)(7) states, “In addition to the limitations provided in subdivisions (1)-(6), employers in California are prohibited from considering, distributing, or disseminating information regarding the following types of criminal history” and then it lists consumer reports as prohibited information. This is an overly broad regulation. Employers are still permitted to utilize background check information and consumer reports, they just cannot consider this information until after an offer of employment has been made. (Government Code Section 12952(b).)

If the proposed regulations simply mean to state that investigative consumer reports, such as background checks, are subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. §§ 1681, et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code Sections 1786, et seq.) then this proposed section should not be included here and should be its own section. In the alternative, the language could be amended to say, “separate and distinct from the limitations provided in subdivisions (1)-(6)...” This would help clarify that the consumer reports are not prohibited information.

Council response: The portion of the comment addressing section 11017.1(b)(4) [referenced in the comment as (b)(3)] significantly overstates the breadth of the exception, which applies only to a specific employment context. However, the Council added language in the first sentence of subsection (b) that acknowledges that there are limited exceptions and also included a reference to Labor Code section 432.7 in (b)(4) so that readers can review the statutory text of the Labor Code provision in its totality. The Council disagrees that the examples provided in section 11017.1(b)(6) cause confusion. To the contrary, they serve as a reminder to the regulated community to be aware of potential applicable local ordinances. The examples provided include two of the largest cities in the state and, in the case of Richmond, a local ordinance with features that are fundamentally different than the other laws and ordinances addressing this topic. The Council agrees that properly limited background checks and consumer reports are allowable, provided that they are otherwise lawfully conducted, and thus added additional language to subsection (7) to dispel any potential confusion regarding this.

### **Section 11017.1(g):**

Comment: The Council should delete the word “Permitting” from the heading of subsection (g) because it misstates the law on this point and is at odds with the body of that subsection.

Council response: This comment was already submitted twice and addressed above.

### **Section 11092:**

Comment: This proposed section discusses an employee's right to use accrued paid time off during NPLA leave. The proposed section states that an employer is not allowed to require an employee to use accrued paid time off, but the employee may elect to do so. This is inaccurate because the statute actually states that an "employee shall be entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave." (Government Code Section 12945.6(1).) Therefore, the code is silent regarding whether or not the employer can require the employee to use paid time off. It simply states that this issue needs to be negotiated with the employer. Therefore, the employee "shall" be permitted to use paid time off, but the statute is silent on whether the employer can require them to do so and this section needs to be revised to clarify the difference.

Based on these concerns, we respectfully request that the FEHC revise these Section and state, "***An employee may elect to use accrued paid time off during an otherwise unpaid portion of a NPLA leave.***" And delete the sentence stating, "An employer does not have the right to require an employee to use accrued paid time off during an otherwise unpaid portion of NPLA leave, although an employee may elect to do so."

Subdivision (b)(2) is not applicable to NPLA leave because NPLA does not provide leave for the employee's own health condition. Additionally, (e) and (f) differ with regards to CFRA versus NPLA leave. To alleviate potential misstatement of the law regarding NPLA leave, Section 11087(o) should be revised to remove the catchall language and the following sentence should be added; "***This section is not applicable to leave under the NPLA.***" Further, these sections should explicitly characterize the differences between CFRA and NPLA rather than making broad general statements.

Council response: The Council addressed the crux of the comment's concerns about incorporation by reference by removing the catchall provision from section 11087(o) and by adding specific references to the NPLA where appropriate. Thus the regulations no longer can be misread to include the NPLA in subdivision (b)(2). With respect to the use of accrued paid time off, the CFRA explicitly grants employers the right to require employees to utilize accrued vacation or other paid time off. Government Code section 12945.2(e). By contrast, the NPLA references only the employee's entitlement to utilize such accrued vacation or paid time off, not an employer entitlement to require that it be used. Government Code section 12945.6(a)(1). The Council declines to assume that this substantive difference in statutory text was unintended by the legislature and thus the regulations reflect the different entitlements with respect to use of accrued vacation and other paid time off.

### **Section 11093(f):**

Comment: While we appreciate the Council's changes to this section, we think additional clarity should be provided. Proposed Section 11093(f) discusses the relationship between CFRA, FMLA and NPLA; however, the way it is drafted causes further confusion. This section seems to confuse "covered employer" with "covered employee." In order to simplify this section, we recommend that it states that ***"an employee works for a covered employer as defined by Government Code Sections 12495.2 or 12495.6."*** But we suggest the following language be used instead:

***"If an employee is covered by CFRA leave and FMLA leave, then the employee is not also entitled to leave under the NPLA. Notably, an employer may be a covered employer under CFRA and FMLA, but the employee may not be eligible for CFRA or FMLA leave. For example, an employer may have over 50 employees and meet all of the other requirements to be considered a "covered employer" for purposes of CFRA and/or FMLA leave (see definition provided in Section 11087). However, the employee may work at a location that only has 25 employees within a 75-mile radius. Therefore, the employer is a "covered employer" for purposes of CFR and/or FMLA, but the employee is not eligible for CFRA or FMLA benefits. In this situation, the employee is an eligible employee per NPLA, but is not entitled to other forms of leave provided by the CFRA and FMLA (e.g. leave for the employee's own serious health condition or the serious health condition of the employee's child, parent or spouse)."***

Council response: The provision accurately and clearly references the respective coverage requirements for both the employee and the employer and the Council disagrees that the language is confusing or inaccurate. The Council did however make several linguistic edits to enhance the grammar and clarity of the provision.

***COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].***

**General:**

Comment: The California Chamber of Commerce and signatories to its letter resubmit many of the same comments from the 45-day and previous two 15-day comment periods.

Council response: The Council's responses to those comments are above. New comments are addressed below.

Comment: The current version of the draft regulations addresses the concerns we have raised.

Council response: The Council appreciates the feedback.

**Section 11017.1(c):**

Comment: California state law requires that applicants have 5 business days to respond to a preliminary adverse action notice, with 5 additional business days granted if the applicant notifies the employer that they intend to provide evidence disputing the accuracy of the background check. The state law is silent with respect to the applicant's receipt of adverse action communications. By adding additional time – ranging from 5 to 20 days depending on the applicant's address – to presume receipt of an adverse action notice, there is a significant burden placed on both employers and job-seekers.

As it stands, this additional time can negatively affect not just the employer doing the hiring by potentially leaving a position empty for an additional three weeks – but those additional job-seekers who were eagerly awaiting a decision on the job may move onto less favorable opportunities because they assume with a month of no contact, the employer must no longer be interested in their services. Any effort could and should be made to keep hiring turn-around time as brief as possible, and given the time mandated by AB 1008, the flexibility is clearly in the presumption of receipt of the adverse action notice.

To further add to the additional employer burden, the proposed regulation creates confusion by including a variation in the “type” of days used to measure required timeframes. While response is measured in “business days”, the initial notification/receipt is measured in “calendar days”. This change creates a challenge for employers and opens them up to potential liability simply as a result of minor mathematical miscalculations.

Due to these concerns, we strongly urge the following changes to establish a greater consistency with existing state law and speed to the consumer adverse action process:

- Adopt the “mailbox rule” standard – that mail sent anywhere in the US is presumed to be received within 3 business days – to ALL applicant mailings in the United States. This would provide a workable and easily measured standard that is universally accepted among courts in the US. A discussion of this standard is noted most heavily in the Ninth Circuit Court case of *Dandino, Inc. v. U.S. Dep't of Transp.*, No. 11-72113 (9th Cir. 2013). This would serve to not only reduce potential wait times, but to provide a standard calculation of time in “business days” for both in-state and out-of-state applicants.
- Allow for the presumption that electronic communications are received the same day sent. This, as with the mailbox rule, is a standard used by US courts so commonly that it has recently been incorporated into the Federal Rules of Civil Procedure.

We feel that both of these modifications to the presumption of receipt of an adverse action notice would serve to help speed up the hiring process for all parties involved while providing consistency and predictability in line with both AB 1008 and commonplace legal standards accepted nationwide.

Council response: The Council disagrees with this comment to the extent it implies that the regulation expands the statutory requirement of allowing the applicant five business days to respond to the notice of disqualification. To the contrary, the regulation clarifies when an applicant will be deemed to have received the notice for purposes of commencing the five business days allowed for response. The regulation mirrors California's “mailbox rule,” codified at California Code of Civil Procedure section 1013. This makes more sense than applying a federal version of the “mailbox” rule, given that these are state regulations implementing a

state statute. The Council also disagrees that these requirements necessitate a significant delay in the hiring process, since an employer remains free to provide the notice in an expedited fashion, such as overnight mail with a confirmation of receipt.

#### **Section 11090(a):**

Comment: The proposed changes to this section are not legally accurate because Government Code Section 12945.6 is silent on the issue. There is no mention of whether leave under NPLA has to be taken continuously or not. Government Code Section 12945.6 (NPLA) simply permits an employee to “take **up to** a total of 12 workweeks in any 12-month period for family care and medical leave.” (emphasis added). In contrast, Government Code Section 12945.2(p) (CFRA) specifically states that “Leave provided for pursuant to this section may be taken in one or more periods.”

If this language were intended, it would have been included in Section 12945.6 when enacted by the Legislature. FEHC does not have the statutory authority to take interpretative liberty with Government Code Section 12945.6 and this proposed provision of the regulation goes beyond the requirements of NPLA. Therefore, this section should specify the difference between CFRA and NPLA regarding continuity of leave in order to prevent confusion.

We suggest that this proposed section state, “(a) CFRA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period. ***This section is not applicable to leave under the NPLA.***”

The same comments apply to proposed Sections 11090(c)(3), 11090(c)(4), 11090(d), 11090(e)(2), 11090(e)(3), and 11090(e)(4).

Additionally, proposed Section 11090(e)(4) misstates the law since NPLA is unpaid job protected leave. The reference to pay for NPLA is legally inaccurate and should be changed.

Council response: This is a repeat comment that was addressed above with the exception of the final paragraph. With respect to section 11090(e)(4), this regulation does not imply that NPLA leave (or CFRA leave) is paid. Rather, it addresses the logistics surrounding salary deduction for incremental leave or a reduced work schedule in the context of exempt employees that are not paid on an hourly basis.

#### **Section 11090(b):**

Comment: This proposed section discusses how CFRA and FMLA may run concurrently. Employers who employ between 20 and 49 employees are merely governed by NPLA—these employers are not governed by CFRA or FMLA because those statutes only apply to employers with 50 or more employees. Thus, NPLA, CFRA and FMLA do not run concurrently. However, the reference to NPLA creates a presumption that it does. This section needs to be revised in order to clarify this distinction.

A deletion of “***or NPLA***” and the simple addition of “***This section is not applicable to leave under the NPLA***” would provide necessary clarity to employers.

Council response: The NPLA is appropriately excluded from the beginning of the paragraph addressing concurrent leave, but appropriately included later in the paragraph since the rules surrounding determination of the 12-week leave entitlement in a 12-month period are equally applicable to NPLA coverage determinations.

***PUBLIC HEARING COMMENTS MADE APRIL 4, 2018 [Government Code Section 11346.9(a)(3)].***

Melissa Patack of the Motion Picture Association of America, Doug Boney of IATSE, and Sarah Glenn-Leistikow of the Center for Employment Opportunities (representing her organization as well as the National Employment Law Project's coalition) commented on the text originally noticed to the public. They all submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

***PUBLIC HEARING COMMENTS MADE JUNE 21, 2018 [Government Code Section 11346.9(a)(3)].***

Will Abernathy of Morgan, Lewis, & Bockius, Eva DeLair of Legal Services for Prisoners with Children (representing her organization as well as being a part of the National Employment Law Project's coalition), and Beth Avery of the National Employment Law Project commented on the text noticed for the first 15-day comment period. They all submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

***PUBLIC HEARING COMMENTS MADE AUGUST 17, 2018 [Government Code Section 11346.9(a)(3)].***

Noah Lebowitz of the California Employment Lawyers Association (representing his organization as well as the National Employment Law Project's coalition) commented on the text noticed for the second 15-day comment period. He submitted written comments that included all of his oral comments and additional comments, which are summarized and responded to above.

***PUBLIC HEARING COMMENTS MADE OCTOBER 19, 2018 [Government Code Section 11346.9(a)(3)].***

No one commented on the text noticed for the third 15-day comment period at this meeting.

***PUBLIC HEARING COMMENTS MADE DECEMBER 10, 2018 [Government Code Section 11346.9(a)(3)].***

No one commented at this meeting. There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council voted 6-0 to submit this draft to the Office of Administrative Law as the final version of the regulations.