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TRANSCRIPT OF PROCEEDINGS JUNE 2, 2014

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FAIR EMPLOYMENT HOUSING COUNCIL
MEETING AND HEARING

CALIFORNIA PUBLIC UTILITIES COMMISSION
AUDITORIUM
505 Van Ness Avenue
San Francisco, California

JUNE 2, 2014

TRANSCRIPT OF PROCEEDINGS
PUBLIC HEARING: ADOPTED PROPOSED
DRAFT AMENDMENTS TO THE CALIFORNIA
FAMILY RIGHTS ACT REGULATIONS

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REPORTED BY: Tammy Moon, CSR No. 13184
FILE NO.: A8065A7

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| <p>1 FAIR EMPLOYMENT HOUSING COUNCIL 2 MEETING AND HEARING 3 4 5 CALIFORNIA PUBLIC UTILITIES COMMISSION 6 AUDITORIUM 7 505 Van Ness Avenue 8 San Francisco, California 9 10 JUNE 2, 2014 11 12 13 TRANSCRIPT OF PROCEEDINGS, taken at California 14 Public Utilities Commission, at 505 Van Ness Avenue, San 15 Francisco, California, commencing at 1:07 p.m., Monday, 16 JUNE 2, 2014, before Tammy Moon, CSR No. 13184. 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 2</p> | <p>1 SAN FRANCISCO, CA; MONDAY, JUNE 2, 2014; 1:07 p.m. 2 3 CHAIRPERSON MANDELBAUM: Welcome back from 4 lunch. We are on the record. The time is 1:09 p.m. on 5 Monday, June 2nd, 2014. We are located here in the 6 auditorium of the California Public Utilities Commission 7 located at 505 Van Ness Avenue in San Francisco, 8 California. 9 My name is Chaya Mandelbaum. I'm the 10 Chairperson of the Fair Employment and Housing Council, 11 and joining me today are members of the Fair Employment 12 Housing Council; Councilmembers Dale Brodsky, Chanee 13 Franklin Minor, Patricia Perez, as well as Ex Officio 14 Member and Director of the Department of Fair Employment 15 and Housing, Phyllis Cheng. 16 Let me welcome you to this CFRA hearing. The 17 purpose of this hearing is to receive public comment 18 regarding the issuance of Amendments to the California 19 Family Rights Act Regulations proposed by the Fair 20 Employment and Housing Council. 21 This rulemaking action clarifies and makes 22 specific, and where appropriate, conforms to relevant 23 federal regulations, the existing state regulations in 24 interpreting the CFRA set forth in Government Code 25 section 12945.2.</p> <p style="text-align: right;">Page 4</p> |
| <p>1 APPEARANCES: 2 3 COUNCILMEMBERS PRESENT: 4 CHAYA MANDELBAUM, CHAIRPERSON 5 CHANEE FRANKLIN MINOR, COUNCILMEMBER 6 ANDREW SCHNEIDERMAN, COUNCILMEMBER 7 DALE BRODSKY, COUNCILMEMBER 8 PATRICIA PEREZ, COUNCILMEMBER 9 PHYLLIS W. CHENG, DFEH DIRECTOR AND EX OFFICIO MEMBER 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 3</p> | <p>1 CFRA ensures work leave rights for the birth of 2 a child for purposes of bonding; for the placement of a 3 child in an employee's family for adoption or foster 4 care; for the serious health condition of an employee's 5 child, parent, or spouse; or for an employee's own 6 serious health condition. 7 The regulations will appear in the California 8 Code of Regulations, Title Two, sections 11087 to 11097. 9 Copies of the proposed amendments to the CFRA 10 Regulations are available in the back of the room. 11 For those of you who will testify, a binder is 12 available at the front of the room that contains a copy 13 of today's hearing notice, the text of the proposed 14 regulations, and the Council's initial statement of 15 reasons. 16 The binder is available for your use while you 17 testify only. Please leave it on the podium or table 18 after you are done. 19 The text of the Council's proposed regulations 20 is also available on the Council's web page at 21 www.dfeh.ca.gov/fehccouncil.htm. The Council's holding 22 this hearing as part of its formal rulemaking process. 23 We noticed this public hearing more than 24 45 days ago in the California Regulatory Notice 25 Register, published February 21, 2014, via e-mail sent</p> <p style="text-align: right;">Page 5</p> |

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1 to more than 7,000 individuals and stakeholders, and
2 also via social media LinkedIn, Facebook, and Twitter to
3 more than 800 individuals to stakeholders on the same
4 date.
5 Pursuant to that notice, we took testimony on
6 April 7, 2014, at UC Irvine Law School. We are taking
7 testimony again here today on the proposed amendments to
8 the CFRA Regulations.
9 We will also accept written comments until 5:00
10 p.m. today on June 2nd, 2014. You may e-mail written
11 comments to the Council at fehccouncil@dfeh.ca.gov.
12 If you prefer, you may mail that instead to the
13 Council care of Phyllis Cheng at 2218 Kausen Drive,
14 Suite 100 in Elk Grove, California, 95758.
15 If you brought a written copy of your comments,
16 please give it to Annmarie Billotti in the front of the
17 room. If you have not brought a written copy of your
18 comments in writing, we would appreciate if you would
19 provide us with a written copy by 5:00 p.m. later today,
20 June 2nd, 2014.
21 Anyone who testifies here today or submits
22 written comments will receive a copy of any changes or
23 amendments that Council makes to its proposed
24 regulations.
25 Also, anyone who testifies or submits written

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1 comments will have a 15-day period within which to make
2 written comments on any further changes to the proposed
3 amendments to the CFRA Regulations.
4 Council and DFEH staff will consider each
5 comment made on April 7, 2014, and again here today as
6 well as all written comments received. The Council will
7 respond to each comment in writing in its Final
8 Statement of Reasons, which will become part of the
9 Council's rulemaking record.
10 The hearing is being transcribed by a certified
11 court reporter. The transcript of the hearing as well
12 as written -- all written comments received today will
13 also be part of your Council's official rulemaking
14 record.
15 Because this hearing is being transcribed, it
16 is critical that anyone speaking do so clearly, and that
17 only one person speak at a time.
18 If you have not already done so, please sign in
19 on the attendance sheet. If you sign in, we will know
20 that you were here and we will be able to send you a
21 copy of any changes to the proposed amendments to the
22 CFRA Regulations. Also, if you would like to testify,
23 please be sure that you have indicated so on the sign-in
24 sheet.
25 You will not be sworn in today when you

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1 testify. However, we ask that you come to the front of
2 the room so that the court reporter can take down your
3 testimony.
4 Please begin by stating and spelling your name
5 and any affiliations. Also, if you are commenting on a
6 specific regulation, please identify the section number
7 of the regulation so that we may refer to it as you
8 speak.
9 We will hear testimony until all those wishing
10 to testify today have had an opportunity to do so.
11 So the primary purpose today is obviously to
12 hear from as many of you as would like to testify.
13 Councilmember Brodsky and I will start with a very brief
14 presentation of our thought process and -- and some --
15 highlight some of what we view to be the more
16 significant or noteworthy changes.
17 For those of you wishing to -- to view a more
18 full -- a more full sort of snapshot of the Council's
19 deliberations, are encouraged to view the September and
20 December meetings of 2013 at the Council where we
21 deliberated at length on this CFRA Regulations in
22 advance of adopting the proposed regulations we are here
23 to talk about today.
24 MS. BRODSKY: I'd like to just by a show of
25 hands see how many people are here who intend to make

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1 public comments today. Thank you.
2 CHAIRPERSON MANDELBAUM: So we -- we started
3 like any rulemaking process with the administrative
4 procedures, which provides six guideposts for any
5 rulemaking action.
6 Necessity, the need for the regulation to
7 effectuate the purpose of the statute. Authority, which
8 is the statutory authority that enables you to make the
9 changes. Clarity, meaning that the regulations should
10 be crafted so that they're easily understood to those
11 affected by them. Consistency, which is in harmony with
12 existing statutes and court decisions and regulations.
13 And in considering the consistency prong in
14 particular, we are mindful that a lot has happened. The
15 last update to the California Family Rights Act
16 Regulation was in 1995, and in the interim there's been
17 one amendment to the statute in 2011, which clarified
18 the prohibition against interfering with the restraint
19 to exercising the rights under CFRA.
20 There's also been numerous rounds of the
21 amendments to regulate the counterpart to the FMLA. We
22 took a close look at those regulations, and in some
23 instances elected to adopt similar language that we
24 thought aided in clarifying and what's consistent with
25 our own statute. In some places we elected not to speak

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1 to those and thought that that was not necessary for our
2 purposes. And sometimes we addressed the same topic but
3 in language we felt was more streamline or better
4 tailored to the CFRA.
5 The final prongs of reference that's the
6 statute of the regulations, finally, non-duplication
7 which is the notion that the regulation shouldn't serve
8 the same purpose as a statute or unnecessarily
9 incorporate statutory language and provisions themselves
10 into the regulations.
11 Now the final prong the code itself
12 acknowledges is at tension somewhat with clarity,
13 meaning there are times when duplicating the statute
14 would aid clarity, but overly doing so is also
15 discouraged and in fact prohibited by the APA.
16 So we sort of approached that on a case-by-case
17 basis in terms of what we thought utilizes some of the
18 language directly out of the statute that would help
19 with clarity but without some sort of overduplicating or
20 unnecessarily duplicating statutory labeling.
21 So a couple of the noteworthy updates. There
22 are a number of clarifications that were made to the
23 definition section which were contained in 11087, such
24 as a clarification at D3 as to who the employer is when
25 there's multiple legal business entities and clarifying

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1 that multiple entities can in fact be joint employers or
2 both subject to the requirements of the CFRA if they
3 constitute joint employers or integrated employers.
4 We made a number of clarifications to the
5 definition of eligible employee in that it includes
6 clarifying that the definition of work for purposes of
7 the CFRA hours requirement is the California Labor Code
8 definition and not the Fair Labor Standards Act
9 definition.
10 We clarified if an employee has an extensive
11 break in service for seven or more years that the past
12 service need not be counted by the employer in
13 determining whether the employee has met the 12 months
14 of service requirement. If the break was caused by
15 military service obligation, the exception does not
16 apply.
17 Finally we added some clarifications to covered
18 employer in 11087(d) by connecting it to covered
19 employee. Because we want -- we thought it would aid
20 sort of in more practical terms when an employer has
21 obligations of -- under the CFRA. And -- and that is
22 connected in large respect to whether they have covered
23 employees that the various substantive provisions
24 make them subject to.
25 We added a definition of key employee at

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1 11087(l) that clarifies the statutory reference later on
2 in the provisions to the particular rules for the
3 highest paid ten percent of employers and employees.
4 We added a definition of 11087(p) that the
5 statutes reference to the reason of a birth of a child
6 includes the often used expression baby bonding.
7 In terms of definitions, we added to the
8 definition of spouse to include same-sex partners and
9 marriage in light of the US Supreme Court's ruling in
10 Hollingsworth versus Perry, which left intact the
11 district court Perry versus Schwarzenegger that violated
12 the Equal Protection Clause.
13 We have added clarifications at 1109(a) and (b)
14 to an employee right to reinstatement after the CFRA
15 Leave and his or her rights upon the return to work
16 including being able to return to the same position or
17 one that is substantially equivalent.
18 We added a number of clarifications at 1109(c)
19 to the narrow reinstatement requirement exception under
20 certain circumstances for leaves taken by key employees,
21 and a clarification that the employee must be offered
22 the opportunity to return to work early if an employer
23 tends to invoke the key employee exception.
24 We added a provision at 11089(d)(3) if an
25 employee in CFRA fraudulently<sic> they're not entitled

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1 to the job protections in CFRA. However, to invoke this
2 exception to the underlying return to work requirement,
3 it is the employer's burden to provide that this CFRA
4 was fraudulently obtained.
5 We addressed in 11090(e)(3) the scenario of
6 incremental use of CFRA Leave in the contents of a
7 workplace where it's physically impossible to return to
8 work during the day. Typical examples of that would be
9 someone that works on an aircraft or on a train, and if
10 they miss part of their shift, it's pretty hard to pick
11 up midflight and continue working. So we clarified that
12 in that context if it's physically impossible that the
13 entire shift would constitute using CFRA for purposes of
14 incremental use.
15 But we did also clarify, and I think the way
16 it's a little more forceful in the FMLA, it truly has to
17 be physically impossible. So if there are tasks that
18 employees can do on the back end, like administrative
19 tasks that they have to do after they get off the flight
20 or train or things that could be done, that that
21 wouldn't constitute physical impossibility. If there's
22 work to be done, they should have the opportunity to do
23 that.
24 Finally, we made clear at 11090(e)(4),
25 employers can make part exemptions from salaries of

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1 exempt employees who use intermittent CFRA Leave but
2 only under the narrow circumstances that leave part that
3 are otherwise allowable by the California Labor Code in
4 the industrial wage orders.
5 I'm going to turn it over to my colleague on
6 the Council to pick up from there.
7 MS. BRODSKY: Starting with 11091(a)(1) having
8 to do with notice, we added that unless an employer
9 waives its employee's notice obligations described
10 herein, an employee shall provide at least verbal notice
11 sufficient to make the employer aware that the employee
12 needs CFRA Leave.
13 And we also added that the employer should
14 inquire further the employee if necessary to determine
15 whether the employee is requesting CFRA Leave and to
16 obtain necessary information concerning the leave such
17 as the commencement date, expected duration, and other
18 pertinent information.
19 And what this means is that the employer can
20 waive an employee's notice obligations just as it can
21 under FMLA. And it also recognizes that -- tried to
22 recognize it. An employee may not be requesting CFRA
23 Leave, which is consistent with a recent ninth circuit
24 case called Escriba versus Foster Poultry Farms in which
25 the Court held that an employee can affirmatively

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1 decline to take an FMLA leave and similarly under the
2 proposed regulation an employee could affirmatively
3 decline to use the CFRA Leave.
4 With respect to notice, we also revised and
5 amended the regulation that existed as to this to
6 clarify that employers may not retroactively designate
7 leave as CFRA Leave after the employee has returned to
8 work without the employee's consent and except under
9 those same circumstances provided for in FMLA and its
10 implementing regulations.
11 With respect to 11091(a)(6), which has to do
12 with the employer response to a leave request, we
13 modified the regulation to say that the employer shall
14 respond to the leave request as soon as practicable and
15 in any event no later than five business days after
16 receiving the employee's request. We made a change from
17 ten days to five days, which conforms to FMLA -- similar
18 FMLA Regulation.
19 The time to obtain certification, also we made
20 a clarified change in that timing. If employer may
21 require that the employee provide any certification
22 showing a serious medical condition within no less than
23 15 calendar days of the employer's request for such
24 certification, that means that the employer can get the
25 employee more than 15 calendar days to provide

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1 certification, but it cannot be less.
2 We clarified that CFRA Leave does not have to
3 be paid except to clarify that it's consistent with
4 FMLA. An employer can require an employee to use
5 accrued paid sick leave during CFRA Leave during his or
6 her own serious health condition or for other reasons
7 permissible under the employer's policies, and that the
8 employee cannot take 12 weeks of unpaid leave and then
9 use paid sick leave to extend the time he or she could
10 be off work.
11 In 11092(b)(3), it begins if an employee
12 requests leave for a CFRA-qualifying event, the employer
13 can require an employee to use accrued vacation or paid
14 time off during the otherwise unpaid portion of the CFRA
15 Leave. But we proposed to conform to FMLA that if an
16 employee uses paid leave under circumstances that do not
17 qualify as CFRA Leave, the leave will not count against
18 the employee's CFRA Leave entitlement.
19 With respect to health benefits, starts with
20 11092. We clarified that the employer's obligation to
21 provide health benefits extends both through both the
22 Pregnancy Disability Leave and the CFRA Leave. In case
23 there was some ambiguity about that that has -- that
24 will be resolved.
25 And this was especially helpful, we think, to

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1 employers who do not do business in California or
2 exclusively do business in California who might be used
3 to the FMLA and not to California's Pregnancy Disability
4 Leave.
5 If a -- if an employee -- generally if an
6 employee fails to return from a leave after the leave is
7 expired or works less than 30 days after returning to
8 work, the employer can recover health benefits that --
9 premiums that it pay for maintaining health insurance.
10 We, in the proposed regulations, clarify to --
11 we added that an employee who retires from CFRA Leave or
12 during the first 30 days is deemed to have returned to
13 work so that that employee who retires cannot be charged
14 back by the employer for premiums that the employer paid
15 to maintain health insurance. This conforms to FMLA.
16 With respect to benefits also, we proposed to
17 conform CFRA regs to FMLA Regs, regarding employer's
18 obligation to maintain group health coverage requiring
19 employee contributions when group coverage can be
20 stopped and when employees can be required to pay their
21 own insurance premiums.
22 With respect to the treatment of unpaid CFRA
23 Leave compared to other leaves, generally during a CFRA
24 Leave an employee is entitled to accrue seniority and
25 participate to health plans to the same extent as it

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1 would apply to other kinds of leave.
2 To explain this, we proposed adopting an FMLA
3 standard that unpaid CFRA Leave for the employee's own
4 serious health conditions is compared to other unpaid
5 disability leaves, whereas unpaid CFRA Leave for all
6 other purposes are compared to other paid leaves offered
7 by the employer.
8 We add, "CFRA leave shall not constitute a
9 break in service or cause the employee to lose seniority
10 even if other paid or unpaid leave constitutes a break
11 in service for purposes of establishing longevity or
12 seniority or for layoff, recall, promotion, job
13 assignment, or seniority-related benefits."
14 This creates an exception to the general rule
15 because it means that an employee cannot lose seniority
16 while on CFRA Leave even if employees on other kinds of
17 leave can lose it.
18 The employer notice obligation we added a -- a
19 statement that if the employer changes its health plans
20 or benefits while an employee is on CFRA Leave, the
21 employer must give notice to the employee that he or she
22 is subject to the newer change plan or benefits to the
23 same extent as if the employee were not on leave. This
24 again conforms to FMLA.
25 With respect to 11093, the proposal, we -- the

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1 title we added to the heading "the Relationship Between
2 CFRA Leave and Pregnancy Disability Leave." The
3 relationship between CFRA Leave and Non-Pregnancy
4 Related Disability Leave. This heading is a reminder
5 that the statutes entail separate rights and
6 obligations.
7 So you have to look at disability rights that
8 an employee would have under the disability provisions
9 of the FEHA separate from the CFRA Regulations and
10 obligations and rights under the -- CFRA. And also
11 compared to pregnancy there are three really parallel
12 tracks.
13 11093(c)(1) we propose to -- a caveat to the
14 general rule that prior to the birth of a child, the
15 employer is not required to provide PEL plus 12 weeks of
16 CFRA Leave for the mother's own pregnancy disability by
17 adding -- this does not excuse the employer's other
18 obligations under the FEHA such as the obligation to
19 provide reasonable accommodation under the disability
20 provisions. So you have to look at each -- each statute
21 separately.
22 The Pregnancy Disability Law does not -- Leave
23 Act does not cut right -- it does not impact reasonable
24 accommodation, and it doesn't -- doesn't reduce the
25 right to reasonable accommodation or the right to an

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1 interactive process under the disability discrimination
2 provisions.
3 And -- and then we -- in the next section, we
4 reiterate this point just to drive it home that these
5 are really separate statutory provisions.
6 In 11094, we added to -- the title is
7 Retaliation and Protection From Interference with CFRA
8 Rights. 12945.2(t) of the government -- that's the
9 Government Code, makes it illegal to -- for an employer
10 or any other person to interfere with an employee's CFRA
11 rights.
12 And that provision was added to FEHA in 2011.
13 The regulations on this are all new. The regulations
14 generally conform to FMLA and replace outdated
15 regulations that minimally address retaliation.
16 I want to draw your attention to 11094(c) which
17 says an employee cannot waive nor may employers induce
18 employees to waive their prospective rights under CFRA.
19 Per one of the proposed regulations, for
20 example, acceptance of light duty assignment instead of
21 a CFRA Leave does not constitute a waiver of rights to a
22 CFRA Leave. And in Escriba, the case I mentioned
23 before, the ninth circuit said declining to take a CFRA
24 Leave is not a waiver of one's rights. We reiterate
25 that. That's in the regulation.

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1 Posting of notice. Employers are required to
2 post CFRA notice to their employees. They have the
3 right to request a CFRA Leave, and the notice must be
4 posted in a conspicuous case. 11095(a) would permit
5 electronic posting at the worksite so long as it's in a
6 conspicuous place.
7 And in addition, the notice must be -- for the
8 non-English speaking work force must be posted in every
9 language spoken by at least ten percent of the work
10 force. That's in 11095(c).
11 The -- we -- the regulation clarifies in the
12 notice that has to be posted -- it has to -- inform
13 employees they have the right to take both PDL,
14 Pregnancy Disability Leave, and a CFRA Leave.
15 The notice would state now that they both
16 require reinstatement, but to distinguish the two in the
17 notice, the Pregnancy Disability Leave requires
18 reinstatement to the same position, but a CFRA Leave
19 requires reinstatement to the same or comparable
20 position. So the notice makes that -- that would be
21 more clear now in the notice the employers are required
22 to post.
23 Finally, we -- the last regulation that we
24 modified or proposed to modify states that:
25 "The Council incorporates by reference

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1 federal regulations that became effective
2 March 8, 2013, to the extent and these are
3 regulations promulgated by the Department of
4 Labor to interpret the FMLA and to the
5 extent we have incorporated by reference,
6 those regulations as of that date to the
7 extent that the FMLA regs are not
8 inconsistent with the California Government
9 Code section 129452.2, which is CFRA, or any
10 other state law or constitution."
11 And this is virtually the same as what was in
12 the regulations before but -- but because we are
13 required by the Office of Administrative Law to be
14 specific as -- as Council Chair Mandelbaum pointed out,
15 we chose to be specific by specifying a particular date
16 in the FMLA Regulations so that if they change we would
17 revisit that and make sure that the changes that would
18 be promulgated later would still be consistent with how
19 we want to view the regulations.
20 So that's the summary. And we are really eager
21 now to hear from you.
22 CHAIRPERSON MANDELBAUM: We'll open up the
23 floor to those who wish to provide public comment.
24 MS. LANGSTON: Good afternoon. My name is
25 Rachel Langston, and I'm a staff attorney at the Legal
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1 Aid Society Employment Law Center here in San Francisco.
2 I'd like to begin by thanking the Council for
3 the opportunity to make these public comments on these
4 important amendments to the regulations.
5 I'm here today on behalf of not only the
6 Employment Law Center, but we have also submitted
7 written comments on behalf of the ACLU of Southern
8 California, the California Women's Law Center,
9 Disability Rights Legal Center, Equal Right Advocates,
10 and Women's Employment Rights Clinic at Golden Gate
11 University School of Law.
12 I'd like to start by making two general
13 comments with regard to these proposed amendments. The
14 first regards the incorporation of the updated FMLA
15 Regulations where the CFRA Regulations are otherwise
16 silent. We have some concerns about this whole silent
17 corporation.
18 As you know, the CFRA preceded FMLA and has
19 always provided broader protections than the federal
20 FMLA, and the protections of the regulations have been
21 broader than the FMLA Regulations. Our concern is that
22 by incorporating these 2013 federal regulations, we will
23 limit the -- the protections that have been available
24 and are currently available to Californians under the
25 California Family Rights Act.
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1 I also would like to caution the Council
2 against striking currently-existing language in the
3 regulations. While I can appreciate the need for
4 conciseness and not repeating what's already in the
5 statute, often these regulations are the go to for
6 laypersons such as Human Resources personnel and other
7 individuals who need kind of a one-stop shop for some
8 guidance on how to apply the California Family Rights
9 Act. They go to these regulations, and I think it's
10 important not to direct them to other statutes and other
11 regulations that may be difficult to find.
12 So for purposes of clarity, there's many places
13 in which -- and I'll specify them as I go on, but
14 there's many areas where I think the language that the
15 Council has proposed to strike should be reinstated for
16 purposes of clarity which I think is really important.
17 With those comments, I'd like to go to specific
18 sections of the regulations. As I said, we did submit
19 written comments, so there will be more detail there.
20 But I wanted to highlight our concerns or our comments
21 about some of these.
22 First of all, Section 11087(b)(1). This is
23 just one area where we would urge the Council to
24 reinstate the language that it has proposed to strike,
25 given clarity concerns that we have. 11087(b)(1)(a)
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1 regarding "warrants the participation of the employee."
2 We would recommend expanding that definition or
3 clarifying what might constitute participation.
4 At the Employment Law Center, we hear from a
5 number of caregivers for family members who need to do a
6 wide variety of things as part of their care, including
7 traveling to and from the care recipient, assisting the
8 recipient with tasks that are made difficult or
9 impossible by the illness, such as moving to a new home,
10 arranging third party care for the recipient, and we
11 would also -- so we have suggested some language to
12 incorporate that broader definition.
13 We would also recommend putting a definition
14 into this section for psychological comfort and care,
15 and noting that it includes spending time with a
16 seriously ill or dying child, parent, spouse, or
17 domestic partner.
18 Finally, in this section we would recommend
19 including the following definition of arranging third
20 party care. We would recommend that it be included that
21 it can involve communication with medical providers,
22 visiting, potentially, nursing homes, or assisted living
23 facilities, interviewing potential caregivers, or
24 calling insurance companies and dealing with all the
25 bureaucracy that often comes up when someone is going
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1 through a serious health condition.
2 Moving on to section 11087(b)(2), we would
3 recommend in order to reflect the Supreme Court's
4 decision in Lonicki versus Sutter Health Central in
5 2008, that there be language added to explain that an
6 employee's ability to perform similar employment for
7 another employer does not necessarily establish that
8 there's no serious health condition for the purpose of
9 taking CFRA Leave.
10 Moving on, we recommend that former section
11 11087(c), the definition of child be reinstated. We
12 feel that the definition of "child" is a really
13 important definition to this particular -- to the
14 California Family Rights Act.
15 It's sort of a central component of the act, so
16 we feel that that definition is important to include.
17 We also recommend that that section be amended to
18 include the idea that in loco parentis include the
19 rights of LGBT individuals to bond with and care for
20 their children and the children of their partners.
21 Section 11087(d) regarding covered employer.
22 We would urge the Council to reinstate the language
23 explaining that the place for counting the 75 employees
24 could be outside of California. We think this is
25 important because a lot of employers don't understand

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1 that if for some reason the worksite from one of
2 accounting should happen outside of California, that's
3 where they have to count. And I'll go into that a bit
4 further, but we do think that that language is important
5 to reinstate.
6 Similarly, we think it's important to also
7 include this strict -- the language that the Council has
8 proposed to strike noting that the State of California
9 is a covered employer. We think that's important to
10 clarify.
11 Moving on to 11087(d)(3). This is a complex
12 area regarding joint employers and integrated employers.
13 It's dealt with at length in the FMLA Regulations, and
14 our concern is that the proposed section contemplates
15 and tends to oversimplify this complex idea, given that
16 we would propose either striking this section or
17 incorporating the earlier 1995 language from the FMLA
18 Regulations in full, given the complex nature of this
19 particular issue.
20 Regarding section 11087(e)(2), this is one area
21 where we oppose adopting the 2013 FMLA Regulations. 29
22 CFR 825.11 limits employee eligibility by providing that
23 employers need not count where that was done prior to a
24 break of service of more than seven years. To this
25 point, CFRA doesn't include a similar limit, and so by

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1 adopting this regulation, individuals who are currently
2 covered inside the CFRA due to their seven-year break in
3 service not being an issue, would no longer be covered.
4 Section 1108783 regarding the relationship with
5 Pregnancy Disability Leave, we'd recommend striking the
6 language the phrase that is also an FMLA Leave because
7 pregnant women may reach their one year FMLA eligibility
8 requirement while on Pregnancy Disability Leave, which
9 is something that we think needs to be clarified.
10 We would also encourage the Council to clarify
11 that a new mother does not have to requalify for CFRA
12 bonding leave by working an additional 1250 hours if she
13 chooses to return to work following her Pregnancy
14 Disability Leave but hasn't yet taken her CFRA.
15 Right now she doesn't have to requalify if she
16 takes bonding leave immediately following the Pregnancy
17 Disability Leave, and we think it's important that that
18 same rule apply if the new mother chooses to go back to
19 work for a period of time and then take bonding leave
20 within the first year of the child's life.
21 Regarding section 11087(e)(4), this is a --
22 another complex issue that we often hear from -- hear
23 about from our callers to the Employment Law Center.
24 And we would suggest that the Council include an example
25 for what happens when someone does not have a fixed

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1 worksite. For example, when someone works out of their
2 home and reports to and receives assignments from an
3 employer out of state, for instance, or far away from
4 their home.
5 For instance, there might be an example that if
6 someone works from home in California and reports to
7 corporate headquarters in New York for purposes of
8 counting the 75 employees within the 50-mile radius.
9 Regarding Section 11087(e)(5) that discusses
10 earning CFRA eligibility during another leave, we would
11 suggest that the Council clarify that the remainder --
12 if someone becomes qualified for FMLA by meeting their
13 one-year requirement during Pregnancy Disability Leave,
14 we would suggest that the regulation clarify that the
15 remainder of that Pregnancy Disability Leave should run
16 concurrently with FMLA Leave, not CFRA.
17 Right now, obviously CFRA doesn't include
18 pregnancy as a recognized serious health condition, and
19 so once the woman qualifies for FMLA, that should be
20 what counts during the remainder of her Pregnancy
21 Disability Leave leaving the 12 weeks of CFRA bonding to
22 be taken after that leave concludes.
23 We would also recommend that the Council
24 include in the section following this section regarding
25 an employer's obligation to create and maintain accurate

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1 records of hours worked.
2 We would recommend clarifying that where an
3 employer claims that the employee does not meet the
4 eligibility requirements based on hours worked, that
5 that employer must show, one, that they have kept
6 records and that those records reflect that the employee
7 worked less than 1250 hours. If they cannot make that
8 showing, the presumption should be that the 1250-hour
9 requirement was met.
10 Similarly, if an employer denies an employee
11 leave, we recommend that the reg state that the
12 employers are required to provide the employee an
13 accounting of her hours worked if the -- not meeting the
14 1250 hours requirement is a reason for that denial of
15 leave.
16 Similarly, we recommended a section regarding
17 an employer's obligation to create and maintain records
18 of the number of employees worked for purposes of
19 determining CFRA eligibility, again creating a
20 presumption that if an employer cannot show that they in
21 fact do not have 50 employees within a 75-mile radius of
22 the employee, that that requirement is meant for
23 purposes of eligibility.
24 Finally, one other recommended section that we
25 would suggest has to do with consequences of

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1 misinformation from the employer. We would suggest if
2 an employee goes out on CFRA Leave based on moral or
3 written information she receives from her employer, that
4 is the reason we believe she is eligible she be granted
5 the protections that she would have if eligible.
6 Section 11087(r)(2) regarding continuing
7 treatment. We would recommend that the Council not
8 adopt or incorporate 2013 FMLA Regulations here. They
9 require an employee to see a healthcare provider within
10 a certain number of days, seven days, and make a second
11 visit. This puts a burden on workers that may be very
12 difficult for them to meet.
13 They must not only deal with the schedules of
14 their health care providers in order to obtain these new
15 certifications or make these appointments, but also deal
16 with their own schedules and that of family member
17 caregivers who have to juggle their work and their lives
18 in order to go to these appointments. So we would urge
19 that the Council not place this greater burden on
20 Californians.
21 Regarding the section 11087(s), we appreciated
22 the changes to this section in so far as they reflect
23 recent court decisions upholding marriage equality. Our
24 only suggestion is the "and" in the phrase partner
25 marriage. And a registered domestic partner should be

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1 changed to "or" domestic partner for purposes of
2 clarity.
3 Section 11088(c) limitation on entitlement. We
4 would simply suggest the addition of language that
5 clarifies that this limitation doesn't apply to
6 unmarried employees who work for the same employer.
7 Section 11089(b), rights upon return. We would
8 add -- encourage the addition of the language pay
9 benefits, working conditions, and then adding shift and
10 geographic location.
11 11089(b)(2) we would also recommend the
12 addition of geographic location.
13 For section 11089(d)(1), we would recommend
14 clarifying that if shift -- a shift or overtime ceases,
15 that an employer can't point to a shift or overtime that
16 ceases based on having accommodated an employee's
17 absence.
18 So in other words, if an employer has made some
19 changes to accommodate someone being out on CFRA Leave
20 and then says we no longer need that new shift we
21 created as an accommodation or those new hours that
22 can't be a reason for denying reinstatement or denying,
23 you know, the same type of position to come back to, but
24 that in fact the employer has to reinstate and can't use
25 any accommodation or any other leave to be a reason as a

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1 justification for not allowing such reinstatement.
2 Section 11089(d)(2)(c), substantial and
3 grievous economic injury. We recommend clarifying
4 which -- including language from the FMLA Regulations
5 825.218(c) stating that such injury cannot include minor
6 inconvenience and costs.
7 Section 11089(d)(3), we recommend striking this
8 section regarding fraudulently-obtained CFRA Leave. We
9 believe that this is dealt with elsewhere in the
10 regulations, for instance, in proposed section
11 11091(b)(2), which permits an employer to obtain a
12 second opinion if they doubt the voracity or the
13 sufficiency of a certification. So we feel that this is
14 redundant, in a sense, and not needed.
15 11090(b), leave periods common to CFRA and
16 FIMRA. We would recommend including language that the
17 employer should provide notice of the method of
18 calculation if it's a 12-month period to requesting
19 employee.
20 For Section 11090(c)(2), computation of 12 work
21 weeks. If there's an intermittent schedule, we would
22 ask that the Council reconsider its adoption of 29 CFR
23 825.203, which requires an employee to make a reasonable
24 effort to schedule intermittent treatment so as not to
25 disrupt the employer's obligations.

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1 This goes back to issues of scheduling and
2 health care and other burdens placed on an employee with
3 a serious health condition and their family caregivers.
4 It's very difficult to consider all of these things and
5 trying to schedule doctor's appointments and other
6 appointments necessary for care. And so we would
7 encourage not placing this burden on Californians.
8 We oppose section 11090(c)(4). It opens the
9 door to confusion among what constitutes required versus
10 voluntary overtime. And it also frankly requires a new
11 -- places a new record-keeping requirement on employers.
12 Section 11090(d), we would suggest that the
13 Council add an example of -- for instance, if an
14 employee wishes to use only one week or one day of
15 bonding leave, the employer must allow the employee to
16 do so on at least two occasions.
17 We would also recommend language clarifying
18 that an employer is not precluded from allowing the use
19 of CFRA Leave on more than two occasions and less than
20 two-week increments.
21 Section 11090(e)(1) we would suggest clarifying
22 -- adding language clarifying an employer.
23 11090(e)(3), I appreciate the broader intention
24 that this regulation only apply where it really is
25 physically impossible and where there aren't other

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1 administrative tasks or, you know, another type of
2 position that the employee can be temporarily
3 transferred to.
4 But I would encourage some clarity in the regs
5 to really solidify this and to suggest that, you know,
6 the employer has to transfer someone or give them other
7 duties if at all possible to avoid forcing them out on
8 leave or which could in many cases require them to use
9 up their CFRA Leave before they would otherwise have to.
10 Section 11091(a) regarding request for leave
11 and certification. We would really encourage the
12 Council adopt language demonstrating that a request for
13 vacation does not in itself render notice insufficient.
14 This is kind of a dangerous area where we -- it allows
15 for employees to basically say just the wrong thing and
16 have their employers not provide them with CFRA Leave.
17 If an employee for instance comes up and says I
18 need vacation. My mother's really ill. Then an
19 employer could say, well, they asked for vacation. They
20 didn't ask for CFRA Leave. So we would encourage that
21 language be included that clarify that whether an
22 employer asks for leave that would otherwise be
23 qualifying for CFRA and provides an underlying leave for
24 CFRA qualifying, it shouldn't matter if they say can I
25 have vacation. Nor should it matter that they don't

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1 necessarily comply with whatever rules or policies that
2 an employee -- employer has for leave request.
3 If they state an underlying reason that is CFRA
4 qualifying regardless of the use of the words vacation
5 or regardless of not following the employer's practices
6 to a T, they should be protected under the CFRA.
7 Moving on to 11091(b) regarding medical
8 certification. The FMLA Regulations also caused some
9 problems. They allowed employer to contact an
10 employee's provider which conflicts with California's
11 very strict privacy laws.
12 They also allow for an employer to require
13 fitness for duty exam every 30 days. Once again, this
14 goes back to the problems of an employer -- employee
15 having to struggle with setting up appointments or
16 working around her caregiver's schedules.
17 And we would also encourage in this section
18 that the Council clarify some aspects of the Department
19 of Labor form. First of all, that the employer -- an
20 employer that uses that may not use disclosure of the
21 diagnosis and also may not include the use of that
22 particular form.
23 Regarding section 11092(b) on paid leave, we
24 suggest the -- the concern that we have here is that
25 many employers' policies may require things that

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1 conflict with the intermittent nature of FMLA. For
2 instance, they might require you to use a certain amount
3 of vacation that's less than an hour or half a day so
4 you couldn't -- you'd have to use more vacation than the
5 FMLA Leave that you took.
6 Also, notice requirements may differ. You may
7 have to give your employer five days notice before you
8 use paid leave. Whereas under FMLA -- under CFRA if the
9 leave is unforeseen then you can provide less notice.
10 So you should be allowed to use approved paid vacation
11 and other approved time even if you can't meet your
12 employer's normal vacation policies for requests and the
13 use of that time.
14 Regarding section 11092(b)(1), there is a
15 potential conflict here with California's paid family
16 leave program which is a wage replacement benefit
17 available to California employees who pay into the
18 California State Disability Insurance program.
19 That program allows an employer to require up
20 to two weeks -- that the employee take up to two weeks
21 of paid but unused vacation leave prior to the receded
22 PFL benefits after which point the employee can start
23 receiving these benefits which are up to 55 percent of
24 the employee's weekly wages.
25 If under the FMLA requirement or the adopted

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1 FMLA Regulations, an employer -- excuse me, an employee
2 can be forced to use vacation for the duration of their
3 leave, that could create an issue where they're not able
4 to use a Paid Family Leave or receiving over 100 percent
5 of their wages which is not permitted under the paid
6 family leave program. So we would recommend that this
7 not be adopted and that instead employers be encouraged
8 to integrate these programs.
9 So for instance, they can allow an -- an
10 employer would be required to use up to 20 weeks of
11 vacation leave after which it could and might be
12 encouraged to integrate so employee could use 55 percent
13 of their paid family leave and get 45 percent of what
14 they would use for paid vacation and save the rest.
15 Moving on to 11092(b)(4). We would encourage
16 the Council to make a change to this language. Instead
17 of saying "an employer and employee may negotiate the
18 employee's use of any additional use of paid or unpaid
19 time off" instead of or -- using to substitute for --
20 instead of that language, saying that they may use this
21 time concurrent -- negotiate to use this time concurrent
22 with or in addition to the CFRA Leave.
23 This was clarified that an employee who is
24 entitled to CFRA Leave gets those protections even if
25 the -- there's other additional leave available to them

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1 through their employers or leave that they can -- leave
2 program that can be used concurrently that the employer
3 may have in their policies. They shouldn't be in a
4 position where they're substituting that unprotected
5 leave for legally protected leave under the CFRA.
6 We would recommend here that the Council also
7 add a section again encouraging that employers
8 integrate -- first of all, tell employees about the
9 existence of Paid Family Leave and State Disability
10 Insurance and encouraging that they integrate these
11 states benefits when -- when it's possible to do so.
12 Section 11092(c)(2), an employer's obligation
13 to continue benefits begins at time of leave. We would
14 recommend that the Council add language clarifying that
15 an employer should continue health coverage both during
16 the duration of the Pregnancy Disability Leave law and
17 during the 12 weeks of CFRA bonding so that, you know,
18 someone doesn't have their up to four months of PDL and
19 then are cut off from their benefits and not able to
20 take the bonding time that they're legally entitled to.
21 Section 11092(e)(1), we would recommend not
22 incorporating the FMLA regulation here, 825.215(c)(2),
23 because this regulation would deny perfect attendance
24 bonus to someone who is on a job-protected leave under
25 the CFRA.

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1 If the Council, you know, chooses to include
2 this section, we would recommend adding language that's
3 taken into account an employee's CFRA Leave for purposes
4 of determining performance with regard to attendance is
5 impermissible.
6 We recommend that the Council reinstate the
7 language it proposed to strike from 11092(f) again for
8 purposes of clarity.
9 Regarding section 11093(c)(1) and (d), we
10 recommend clarifying that there's an entitlement both to
11 reasonable accommodation and to CFRA bonding. So for
12 instance, if someone is out of Pregnancy Disability
13 Leave, needs additional time as a reasonable
14 accommodation for disability after that because they're
15 separate entitlements after the conclusion of that
16 accommodation, they're still entitled to the full
17 12 weeks of their bonding leave under the CFRA.
18 We appreciate the Council's clarifying language
19 regarding disability leave in section 11093(e). I'm
20 sorry, 11093(c)(1). And would suggest similar language
21 in 11093(e). We would suggest language clarifying that
22 an extension of CFRA Leave can be a reasonable
23 accommodation under the Fair Employment Housing Act.
24 This is an issue that again we often see from
25 people that come to the Employment Law Center where they

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1 have exhausted their CFRA Leave and the employee knows
2 that they have a serious health condition that is also a
3 qualifying disability and instead of engaging with them
4 in any sort of interactive process regarding either how
5 they can come back with accommodation or if they need an
6 extension of leave as an accommodation, they receive a
7 form letter from their employer saying your CFRA Leave
8 is up, if you don't come back on x date, it's job
9 <unintelligible>.
10 This is something employers routinely fail to
11 consider when the end of CFRA Leave is approaching; that
12 indeed they may still have a legal requirement to the
13 employee under the Fair Employment Housing Act if that
14 employee's serious health condition also constitutes a
15 disability.
16 For sections 11094(a) and (b), we would again
17 recommend reinstating the language that the Council
18 proposed to strike for purposes of clarity and also
19 including language clarifying that an employee should be
20 protected against retaliation even if she's not yet
21 eligible for CFRA Leave. This is reflected in the case
22 law which is cited in our written comments, so we would
23 recommend clarifying that in the regulations.
24 Regarding section 11095(a), we would object to
25 the statement that electronic posting is sufficient.

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1 However, we do see the value of electronic posting,
2 especially where employees don't always report to some
3 central location. So we would suggest requiring both
4 hard copy posting and in situations where there's not
5 that central reporting point for all employees,
6 electronic posting as well.
7 11095(b), we would suggest clarifying when the
8 obligation to give notice is triggered. For instance,
9 when an employee mentions that she or her partner is
10 pregnant or when she asks about pregnancy leave, informs
11 the employer that he or she is adopting or fostering a
12 child. All these should trigger the notice requirements
13 under these regulations.
14 We would also suggest adding language that
15 requires employers to provide notice of the wage
16 replacement programs that are available concurrently
17 with CFRA Leave and Pregnancy Disability Leave.
18 Similarly or along those lines in section
19 11095(c), when a -- an employee with limited English
20 proficiency makes one of the statements outlined above
21 that she's pregnant, adopting a child, etc., the
22 employer should be required to provide that employee
23 notice in his or her own language of rights,
24 responsibilities, and consequences and noncompliance.
25 Finally, Section 11097 regarding the

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1 certification form. Again, we would add -- recommend
2 adding language emphasizing that the underlying serious
3 health condition may not be disclosed on this form
4 without the consent of the patient and need not be
5 disclosed.
6 And we would also recommend that if language
7 stating that if an employee turns in this form to their
8 employer, attempts to use it, that the employer must
9 accept it and may not require the Department of Labor
10 form or some other form that requires more information
11 that is required under the CFRA form.
12 In order to make this -- using this form
13 simpler for employees and a wider -- and for employers,
14 frankly, we would also strongly suggest that the Council
15 include the form in a conspicuous place on the website
16 so that it's easily accessible. Right now you'd have to
17 find it in the regulations themselves.
18 So including that on the website I think would
19 be wonderful for employers. They would know what it
20 was. They could print it out instead of just going to
21 the DOL's form, and that would help them to make sense
22 of that requirement and know what they're looking at
23 when an employee uses that form.
24 So I appreciate your time and appreciate your
25 consideration of our comments.

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1 Thank you.
2 CHAIRPERSON MANDELBAUM: Thank you,
3 Ms. Langston.
4 MS. BRODSKY: You may not know the answer to
5 this, but do you know whether under the state Paid Leave
6 Act there's any notice requirements?
7 MS. LANGSTON: I believe there are some notice
8 requirements. I would need to double check on the
9 specifics of those. But you know, again, I think it
10 could only be helpful to also include -- you'll notice
11 requirements here where employers are -- you know, and I
12 don't know. I think there may be some in the very
13 beginning. But here where it's actually used to have
14 that notice given, I think it would be very helpful.
15 MS. BRODSKY: Thank you.
16 MS. LANGSTON: Sure.
17 CHAIRPERSON MANDELBAUM: Anyone else wishing to
18 speak on the California Family Rights Act Regulations?
19 MR. SCHUMANN: Good afternoon. My name is Jay
20 Schumann. I'm a private attorney and HR consultant. I
21 have a couple short general statements, and then I have
22 a couple specific provisions I'd like to discuss.
23 The general -- the first general statement is
24 I've worked internally as a Human Resources
25 practitioner, and having the new regulation or the

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1 proposed new regulation about the electronic notices I
2 think is a very good idea. Because in the environment
3 that I was at, people relied on their computers far more
4 than they relied on paper notes. So I think that's
5 helpful.
6 And the other general statement is I appreciate
7 that in the proposed regulations the Council makes
8 reference to the possible need for reasonable
9 accommodation under the disability laws. I think
10 having -- I know there's a reference to the leave laws
11 in the disability regulations. And now there'll be
12 reference to the disabilities accommodation laws in the
13 leave regulations. I think it's very helpful to have it
14 in both places like that.
15 So I have a couple of very minor and very
16 targeted comments. The first one -- by the way, I have
17 submitted these in writing also. The first one is on
18 page 11 and it's under section 11089(d)(2)(f), and this
19 is the section that deals with key person coverage or
20 key employee coverage under CFRA.
21 And there's a statement in there about the --
22 that the employee continues to be entitled to
23 maintenance of health benefits. I suggest it would be
24 helpful to refer them to section 11092(c) at that point,
25 because the way it reads right now where it says if an

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1 employee on leave does not return to work in response to
2 the employer's notification of intent to deny
3 reinstatement, the employee continues to be entitled to
4 maintenance of health benefits. But it doesn't say for
5 how long. And so I think referring -- referring --
6 making a reference to section 11092(c) at that point
7 would -- would add clarification.
8 And the other specific comment is on page 22 of
9 the proposed regs. Section 11092(d)(3)(c). And this is
10 really just a semantic comment. Throughout this section
11 on health benefits coverage, it's referred to as health
12 benefits coverage, but in the section that I've just
13 pointed out to you, for some reason it talks about
14 health insurance. And I think for consistency, wherever
15 it refers to health insurance in 11092(d)(3)(c), it
16 should refer to health benefits coverage.
17 That concludes my comments.
18 CHAIRPERSON MANDELBAUM: Thank you,
19 Mr. Schumann. I appreciate it.
20 MR. SCHUMANN: Thank you.
21 CHAIRPERSON MANDELBAUM: Are there others that
22 would like to speak?
23 MS. MAECHTLEN: Good afternoon. My name is
24 Laura Maechtlen. I'm a partner with Seyfarth Shaw, and
25 a member of our California Workplace Solutions and
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1 Complex Discrimination Litigation.
2 Our firm is sending today under separate cover
3 written comments on behalf of the Employer's Group and
4 California Employment Law Council, both of which have
5 members in the employer community.
6 We overall and the Employer's Group and CELC
7 support the spirit and intent of the Council's
8 regulations, but we have experienced some significant
9 challenges in complying with the regulations so far.
10 And I wanted to provide some comment about those today.
11 I'll summarize by section.
12 In section 1087 definitions, we have a general
13 comment that the definition -- and I have heard the
14 commentary before this from both the Council and other
15 folks that have testified. But the definition is
16 referring to the most current federal regulations that
17 became effective on March 8. It sometimes can become
18 confusing and other situations where regulations from
19 another place have been incorporated.
20 Our actual proposal would be to use language
21 referring simply to the, quote, most current regulations
22 of the FMLA in case they are subsequently changed again
23 to the extent that you provide clarifying language that
24 they are only incorporated to the extent that they do
25 not otherwise -- that they're not otherwise inconsistent
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1 with the CFRA.
2 The next section is 11087 subdivision (c). For
3 consistency and ease of reference, we would recommend
4 putting the definition of "child" back into regulations
5 and not striking that provision. We agree, however,
6 that moving in loco parentis to its own subdivision
7 makes sense and makes it easier to locate.
8 In section 11087 subdivision (d), the
9 definition of "covered employer." The proposed
10 regulations add the phrase "including successor in
11 interest" to the definition of the covered employer
12 here. Adding the phrase "successors in interest" to the
13 definition makes the definition overly broad, seemingly
14 without statutory basis, and would impose onerous
15 consequences for buyers and sellers of businesses in
16 California.
17 If the language of this regulation remains as
18 proposed, purchasers of entities that have any
19 California employees will now, by law, be assuming
20 liability for all potential CFRA claims, unless the
21 seller expressly retains those liabilities.
22 The proposed phrase is also vague. It is
23 unclear whether the proposed language permits the
24 parties to agree to shift the potential liability or
25 not. And while it may be possible for a seller to agree
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1 to indemnify the buyer of the business, the proposed
2 addition adds a layer of complexity that was not
3 previously in the regulations. Therefore, we recommend
4 deleting the "successors in interest" language.
5 The next provision we had comments to, 11087
6 subdivision (e)(4), the definition of eligible employee.
7 Here to clarify that only employees who have a certain
8 minimum level of contact working within California --
9 actually, sorry.
10 Backing up, just to provide reference. We
11 propose that there be language added to this where there
12 would be clarification that an employee must physically
13 perform work in California at least half of the time;
14 the reason being is this would clarify that only
15 employees who have certain minimal level of contact
16 working within California are eligible for the benefits
17 provided by the CFRA.
18 And so therefore we propose including language
19 specifying that only employees who perform work in
20 California at least half of the time are eligible for
21 CFRA Leave. This is consistent with the jurisdictional
22 reach and protections of the California laws. We have
23 actually cited legal authority in support of that
24 recommendation in our written comments that are being
25 forwarded today under separate cover.
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1 Our next proposal would be to section 11087
2 subdivision (r)(1) related to inpatient care. Council
3 has removed reference to a, quote, overnight stay in
4 this section. Council's proposed revision to this
5 definition to remove the reference to an overnight stay
6 makes it inconsistent with the FMLA Regulations and
7 unclear how long a stay must be to qualify for inpatient
8 care.
9 We would recommend keeping the reference to an
10 overnight stay to keep this definition clear and
11 consistent with the FMLA. If that's not acceptable to
12 the Council and you do not wish to do that, we would
13 strongly recommend that the Council further clarify then
14 what inpatient stay means.
15 For example, you could state that inpatient
16 care means a stay -- that the patient has been, for
17 example, admitted to a hospital, hospice, or residential
18 care facility. The lack of a definition would make it
19 very unclear for employers to interpret that language.
20 Our next proposal would be regarding section
21 11088(c), the limitation of entitlement provision.
22 There was a proposed change of the term parents to
23 spouses in the first sentence, which we see as a problem
24 in California because marital status is a protected
25 category under the FEHA. The current CFRA Regulations

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1 utilize the term parents to avoid different treatment of
2 married and unmarried people for purposes of CFRA
3 bonding leave entitlement. So retaining the old
4 language or using our proposed would help avoid this
5 issue.
6 Our proposed edit would be rather than saying
7 if spouses -- if it said -- current proposed language is
8 if spouses employed by the same employer are entitled to
9 CFRA Leave, their employer may limit leave for the
10 birth. We propose deleting spouses and instead using
11 the language if both parents are employed by the same
12 employer and are entitled to CFRA Leave. So using,
13 essentially, the term "parents" rather than "spouses".
14 The next provision would be 11089(d)(3)
15 regarding fraudulently-obtained CFRA Leave. We believe
16 this section should be included in the regulations, and
17 the Council has proposed language stating that an
18 employee is not entitled to, quote, job protections
19 afforded by the CFRA if they fraudulently obtained CFRA
20 Leave.
21 We would recommend a change to make it clear
22 that an employee commits fraud to obtain CFRA Leave is
23 not entitled to any CFRA protection. It is not just
24 limited to CFRA's job protections. Benefits and any
25 other CFRA protections are unavailable to employees who

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1 commit fraud to obtain leave.
2 Section 11090 subdivision (e)(4) regarding
3 deduction of exempt employee's pay. Just a general
4 comment to this one. Given that wage and hour laws are
5 outside the Council's jurisdiction but that this is an
6 area where clarification is definitely needed within the
7 State of California, we would respectfully request that
8 the Council solicit confirmation from the California
9 Division of Labor Standards Enforcement in the form of a
10 formal opinion that California employers may follow the
11 FMLA regulation 29 CFRA 825.206 as to deductions from
12 exempt employees salaries for intermittent or reduced
13 scheduled leave.
14 The next section we had a comment on was
15 11091(b)(2)(a) regarding second opinions. In this
16 proposed regulation, the language reads, "if the
17 employer establishes a reason to doubt the validity of
18 the certification the employee provides for his or her
19 own serious health condition, the employer may require
20 at the employer's own expense, the employee to obtain
21 essentially a second opinion."
22 The proposed regulation adopts the term
23 "establishes" instead of the term "has". It used to be
24 that if the employer simply has a reason to doubt. The
25 addition of the term "establish" instead of the word

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1 "has" makes the new language somewhat unclear in terms
2 of what the employer would have to do to establish or
3 reason to doubt the validity of the certification.
4 So we would recommend retaining the term "has".
5 Without any state of justification, this change appears
6 to be unnecessarily placing a heightened burden on
7 employers to establish a reason to doubt the validity of
8 the certification to support a second opinion.
9 The next section is 11091(b)(2)(e), regarding
10 the return to work release. Here it's just a simple
11 edit. It appears new language might have been added in
12 the wrong place.
13 So in our written comments we moved the term
14 "other policy" to later in a sentence there. So it
15 would be read the final sentence starting with "there is
16 no collective bargaining," it reads now, "there is no
17 collective bargaining or other policy agreement
18 forbidding the practice, and we are suggesting there is
19 no collective bargaining agreement or other policy
20 forbidding the practice."
21 With that change, however, nevertheless we
22 would say that the FMLA regulation on this same topic
23 only addresses limits and collective bargaining
24 agreements and doesn't go further. So there is no
25 explanation provided to justify expansion of the FMLA

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1 language.
2 Section 11091(b)(3) regarding providing
3 certification. There was a parenthetical providing an
4 example where in this sentence that talks about absent
5 extenuating circumstances, e.g., unavailability of
6 health care provider, if the employee fails to timely
7 return.
8 We just recommend removing the parenthetical
9 example, as the Council has expressed its intention to
10 follow the FMLA regulation on this topic. There's no
11 such example within the FMLA Regulations.
12 Our final section that we had comments to was
13 regarding the certification form itself as section
14 11097. We have attached a proposed revised
15 Certification of Health Care Provider form for your
16 consideration with our written comments that are being
17 submitted by US mail and via e-mail to you to Director
18 Cheng today. We made proposed revisions to essentially
19 four areas of the certification form itself.
20 One, to question two, essentially to add some
21 questions regarding the patient's relationship to the
22 employee so that the employer can confirm that the
23 person is a covered family member and also whether it is
24 a minor or adult child for which the person is
25 requesting leave.

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1 We have proposed edits to question 4(b), which
2 we believe is insufficient on its own to provide
3 information regarding the duration of the employee's
4 need for leave which is often different than the
5 probable duration of the condition or the need for
6 treatment. So that's under clarification.
7 We have proposed edits to question nine on the
8 form, regarding obtaining sufficient medical
9 certification.
10 And then also to the definition of serious
11 health condition. We revised that to make it consistent
12 with the current FMLA Regulations and the definition in
13 the proposed amendments to section 11087(r) except that
14 we kept the overnight stay language consistent with our
15 other comments regarding overnight stay. And then --
16 and believe that this comment would essentially ensure
17 the Council's stated purpose of following the most
18 current federal regulations with respect to that
19 definition.
20 So we thank the Council for the opportunity to
21 comment and appreciate your time. If you want any
22 further input from the Employer's Group or from CELC in
23 this process, we have provided contact information in
24 our written materials.
25 CHAIRPERSON MANDELBAUM: Great. Thank you very

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1 much. We are about halfway through our afternoon
2 session. Now would be time for a short break, then
3 we'll resume with the hearing on the CFRA Regulations.
4 We do have a number of people I know who wish to speak,
5 and we are running into somewhat time constraints. So
6 we will be back promptly at 2:40, in 12 minutes by my
7 watch.
8 (Break taken.)
9 CHAIRPERSON MANDELBAUM: Back on the record for
10 the California Family Rights Acts Regulations. Herein
11 the time is 2:45 p.m., and we will take further public
12 comment.
13 There will be an opportunity to make public
14 comment on other topics once we conclude the hearing.
15 MR. LEBOWITZ: Good afternoon. My name is Noah
16 Lebowitz. I am a partner with San Francisco Law Firm of
17 Duckworth Peters Lebowitz Olivier. My capacity here is
18 a member of the executive board with California
19 Employment Lawyers Association otherwise known as CELA.
20 What we have submitted electronically prior to
21 my arrival here today, and I have just handed you a hard
22 copy of, is CELA's official written comments. These are
23 to be considered in conjunction with the oral comments,
24 verbal comments that were made by a couple of our
25 members at the April 7th hearing as well.

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1 And so CELA, as you know, is a statewide
2 organization. We now have more than 1100 members. We
3 are -- folks who are primarily in the business of
4 representing employees in wrongful termination and
5 employment matters of all types, and primarily engaged
6 in the enforcement of the Fair Employment Housing Act in
7 general and inclusive of the California Family Rights
8 Act. So these regulations are of extraordinary
9 importance to our members and the folks they are
10 helping.
11 Before I get started with substance, let me --
12 as I was sitting here in the audience noticed a couple
13 of corrections, if we can, to page two of the comments
14 we have made. There's a typographical error in the
15 second to last line. There's a capital "I" which is
16 intended to be "is" and not capital "I". Do you see
17 that? That's the standard.
18 And then on page seven, footnote two, the
19 reference should be to section 11089 sub (2)(b).
20 Capital B instead of section -- subsection (a). And for
21 more information -- I'll submit a corrected version
22 electronically so you have a full version for the
23 record. But I wanted to do that now before the five
24 o'clock deadline.
25 So the specifics of all of our detailed

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1 comments are contained in the letter. What I want to do
2 today with my comments is revisit one of my favorite
3 issues, which is the -- the issue of non-duplication
4 versus clarity. And then pointing out one or two
5 sections for a couple highlights and not go through all
6 the details.
7 But I appreciate the comments made by the chair
8 this morning or this afternoon, on -- there is this
9 tension between non-duplication and clarity that exists
10 within the Administrative Procedures Act, the APA.
11 And what's important as I read both the statute
12 and the regulations that implement the APA is that
13 non-duplication is, as I read it, secondary to clarity.
14 And that clarity is of importance. It is of primary
15 importance, frankly. And especially because what we are
16 dealing with here is probably the most highly technical
17 area of law within the Council's jurisdiction and one of
18 the most highly technical areas of law within employment
19 law in general in California. But certainly within the
20 Council's jurisdiction. This is the most technical
21 area, I would say.
22 And so clarity is really, really important
23 because what these regulations are used for is almost --
24 the real users I believe are the Human Resources
25 professional management side folks who use these

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1 regulations to create the personnel handbooks and the
2 internal policies that tell and help the employees
3 understand what their rights are and what their
4 obligations are as well for compliance.
5 And then it also invests those same management
6 side folks' understanding what their rights and
7 obligations are in complying. And of course, because
8 regulations -- the real goal of regulations is increase
9 of compliance. As we approach regulations and comments
10 on regulations from our organization is with that in
11 mind, that the goal of regulatory enactment and reform
12 in revision is increased compliance and reduced
13 litigation and increased resolution.
14 And so when we look at the actual regulations
15 that implement the APA, there's more than one place that
16 talks about the fact that non-duplication is a secondary
17 consideration to clarity. In fact, there's a negative
18 presumption.
19 If the regulation presents information in a
20 format that is not readily understandable by persons
21 directly affected by the regulation and a presumption
22 that it is not clear and does not meet the clarity
23 standard and those folks who are directly affected,
24 there's the definition of regulations about those that
25 are directly affected. But it means, obviously, in our

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1 situation both sides of the potential dispute and both
2 sides of the folks who are trying to figure out their
3 rights and obligation.
4 And as I said, the intended audience for these
5 regulations really are not the lawyers who have Westlaw
6 or whatever at their fingertips and are able to slip
7 back and forth between the statutes and regulations and
8 the FMLA Regulations relatively easily. It's the folks
9 who don't necessarily have access and don't know where
10 to look for all this information. And the idea as
11 stated before, the content of a one-stop shop is really
12 what we believe is regulations. That should be the goal
13 of these regulations.
14 And so there are -- by our count, no fewer than
15 12 instances within the proposed regulations where the
16 Council has proposed to strike existing language
17 wholesale in favor of a cross reference back to the
18 statute. And there's -- frankly, we believe that all of
19 those suggest those proposed amendments should be
20 reversed and that language should be restored. And we
21 do address each of those sections within the -- within
22 the written comments.
23 I'll stop here for a second and say this. You
24 all have done a remarkable job to this point, of course.
25 And there has been -- the hours of work that have been

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1 put into these regulations is obvious. And I know you
2 all don't get paid much for this job. So on behalf of
3 our organization, I will say absolutely thank you for
4 all the time that you have put into it.
5 And just because we may have comments that say
6 you should have done it a different way doesn't mean we
7 don't appreciate the work that you have put in to get
8 these to this point. And we know there's a lot more to
9 go and you have got a time limit. So good luck.
10 So anyway, there's -- let me point out one
11 example of where I think the proposed striking of
12 language in favor -- for stated reasons of
13 non-duplication has actually caused more confusion
14 than -- than otherwise necessary.
15 And that is in the definitions section, where
16 the proposal is to strike section 11087 sub (c), little
17 (c), which is the definition of child, I believe. The
18 definition of child. And in favor -- because the stated
19 reason is there is a portion of that language that is
20 duplicative of the statute. But some of it is not.
21 And so to make up for that, the Council has
22 been -- has had to make -- has had to create two new
23 sections. So 11087 sub (a) proposed, which is
24 definition of adult dependent child, and 11087 sub (k),
25 which is the separate definition of "in loco parentis".

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1 The way we read the existing language of sub
2 (c), we believe that it is actually a better placement
3 and more contextualized description of those
4 definitions. And therefore, because all three of those
5 idea concepts, the child in loco parentis, and adult
6 dependent child, are all in one place, where it is --
7 they're read in context in relation to one another, it
8 makes more sense.

9 Simply for the purpose of avoiding duplication
10 of some statutory language these things are now split
11 out. You have to read two separate sections within the
12 regulations and then go back to the statute and read a
13 third section to get all the information as presently
14 constructed to get in one section. So that is one
15 example of where we believe it's a little bit more form
16 over substance as far as the non-duplication versus
17 clarity.

18 And then I want to talk about two other
19 sections that don't necessarily compact -- come from
20 this general non-duplication versus clarity debate. And
21 that is on page seven of my comments -- of our comments
22 on the two sections dealing with the employee. So the
23 language that we looked at in section 11087 sub (l) and
24 11089 sub (d)(2). And those two sections, one -- the
25 11087 section including the definition and 11089 section

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1 being the more substantiative right description as we
2 see it drawn out. There is -- it's somewhat awkward in
3 that the -- there is definitional language in the
4 substantiative section as opposed to being in the
5 definitional section.

6 So sub (d)(2) contains the second clause of sub
7 (d)(2) -- the new suggested language that Council has
8 proposed in (d)(2) is essentially definition. And if
9 you take that, cut it and paste it into the definitional
10 section, we believe it reads better and is clearer.

11 And instead what you are left with under the
12 substantive section is a much more streamlined
13 description of what the substantiative right is as far
14 as the affirmative defense goes. And how that -- and it
15 makes it clearer for those who are attempting to analyze
16 whether the affirmative defense applies, whether or not
17 it does apply.

18 So that's one I just wanted to highlight,
19 because it might be kind of confusing. It was difficult
20 to write it out and describe it in one document, so I
21 wanted to explain that a little better.

22 And then finally, the one section -- one other
23 section I want to draw your attention to, is 11094 sub
24 (b) as in boy. Retaliation and protection from
25 interference section.

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1 The only thing -- a lot of this is new in these
2 sections, and we believe that it is very good language
3 and we appreciate it. And this is an area that is
4 obviously often litigated.

5 There is one concept that we found not
6 necessarily addressed, kind of sideswiped, not directly
7 addressed, and we would like it directly addressed.
8 It's a very simple concept that when someone has taken a
9 CFRA protected leave that that -- if that employee is
10 judged or assessed at year end or on some annualized
11 basis or on some regular basis based on performance
12 metrics, so for instance, you have a salesperson whose
13 annual bonus or performance review is based largely if
14 not entirely on meeting a predetermined sales goal for
15 the year based on the 12-month calendar, that employee
16 takes a three-month leave of absence, CFRA protected
17 leave of absence.

18 They cannot and still complying with the law
19 they cannot be judged on that 100 percent of reaching
20 that 100 percent metric. It needs to be prorated to
21 75 percent or whatever the appropriate ratio is.

22 And so to be able to say that they have met
23 their metrics for the year it's only judged on the time
24 they were actively at work and not on protected leave.
25 Because to do otherwise, to use that would be using that

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1 protected leave against them. If you were to judge that
2 same employee on the 100th percent of the predetermined
3 sales goal, they would have only nine months to reach
4 that goal, whereas an employee who did not exercise
5 their rights would have a full 12 months to reach that
6 goal.

7 That's a concept that we find not directly
8 addressed in the regulations, and we found a place that
9 we think in the section 11094 sub (b) that it ought to
10 be placed, and we have some suggested language for that.

11 And with that, I will leave the rest to the
12 written comments, unless you have any questions I'm more
13 than happy to try to address.

14 CHAIRPERSON MANDELBAUM: Thank you,
15 Mr. Lebowitz.

16 Other comments on the California and Family
17 Rights Act and Regulations?
18 Going once. Going twice.

19 So hearing no further comments requested, this
20 concludes our public comment portion of the hearing. So
21 thank you for taking time to provide public comment
22 regarding the issuance of the composed amendments for
23 the California Family Rights Act Regulations. We will
24 accept written comments on the proposed amendments until
25 5:00 p.m. today, June 2nd, 2014.

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| | |
|--|--|
| <p>1 Also, anyone who testifies here today or 2 submits written comments will receive a copy of any 3 changes or amendments that Council makes to its proposed 4 amendments to the CFRA Regulations. 5 Anyone who testifies or submits written 6 comments will have a 15-day period in which to make 7 written comments to changes that are made to the 8 proposed CFRA Regulations. 9 Council will consider each comment made on 10 April 7, 2014, and here today as well as all written 11 comments received. Council will respond to each comment 12 in writing in its final statement of reasons which will 13 become a part of the Council's rulemaking record. 14 So again, thank you for everyone today who 15 provided testimony. The hearing part of this meeting is 16 now adjourned. 17 18 (TIME NOTED: 3:00 p.m.) 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 66</p> | |
| <p>1 REPORTER'S CERTIFICATION 2 3 I, TAMMY MOON, CSR No. 13184, Certified 4 Shorthand Reporter, certify: 5 That the foregoing proceedings were taken 6 before me at the time and place therein set forth, at 7 which time the witness was put under oath by me; 8 That the testimony of the witness, the 9 questions propounded, and all objections and statements 10 made at the time of the examination were recorded 11 stenographically by me and were thereafter transcribed; 12 That the foregoing is a true and correct 13 transcript of my shorthand notes so taken. 14 I further certify that I am not a relative or 15 employee of any attorney of the parties, nor financially 16 interested in the action. 17 I declare under penalty of perjury under the 18 law of California that the foregoing is true and 19 correct. 20 Dated this 7th day of June, 2014. 21 22 23 24 Tammy Moon, CSR No. 13184 25</p> | |

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