ATTACHMENT C

Fair Employment and Housing Council
Request for Public Input Regarding Reasonable Accommodations for Associational Disabilities Under the Fair Employment and Housing Act

Date of Request: December 4, 2020
Deadline to Submit Input in Response to Request: February 1, 2021

I. Issue Under Review

The California Fair Employment and Housing Council is seeking input on the question of whether an employer has a duty to engage in an interactive process with, and provide reasonable accommodation for, an employee on account of the employee's association with a person who has a mental or physical disability. This Request does not express any opinions or legal interpretations of the Council and is only meant to solicit input on the questions asked.

II. Summary of the Law

The Fair Employment and Housing Act (FEHA) requires a covered employer to reasonably accommodate the known physical or mental disability of an employee or applicant, unless an exception applies. Gov. Code § 12940(m). The characteristics protected by FEHA, such as disability, "include[] a perception that the person has any of those characteristics or that the person *is associated with* a person who has, or is perceived to have, any of those characteristics." Gov. Code § 12926(o) (emphasis added). Recently, the Court of Appeal for the Second Appellate District stated in *dicta*, and one federal district court has held, that FEHA requires employers to reasonably accommodate an employee who associates with someone with a disability, which we refer to as the "Duty to Reasonably Accommodate Associational Disability." The duty to provide reasonable accommodation for associational disability – such as a particular work schedule for a non-disabled employee who cares for a disabled child or parent – would be in addition to an employer's obligation not to discriminate against an employee on account of their association with a person who has a mental or physical disability.

III. Topics on which the Council Is Seeking Public Input

The Council welcomes input on the applicability of FEHA's interactive process and reasonable accommodation requirements to associational disability, and the following questions are of particular interest. Questions 2 through 6 assume that FEHA obligates employers to accommodate associational disabilities and to engage in the interactive process regarding requests for such accommodations.

1. Does the FEHA require employers to engage in an interactive process with, and provide reasonable accommodation for, employees who do not themselves have a disability but who associate with a person who has a mental or physical disability? Why or why not?

2. Should there be a limit on the types of relationships that would warrant an accommodation for an associational disability? For example, should the protection be limited to an employee's family members, should the protection be

limited to “close and enduring relationships,” or should the scope of a qualifying association be broader or narrower? What is the legal basis for any such limitation?

3. Would the employer be permitted to ask for proof that the person requesting the accommodation does, in fact, have a qualifying association with the person with the disability? If required, what type of proof would or would not suffice to make such a showing?

4. How would the interactive process operate between the employer and employee who is requesting reasonable accommodation for an associational disability? How would it be similar to or different from an interactive process between an employer and an employee with a disability?

5. Would the employer be permitted to ask for proof that the person with whom the employee associates has a condition that is cognizable as a disability under FEHA? Would such proof be the same as that which applies to employees who request an accommodation for their own disability?

6. Must the person with whom the employee associates have an actual disability, or can it be a “perceived” disability? If so, whose perception is determinative? And, what type of proof may the employer require with respect to the perceived disability of the employee’s associate?

7. What other topics should the Council consider in evaluating the applicability of FEHA’s interactive process and reasonable accommodation requirements to associational disability?

IV. Relevant Statutory and Judicial Background

A. FEHA prohibits discrimination on the basis of disability and imposes a duty on employers to engage in an interactive process and to provide reasonable accommodations, and bars retaliation.

Mental disability is defined in Government Code section 12926(j), and physical disability is defined in Government Code section 12926(m). Both definitions of disability include “[b]eing regarded or treated by the employer . . . as having, or having had, any [mental or physical] condition that makes achievement of a major life activity difficult.” Gov. Code §§ 12926(j)(4) & 12926(m)(4). Further, Government Code section 12926(o) states that disability and each of FEHA’s other protected bases “includes a perception that the person has any of those characteristics or that the person *is associated with a person* who has, or is perceived to have, any of those characteristics.” (emphasis added). We refer to this type of disability as “associational disability.”

FEHA provides separate causes of action for **(1)** discrimination against employees because of their mental or physical disabilities (Gov. Code § 12940(a)); **(2)** the failure to provide reasonable accommodations for the known disabilities of employees (Gov. Code § 12940(m)(1); *see also* Gov. Code § 12940(a)); **(3)** the failure to engage in the interactive process to determine an effective reasonable accommodation, if any (Gov. Code § 12940(n)); and **(4)** retaliation or discrimination against an employee for requesting an accommodation

(Gov. Code § 12940(m)(2)). The elements of a cause of action alleging discrimination are similar, but not identical, to those for a cause of action alleging the failure to provide reasonable accommodation. An accommodation cause of action does not require proof that the employee's disability resulted in any other adverse employment action because the failure to accommodate violates the statute "in and of itself." *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.

B. Under FEHA, the duty to provide reasonable accommodation applies to employees with actual disabilities and those who are "regarded as" having a disability.

California courts have held, under FEHA, employers must engage in the interactive process with employees who are perceived as having a disability and provide reasonable accommodation for such employees, unless providing accommodation would create an undue hardship. *Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 55-62 (*review denied*); *Moore v. Regents of the University of California* (2016) 248 Cal.App.4th 216, 242-243.

C. FEHA has been read to include a duty to reasonably accommodate associational disability.

Although it is unsettled in California whether employers have a duty to provide reasonable accommodation for employees on the basis of their association with a person with a disability, the Second District Court of Appeal addressed this issue *in dicta* in *Castro-Ramirez v. Dependable Highway Express Inc*. (2016) 2 Cal.App.5th 1028 (*review denied*). As the court explained:

> We first observe that no published California case has determined whether employers have a duty under FEHA to provide reasonable accommodations to an applicant or employee who is associated with a disabled person. We acknowledge that the reasonable accommodation subdivision of section 12940 does not expressly refer to persons other than an applicant or employee. The pertinent language makes it an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (§12940, subd. (m)(1).) But we do not read subdivision (m)(1) in isolation; instead we read parts of a statutory scheme together and construe them in a manner that gives effect to each. And under section 12926, subdivision (o), "'physical disability'... includes a perception" that a person "is associated with a person who has, or is perceived to have," a physical disability. In other words, association with a physically disabled person appears to be itself a disability under FEHA. Like the many other definitions set forth in section 12926, this definition of a physical disability applies "in connection with unlawful practices [under FEHA], unless a different meaning clearly appears from the context." (§12926.) Accordingly, when section 12940, subdivision (m) requires employers to reasonably accommodate "the known physical . . . disability of an applicant or employee," read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person. (*Id.* at pp. 1038-1039.)

The Court's *dicta* prompted the dissenting justice to write a rebuttal:

> I recognize the literal differences in wording, but I cannot agree that FEHA may be construed as declaring that a person with no disability ipso facto becomes "disabled" by association with a disabled person. I see no material difference in the purpose or effect of the two statutes so far as their associational disability discrimination provisions are concerned. FEHA, of course, is broader than the ADA. . . . But in many ways FEHA is similar to the ADA, and we should not construe FEHA as departing from the ADA without a clear legislative statement of intent to do so. (*Id.* at pp. 1057-58)

The employer petitioned for review, which the Supreme Court denied.

In addition to *Castro-Ramirez*, at least one federal district court has held that FEHA imposes a duty to reasonably accommodate associational disability, adopting the reasoning of *Castro-Ramirez* in the context of denying a motion to dismiss. *Castro v. Classy Inc.*, No. 3:19-cv-02246-H-BGS, 2020 WL 996948 (S.D. Cal. Mar. 2, 2020).

V. Directions to Submit Input

The deadline to submit input in response to this Request is February 1, 2021. Written submissions may be either emailed to FEHCouncil@dfeh.ca.gov or mailed to:

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