



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
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DIRECTOR KEVIN KISH

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of January 10, 2017

Minutes

Ronald Reagan State Building Auditorium
300 S. Spring Street, First Floor
Los Angeles, CA 90013

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Tim Iglesias, Councilmember
Andrew Schneiderman, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Holly Thomas, Deputy Director of Executive Programs
Brian Sperber, Legislative and Regulatory Counsel
Tim Martin, Civil Rights Fellow
Paul Kennedy, Associate Business Management Analyst

Others Present

Janet Powers, Fiore Racobs & Powers
Kelly Richardson, Richardson Harman Ober PC
Sanjay Wagle, California Association of Realtors
Heidi Palutke, California Apartment Association
Jane Win-Thu, Mental Health Advocacy Services
Michaela Mendelsohn
Marisa Diaz, Legal Aid at Work
Jonathan Cherne, Church-State Council

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:05 a.m. and DFEH Civil Rights Fellow Tim Martin conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum announced that the Council meeting will be webcast live and that a video of the meeting will be available later on the Council's YouTube channel and the DFEH website. He notified members of the public that they can participate in the meeting by emailing the Council. He acknowledged the presence of DFEH staff

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

ANDREW SCHNEIDERMAN
COUNCILMEMBER

DARA L. SCHUR
COUNCILMEMBER

members Holly Thomas, Brian Sperber, Tim Martin, and Paul Kennedy. He invited guests in attendance to introduce themselves.

III. Review of the Agenda

Chair Mandelbaum noted that hard copies of the agenda and associated materials were available for people in attendance and that copies are also available on the Council's webpage. He then reviewed the agenda for the meeting. He acknowledged former Councilmembers Perez and Franklin Minor, who completed their terms of service, and thanked them for their service.

IV. Approval of the Minutes

Attachment A: Minutes from the November 15, 2016 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the November 15, 2016 Meeting. He noted that during that meeting, the Council considered Further Modifications to the Text of Proposed Regulations Regarding Gender Identity and Expression, received a presentation from Allison Elgart of the Equal Justice Society, considered Additional Modifications to the Text of Proposed Regulations Regarding Criminal History in Employment Decisions, and considered and adopted for public comment proposed Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information. Chair Mandelbaum invited comments pertaining to the minutes from the Council and the public. There being no comments, the Council approved the minutes by unanimous vote of all voting Councilmembers.

V. Councilmembers' Reports

Chair Mandelbaum invited the Council to report any updates since the last meeting.

Councilmember Schur noted that AB 1732 passed. She stated that it is a law requiring all single-user toilet facilities in any business establishment, place of public accommodation, or government agency to be all-gender. She noted that it appears consistent with the thinking behind the Council's proposed regulations concerning gender identity and gender expression and she wants to ensure that the final regulatory language is consistent with it.

VI. Department of Fair Employment and Housing Report

Director Kish clarified a statement that he had made during an exchange with former Councilmember Franklin Minor during the Council's November 15, 2016 meeting. He had suggested that landlords have a duty of care under a negligence theory, which could have been interpreted to erroneously suggest that landlords could be held liable under a negligence theory for failing to conduct a criminal background check. He explained that a 2007 California Supreme Court case, *Castaneda v. Olsher*, made clear that landlords do not have a general duty to investigate or inquire into criminal history. He thanked DFEH Deputy Director of Executive Programs Holly Thomas for noticing the issue with his previous comment.

Director Kish stated that as of January 1, 2017, the DFEH's powers have been extended to include civil prosecution of human trafficking and enforcement of Government Code section 11135, which prohibits discrimination in government-funded programs and activities. He noted that the DFEH website now includes pages concerning these topics, including complaint forms. He noted that the page concerning government-funded programs also includes information on pre-existing requirements regarding state contractors, including a complaint form and an easy method for state agencies to comply with their duty to notify the DFEH of any award of contract over \$5,000.

Director Kish thanked former Councilmembers Perez and Franklin Minor for their work on the Council. He noted that there are two open positions on the Council, anyone can apply, and application information is available on the Governor's website. He encouraged anyone who decides to apply to contact the Council for more information.

Chair Mandelbaum noted that because the court reporter and Councilmember Brodsky were not yet present, the Council would postpone the next two items on the agenda and proceed to Nonsubstantial Modifications to Text of Consideration of Criminal History in Employment Decisions Regulations.

VII. Consideration of Nonsubstantial Modifications to Text of Proposed Regulations Concerning the Use of Criminal History in Employment Decisions

Attachment F: Nonsubstantial Modifications to Text of Proposed Consideration of Criminal History in Employment Decisions Regulations

A. Discussion by Council

Chair Mandelbaum noted that he and Councilmember Schneiderman had reviewed the most recent public comments and did not believe that they warranted any additional substantive changes. He stated that as of January 1, 2017, AB 1843 amended Labor Code section 432.7 by adding juvenile court crimes and arrests to the list of prohibited criminal history information. He stated that he and Councilmember Schneiderman had added identical language to proposed Section 11017.1(b) and viewed it as a nonsubstantial change, not requiring an additional public comment period. He noted that any change requiring an additional public comment period may prevent the Council from meeting its deadline for submitting the proposed regulations to the Office of Administrative Law for approval, and thereby delay the regulations' effective date considerably. He invited comment from the other Councilmembers, who had none.

B. Public Comment

There was no public comment.

C. Action by Council

The Council unanimously approved the text, authorized DFEH staff to submit it to the Office of Administrative Law, and authorized DFEH staff to make non-substantial changes if required by the Office of Administrative Law.

VIII. Consideration of Additional Modifications to Text of Proposed Regulations Regarding Transgender Identity and Expression

Attachment E: Additional Modifications to Text of Proposed Regulations Regarding Transgender Identity and Expression

A. Discussion by Council

Councilmember Brodsky highlighted changes she and Councilmember Perez had made as the members of the subcommittee on this topic in response to the most recent public comments.

Section 11030(b): The subcommittee added “or the perception of such appearance or behavior” to conform to statutory text. It changed “sex at birth” to “sex assigned at birth” to promote consistency with language universally used on this topic.

Section 11030(c): The subcommittee changed “self-identification” to “internal understanding” in response to comments explaining that the latter is a better description of gender identity. It added “or the perception of a person’s gender identity” and changed “sex at birth” to “sex assigned at birth” for the same reasons it made similar changes to Section 11030(b).

Section 11034(h): The subcommittee added cross-references to Sections 11016(b)(1) and 11032(b)(2), which make it clear that inquiries that directly or indirectly identify an individual on the basis of protected characteristics, including sex, cannot be made. It added language stating that such inquiries are unlawful. It added language stating that an employer may request such information “solely” on a voluntary basis “[f]or recordkeeping purposes in accordance with [Section] 11013(b).” Finally, it removed language stating that this permission is “similar to other protected categories” because it is identical, not similar.

Section 11034(h)(1): The subcommittee deleted the prior language in its entirety because it was confusing and replaced it with clearer language.

Councilmember Brodsky asked the Council to consider removing the U.S. Department of Labor’s Occupational Safety & Health Administration’s guidelines from the note of authorities cited. Chair Mandelbaum and DFEH Legislative and Regulatory Counsel Brian Sperber clarified that the guidelines had already been removed, as indicated by italics.

Councilmember Iglesias highlighted a comment from Transgender Law Center, which pointed out that the note of authorities cited in support of proposed Section 11034 misspells “Tamara” as “Tamra.” Councilmember Brodsky agreed that the spelling should be changed.

Councilmember Schur stated that Transgender Law Center had made additional comments that seemed appropriate to her. Councilmember Brodsky responded that the only change suggested by the Center and not incorporated by the subcommittee was the Center’s suggested definition of “sex stereotype.” She explained that the subcommittee believed the suggested definition was overly specific. Councilmember Schur noted that the Center had also suggested inserting “sex-segregated” in proposed Section 11030(g). Councilmember Brodsky responded that she thinks the insertion is unnecessary and potentially limiting. Councilmember Schur noted that the Center had also made some suggestions regarding health plans. Councilmember Brodsky clarified that the Council had discussed those suggestions at its last meeting.

Chair Mandelbaum asked if the subcommittee had considered the new law, mentioned by Councilmember Schur earlier in the meeting, concerning single-user restroom facilities. Councilmember Brodsky responded that the subcommittee anticipated it and that the proposed regulations are consistent with it.

Chair Mandelbaum suggested revising Sections 11034(g) and 11034(h)(5) in light of the proposed regulations’ inclusion of both internal understanding and external perception in the definitions of “gender identity” and “gender expression.” Those sections currently require certain employer actions to be consistent with an employee’s gender identity or gender expression. However, in situations where internal understanding and external perception conflict, an employer’s action may be consistent with one and inconsistent with the other. Chair Mandelbaum suggested clarifying that in this context, the regulations require action consistent with the employee’s internal understanding (not external perception). Director Kish noted that he believes it unlikely to be a problem in practice, but it could be solved by replacing “gender identity” and “gender expression” in these sections with “the person’s internal understanding of their gender.” Councilmember Iglesias agreed that the problem is unlikely in practice and that Director Kish’s suggestion clarifies the problem without creating new ones. Councilmember Schur agreed that the problem is unlikely in practice and expressed concern that adding “internal understanding” creates more ambiguity because, unlike “gender identity” and “gender expression,” it is

not clearly defined in the regulations. She also stated that a similar issue likely exists elsewhere in the regulations. Chair Mandelbaum stated that he is comfortable leaving the sections as proposed, and noted that there will be another public comment period.

B. Public Comment

There was no public comment when Chair Mandelbaum originally invited comment.

After the Council reconvened from its lunch break, it heard comment on this topic from Michaela Mendelsohn. Ms. Mendelsohn introduced herself as the CEO for over forty years of two medium-sized companies that she started, a member of the Los Angeles Workforce Development Board, a member of the board of directors of the Trevor Project, and founder of the California Trans Workplace Project. She distributed materials to the Councilmembers, including a training video hosted by actor Jeffrey Tambor of *Transparent*. She stated that she had no negative comments on the proposed regulations. She described some of her experience hiring transgender women and some of her organization's work educating employers on the law and on creating a trans-inclusive workplace. She cited research published by the Williams Institute, finding that there are 220,000 transgender adults in California and that 4.5% of people ages 12-17 identify as gender nonconforming, in support of the prediction that workplaces will become much more gender-diverse in the future. She stated that there is a trend towards allowing applicants to identify as gender nonconforming rather than as male or female on employment applications. She expressed concern about how to spread awareness of the proposed regulations, noting that they may be of limited use if nobody knows about them. Chair Mandelbaum thanked Ms. Mendelsohn for her work and her testimony. He commented that the Council is not well equipped for disseminating regulations, particularly due to its lack of staff. He mentioned that the State Bar Labor and Employment Executive Committee, on which he serves, is starting to dedicate a fair amount of resources to educating employers, and suggested that the Committee would be interested in collaborating with Ms. Mendelsohn. He commented that it is important for her organization to adapt its training to different workplace contexts, as it seems the organization is doing. Councilmember Schur thanked Ms. Mendelsohn for her important work.

C. Action by Council

The Council unanimously adopted the additional modifications, with the spelling correction mentioned above.

Chair Mandelbaum confirmed that the court reporter was not yet present. The Council therefore continued to postpone the public hearing on Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals and moved onto Councilmember Iglesias's presentation.

IX. Presentation Regarding the Background and History of Residential Occupancy Standards

Attachment H: PowerPoint re Background and History of Residential Occupancy Standards

Councilmember Iglesias began his presentation by drawing some key distinctions. A residential occupancy standard is a definition of the space needed for a person to legally occupy a housing unit. This is different from definitions of family often used in planning and zoning codes with regard to single-family zones. A government residential occupancy standard is usually in the form of minimum required square footage per person and intended to preserve health and safety. A private residential occupancy standard is usually in the form of number of persons per unit or bedroom. As a form of regulation, residential occupancy standards began with local government. The first was in New York City and motivated both by a desire to preserve residents' health and safety and to control their behavior.

Governmental residential occupancy standards have rarely been enforced against homeowners—they have more often been enforced against renters. California has enacted the Uniform Housing Code, which sets forth a residential occupancy standard. Many other states use different basic standards. California and the Uniform Housing Code allow local governments to impose more restrictive residential occupancy standards if they meet certain requirements.

The residential occupancy standard issue was complicated by 1988 Fair Housing Act amendments that added familial status as a protected characteristic. These amendments allowed tenants to argue that a private residential occupancy standard that is more restrictive than the relevant government residential occupancy standard discriminates on the basis of familial status.

Enforcement of a residential occupancy standard may harm tenants by forcing them to reconfigure their desired household configuration, to purchase more housing, to change location, or to accept lower-quality housing. These possibilities also entail additional search time and costs. Tenants may also suffer discrimination. The most often harmed group is families with children, particularly larger families, nontraditional families, and blended families, which are statistically more likely to consist of people of color.

Housing providers' concerns related to residential occupancy standards include concerns about harm to property, such as wear and tear, nuisance, overwhelmed building systems, increased management costs, and potential liability. Other tenants and neighbors may share some of those concerns. Local governments have raised health and safety concerns and the concern that public services and infrastructure cannot meet the needs of overcrowded housing. Councilmember Iglesias clarified the manner in which the word “overcrowding” is used differently in housing needs studies, in other disciplines such as sociology and medicine, and in informal usage.

Councilmember Iglesias identified reasons why this issue has growing significance in California and why the Council is justified in at least considering addressing the issue by regulation: more intergenerational households and “boomerang kids,” blended households and divorced parents with partial custody, a predicted increase in Latino and Asian households, increased “doubling up,” and micro-housing.

Conflicts about governmental residential occupancy standards usually arise due to enforcement of a housing code violation triggered by a private complaint. The Fair Housing Act includes an exemption for reasonable governmental residential occupancy standards. The meaning of “reasonable” is unsettled.

Conflicts about private residential occupancy standards usually arise due to refusal to rent, eviction, or enforcement of a common interest community rule. In informal guidance and enforcement activity, HUD has applied the reasonableness standard from the governmental context to the private context. There has been no formal HUD rulemaking on private residential occupancy standards. But HUD has issued residential occupancy standard guidance for public housing and certain other HUD-assisted housing. HUD’s current standard, which it has been using as its intake standard since 1998, is set forth in the “Keating Memorandum.” Congress directed HUD to use that standard. The Keating Memorandum provides that a two-people-per-bedroom standard is reasonable as a general rule, but the reasonableness of any standard is rebuttable. It sets forth various factors to consider in assessing reasonableness.

The case law on residential occupancy standards is messy. Some cases confuse the disparate impact and disparate treatment standards. Disparate impact cases exhibit uncertainty over statistics and burden-shifting standards, as well as what constitutes a sufficient defense. The Keating Memorandum standard is not a liability rule because no court has adopted it as such, though courts and Administrative Law Judges have used it for guidance. Councilmember Iglesias explained ways in which cases have applied the Keating Memorandum factors. He also identified several DFEH precedential cases involving private residential occupancy standards.

DFEH's current intake standard for acceptance of familial status complaints related to residential occupancy standards was articulated in a January 31, 1989 notice. It uses the well-known "two-people-per-bedroom-plus-one" standard. If a complaint is accepted, a non-exhaustive list of factors is consulted to determine if there has been a violation. The factors overlap with those in the Keating Memorandum, but are somewhat distinct.

Councilmember Iglesias invited questions. There being none, the Council adjourned for a five-minute break and reconvened at 11:43 a.m. for the public hearing.

X. Public Hearing: Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

Attachment B: Notice of Proposed Rulemaking

Attachment C: Initial Statement of Reasons

Attachment D: Proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

A. Introduction

Chair Mandelbaum confirmed that the court reporter was present and started the public hearing at 11:43 a.m. He reintroduced the Council members and stated that the purpose of the public hearing was to receive public comment regarding the Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals. He noted that the regulations are slated to appear in the California Code of Regulations, title two, sections 11098.1 through 11098.6 and 11098.23 through 11098.30. He noted that Attachment D consisted of copies of the proposed amendments, which were also available immediately outside of the meeting room and on the Council's webpage. He noted that the Notice of Proposed Rulemaking and the Initial Statement of Reasons were reflected in Attachments B and C, respectively.

Chair Mandelbaum stated that the Council was holding the hearing pursuant to a public rulemaking process and that it had noticed the hearing more than 45 days ago. He continued that, pursuant to that notice, the Council would take testimony on the proposed regulations and accept written comments on the proposed regulations until 5:00 p.m. (January 10, 2017), which could be transmitted to the Council via email or by mail care of DFEH Legislative and Regulatory Counsel Brian Sperber. He asked anyone who had brought written copies of comments and who did not intend to separately submit them to give copies to Mr. Sperber before the 5:00 p.m. deadline. He stated that anyone who testified or submitted written comments would receive a copy of changes or amendments and have a 15-day period in which to submit written comments if the Council made any further changes to the proposed amendments during the rulemaking process. He stated that the Council will consider all comments and will respond to each in writing, which will become part of the rulemaking record.

Chair Mandelbaum announced that the hearing was being transcribed by a certified court reporter and that the transcript of the hearing would be part of the Council's rulemaking record. He proceeded to describe the procedure for providing testimony and asked if anyone had questions. There being no questions, he invited public comment.

B. Public Comment

Testimony of Janet Powers, of the law firm Fiore Racobs & Powers

Ms. Powers noted that she had submitted written comments. She stated that she was also providing input on behalf of Robert Riddick, the president of a large community in the Inland Empire and a certified community association manager. She emphasized that community associations are different from other kinds of housing

providers and commended Councilmember Schur for her knowledge of this issue and the work she had done. She also commended Councilmember Iglesias for his presentation on residential occupancy standards.

Ms. Powers stated that assistive animals have been one of the biggest challenges for common interest developments in recent years. She stated that community associations have a very different government structure than other housing providers – residents elect volunteers to sit on a board of directors. She stated that most of these entities are incorporated and required to comply with the California Corporations Code and the Davis-Sterling Common Interest Development Act. She stated that associations are willing to grant a request for an assistive animal as a reasonable accommodation for a disability, without asking for a diagnosis or other details, if the resident provides reliable verification of a disability and of a nexus between the disability and the requested animal. She identified “the faker” as the greatest problem with such requests and stated that rampant abuse is occurring. For example, associations are seeing a proliferation of requests for exotic assistive animals, most commonly (multiple) poultry. They are also faced with many requests for a single resident to be allowed multiple assistive animals, even though some units are very small. She stated that community associations need very specific, detailed regulations that include as much information and as many examples concerning the request, verification, and interactive processes as possible, particularly to the extent that they take common interest developments into consideration. Such regulations would enable people like her to point volunteer directors and their community managers to specific portions of the regulations that help them work through the processes. She indicated that such guidance is important because at least twenty-five percent of associations statewide are self-managed, meaning they are run by volunteers who lack professional assistance on day-to-day operations and who often also lack education on the law and the ability to hire counsel. She stated that the community association industry is willing to educate the Council, DFEH staff, or anyone else about associations and how they differ from other housing providers. She described a recent presentation on the topic of assistive animals by DFEH Senior Staff Counsel Gregory Mann, and stated that she believes similar communication will serve everyone well in the future.

Councilmember Schneiderman thanked Ms. Powers for her comments and noted that the issue of eliminating fraudulent requests for assistive animals as an accommodation for a disability may be beyond the purview of the Council’s regulations.

Testimony of Kelly Richardson, of the law firm Richardson Harman Ober PC

Mr. Richardson introduced himself as an attorney practicing in Southern California, currently representing hundreds of common interest developments of various sizes. He mentioned that he writes a newspaper column in which he tries to highlight fair housing issues in Southern California, and that he is a member of the California Association of Realtors.

Proposed Section 11098.4(a)(1)(C)

Mr. Richardson urged caution in applying standards or reasoning from the employment context to the housing context because housing providers are more limited than employers in their ability to remedy misconduct. He highlighted the proposed language imposing liability for failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. He stated that the proposed regulation omits language in a recent HUD regulation that limits liability to situations where the housing provider has the power to correct the discriminatory conduct. He asked the Council to consider adding such language to the proposed regulation. He then highlighted the proposed subsection’s language stating that a relevant duty can be derived from bylaws or other rules of a homeowners association, condominium, or cooperative. He stated that the term “homeowners association” is not recognized in the California Civil Code, which instead refers to a “common interest development” (he mentioned that the term “homeowners association” is referenced a few times in the Civil Code and perhaps the Business and Professions Code, but stated that these are typographical errors). He noted that the Civil Code identifies four varieties of common interest development, and that a community apartment (one of the four varieties) could

argue that the current proposed regulation does not apply to it because it is not mentioned. He suggested revising the proposed regulation to mention the four varieties of common interest development.

Proposed Section 11098.4(b)

Mr. Richardson suggested that because the provision imposes liability even in the absence of knowledge of the discriminatory conduct, it may impose greater liability on housing providers than is imposed on employers in comparable situations. He opined that it would be unjust to hold members of a common interest development's board of directors liable for conduct of which they were unaware. He stated that the issue is even more difficult with regard to a tenant's harassment of another tenant, particularly where the board of directors has no evidence to corroborate tenants' conflicting allegations. He stated that with respect to such situations, he currently advises boards of directors that it is not their duty, in the absence of corroborating evidence or an effect on the broader community, to determine which tenant is right. He suggested that the proposed regulation, if enacted, might lead the board of directors to penalize a tenant in such a situation, even without corroborating evidence, to avoid the risk of being sued. He suggested considering these issues and perhaps adding clarity, including clarity with respect to whether the regulation would impose vicarious liability on members of the board of directors.

Councilmember Schur stated that because the proposed regulation imposes vicarious liability only for the person's agents or employees, she does not understand it to extend to tenant-versus-tenant conduct. She asked Mr. Richardson to explain why he believed it extended to such conduct. Mr. Richardson responded that in HUD's responses to public comments on its regulation that became effective October 14, 2016, HUD indicated that its regulation applied to tenant-versus-tenant conduct. He suggested that if the Council is not following HUD's lead on this issue and wants to make sure that tenant-versus-tenant conduct is not included, the regulation should say that it is not included.

Councilmember Brodsky commented that she thinks the source of potential liability for tenant-versus-tenant conduct is proposed Section 11098.4(a)(1)(C). She asked Mr. Richardson if he has a proposal regarding what would be appropriate preventative or corrective action regarding third-party misconduct of which the person knew or should have known. Mr. Richardson noted that the public comments to HUD's recent regulation raised the issue that a common interest development may not be able to take corrective action regarding tenant-on-tenant conduct, but HUD did not adequately address the issue. He opined that the regulations may be going too far if they impose liability for tenant-versus-tenant or third-party-versus-tenant conduct, particularly because the regulations may generate private litigation. Councilmember Schur suggested that because the regulation imposes liability only for failure to fulfill a duty, it would not impose liability for tenant-versus-tenant conduct in the absence of a written provision in the bylaws or another document imposing a duty regarding such conduct. Mr. Richardson respectfully disagreed because the proposed regulation omits language limiting liability to situations where the housing provider has the ability to correct or prevent the conduct. Director Kish asked if adding such language would solve the problem. Mr. Richardson responded that it would help dramatically. Director Kish commented that nothing the Council can do can prevent lawsuits. He further stated that HUD has commented on the proposed regulations, that it will continue to do so, and that the Council can only deviate from what HUD has done if it convinces HUD that the deviation is justified. He further stated that he is committed to offering plain English guidance that he hopes will be helpful to people in the situations discussed, but the Council must first finalize the regulations.

Mr. Richardson suggested defining the "person" as the corporation or as the managing agent and clarifying that "person" does not include an individual member of a board of directors. Councilmember Schur asked if other legal provisions already make it clear that because the board of directors acts as an entity, individual board members would not be liable. Mr. Richardson suggested making this explicit in the regulations, predicting that individual board members will be named as defendants in lawsuits.

Proposed Section 11098.5(a)(2)

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Mr. Richardson noted that application of this provision to common interest developments may contradict language in the Davis-Sterling Act.

Proposed Section 11098.5(b)(1)

Mr. Richardson asked if there is a safe harbor for an association that cannot confirm that the prohibited conduct occurred. He stated that the absence of such a safe harbor is an issue, even if it is implied.

Proposed Section 11098.5(b)(2)

Mr. Richardson suggested that holding a common interest development liable for visual harassment as defined in this provision may conflict with the common interest development's obligation to respect a resident's speech rights under Civil Code section 4170.

Proposed Section 11098.27

Mr. Richardson stated that there is rampant abuse related to assistive animals. He encouraged the Council to consult the psychiatric or mental health community regarding which animals are typically approved as assistive animals. He stated that there is a need to define assistive animal with more specificity in terms of species. He suggested adding a provision to the proposed regulations that would specify that an assistive animal is not a reasonable accommodation if the animal is a nuisance. He explained that the current proposal does not cover all varieties of nuisance because animals can be a nuisance in ways that do not pose a direct threat to health or safety or cause substantial damage to property, such as excessive barking. Mr. Richardson expressed approval of proposed Section 11098.27(g).

Proposed Section 11098.30(e)(3)

Mr. Richardson suggested deleting this section, reasoning that it renders the definition of "qualified healthcare provider" so broad that it effectively destroys the disability verification requirement. Director Kish asked if the subsection represents HUD's enforcement position and, if so, if it would be helpful to delete it. Mr. Richardson responded that the standard does not serve people with disabilities because people with disabilities should see health care providers who are qualified to give professional opinions. If the section is not deleted, its inclusion would destroy the significance of requiring verification for disability because people could obtain verification from unconventional or unreliable sources and could abuse the right to disability accommodations.

Councilmember Schur commented that some people with disabilities find some supports more useful for their mental health issues than those recommended by traditional medical establishments, and that people need to be careful about saying what people with disabilities need or do not need. Mr. Richardson responded that, assuming the standard in section (e)(3) will have broader application than in the assistive animal context, proper verification is important to ensure people with disabilities get what they need.

Chair Mandelbaum questioned whether the clarity of the law in California would be advanced by the proposal, assuming that for the most part the law at issue replicates federal law, and whether the issue is better addressed by HUD. Mr. Richardson responded that the adoption of interpretive guidance from HUD needs more dialogue and thought before it is elevated into our state regulations because it is not the law and it is unclear what HUD really meant to say by its guidance. He then thanked the Council for their patience.

Councilmember Schur thanked Mr. Richardson for educating her about condominiums and common interest developments. Director Kish mentioned that the Council does not have the power to deviate from HUD or federal law in more restrictive ways even if it disagrees with HUD.

Testimony of Heidi Palutke, of the California Apartment Association.

Ms. Palutke noted that she had submitted comments by email.

Proposed Section 11098.4(a)(1)(C)

Ms. Palutke expressed concern that it is not clear whether a landlord has to actually succeed at “prompt action” to avoid liability, and suggested adding clarifying language.

Proposed Section 11098.4(a)(2)

Ms. Palutke expressed concern that the way this proposed section is stated may delay or prevent eviction of the person who is the victim of discrimination where there are unrelated and legitimate reasons to evict that person, such as failure to pay rent. She noted that her written comments propose alternative language.

Proposed Section 11098.5(a)

Ms. Palutke expressed concern that this proposed section suggests that any allegation of housing discrimination, because it interferes with the right to live in a discrimination-free housing environment, would then also serve as a claim for harassment. She suggested deleting the second sentence.

Proposed Section 11098.5(b)(7)

Ms. Palutke stated that sometimes it is necessary to use information about the person’s membership in a protected class either to do something that is essential to the landlord-tenant relationship or to actually provide the accommodation that the tenant is asking for, and often consent is unreasonably withheld. For example, a housing provider may need to notify an employee doing necessary maintenance in a building that is officially a “no-pets” building that when they go into a specific unit, there is actually an assistive animal in that unit, and the maintenance employee will need that information whether or not the tenant consents to providing that information. Another example is when a housing provider might need to discuss a particular tenant’s disability needs when working with a contractor to re-stripe a parking lot or adjust curb cuts. Ms. Palutke stated that it would be helpful if the proposed section included some exceptions for when it is essential for the landlord to share private information about an individual with a third party.

Proposed Section 11098.6

Ms. Palutke expressed concern that law from the employment context is being inappropriately shifted into the housing context. Her suggestion is to either come up with a definition for “dominant purpose” that reflects the ordinary usage of those words in English or strike the definition that improperly refers to the language from *Harris*, leaving the courts to decide the meaning of “dominant purpose.” Additionally, she suggested that Government Code section 12955(f), which states that “nothing herein is intended to cause or permit the delay of an unlawful detainer action,” be reflected in the proposed regulation.

Proposed Section 11098.26

Ms. Palutke expressed concern that the language in this section is used differently than used in the HUD or DOJ guidance and among practitioners in this area of law. She suggested revising so there would essentially be three reasons for denying reasonable accommodation: first, when the applicant has failed to provide verification of a disability that is not obvious within a reasonable time after a request by the housing provider; second, when an applicant has failed to provide verification of the need for an accommodation that is not obvious within a reasonable time after a request by the housing provider; and third, when the original accommodation requested is not reasonable and the interactive process as defined in this section has failed to result in an alternate reasonable accommodation.

Proposed Section 11098.27

Ms. Palutke expressed concern that subpart (a), which requires that an animal that is known to be a direct threat must still be allowed if the threat can be reduced or eliminated, does not say how much the threat should be “reduced.” She suggested that the language change to say that the threat must be “eliminated or sufficiently mitigated.” Subpart (a)(3) provides that the determination of a direct threat must be based on individualized assessment of objective evidence. Ms. Palutke requested that the Council provide examples of what would be

sufficient evidence and what would not be sufficient. Subpart (b) makes the person with a disability liable for damage beyond reasonable wear and tear caused by the animal to the dwelling unit or common area. Ms. Palutke made two suggestions. First, she suggested that “reasonable wear and tear” should be changed to “ordinary wear and tear” because that is the language used by the Civil Code related to security deposits; and second, that the scope of the area where the animal might cause damage refer to the “premises” rather than the “dwelling unit or common areas” because the animal could cause damage to other areas. Ms. Palutke stated that it would be helpful for the Council to describe, in subpart (d), how the owner can impose and enforce the proposed regulation. With respect to subpart (e), Ms. Palutke requested that the Council explain its authority to require housing providers to provide reasonable accommodations for third parties, i.e. persons with whom it has no relationship and for whom it does not provide or offer any housing services. She gave an example of when a tenant’s friend has a dog and brings the dog to the tenant’s “no pet” building—how do you ensure the tenant’s friend follows the property’s assistive animal rules? In subpart (g), Ms. Palutke requested that qualified healthcare providers have specific knowledge of the patient’s medical condition based on assessment, and not operate primarily to provide certifications for assistive animals (e.g. internet certificates).

Proposed Section 11098.28

Ms. Palutke expressed concern that this section uses different terminology than what is used by HUD and DOJ. HUD talks about “undue financial or administrative burden” or “fundamental alteration of the housing program.” Using different terminology lumps together three distinct grounds for denial of an accommodation. Ms. Palutke provided revised text using HUD’s terminology so that definitions and examples can be provided for each of the reasons for denial of an accommodation. Ms. Palutke also suggested looking to HUD’s Occupancy Handbook, which provides a number of examples and guidance on determining when undue financial and administrative burdens exist. She stated that there are other grounds for denial of accommodation, referring to the discussion of direct threat under the section on assistive animals. Ms. Palutke asked that the Council be clear in this section that there can be other reasons why something is not reasonable. One example given by the HUD-DOJ statement concerns a tenant brandishing a bat, which was a violation of the property’s no-threats policy.

Proposed Section 11098.29

Ms. Palutke reiterated her earlier concern regarding subpart (d). She also stated that it would be helpful if the regulations would state when a housing provider’s duty to engage in the interactive process ends due to the applicant’s or resident’s nonparticipation and when, earlier in the context of verification an owner can deny the request due to noncommunication or extreme delay in providing sufficient verification by the applicant or resident, particularly if dealing with someone applying for housing and that person has not moved in yet. Ms. Palutke suggested rewriting the section to break it into two parts—one part dealing with the request for the accommodation and verification, if necessary, and the second part dealing with the interactive process.

Proposed Section 11098.30

Ms. Palutke stated she made a number of remarks in her written comments, but her main comment is to include a section about qualified healthcare providers with specific knowledge of the patient’s medical condition in this section, as discussed earlier, so it would apply to all accommodations.

Ms. Palutke and the Council exchanged thanks.

Testimony of Sanjay Wagle, of the California Association of Realtors

Mr. Wagle thanked the Council and said that some comments he intended to make were already made by Mr. Richardson and Ms. Palutke, so he would not repeat them.

Proposed Section 11098.30

Mr. Wagle requested that the word “reliable” be added to line 2 of proposed Section 11098.30(b) instead of just the word “documentation.” He stated that adding the word “reliable” would help make clear that not just any

documentation is sufficient. Mr. Wagle also asked that a paragraph be added on the types of proof that would themselves be insufficient, suggesting that the Council could look to page 27 of the DFEH's settlement agreement with the Irvine Company for examples. Mr. Wagle also objected to allowing verification from sources outside of the United States because it is too difficult for a housing provider to be able to assess the validity of out-of-country certifications. Housing providers would have difficulty verifying the validity of outside sources because they would have to figure out what medical standards apply, what types of physicians or other various types of healthcare providers might be available in different countries, language issues, and categories of care. Additionally, trying to get in contact with a provider outside of the United States can be very difficult. Mr. Wagle stated that putting a burden on housing providers to evaluate these various medical professionals is problematic.

Proposed Section 11098.29

Mr. Wagle stated that this proposed section borrows heavily from HUD and DOJ guidance, but it omits a very helpful and clear statement in that guidance that says an applicant or resident is not entitled to receive a reasonable accommodation unless she requests one. Mr. Wagle stated that it would be helpful to add a statement to this section that makes it clear that the onus is on the tenant to request a reasonable accommodation to get the interactive process going.

Proposed Section 11098.27

Mr. Wagle stated that a tenant should be required to inform the landlord of the need for a service animal as soon as possible to allow the interactive process to begin quickly. He also asked that the Council consider adding, after the second "if" in the first sentence of proposed subpart (a), a line stating, "if a housing provider has a reasonable belief that." He explained that a "reasonable belief" standard was adopted by the Tenth Circuit in an employment context related to direct threat analysis. He cited *EEOC v. Beverage Distributors Co., LLC* (10th Cir. 2015) 780 F.3d 1018.

Proposed Section 11098.28(a)(5)

Mr. Wagle expressed appreciation for the Council's recognition of the issue of competing disability accommodation requests, but asked that the regulation be clarified or additional guidance be provided to help housing providers determine when it is not possible to accommodate the needs of two tenants with disabilities. Mr. Wagle provided an example of one tenant who is allergic to peanuts and another tenant who needs peanuts around all the time. He suggested that in these instances the first in time tenant should get priority where there are competing disability accommodations between two tenants.

Mr. Wagle lastly wanted to explain to the Council that a large part of his request for clarity on behalf of California Association of Realtors is because many realtors are small property owners who cannot afford to hire an attorney every time there is a request for an accommodation or when matters become complicated. He stated that clearer guidance that people can act on without seeking an attorney's help would be helpful for everyone.

Further testimony of Janet Powers

Ms. Powers stated that Kelly Richardson and she realized they should offer themselves as resources for information about common interest associations. She stated that the Council should feel free to contact either of them.

Chair Mandelbaum stated that the Council will accept written comments on the proposed regulations until 5:00 p.m. that day.

Hearing Adjourned for Lunch Break at 1:34 PM and Reconvened at 2:35 PM

Upon reconvening, the Council heard public comment from Michaela Mendelsohn on its consideration of Additional Modifications to Text of Regulations Regarding Transgender Identity and Expression (see Section

VIII.B of these minutes). Chair Mandelbaum then noted that there are two items left on the agenda to address: first, the proposed national origin regulations, and second, the implications of Senate Bill 1442 (2016). But before discussing these items, the Council provided an opportunity for the Councilmembers to make additional comments regarding the housing regulations, which has been closed to the public at the end of the morning session. Councilmembers Brodsky and Iglesias provided thoughts for the subcommittee when considering the 45-day public comments.

XI. Discussion of SB 1442, New Additional Topics, and Potential Subcommittee Reassignments

Chair Mandelbaum stated that SB 1442, effective January 1, 2017, has empowered the Council to promulgate regulations to the Unruh Civil Rights Act, the Disabled Persons Act, and Government Code section 11135 et seq. Chair Mandelbaum stated that in light of these additional topic areas and the recent Council vacancies, the Council should talk about subcommittee reassignments.

Chair Mandelbaum stated that one overriding point that needs to be addressed is whether the Council should narrow the scope of what each subcommittee is tasked with, so that in the future the Council can better handle the complexities caused by changes in Council composition. He stated that the Council's first priority is to look at current projects and subcommittees that have lost a councilmember and to decide how to best move things forward. He also noted that there are two remaining subcommittees: one dealing with the national origin regulations and one dealing with the inaugural housing regulations. He asked the Councilmembers if they had thoughts on joining one of the subcommittees, or about an alternative approach.

Councilmember Iglesias asked if the Council needed to replace a member for the liaison with civil rights groups subcommittee. Councilmember Brodsky and Councilmember Schur stated that the replacement could wait.

Director Kish proposed that the Council create subcommittees to address more specific and discrete issues based on expertise and interest and to avoid having a councilmember be stuck on a subcommittee that must address a broad omnibus draft of regulations that has been debated over several years. For example, when thinking of subcommittees to address Government Code section 11135 et seq., Director Kish proposed creating a subcommittee to first decide what parts of the regulations to focus on first, then that subcommittee or another group can decide to move forward with what the subcommittee selects as its first area to focus on. Chair Mandelbaum stated that this new approach would give the Council more flexibility in deciding subcommittee membership. He then stated that his thoughts are to add someone to the National Origin Regulations subcommittee, add someone to the first housing subcommittee, and create a subcommittee to explore Government Code section 11135 et seq. to determine which area to tackle first.

Councilmember Brodsky stated that the Council had previously created a subcommittee about retaliation amendments but had not done anything on it. Chair Mandelbaum suggested disbanding the subcommittee. Councilmember Brodsky agreed.

The Councilmembers then discussed which subcommittees each would like to join. Councilmember Schur stated that it might be helpful for her, given her expertise, to join the first housing regulations subcommittee with Councilmember Schneiderman. She expressed willingness to defer to someone else or to participate in the Section 11135 subcommittee.

Director Kish stated that he does not think the Section exploratory subcommittee would be an overwhelming project. He stated that the purpose of the subcommittee would be to figure out what part of the Section 11135 regulations needs attention first. So the subcommittee would handle a relatively limited task and could accomplish its task with a single subcommittee meeting. Councilmember Schur stated she would be willing to

join the Section 11135 exploratory subcommittee, but hopes that someone else would take the lead on that subcommittee. Councilmember Brodsky joined her.

Chair Mandelbaum stated that he would be happy to join the subcommittee on Section 11135, but that it makes more sense for him to join the National Origins Regulations subcommittee.

Chair Mandelbaum provided a summary of reassignments. He stated that Councilmember Schur would be joining housing subcommittee #1 for its current rulemaking action (Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals). He stated that Councilmember Schur and Councilmember Brodsky will be forming a Section 11135 exploratory subcommittee to identify priorities. He stated that he would be joining Councilmember Brodsky on the National Origins Regulations subcommittee.

Councilmember Iglesias asked whether the liaison to civil groups should be placed on next meeting's agenda for discussion. Chair Mandelbaum made a note to add it to the next meeting's agenda. Councilmember Brodsky suggested that each councilmember do some liaison activity between meetings individually. Chair Mandelbaum stated that councilmembers need to devise an approach specific to the Council on educating the public and disseminating information.

Public Comment

There was no public comment.

Action

The Council approved the new subcommittee assignments by unanimous vote.

XII. Consideration of Draft Proposed Regulations Regarding National Origin Discrimination

Attachment G: Draft Proposed Regulations Regarding National Origin Discrimination

A. Discussion by Council

Councilmember Brodsky thanked former Councilmember Perez and the Employment Law Center, now called Legal Aid at Work, for its presentation on national origin at the August 31, 2016, Council meeting. She explained that the definitions were largely derived from the EEOC's guidelines on national origin, but modifications were made based on Government Code section 12926, the recommendation of Legal Aid at Work, and legal research. She also added the very last sentence that defines national origin to include Native American tribes.

Councilmember Brodsky stated that the "language restrictions" section is all new and comes from both the EEOC's guidelines and based on other statutes. She wanted to suggest one change, that the Council strike "job related" and "consistent with" (on page 2) and replace with "policies justified by business necessity" to track the language of the statute. She stated that some of the language in this section comes from the Labor Code, e.g. the section on immigration labor practices comes from Labor Code section 1024.6, the EEOC guidelines, and a California Supreme Court case (*Salas v. Sierra Chemical Company* (2014) 59 Cal.4th 407).

Councilmember Brodsky commented on the human trafficking section. This section references Civil Code section 52.5 and Penal Code section 236.1(a), which is where the definition of human trafficking comes from.

Councilmember Brodsky stated that she looks forward to comments on whether to expand the section on harassment or whether it is sufficient to reference Section 11019(b), which itself appears comprehensive. She stated that she added a section on retaliation, but the section is not detailed and may need to be amended. Councilmember Brodsky also commented on the sections dealing with height and weight requirements and then recruitment and job segregation. She stated that she combined the recruitment and job segregation sections, which were initially separated.

Councilmember Iglesias commented on the language restrictions section, subsection (a)(2), pointing out that this section includes a distinct definition of business necessity. He stated he was curious as to why this definition was included here if it is the same for the rest of the statute. Councilmember Brodsky made note to follow up with this question.

Councilmember Iglesias commented that it seemed odd to use employment language for human trafficking, when most people consider human trafficking an unjust, slavery relationship rather than an employment relationship. Director Kish posed a related question on why the section on human trafficking was added under the national origin section. Councilmember Brodsky stated that the new statute makes human trafficking an unlawful employment practice, and human trafficking came up in the Legal Aid at Work's PowerPoint presentation. Director Kish asked whether the inclusion of human trafficking under the national origin section is meant to specify that human trafficking can be an unlawful employment practice on the basis of national origin. Councilmember Brodsky responded yes, because there are other kinds of human trafficking, e.g. sex trafficking, which is unrelated to national origin.

Councilmember Iglesias commented on the height and weight requirements, stating that this requirement does not appear to relate to national origin. He stated it would be helpful to add "on the basis of national origin" to be consistent with the rest of the sections. Chair Mandelbaum suggested, in addition to adding "on the basis of national origin," adding "or if it has a disparate impact."

Director Kish commented that it could be helpful to cross-reference other sections where height and weight standards are already prohibited. Councilmember Brodsky agreed.

Chair Mandelbaum commented on section (k), dealing with recruitment and job segregation. He stated that it appeared that the Council needed to assert the same language that is used in section (j), i.e. "unless pursuant to permissible defense." Councilmember Brodsky commented that she could not think of a situation where there would be a permissible defense. Chair Mandelbaum stated that he is uncomfortable saying there is no context in which there is a permissible defense. Councilmember Brodsky stated that she is not opposed to adding that language as it would be consistent with the rest of the section.

Chair Mandelbaum also commented on a typographical error in Section 11027.1(a), noting that there was an extra space between "of" and "a" halfway down the page.

Councilmember Brodsky noted that the definition of "business necessity" is taken essentially verbatim from Government Code section 12951(b). Councilmember Iglesias asked why it was taken from that section. Councilmember Brodsky stated that it is framed in terms of language restrictions as opposed to something else. Director Kish stated that the term is also defined identically elsewhere in the regulations, in Section 11010(b). Councilmember Iglesias pointed out that the only difference (from the statute) he sees is that the statute provides an additional example.

Councilmember Iglesias stated that this section links to a prior regulation regarding holding driver licenses. He asked whether the definitions section should address another possible avenue of national origin discrimination based on government-issued documents (e.g., an employer taking adverse action against someone because they

have a state-issued document and not a driver license). Councilmember Brodsky stated that Councilmember Iglesias’s concern is addressed in a prior statute, Government Code section 12926(v), which prohibits discrimination, including discrimination based on possessing a driver’s license issued under section 12801.9 of the Vehicle Code.

Councilmember Schur asked whether the retaliation provision is broad enough and if there are other circumstances that might fall into the retaliation section besides simply opposing discrimination or participating in a complaint or proceeding. Councilmember Brodsky stated that the retaliation section comes from the statute, and that if the Council wants to expand it the issue ought to be addressed by another subcommittee.

B. Public Comment

The Council heard public comment from Marisa Diaz, of Legal Aid at Work (formerly Legal Aid Society—Employment Law Center). She stated that she was glad to hear that her organization’s presentation was helpful. She thanked the Council for considering the issue at hand and stated it was a very important issue given the diversity of the workforce in California.

First, Ms. Diaz stated that she was excited to see expansion of the language rights provision. She stated that California has a strong law in Government Code section 12951, but suggested a minor revision to current section 11028(a)(4) to clarify the presumption. She stated that, as read, it could mean that the presumption does not always exist. She also suggested taking out the word “ancestry” because it is already included in the definition of “national origin.” She recommended the following language: “English-only rules are presumed to violate the Act on the basis of national origin. An employer can rebut this presumption...” followed by a reference back to the elements an employer can use to rebut that presumption.

Ms. Diaz also suggested that the “acts of discrimination” piece can be strengthened and clarified by incorporating the Ninth Circuit standard articulated in *Fragante v. City of Honolulu* (9th Cir. 1989), 888 F.2d 591. The case states that in order for an “act of discrimination” to be lawful, the employer must show that it interferes materially with the applicant’s or employee’s ability to carry out the job in question.

Ms. Diaz also suggested that the regulations include a provision about “English proficiency requirements.” The EEOC guidance refers to these as “English fluency requirements.” She stated that this is another common form of national origin discrimination that she sees in her work. For example, there could be someone who has worked as a janitor for 10 years who suddenly is required to take a written English fluency test, and if the janitor cannot pass the test, she or he is terminated or demoted. Ms. Diaz stated that, as of now, the current draft of the regulations does not address this type of situation. She recommend that the Council add, after the “act of discrimination” provision, another provision that clarifies that discrimination based on English proficiency is unlawful, unless the English proficiency is necessary for the effective performance of the specific position for which it is imposed, and the type and degree of proficiency (written, oral, or both) is tailored to the requirements of the position in question. Her suggestion is based on case law and EEOC guidance.

Ms. Diaz stated that her organization also sees a lot of language discrimination cases. She stated that there are a lot of unconscious assumptions underlying the justifications or the manner of application of certain language-restrictive policies. Thus, she stated that it would be important for the regulations to specify that if an employer is going to discriminate based on accent or English proficiency or impose a type of language-restrictive policy (e.g., an English-only policy), that the employer’s policies must be based on objective, concrete evidence, not just on unconscious assumptions or unfounded allegations. Ms. Diaz stated that her organization would provide more detail through its written comments.

Ms. Diaz also stated that English-only policies often play a role in hostile environment claims, e.g. where an employee is constantly surveilled, or yelled at when there's a slight slip of the tongue, etc. She recommended that the regulations address these situations more explicitly. She suggested adding language to the regulation that states, when an English-only rule is applied in an unreasonable manner, the rule is presumed to give rise to a hostile work environment claim. She cited a Ninth Circuit case, *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, in which the court found that the manner of application of English-only policies can itself give rise to hostile work environment claims.

Councilmember Brodsky asked whether Ms. Diaz meant that English-only rules are presumptively unlawful, and if an employer uses them, the employer is not only liable for discrimination, but also for creating a hostile work environment and harassment on the basis of national origin. Additionally, she asked whether Ms. Diaz is not referring to actual overt policies. Ms. Diaz stated that the presumption would apply to actual policies as well as more informal and unofficial acts by the employer. Director Kish stated that, from his understanding, Ms. Diaz is asking for explicit recognition that, in some circumstances, the implementation of English-only policies can be a violation of the discrimination and the harassment laws.

Ms. Diaz then discussed Section 11028(d), concerning immigration-related practices. She first stated that she strongly supported the revision that makes it clear that the FEHA and its regulations apply to *all* workers, regardless of immigration status. But she suggested revising the second sentence in subsection (d)(1) because, as is currently written, it suggests that employers often know of the workers' immigration status during the proceedings, where that is often not the case. Ms. Diaz stated that it is important to clarify that immigration status is never relevant at the liability stage of any proceeding under the Act and discovery into an employee's immigration status may only be conducted upon a showing by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law. She stated that this standard is from SB 1818 and the case *Rivera v. NIBCO, Inc.* (9th Cir 2004) 364 F.2d 1057.

Ms. Diaz again mentioned the case *Salas v. Sierra Chemical Company* (2014) 59 Cal.4th 407. She stated that she does not think the current draft is inconsistent with this case and thus has no recommended changes. But she wanted to mention the case because it discusses how undocumented workers are entitled to back-pay under FEHA except for any period after the employer learned about his/her undocumented status.

Ms. Diaz stated that she wanted to address a few minor preemption issues that could be avoided at the outset. First, in Section 11027.1(a), she suggested removing the terms "actual or perceived citizenship status" from the definition of "national origin" because she thinks the current Section 11028(f) more accurately reflects how citizenship status and national origin discrimination can intersect. But as the definition is now, it could lead to a situation, for example, where an undocumented worker is not given a position because the employer knows that that the worker does not have legal authorization to work in the U.S. She stated that, in some ways, this is based on his or her citizenship, which would be in direct conflict with Immigration Reform and Control Act of 1986 that requires the employer not to hire that person. Chair Mandelbaum asked whether Ms. Diaz meant modifying the definition to align with what is provided in Section 11028(f) in order to steer clear of violating federal law. She responded yes. Councilmember Brodsky commented that the purpose of the definition's current language is to prevent situations where an employer might take adverse employment action against someone she believes is not documented, but the person adversely affected is actually documented. In the example provided, the employee-applicant was perceived undocumented and thus adversely affected. Chair Mandelbaum suggested that the Council remove the term "actual" from the definition. Councilmember Brodsky stated that she thought the definition should be expansive.

Ms. Diaz suggested taking "retaliation" out of current Section 11028(d)(2), and to instead have this section focus on discrimination. She suggested adding a provision at the end of the sentence, for example "unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal

immigration law” to help clarify the law. Councilmember Brodsky asked why Ms. Diaz thought to take out retaliation. Ms. Diaz responded that it would make the section clearer if retaliation was taken out and addressed in a separate section after. Director Kish summarized that there appears to be a distinction between discrimination and retaliation, where essentially employers have a defense to a claim of discrimination based on immigration status, but not to a retaliation claim, so it would be clearer to have them included in two separate section in the regulations. Ms. Diaz agreed.

Ms. Diaz had no further comments and said she looked forward to submitting written comments. There was no additional public comment.

C. Discussion by Council

Councilmember Iglesias commented that it might be good to flesh out the “national origin” definition, but it would also be worth paying attention to the term “ancestry” because the term is used a couple times in the draft of the regulations.

Chair Mandelbaum stated that it is interesting that “ancestry” is considered its own protected class, yet it is included in the definition of “national origin.” Councilmember Brodsky stated that it might be helpful to remove “ancestry” from the draft where it is mentioned with the term “national origin” because it appears redundant. Councilmember Schur suggested adding a section about the relationship between the terms “ancestry” and “national origin.”

Chair Mandelbaum commented that the Council could attempt to edit the current draft during the meeting and try to move things forward, or to wait and send the draft back to the subcommittee for review. Councilmember Brodsky asked if the Council could approve the first draft during the current meeting. Director Kish recommended that the changes related to preemption issues be made first before the Council approves the draft and moves it forward and the Council agreed.

And on a related topic, Director Kish asked if the Council would like to add another person to the gender identity subcommittee for the last hearing. Councilmember Brodsky stated that adding another person to the subcommittee likely would not be necessary, but another person is welcome to join the subcommittee. No councilmember expressed a desire to join the subcommittee. Chair Mandelbaum confirmed that Councilmember Brodsky will continue as the sole member.

XIII. Further Public Comment

The Council heard public comment from Jonathan Cherne of Church State Council. Mr. Cherne noted that they had previously worked with the Council regarding religious discrimination and accommodation regulations. They had also requested more regulation or guidance related to pre-employment questionnaires. Mr. Cherne stated that they just wanted to remind the Council about their previous request. He stated that he is seeing more issues and lawsuits due to pre-employment questionnaires. For example, individuals are being asked to state when they are available while applying to various jobs; the job applicants state they are not available on certain days because of religious accommodation reasons; the job applicants are then not contacted by the employer because of their restrictions on workday availability. He stated that some companies use automated online processes that do not allow for an interactive process and a proper determination of undue hardship. Rather, the automated online processes automatically dismiss the job applicant.

Mr. Cherne shared a recent example of a young man in college who applied to 20 different companies. The young man could not work part of Friday and Saturday due to his religion, and none of the companies contacted him. Mr. Cherne asked the young man to try stating in the pre-employment questionnaire that he would be

available every day, and afterward, the young man got two job interviews. When he interviewed with one of the companies, he told the company that he could not work certain hours for two days a week, and the company said that they could not hire the young man because they were only hiring people with fully open work schedules.

Councilmember Brodsky asked if Mr. Cherne's organization was litigating any of those cases. Mr. Cherne answered yes and noted that he had settled some cases and would be going to trial in another soon.

Councilmember Brodsky asked Mr. Cherne to keep the Council posted on the issue. Director Kish encouraged Mr. Cherne to bring cases like the ones mentioned to the DFEH so that the DFEH could investigate and publicize them.

Mr. Cherne stated that the Council could adopt regulations or guidance explicitly stating that job applicants do not have to mark that they are unavailable for certain times or days due to religious obligations. Chair Mandelbaum stated that he would note Mr. Cherne's comments and thanked him for reminding the Council.

XIV. Adjournment

Chair Mandelbaum adjourned the meeting at 4:22 p.m.

Date: February 9, 2017

CHAYA MANDELBAUM

Chair

MICHELLE CHUNG

DFEH Civil Rights Fellow

TIM MARTIN

DFEH Civil Rights Fellow