

# ATTACHMENT E

## TITLE 2. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING EMPLOYMENT REGULATIONS REGARDING CRIMINAL HISTORY, THE CALIFORNIA FAMILY RIGHTS ACT, AND THE NEW PARENT LEAVE ACT

[Notice published February 16, 2018]

### NOTICE OF PROPOSED RULEMAKING

The Fair Employment and Housing Council (Council) of the Department of Fair Employment and Housing (DFEH) proposes to amend sections 11017.1 and 11087-97 of Title 2 of the California Code of Regulations after considering all comments, objections, and recommendations regarding the proposed action.

### PUBLIC HEARING

The Council will hold a public hearing starting at **10:00 a.m. on April 4, 2018**, at the following location:

Junipero Serra Building  
Carmel Room Auditorium (First Floor)  
320 W. 4th Street  
Los Angeles, CA 90013

At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Council requests but does not require that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

The meeting facilities are accessible to individuals with physical disabilities. Anyone who requires an auxiliary aid or service for effective communication, or a modification of policies or procedures to participate in the meeting, should contact Brenda Valle, DFEH ADA Coordinator, at (844) 541-2877 (voice or via relay operator 711) or TTY (800) 700-2320 or via email: [brenda.valle@dfeh.ca.gov](mailto:brenda.valle@dfeh.ca.gov) or [accommodations@dfeh.ca.gov](mailto:accommodations@dfeh.ca.gov) as soon as possible or at least 72 hours before the meeting.

### WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Council. The written comment period closes at **5:00 p.m. on April 4, 2018**. The Council will consider only comments received by that time. Written comments can be mailed to:

Fair Employment and Housing Council  
c/o Brian Sperber, Legislative & Regulatory Counsel  
Department of Fair Employment and Housing  
320 West 4th Street, 10<sup>th</sup> Floor  
Los Angeles, CA 90013  
Telephone: (213) 337-4495

Comments may also be submitted by e-mail to [FEHCouncil@dfeh.ca.gov](mailto:FEHCouncil@dfeh.ca.gov).

## **AUTHORITY AND REFERENCE**

Government Code section 12935(a) authorizes the Council to adopt these proposed regulations. The proposed regulations implement, interpret, and make specific section 12900 et seq. of the Government Code.

## **INFORMATIVE DIGEST/ POLICY STATEMENT OVERVIEW**

This rulemaking action clarifies, makes specific, and supplements existing state regulations interpreting the Fair Employment and Housing Act (“FEHA”) set forth in Government Code section 12900 et seq. Two bills from 2017 – AB 1008 and SB 63 – add new sections to the FEHA that respectively “ban the box” by prohibiting employers from seeking criminal history information until a conditional offer of employment is made and enact the New Parent Leave Act (NPLA), thereby expanding parental leave rights at employers of 20-49 employees.

In compliance with the Administrative Procedure Act, the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The overall objective of the proposed regulations is to describe how the two new laws operate and fit into the broader context of the FEHA, primarily by centralizing, clarifying, and codifying the two statutes. This action has the specific benefit of clarifying new, potentially misunderstood areas of the law, in turn reducing litigation costs and court overcrowding. Ultimately, the proposed action furthers the mission of the DFEH by protecting Californians from employment discrimination.

The proposed amendments specifically do the following: (1) articulate the parameters of AB 1008 in an orderly fashion in the context of existing regulations regarding the consideration of criminal history in employment decisions; (2) distinguish between ban-the-box and the adverse impact theory of liability; (3) clarify any ambiguities in AB 1008, particularly how to calculate “five business days”; (4) integrate SB 63 into existing regulations regarding the California Family Rights Act (CFRA); and (5) identify differences between CFRA and NPLA, namely jurisdictional differences and the latter’s lack of a “key employee” defense and lack of a provision allowing employers to mandate the use of vacation time or other accrued paid time off.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

## **DISCLOSURES REGARDING THE PROPOSED ACTION**

*The Council has made the following initial determinations:*

**Mandate on local agencies and school districts:** None.

**Cost or savings to any state agency:** No additional costs or savings beyond those imposed by existing law.

**Cost to any local agency or school district, which must be reimbursed in accordance with Government Code sections 17500 through 17630:** None.

**Other nondiscretionary cost or savings imposed on local agencies:** No additional costs or savings beyond those imposed by existing law.

**Cost or savings in federal funding to the state:** None.

**Cost impacts on a representative private person or businesses:** No additional costs or savings beyond those imposed by existing law. Therefore, the agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**Results of the economic impact assessment/analysis:** The Council anticipates that the adoption of the regulations will not impact the creation or elimination of jobs within the state, the creation of new businesses or the elimination of existing businesses within the state, or the expansion of businesses currently doing business within the state. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations, and reducing litigation costs for businesses.

**Statewide adverse economic impact directly affecting businesses and individuals:** The Council has made an initial determination that the proposed action *will not* have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

**Significant effect on housing costs:** None.

**Small Business Determination:** The Council anticipates that the regulations will not create additional costs or savings beyond those imposed by existing regulations. Similarly, the Council has determined that there is no impact on small businesses as a result of this proposed action because these regulations primarily serve to clarify existing law.

**Business Report:** The Council has determined that the proposed regulations do not require a report to be made.

## **CONSIDERATION OF ALTERNATIVES**

In accordance with Government Code section 11346.5, subdivision (a)(13), the Council must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the Council's attention would be more effective in carrying out the purpose for which this action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Council has thus far not become aware of a better alternative and invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

## **CONTACT PERSONS**

Inquiries concerning the proposed administrative action may be directed to:

Brian Sperber, Legislative & Regulatory Counsel  
Department of Fair Employment and Housing  
320 West 4th Street, 10th Floor  
Los Angeles, CA 90013  
Telephone: (213) 337-4495  
E-mail: [brian.sperber@dfeh.ca.gov](mailto:brian.sperber@dfeh.ca.gov)

The backup contact person for these inquiries is:

Holly Thomas, Deputy Director of Executive Programs  
Department of Fair Employment and Housing  
320 West 4th Street, 10th Floor  
Los Angeles, CA 90013  
Telephone: (213) 439-6799  
E-mail: [holly.thomas@dfeh.ca.gov](mailto:holly.thomas@dfeh.ca.gov)

Please direct requests for copies of the proposed text (express terms) of the regulations, the Initial Statement of Reasons, the modified text of the regulations, if any, or other information upon which the rulemaking is based, should other sources be used in the future, to Brian Sperber at the above address.

## **AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING FILE**

The Council will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, and the Initial Statement of Reasons. Copies may be obtained by contacting Brian Sperber at the address or phone number listed above.

## **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After holding the hearing and considering all timely and relevant comments received, the Council may adopt the proposed regulations substantially as described in this notice. If the Council makes modifications that are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Council adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Brian Sperber at the address indicated above. The Council will accept written comments on the modified regulations for 15 days after the date on

which they are made available.

#### **AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

Upon its completion, copies of the Final Statement of Reasons will be available on the Council's Web page: <http://www.dfeh.ca.gov/fehouncil/>.

Copies also may be obtained by contacting Brian Sperber at the above address.

#### **AVAILABILITY OF DOCUMENTS ON THE INTERNET**

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, the text of the regulations, and any modified texts and the Final Statement of Reasons can be accessed through the Council's Web page at <http://www.dfeh.ca.gov/fehouncil/>.

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