FAIR EMPLOYMENT AND HOUSING COUNCIL PROPOSED MODIFICATIONS TO EMPLOYMENT REGULATIONS REGARDING CRIMINAL HISTORY

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF
REGULATIONS Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapters 2. Discrimination in Employment
Article 2. Particular Employment Practices

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status of any person. The Fair Chance Act (Gov. Code § 12952), which is part of FEHA, specifies limitations on employers who seek to consider criminal history information.

Pursuant to Government Code section 12935(a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subsection, as applicable, when the proposed change goes beyond mere clarification. Some changes are not explained below as they are non-substantive, including correcting grammatical and formatting errors, renumbering and re-lettering provisions, deleting unnecessary citations, and eliminating jargon.

§ 11017.1. Consideration of Criminal History in Employment Decisions.

The purpose of this section is to explain the obligations and restrictions set forth by the Fair Chance Act and other provisions of the FEHA, the Labor Code, and federal law relating to the consideration of criminal history in the employment context.

§ 11017.1. Introduction

The Council proposes to add an introduction to provide an overview of the regulations and to outline the intersecting laws governing the consideration of criminal and conviction history in employment decisions. This is necessary to contextualize the rest of this section, as well as to generally provide clarity by summarizing the interaction between the Fair Employment and Housing Act (Gov. Code § 12900 et seq.), including the Fair Chance Act (Gov. Code § 12952), Labor Code § 432.7, and relevant federal law.

§ 11017.1(a) Prohibition of Consideration of Criminal History Prior to a Conditional Offer of Employment.

The Council proposes to add a heading to this subsection. This is necessary to clarify the context during which this subsection is applicable (before an employer has extended a conditional offer of employment to an applicant) and its scope (prohibits the consideration of *all* criminal history, subject to limited exceptions delineated in paragraph (a)(4)).

The Council proposes to add paragraph (a)(2). This is necessary to fully render and make more specific Government Code section 12952's prohibition on consideration of criminal history prior to a conditional offer of employment, by clarifying that an employer is prohibited from posting recruiting materials containing language which indicates that individuals with criminal history will not be considered for hire. The paragraph includes common examples of prohibited language used in job advertisements and other recruiting materials.

The Council proposes additional non-substantive changes, including reorganization of this subsection for clarity, breaking out subsection (a) into subparagraphs, and updating cross-references to reflect the correct subsections and paragraphs in accordance with the proposed reorganization of this regulation. These changes are necessary to ensure clarity throughout the regulation.

Deleted former § 11017.1(b).

The Council proposes to move former paragraphs (b)(1) through (b)(3) (and the text preceding former (b)(1) in this subsection) to subsection (d). This relocation is non-substantive and ensures clarity and continuity of the regulations. Specifically, this proposed reorganization results in subsections (a), (b), and (c), which set forth the broad prohibitions against considering criminal history and/or conviction history and exceptions thereto, preceding new subsection (d), which applies these prohibitions more specifically to labor unions, union hiring halls, and client employers.

The Council proposes to move former paragraph (b)(4) to new subsection (i). This relocation is non-substantive and clarifies that these definitions apply to all of section 11017.1 by making the definitions clearly available in one "definitions" subsection.

§ 11017.1~~(c)~~(b). Prohibition of Consideration of Certain Types of Criminal History.

The Council proposes to modify the heading of this subsection. This modification is necessary to clarify that the purpose of the subsection is to elucidate specific types of criminal history that an employer may never consider at any time in the employment process (pre-hire, post-conditional offer, or post-hire), even if they are permitted to consider other types of criminal history.

The Council proposes to eliminate "in California" after "Employers." This is necessary for consistency with the usage of term "employers" elsewhere in this regulation and because "employer" is defined at subsection 11008(d).

The Council proposes to add the language "prior to making a conditional offer." This addition

is necessary to clarify and emphasize that (b) applies when an employer is permitted to consider criminal history prior to making a conditional offer of employment.

The Council proposes additional non-substantive changes, including updated cross-references to reflect the correct subsections in accordance with the proposed reorganization of this regulation, to ensure clarity and correct cross-references throughout the regulation.

§ 11017.1~~(d)~~(c). Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

The Council proposes a number of changes to this subsection. These changes are necessary to clarify employers' obligations, and employees' and applicants' rights, under the Fair Chance Act.

In paragraph (c)(1), the Council proposes adding the heading "Individualized Assessments" and striking some language in subparagraph (c)(1)(A) (namely, the phrase "of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity"). These changes are necessary to enhance clarity and conciseness. In subparagraph (c)(1)(B), the Council proposes referencing the Department's online individualized assessment form (currently available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/09/Fair-Chance-Act-Sample-Forms-Packet.pdf). This reference provides specific guidance for employers regarding the process by which they can comply with the individualized assessment requirements. Employers may, but are not required to, use this form; however, the Council seeks to include specific reference to this form to facilitate and otherwise make compliance easier for employers.

In paragraph (c)(2), the Council recommends adding the heading "Notice of Preliminary Decision and Opportunity for Applicant Response." This addition is necessary to enhance the clarity of this regulation.

The Council proposes moving information in subparagraph (c)(2)(C) relating to an employer's requirement to provide an applicant with notice of the deadline by which to respond, as well as the form of transmittal of that notice, to new subparagraph (c)(2)(E), such that notice of an applicant's right to respond and notice of the deadline in which to respond are addressed in individual subparagraphs. This change is necessary to enhance clarity and emphasize each notice obligation. For similar reasons, the Council relocated the portion of paragraph (c)(2)(F) relating to the initial five-day response deadline to subparagraph (c)(2)(E). This change is necessary to avoid duplication and to add clarity by designating one subparagraph – (c)(2)(E) – to setting forth the initial deadline for an applicant's response, and a separate subparagraph – (c)(2)(F) – to setting forth the requirement that this deadline be extended if an applicant disputes the accuracy of a conviction record.

In subparagraph (c)(2)(D), the Council proposes to further elucidate, and provide additional examples of, the substance and form of evidence demonstrating rehabilitation or mitigating circumstances, which an applicant may provide a potential employer after receiving notice of the employer's preliminary decision to rescind a conditional offer due to a potentially disqualifying conviction. These additional examples are necessary to reduce confusion that, based on the Council's understanding, is common among employers, applicants, and employees as to how parties can fully participate in the individualized assessment process as

well as the types of resources that may inform the assessment.

In subparagraph (c)(2)(D)(i), the Council proposes to expand the non-exhaustive list of examples of the substance of evidence that may be indicative of rehabilitation or mitigating circumstances. In subparagraph (c)(2)(D)(ii), the Council proposes adding a non-exhaustive list of examples indicating the various forms of documentation that can reflect the evidence described in subparagraph (c)(2)(D)(i). In the Council's experience, the list includes common examples of mitigating evidence, and they are largely borrowed from the Council's housing regulations regarding the consideration of criminal history. (See Cal. Code Regs., tit. 2, § 12266(e) [listing examples of mitigating information that suggests an individual is not likely to pose a demonstrable risk].) The Council believes that the inclusion of these examples would have the same value and effect as did their inclusion in the housing regulations. The Council proposes to add the following examples to this non-exhaustive list:

Current or former participation in self-improvement efforts, including but not limited to school, job training, counseling, community service, and/or a rehabilitation program.

Information relating to an individual's former participation in self-improvement efforts, including but not limited to school, job training, counseling, community service, and/or a rehabilitation program, may be relevant mitigating evidence suggesting that the individual is not likely to commit any crime in the future and therefore that their criminal history may not have a direct and adverse relationship with the specific duties of the job that would justify denying the individual the position.

Whether the conduct arose from the applicant's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses.

Information relating to whether the conduct leading to the conviction arose from an individual's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses may be relevant mitigating evidence suggesting that the individual is not a threat to others and therefore that their criminal history may not have a direct and adverse relationship with the specific duties of the job that would justify denying the individual the position.

Whether the conduct arose from the applicant's disability or disabilities and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation.

Information relating to whether the conduct leading to the conviction arose from an individual's disability, and whether any risks related to such conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, may be relevant mitigating evidence suggesting that the individual is capable of performing their job if provided with appropriate reasonable accommodation such that their criminal history may not have a direct and adverse relationship with the specific duties of the job that would justify denying the individual the position. It is also relevant because intervening treatment for the disability or related symptoms may have mitigated or eliminated the likelihood of similar conduct occurring in the future.

The likelihood that similar conduct will recur.

In its list of examples of mitigating or rehabilitative evidence, the Council proposes also including information relating to "the likelihood that similar conduct will recur." Including this broad category within the list of examples is necessary to clarify that the other examples set forth in the list of evidence are non-exhaustive, as other information not expressly set forth in the list could constitute relevant mitigating evidence that similar conduct is unlikely to recur.

In paragraph (c)(3), the Council proposes referencing the individualized reassessment form on the department's website that employers may, but are not required to, use in the process of reaching a final decision regarding whether to rescind a conditional offer of employment after learning of a conviction. This reference is necessary to provide further clarity to employers and to better facilitate their compliance with their obligations under the Fair Chance Act. This form is also currently available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/09/Fair-Chance-Act-Sample-Forms-Packet.pdf.

The Council also proposes non-substantive organizational changes for clarity. For example, the Council proposes to transfer the text deleted from (c)(2)(C) and (c)(2)(F) into (c)(2)(E), and to clarify in (c)(2)(E)(ii) that employers may, but are not required to, offer more than five days for an applicant to respond. The Council also proposes to update cross-refences to reflect the correct subsections in accordance with the proposed reorganization of this regulation.

§ 11017.1(d). Labor contractors, union hiring halls, and client employers.

The Council proposes to move the language formerly in paragraphs (b)(1) through (b)(3) (and the text preceding (b)(1)) to subsection (d). This relocation, which is non-substantive, provides clarity and continuity.

§ 11017.1(e). Disparate treatment.

The Council proposes to replace "enumerated in" with "protected by." This non-substantive change is for consistency with the Council's more recent terminology, such as in sections 12120(e) and 12050.

§ 11017.1(f). Adverse Impact.

The Council proposes shortening the heading of this subsection and dividing this subsection into paragraphs. These non-substantive changes provide clarity and conciseness. The Council further proposes replacing "individuals" with "applicants or employees." This non-substantive change is for consistency and clarifies the applicability of this subsection.

Throughout subsection (f), the Council proposes to replace "enumerated in" with "protected by." This non-substantive change is for consistency with the Council's more recent terminology, such as in sections 12120(e) and 12050.

In paragraph (f)(2), the Council proposes expounding upon the definition of "adverse impact," rather than solely relying on references to other sources and regulations. This change is necessary to clarify without limiting the meaning of this technical term used throughout this

subsection. The proposed definition is derived from 29 C.F.R. § 1607.16(B), which defines "[a]dverse impact" as "a substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group." The Council proposes modifying this definition to reflect all the characteristics protected by the FEHA, which is necessary to fully implement the FEHA. The proposed definition "includes," rather than "means," "a substantial disparity in the rate of selection in hiring, promotion, or other employment decisions which works to the disadvantage of groups of individuals on the basis of any characteristics protected by the Act" to ensure greater consistency with the Council's definition of "disparate impact" in the housing context under subsection 12060(b).

The Council proposes to delete the word "conviction" before "statistics" in the first sentence of paragraph (f)(3). This is necessary because adverse impact liability may, but need not, rely on statistics about convictions; other types of statistics may also be relevant. The remainder of the amendments to this paragraph are non-substantive and improve clarity.

The Council proposes relocating what was previously subsection (g) to paragraph (f)(4). This relocation is non-substantive and clarifies that whether a policy or practice is "job-related and consistent with business necessity" is part of an adverse impact analysis.

In subparagraph (f)(4)(A), the Council proposes striking "criminal conviction consideration" before "policy or practice." This non-substantive change is for conciseness, as the nature of the "policy or practice" is previously described earlier in the paragraph.

In subparagraphs (f)(4)(B) and (f)(4)(D), the Council proposes to add the language "or employee" after "applicant," or "or applicant" after "employee." These additions are necessary because adverse impact liability under the FEHA can arise during the application process as well as during employment. The additions also provide greater consistency within these subparagraphs. Not mentioning employees or applicants in these subparagraphs gives the false impression as to their scope. Therefore, these additions are necessary for clarity and to fully implement the FEHA.

In subparagraph (f)(4)(D), the Council proposes including language "or otherwise denied an employment opportunity" after "screened out." This addition is necessary to clarify that individualized assessments are required not only when an employee or applicant has been "screened out" from employment but also when an employee or applicant is denied a promotion, raise, or other benefit of employment.

In subparagraph (f)(4)(D), the Council proposes referencing the individualized assessment form available on its website, which an employer may, but is not required to, use to facilitate an individualized assessment. This reference is necessary to provide further clarity, better facilitating employers' ability to comply with antidiscrimination requirements. This form is currently available at https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/09/Fair-Chance-Act-Sample-Forms-Packet.pdf.

In subparagraph (f)(4)(E), the Council proposes changing the last reference to "record" in the final sentence to "information." This change is necessary to clarify that although an employer may not consider inaccurate information in a criminal record, the employer may nevertheless consider accurate information, if any, in that same record.

The Council proposes moving language in former subsection (i) to new paragraph (f)(5). This relocation is non-substantive and clarifies that a consideration of less discriminatory alternatives is part of an adverse impact analysis.

The Council proposes additional non-substantive changes through this subsection, including updated cross-references to reflect the correct subsections in accordance with the proposed reorganization of this regulation.

Deleted former § 11017.1(i).

As explained above, the Council proposes to move section (i) of this regulation to paragraph (f)(4). This relocation is non-substantive and clarifies that consideration of less discriminatory alternatives is part of an adverse impact analysis.

§ 11017.1(h) Employers Seeking the Work Opportunity Tax Credit.

The Council proposes to add this new subsection to the regulation. This addition is necessary to clarify that an employer seeking the federal Work Opportunity Tax Credit ("WOTC") is not exempt from the FEHA or this regulation. This addition is also necessary to alleviate common confusion and to provide guidance to employers about how they may seek a WOTC without violating the FEHA or this regulation, by clarifying what types of inquiries may be made of applicants, when particular inquiries may be made, and how information obtained from those inquiries may be considered.

In paragraph (h)(1), the Council proposes to clarify that an employer may request, even before extending a conditional offer of employment, an applicant to complete required IRS Form 8850 (rev. March 2016) ("Pre-Screening Notice and Certification Request for the Work Opportunity Credit"), or a later iteration thereof. This form is for the purpose of requesting certification from a state workforce agency regarding whether a prospective employee is a member of a targeted group for purposes of qualifying for the WOTC. Currently, individuals may qualify for the WOTC on a number of bases, including but not limited to having past felony convictions, having received certain government financial assistance (including TANF, SNAP, and SSI), or being an unemployed or disabled veteran, among others. Proposed paragraph (h)(1) clarifies that an employer may not inquire as to which particular basis qualifies the applicant for the WOTC. To the extent that an applicant's completed form reflects that their basis for qualification is related to a felony conviction, subparagraph (h)(1) allows the employer to consider that information only to the extent and for the purposes prescribed by the requirements of this regulation and other applicable law. This is necessary to clarify how an employer can apply for the WOTC without violating its obligations under the FEHA and this regulation.

In paragraph (h)(2), the Council proposes to clarify that an employer may not require an applicant to complete the U.S. Department of Labor's Form 9061 (rev. Nov. 2016) ("Individual Characteristics Form (ICF) Work Opportunity Tax Credit"), or later iterations thereof, until after the employer has made a conditional offer of employment. This form is also required for WOTC application and seeks similar information to that sought through IRS Form 8850; however, this form requests more detailed information than does the IRS form. The Council also proposes to clarify that an employer may only consider that information to

the extent and for the purposes prescribed by the requirements of this regulation and other applicable law. This is necessary to clarify how an employer can apply for the WOTC without violating its obligations under the FEHA and this regulation.

§ 11017.1(i). Definitions.
As explained above, the Council proposes to move the definitions set forth in former paragraph (b)(4) to new section (i). This relocation is non-substantive and clarifies that these definitions apply throughout the regulation.

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For ease of reference, the table below sets forth the proposed reorganization of this section. Also indicated below is whether any changes were proposed in addition to moving the respective subsection or paragraph.

Subsections in Former Section 11017.1	Subsections in Proposed Modifications to Section 11017.1	Proposed substantive changes beyond movement and re-lettering/numbering?
(b)(1) – (b)(3)	(d)	No.
(b)(4)	(i)	No.
(d)	(c)	Yes; see explanation above.
(d)(2)(C)	Divided into (c)(2)(C) and (c)(2)(E)	No.
(g)	(f)(4)	Yes; see explanation above.
(i)	(f)(5)	No.
(h)	(g)	No.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

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

The proposed amendments clarify existing law without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses. Therefore, the Council has determined that these amendments will not have a significant adverse economic impact on business.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State because the regulations codify existing law into a digestible format and promote harmonious relations in the workplace without affecting the supply of jobs or ability to do business in California. Adoption of the proposed amendments is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses. The proposed amendments are not anticipated to benefit the state's environment because they do not relate to or impact the environment.