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FAIR EMPLOYMENT AND HOUSING COUNCIL
MEETING MINUTES OF JULY 17, 2017

LOCATION:

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

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<p>1 PROCEEDINGS 2 JULY 17, 2017 3 4 CHAIR CHAYA MANDELBAUM: So we're ready 5 for our public hearing. So without further adieux, 6 we'll begin. So we're on the record. It is a little 7 bit before 10:30 on Monday, July 17th. We're here at 8 the California CPUC Auditorium in San Francisco. 9 My name is Chaya Mandelbaum, Chairperson 10 of the Fair Employment and Housing Counsel. Joining 11 me today are members of the Council, Councilmembers 12 Dale Brodsky, Dara Schur, Tim Iglesias, Joseph Ortiz 13 and Lisa Cisneros, along with Ex-officio Director of 14 the Department Kevin Kish. Even though we've made 15 initial introductions, let me, again, welcome you to 16 the hearing portion of this meeting. 17 The purpose of this hearing is to 18 receive public comment regarding issuance of 19 amendments to the FEHA regulations regarding national 20 origin discrimination. The rulemaking clarifies and 21 makes specific and supplements existing state 22 regulations interpreting the FEHA set forth in the 23 government code at 12900, et seq, as it relates to 24 employment the FEHA prohibits harassment and 25 discrimination because of race, religious creed,</p> <p style="text-align: right;">Page 2</p>	<p>1 comments to the council at FEHCouncil@DFEH.CA.gov or 2 you can mail them instead to the Council, care of 3 Brian Sperber at the DFEH's Los Angeles office at 320 4 West 4th Street, 10th Floor, L.A., California 90013. 5 If you have brought written copies of your comments 6 and you do not plan to separately submit them, please 7 have a copy given to Brian Sperber. If you have not 8 brought a copy of your comments, please make sure 9 they're delivered by 5:00 p.m. today. 10 Anyone who testifies here today or who 11 submits a copy will receive a copy of any amendments 12 or changes that Council makes to the proposed 13 regulations as will anyone who makes such a request. 14 Also, anyone who testifies or submits 15 written comments will have a chance a 15-day period 16 within which to make comments on any changes that 17 Council elects to make to the proposed regulations 18 as part of the rulemaking process. 19 So we'll consider each comment made here 20 today, as well as all written comments received, and 21 then we'll respond to all those comments in the final 22 statements of reasons, which will become part of the 23 Council's rulemaking record. The hearing is being 24 transcribed by a court reporter, so the transcript of 25 the hearing, as well as all the written comments,</p> <p style="text-align: right;">Page 4</p>
<p>1 color, national origin, ancestry, physical 2 disability, mental disability, medical condition, 3 genetic information, marital status, sex, gender, 4 gender identity, gender expression, age, sexual 5 orientation, and military and/or veteran status. 6 The proposed regulations are slated to 7 appear in the California Code of Regulations at 8 Title 2, sections 11027, 11027.1 and 11028. Copies 9 of the proposed amendments are available at the back 10 of the room and reflect an Attachment D to the 11 meeting material and the notice and initial statement 12 of reasons are reflected in Attachments B and C 13 respectfully. The text of the Council's regulations 14 are also available on the Council's web page 15 www.DFEH.CA.gov/FEHcouncil. The council's holding 16 this hearing as part of its formal rulemaking 17 process. 18 We noticed the hearing 45 days ago in 19 the California Register notice published on June 2nd, 20 2017, and also via e-mail sent to more than 7,500 21 individuals and stakeholders and through the 22 Council's web page. Pursuant to that notice we're 23 taking testimony on the proposed amendments, and we 24 also accept written testimony and comments until 25 5:00 p.m. today, July 17th. You may e-mail written</p> <p style="text-align: right;">Page 3</p>	<p>1 will be part of the rulemaking record. 2 Because it's being transcribed, it's 3 critical that anyone speaking does so clearly and 4 slowly, and that only one person speak at a time. 5 You will not be sworn in today when you testify, but 6 we do ask that you come to the front of the room and 7 speak into the microphone, so that CHAIR CHAYA 8 MANDELBAUM reporter can take down your testimony. 9 Please also begin by spelling your name 10 and stating your affiliation. Also, for our benefit 11 if you are commenting on a specific regulation, 12 please remember to identify the section and 13 subsection of the regulations, so that we may refer 14 to it as you speak. We will hear testimony this 15 morning until all those wishing to testify have had 16 an opportunity to do so. 17 Does anyone have any questions? 18 All right. I think we're ready to 19 begin. So whoever wants to kick off our public 20 hearing first, please step up. 21 SPEAKER DIAZ: Hi, there. Good morning. 22 First, thank you to the Chair Chaya 23 Mandelbaum and the councilmembers for undertaking 24 this normal process and providing us this opportunity 25 to comment.</p> <p style="text-align: right;">Page 5</p>

<p>1 My name is Marisa Diaz spelled 2 M-A-R-I-S-A. Last name D-I-A-Z, and I am a staff 3 attorney at Legal Aid at Work, which is a public 4 interest law firm here in San Francisco, and I work 5 in the national origin immigrants rights program 6 where we focus on advocating on behalf of workers, 7 who have faced national origin discrimination in the 8 workplace. 9 I have submitted written comments via 10 e-mail on Friday, so today I'm going to go over some 11 of those comments and to highlight some of the key 12 points, and I'm welcoming any of your questions or 13 concerns as well. 14 So, first, I wanted to address 15 Section 11028(a)(3), which is on page 2 of the 16 proposed regulations, and this provision addresses -- 17 currently addresses only customer preference as a 18 justification for a language restrictive policy, and 19 we would strongly encourage the council to revise 20 this provision, so to also address co-worker 21 preference. Here neither customer, nor a co-worker 22 has a pleasure of speech in languages other than 23 English to be a legitimate reason to justify a 24 language-restrictive policy, as allowing this to 25 happen would cater and serve to only perpetuate</p> <p style="text-align: right;">Page 6</p>	<p>1 So if there are no questions on that, I 2 now wanted to move to Section 11028(a)(4) of the 3 regulations, and as this provision already states 4 under California law there is a presumption that 5 English-only rules have a desperate impact on the 6 basis of national origin. So once an employee has or 7 an applicant has made out that prima facie case, then 8 the burden automatically shifts to the defendant to 9 show that there is a business necessity for this 10 policy. However, under California law an employer in 11 addition to showing business necessity also has to 12 show, for example, that they effectively notified the 13 employees of this policy and the consequences for 14 violating the policy. 15 So as currently written 16 Section 11028(a)(4) states only that an employer has 17 to prove the affirmative defense of business 18 necessity, and we would suggest that this provision 19 be revised to read, first, that English-only rules 20 are presumed to violate the act on the basis of 21 national origin. In order to rebut this presumption 22 an employer must prove the elements listed in Section 23 11028(a)(1)(a), and that would refer people to the 24 various elements that are listed in that -- in the 25 language restrictions section. That would include</p> <p style="text-align: right;">Page 8</p>
<p>1 prejudice and legitimize that, which serve only 2 prejudice and this is when clear case law that deals 3 with other forms of discrimination such as racially 4 discrimination, where an employer cannot justify a 5 racially discriminatory policy based simply on a 6 co-worker's preference, for example, to not have 7 someone of that race in the workplace, and so that we 8 believe that situation is no different from someone 9 who simply prefers not to hear Spanish, for example, 10 and a co-worker who prefers not to hear Spanish and 11 an employer, who, therefore, adopts an English-only 12 policy in order to cater to that preference. So for 13 those reasons we strongly encourage the Council to 14 safely provide this provision to just add co-worker 15 preference in addition to the customer preference. 16 COUNCILMEMBER BRODSKY: Are you finding 17 that -- has come up in your practice? 18 SPEAKER DIAZ: Yes, it definitely comes 19 up, and also, the EEOC also addresses this in their 20 2016 guidance and gives some good examples of how 21 language neutral and general policies that many 22 employers already have on the books could be used to 23 address this type of situation without creating a 24 desperate impact on a national origin minority group 25 in the workplace.</p> <p style="text-align: right;">Page 7</p>	<p>1 business necessity and the notice requirement, for 2 example. So we believe that would just be more 3 complete and accurate. 4 SPEAKER BRODSKY: You don't think it 5 already does that by referencing business necessity, 6 which is defined above as having three components to 7 it? 8 SPEAKER DIAZ: No. Yeah, I don't think 9 that it does that, because if you look at 10 11028(a)(1), the A says the policy is job related and 11 consistent with business necessity; then B says the 12 policy is narrowly tailored; and C, the employer has 13 effectively notified its employees of the 14 circumstances and time. So business necessity is a 15 separate -- is listed as one part of the employer's 16 burden, but then there is also the notification 17 provision, which isn't encompassed within business 18 necessity. 19 SPEAKER BRODSKY: So it looks to me like 20 -- then, what you are focusing on then is the notice. 21 That's the only thing that looks like it's different 22 really between one and two. 23 Business necessity is defined in two for 24 purposes of the subsection business necessity means 25 an overriding legitimate business purpose such that</p> <p style="text-align: right;">Page 9</p>

<p>1 is necessary. 2 SPEAKER DIAZ: Yes, we agree that 3 business necessity is sufficiently explained in this 4 provision, but subsection four, the one I'm focusing 5 on, if you were to just read that section, it would 6 -- one would understand that the employer just has to 7 prove business necessity wherein, in fact, the 8 provisions directly above this say that they have to 9 prove business necessity, also, that the policies 10 nearly tailored and that it has effectively notified 11 its employees of the policy and the consequences for 12 violating it. So we make the suggestion just for 13 consistency and so that it's as clear as possible, 14 first, that there is a presumption that there is a 15 desperate impact, and secondly, what the employer has 16 to show to rebut that presumption. 17 Okay. So if there are no other 18 questions, I'll move on to another issue regarding 19 burdens of proof in language discrimination cases. 20 So whether a case deals with a language-restrictive 21 policy, an English-proficiency requirement, or accent 22 discrimination, there is always unfortunately a 23 possibility that unfounded assumptions will pervade 24 the fact finder's analysis in determining whether a 25 given policy or an act violates the FEHA, and in our</p> <p style="text-align: right;">Page 10</p>	<p>1 So we would suggest adding a new 2 section. It would be 11028(a)(5), which would be on 3 page 2 of the current draft regulations, and it would 4 state: To meet its burden it is not sufficient that 5 the employer rely on subjective beliefs or facially 6 unsupported assumptions about the need for a language 7 restrictive policy, and we would recommend that same 8 type of language be added to the end of 9 Section 11028(b), which deals with accent 10 discrimination, and at Section 11028(c), which deals 11 with English-proficiency requirements, and in our 12 written comments we have included the specific 13 language for each of those additions as well. 14 Okay. Now, moving on to discovery and 15 into immigration status. First, I just want to thank 16 the Council again for addressing this issue in the 17 proposed regulations. As I'm sure many of you are 18 aware, actual discovery or even the potential that 19 there could be discovery into immigration status can 20 have a very extreme, chilling effect on individual 21 claimants, and also, the broader immigrant worker 22 community. So I think it's very important that these 23 regulations do address this, and we thank you for 24 doing that. We would -- we made some suggestions in 25 our written comments to just make this area of the</p> <p style="text-align: right;">Page 12</p>
<p>1 written comments we have cited to several cases in 2 the Title 7, context that illustrate this point. 3 I'll highlight one today. That's a seventh circuit 4 case where CHAIR CHAYA MANDELBAUM upheld a very 5 broadening proficiency that required, both, verbal 6 and written English proficiency for nearly all job 7 classifications in a large medical facility, and that 8 covered things within the maintenance department, the 9 whole gamut of jobs in that environment. 10 In upholding the judgment in favor of 11 the defendants in that case, the seventh circuit 12 noted, quote, that it would suppose that English is 13 most likely to be the common language of a majority 14 of patient and the like, therefore, deficiencies in 15 English is a language deficiency most likely to be 16 troublesome with an employee of a hospital located 17 well in the interior of a supposedly English-speaking 18 nation. 19 So this is a case that unfortunately 20 demonstrates some of the assumptions that can come in 21 to play in these types of cases, and we think that 22 these regulations provide a really important 23 opportunity for the Council to clarify the burdens on 24 each party, and also, what each party has to do to 25 meet those burdens.</p> <p style="text-align: right;">Page 11</p>	<p>1 law even clearer in the regulations, first, to make 2 clear that in the liability phase there is -- there 3 is no discovery allowed in immigration status, and 4 secondly, during the remedies phase, there is a 5 certain standard that are set in California law, 6 where by which the employer would have to prove by a 7 clear and convincing evidence that this inquiry is 8 necessary, and then, also, that this discovery can 9 only be used for purpose of determining the remedies. 10 So it's more of a structural suggestion that we've 11 made, and I would refer you to our written comments 12 to look at that, and then, also, the specific 13 language, but I just wanted to highlight that we 14 think it's the regulations do a great job. We 15 suggest that just further clarity, and this would be 16 helpful, and then I'm going to move to the driver's 17 license provisions. So that's on page 4 of the 18 proposed regulations. 19 So, we suggest that the Council add a 20 new provision under Section 11028(g), which as I 21 said, deals with driver's licenses that are issued 22 under California Vehicle Code 12801.9, and this 23 provision that we suggest would make clear that 24 possession of this type of license would not 25 constitute the clear and convincing evidence required</p> <p style="text-align: right;">Page 13</p>

<p>1 to allow discovery into immigration status at the 2 remedies phase of a proceeding. 3 So, the language that we suggested is 4 that an employer applicant possesses a driver's 5 license issued under Section 12801.9 of the vehicle 6 does not constitute clear and convincing evidence for 7 purposes of Section 11028(f)(2)(b), which we refer to 8 another section we recommended you at. 9 Possession of a driver's license issued 10 under Section 12801.9 of the Vehicle Code cannot be 11 considered when determining whether an employer has 12 made the required showing for remedies related to 13 discovery into an applicant's or employee's 14 immigration status as described under Section 15 11028(f)(2)(b) of this article. We make this 16 suggestion because all California residents are 17 eligible for a license under Vehicle Code 18 Section 12801.9, and also, the Vehicle Code, itself, 19 states that possession of this license cannot be used 20 to discriminate under -- or discrimination based on 21 the possession of this license is a violation of the 22 Fair Employment and Housing Act and the Vehicle Code 23 also states that a license issued under 12801.9 is 24 not to be used for any purpose other than to 25 establish identity and authorization to drive.</p> <p style="text-align: right;">Page 14</p>	<p>1 question regarding this -- your suggestion around the 2 driver's license. Are there some scenarios where an 3 employee would have a driver's license under 4 Section 12801.9, and actually, be authorized to work 5 in the U.S.? Can you explain what those scenarios 6 would be? 7 SPEAKER DIAZ: Yeah, a doctor recipient 8 might have a license. People who are in different 9 states of the asylum process, so it's not synonymous 10 with being undocumented necessarily. 11 COUNCILMEMBER CISNEROS: An asylum 12 applicant is eligible for employment authorization 13 after 150 days of their application pending. 14 SPEAKER DIAZ: So there is no requirement 15 that someone has to have, you know, change the type 16 of license they have if they were to change status or 17 obtain DACA, and just in general the eligibility 18 requirements are eligible to all residents in 19 California. So we don't think that meets the clear 20 and convincing standard. 21 COUNCILMEMBER CISNEROS: I have another 22 question about one of your suggestions. This relates 23 to adding the language it's not sufficient -- this is 24 for your proposal around a new section 11028, 25 subsection (a)(5), where you suggest adding it is not</p> <p style="text-align: right;">Page 16</p>
<p>1 So we think this is a related point and 2 is very important in that discovery area of the 3 regulations, and then finally, in our written 4 comments we provided some detailed language to be 5 added to the harassment provision, which is section 6 11028, subdivision J, currently on page 4. 7 As it stands now there is just one 8 provision that in general says that it is unlawful 9 for an employer to harass someone on the bases of 10 national origin and because there are certain types 11 of harassment specific to national origin context, we 12 would suggest that the Council add some of those 13 common examples that we have seen, and that I'm 14 guessing others have seen in work to strengthen the 15 regulations and make clear what the national origin. 16 So we suggested that the Council added 11028(a), 1 17 through 4, to address the harassment involving 18 English-only rules, threats of deportation, 19 derogatory comments regarding immigration or 20 immigration status and language or speakers and 21 specific languages in our comments on those. 22 So, that is all for now unless there are 23 any questions. 24 Okay. Well, thank you so much. 25 COUNCILMEMBER CISNEROS: I have a</p> <p style="text-align: right;">Page 15</p>	<p>1 sufficient an employer rely on subjective beliefs or 2 assumptions about the need for a language restrictive 3 policy and you propose adding that same language to 4 11028, subsection (b) and (c), but you don't propose 5 adding that language to subsection (d) about foreign 6 training, and I was wondering if there is a 7 particular reason for -- if it were to be added, do 8 you think it wouldn't be applicable to 11028, 9 subsection (d), foreign training and experience. It 10 is unlawful for employment practice. It is an 11 unlawful employment practice pursuant to permissible 12 defense for an employer or other covered entity to 13 deny employment opportunities to an individual 14 because the individual received training or education 15 outside of the United States or were to require an 16 individual to be foreign trained. 17 SPEAKER DIAZ: I could see that be useful 18 there either and equally applicable. That's a good 19 point that we hadn't considered. 20 COUNCILMEMBER CISNEROS: Thanks. 21 SPEAKER DIAZ: Okay. 22 CHAIR CHAYA MANDELBAUM: Thank you very 23 much, Miss Diaz. 24 SPEAKER DIAZ: Thank you. 25 CHAIR CHAYA MANDELBAUM: Anyone else</p> <p style="text-align: right;">Page 17</p>

<p>1 wishing to testify regarding the national origin 2 regulations? 3 SPEAKER LEBOWITZ: Good morning. My name 4 is Noah Lebowitz, the partner with... Peter, Lebowitz 5 in San Francisco, here today in my capacity as the 6 chair of the California employment lawyers 7 association, FEHC regulations Task Force. We have 8 not yet submitted our written comments for these 9 regulations. We will do so by the end of today, and 10 we have a number of sections that we're addressing, 11 some minor tweaks, some other more significant. 12 The one thing I want to highlight today 13 and although I will mention that most of what we are 14 submitting is similar, if not precisely what we 15 submitted several months ago while these regulations 16 were in draft near the end of that process, so most 17 of what we submit today will be familiar to members 18 of the Council who were involved in that process. 19 What I want to address today two 20 subsections that we're asking be added to the 21 regulations to the proposed regulation within the 22 language restrictions section. So we're looking at 23 Section 11028, subsection (a), and these are 24 subsections that we have designated as five and six. 25 Obviously, if you incorporate other folks, you</p> <p style="text-align: right;">Page 18</p>	<p>1 language restrictions? I mean, I think it's implied 2 because of the reference back to 11019(b), which is 3 the harassment that talks about hostile work 4 environment but... 5 SPEAKER LEBOWITZ: Understood. We think 6 that it's important that it's explicit within the 7 language restrictions regulations especially due to 8 the Federal regulation on point as well as the 9 Federal case law that we cite in our -- in our letter 10 to the Council, which includes a Ninth Circuit case 11 which the -- excuse me -- in the Garcia versus 12 Spontate (phonetically) from 1993, which at the 13 relevant page says, quote, "Likewise we can envision 14 a case in which such rules are enforced in such a 15 draconian manner that the enforcement itself amounts 16 to harassment." So that is specifically talking 17 about the language restriction rules and enforcement 18 of language restriction policies. 19 The second section that we propose 20 adding, again, in our letter designated as 21 11028(a)(6) were to read as follows -- and it's a 22 little wordy. It probably needs some work. This is 23 what we come up at this point. Implementation of 24 language restrictions may also constitute an 25 employment practice that adversely affects an</p> <p style="text-align: right;">Page 20</p>
<p>1 renumber as needed in the subsection. The first is 2 -- I'll just read it. Obviously, you will see it all 3 there in writing today, but our proposed section 5 4 would say language restrictions language -- excuse me 5 -- language restriction policies including English 6 only rules may create a hostile work environment for 7 non-English and bilingual workers. The hostile or 8 harassment negotiation or sentiment we do not really 9 see in any other part of the existing proposed 10 regulations, so we want to make sure that that idea 11 is explicit within the proposed regulations. We draw 12 for authority for this proposal both from Federal 13 regulations and from Federal case law. The Federal 14 regulations, specifically 29 CFR, section 106.7, 15 which recognizes that implementation of a language 16 restriction policy, quote, or may, quote, "result in 17 a discriminatory working environment," unquote. 18 That's, again, a sentiment we don't necessarily we 19 believe are in the existing proposals in these 20 regulations. 21 COUNCILMEMBER BRODSKY: Can I ask you a 22 question about that? Is there a reason why you would 23 not maybe in addition to that add it to the 24 harassment section (J) or put it there instead of, so 25 that is -- so that it covers everything, not just</p> <p style="text-align: right;">Page 19</p>	<p>1 employee's enjoyment of an employment benefit by 2 prohibiting bilingual employees whose primary 3 language is not English from communicating in a most 4 effective language, and, again, this is a broader by 5 using the words by incorporating the employment 6 benefit language that is defined elsewhere in the 7 regulations ensures that not only are we talking 8 about the original justification for the language 9 restriction policy, but we also address how it's 10 being implemented, and, again, this is something that 11 is drawn from authority -- Federal authority, for 12 instance, in the EEOC guidance, section 5 on national 13 origin discrimination -- section 5, subsection 14 (c)(2), specifically addresses this idea, and, again, 15 this -- and also this idea has been recognized by the 16 Fair Employment Housing Commission when it was still 17 in effect and still operating in its adjudicatory 18 function in the DFEH versus national bindery case, 19 which we cite and quote at length in our paper. So, 20 we just want to highlight those two subsections -- 21 two proposed new subsections to make sure that the 22 Council takes a good look at those, and if you have 23 any other questions about that. 24 CHAIR CHAYA MANDELBAUM: Thank you, Mr. 25 Lebowitz.</p> <p style="text-align: right;">Page 21</p>

1 SPEAKER LEBOWITZ: Thank you very much.
2 CHAIR CHAYA MANDELBAUM: Anyone else
3 wishing to provide testimony?
4 SPEAKER HERRINGTON: It's Joan Herrington
5 and my law firm is the Bay Area Employment Law
6 Office. Herrington is H-E-R-R-I-N-G-T-O-N.
7 I just want to put in a plea to the
8 Council in the initial statement of reasons
9 supporting the regulations for national origin.
10 There is a single Federal cite, for example. It is
11 so helpful for people who want to educate judges that
12 the regulations are always retroactive that the
13 Council cannot make new law. They can only interpret
14 the existing law that we have better citations
15 supporting each of these subsections that the Council
16 has relied on in reaching these regulations. I can't
17 stress how helpful it is to have point-by-point
18 authority that the Council relied on. That's my own
19 personal recommendation, and it's not necessarily for
20 language of the regulations, but for amplification in
21 the final statement of reasons.
22 Thank you.
23 CHAIR CHAYA MANDELBAUM: Thank you, Miss
24 Herrington.
25 Anyone else wishing --

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1 DFEH DIRECTOR KISH: I just want to
2 respond to that. I think Miss Herrington's point is
3 very well taken. The only thing I would add is that
4 the office of administrative law is not on the same
5 page as you. So that limits us in terms of what we
6 can include as citations in, both, the initial and
7 final statement of reason. So to the extent you
8 would like to see, I just want to emphasize it's not
9 the will of the councilmembers that we have citations
10 that are more spare than might be useful for
11 practitioners.
12 CHAIR CHAYA MANDELBAUM: Thank you.
13 Important point to clarify.
14 Anyone else wishing to provide
15 testimony?
16 Brian, any e-mails coming in about this?
17 SPEAKER VERNOFF: So, provision that I
18 wanted to bring attention is not specifically in the
19 respect.
20 CHAIR CHAYA MANDELBAUM: I'm sorry. Can
21 you start by introducing yourself?
22 SPEAKER VERNOFF: Raven Vernoff
23 (phonetically). I represent plaintiffs in
24 discriminations. The provision I wanted to bring
25 attention to is actually not specifically in the

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1 national origin regulations, so if it's not
2 appropriate at this time, then I can bring another
3 time, let me know, but it is in the regulations with
4 respect to the definition of employers in
5 Section 110008. Would that be appropriate at this
6 time to address?
7 CHAIR CHAYA MANDELBAUM: Sure. I mean,
8 to the extent, at least, that employer incorporates
9 itself into the regulations by virtue of existing...
10 SPEAKER VERNOFF: Yeah, I don't know that
11 I specifically sent written comments, but I did
12 submit an e-mail to Mr. Kish on Friday regarding this
13 issue, and I don't know if he recalls. With respect
14 to subsection (d)(1), and so the provision reads, you
15 know, regularly employing means employing five or
16 more individuals working day and 20 consecutive weeks
17 in the current calendar year or preceding calendar
18 year.
19 I am currently facing an issue with this
20 regulation that is currently up on a motion for
21 summary judgment, and it could result in my case
22 being thrown out due to the language, and so I wanted
23 to bring attention to the ambiguity here, so,
24 perhaps, it could be clarified.
25 In the particular case that I have there

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1 is a business that purchased another business and
2 when they made an asset purchase, which did not
3 obligate them to hire any of the employees, so all
4 the employees were terminated, and then they rehired
5 essentially everyone, other than my client, who was
6 pregnant, and they're making the argument that they
7 are not subject to the regulation based on the
8 argument, based on the language in the current
9 calendar year or preceding calendar year, and this
10 may be a little bit difficult to illustrate, so I
11 will try my best, but the company that bought the
12 prior company created a new corporation in December
13 of 2014, so that company did not exist until December
14 of 2014. They hired everyone, but my client in
15 December of 2014.
16 Now, if you look at the strict language
17 of the regulations, they did not have five or more
18 employees in the current, i.e., 2014 or preceding
19 calendar year, 2013, because they did not exist until
20 December of 2014. Technically it seems under the
21 language they could be correct.
22 Now, this is not a situation that is
23 limited to this very specific circumstance, but, in
24 fact, this argument could be made by any employer who
25 basically starts a business or purchases a business

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<p>1 at any time after August 15th. 2 CHAIR CHAYA MANDELBAUM: So one thing I'm 3 aware of is this abnormality. This language comes 4 directly either from the statute or from Title 7, one 5 or the other. It's interpreted the same way in 6 Title 7, and I agree with you that that can't be the 7 intent. What I would be curious to look at is case 8 law, because I don't think that that exception makes 9 sense, and I doubt that case law is interpreting it 10 that way, but the language, itself, is not unique to 11 these regulations. It's the way it's defined across 12 the board state and Federally. 13 SPEAKER VERNOFF: So I looked at all the 14 case law. There is not a California one on point. 15 There is unfortunately a Federal law case -- a 16 Federal and Title 7 on point, which favors in 17 employer's position. So, it actually has been 18 interpreted adversely to the position that I'm 19 advocating under Title 7. With respect to California 20 cases there is absolutely nothing. 21 CHAIR CHAYA MANDELBAUM: Okay. I 22 appreciate that, and thank you for calling it to our 23 attention. 24 Just by way of procedural process, this 25 will fall outside, I think, of the notice rulemaking</p> <p style="text-align: right;">Page 26</p>	<p>1 discussed at the last meeting, we generally don't, if 2 you have any big picture of things you would like to 3 provide, certainly. 4 COUNCILMEMBER SCHUR: I just became aware 5 that might be of interest to the committee, which 6 Councilmember Cisneros is shaking her head, areas 7 which involves Arias v. Ramondo case, A-R-I-A-S 8 versus Ramondo, R-A-M-O-N-D-O, came down on June 22nd 9 from the Ninth Circuit. I don't have a cite or West 10 Law cite at the moment, and it involves harassment of 11 employees providing them, and actually arranging to 12 get them deported by someone showing at a deposition, 13 and it determined that the agent of the employer in 14 this case, the lawyer, could -- the employer could be 15 held accountable for that. It has a lot of good 16 language in it, although it doesn't directly address 17 the threatening to call immigration issue, but I 18 would recommend that the committee read it as they're 19 looking. 20 CHAIR CHAYA MANDELBAUM: Thank you for 21 calling that to our attention. 22 And just those following along, the 23 subcommittee are Brodsky and I, so, we will go -- I 24 mean, we'll all receive all the comment that comes in 25 by 5:00 p.m. -- the written comment -- and have a</p> <p style="text-align: right;">Page 28</p>
<p>1 with national origin discrimination. We have had 2 various general employment regulations brought to our 3 attention, so it will be on the Council's radar the 4 next time a rulemaking covering other parts of the 5 regulations is considered. 6 SPEAKER VERNOFF: Thank you so much for 7 hearing me out. 8 Have a great day. Thank you. 9 CHAIR CHAYA MANDELBAUM: Anyone else 10 wishing to provide testimony? 11 Seeing none and having checked the 12 e-mail as well, we'll conclude. So thank you to 13 those who provided public comment on the proposed 14 regulations regarding national origin and 15 discrimination. We'll accept written comments until 16 5:00 p.m., July 17th and with that, the hearing 17 portion of our meeting is adjourned, and we can move 18 right along, I think, unless anyone -- I mean, 19 generally we don't do these. 20 This is the draft that was voted in and 21 we're about to get a bunch of public comment that the 22 subcommittee will consider and everyone will have a 23 chance to digest and then the subcommittee will 24 introduce a draft for the Council, but since the 25 version that's been provided is the same one we</p> <p style="text-align: right;">Page 27</p>	<p>1 chance to read it. Councilmembers Brodsky and I will 2 review it all and provide an updated proposed draft 3 for the full Council to consider and provide comments 4 and vote on it at our next meeting. 5 COUNCILMEMBER IGLESIAS: Could I make a 6 quick comment? 7 One of the comments that came in asked 8 about whether reasonable accommodation applies here, 9 and if so, I do think it merits some specification 10 about how and when reasonable accommodation would 11 apply in these cases, and then the situation, and 12 then also just, I think, there may be a typo on 13 11028(f)(4), but it refers back to F, but I think it 14 really means E, and one, the height and weight 15 restrictions. It seems like that clause or provision 16 should specifically refer to national origin in some 17 way. 18 COUNCILMEMBER CISNEROS: National origin. 19 CHAIR CHAYA MANDELBAUM: And some way. 20 COUNCILMEMBER CISNEROS: I have another 21 comment, too, for subsection (f), and subsection 22 (4)(a), and it talks about retaliation may include, 23 but is not limited to, and then it's got a capital A 24 that talks about threatening to call the immigration 25 authorities related to an employee and various family</p> <p style="text-align: right;">Page 29</p>

1 members, and I was wondering about the extent to
2 which the list might be, you know, too narrow in
3 terms of not referencing step parents or great aunt
4 or great uncles and immigrant families oftentimes
5 have, you know, very large extended families, and so
6 threatening retaliation against a family member like
7 a great aunt or great uncle or a step parent could
8 be, you know, a pretty powerful form of retaliation,
9 but maybe how family members defined in this section
10 may be too narrow.
11 COUNCILMEMBER BRODSKY: What if we were
12 to say something like includes, not limited to?
13 COUNCILMEMBER CISNEROS: Yeah, something
14 like that.
15 COUNCILMEMBER BRODSKY: Something like
16 that.
17 CHAIR CHAYA MANDELBAUM: One thing I
18 might comment from the statute.
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1 STATE OF CALIFORNIA)
2) SS.
3 COUNTY OF SAN FRANCISCO)
4
5 I, DEBRA L. ACEVEDO-RAMIREZ, hereby certify:
6 That I am a Certified Shorthand Reporter of the
7 State of California;
8 That in pursuance of my duties as such, I
9 attended the proceedings in the foregoing matter and
10 reported all of the proceedings and testimony taken
11 therein;
12 That the foregoing is a full, true and correct
13 transcript of my shorthand notes so taken.
14 Dated: August 26, 2017
15
16
17
18
19 _____
20 DEBRA L. ACEVEDO-RAMIREZ, RPR, CSR 7692
21
22
23
24
25

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<p style="text-align: center;">A</p> <p>abnormality 26:3 about 12:6 16:22 17:2,5 19:22 20:3,17 21:8,23 23:16 27:21 29:8,10,22 29:24 30:1 above 9:6 10:8 absolutely 26:20 AB077C8 1:24 accent 10:21 12:9 accept 3:24 27:15 accommodation 29:8,10 accountable 28:15 accurate 9:3 ACEVEDO-RAMIREZ 1:23 31:5,18 across 26:11 act 8:20 10:25 14:22 actual 12:18 actually 16:4 23:25 26:17 28:11 add 7:14 13:19 15:12 19:23 23:3 added 12:8 15:5,16 17:7 18:20 adding 12:1 16:23,25 17:3,5 20:20 addition 7:15 8:11 19:23 additions 12:13 address 6:14,20 7:23 12:23 15:17 18:19 21:9 24:6 28:16 addresses 6:16,17 7:19 21:14 addressing 12:16 18:10 adieux 2:5 adjourned 27:17 adjudicatory 21:17 administrative 23:4 adopts 7:11 adversely 20:25 26:18 advocating 6:6 26:19 affects 20:25 affiliation 5:10 affirmative 8:17 after 16:13 26:1 again 2:15 12:16 19:18 20:20 21:4,10,14 against 30:6 age 3:4 agent 28:13 ago 3:18 18:15 agree 10:2 26:6 Aid 6:3 allow 14:1 allowed 13:3 allowing 6:24 along 2:13 27:18 28:22 already 7:22 8:3 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