



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

DIRECTOR KEVIN KISH

FAIR EMPLOYMENT & HOUSING COUNCIL

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ATTACHMENT A

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of April 4, 2018

Minutes

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

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Lisa Cisneros, Councilmember
Tim Iglesias, Councilmember
Joseph Ortiz, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Holly Thomas, DFEH Deputy Director of Executive Programs
Brian Sperber, DFEH Legislative and Regulatory Counsel
Paul Kennedy, DFEH Associate Business Management Analyst

Others Present

Whitney Prout, California Apartment Association
Sanjay Wagle, California Association of Realtors
Janet Powers, Fiore, Racobs & Powers
Diane Dumas
Sri Panchalam
Scott Chang, Housing Rights Center
Denise McGranahan, Legal Aid Foundation of Los Angeles
Diana Prado, Eviction Defense Network
Adrienna Wong, ACLU of Southern California
Melissa Patack, Motion Picture Association of America
Doug Boney, Motion Pictures Studio Teachers and Welfare Workers of Local 884 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its territories and Canada
Sarah Glenn-Leistikow, Center for Employment Opportunities
Chloe Hollett-Billingsley
Bill Lann Lee, Civil Rights Education and Enforcement Center

I. Call to Order and Roll Call

Chair Mandelbaum welcomed guests to the FEH Council's 24th meeting and called it to order. He then turned the meeting over to DFEH Legislative and Regulatory Counsel, Brian Sperber, who conducted roll call.

II. Welcome and Introduction of Guests

Chair Mandelbaum announced that the Council meeting would be livestreamed on the Council's website and that the recording will be available later on the Council's website and YouTube channel. The public can participate in the meeting by emailing the Council and can find the Attachments to the Agenda on the website.

Chair Mandelbaum then acknowledged Department leaders and members, including: Holly Thomas, DFEH Deputy Director of Executive Programs; Brian Sperber, DFEH Legislative and Regulatory Counsel; and Paul Kennedy, DFEH Associate Business Management Analyst.

Chair Mandelbaum then invited the guests in attendance to introduce themselves, on a voluntary basis.

III. Review of the Agenda

Chair Mandelbaum noted that hard copies of the agenda and associated materials were available for people in attendance and that copies are also available on the Council's webpage. He then reviewed the agenda for the meeting.

Chair Mandelbaum announced the highlights of the meeting, which included:

- Public Hearing: Proposed Fair Housing Regulations
- Public Hearing: Proposed Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act
- Consideration of Employment Regulations Regarding Definitions; Harassment and Discrimination Prevention and Correction; and Training
- Consideration of Unmodified Text of Proposed Regulations Regarding National Origin Discrimination
- Public Workshop and Review of Working Draft of Regulations Regarding Religious Creed and Age Discrimination
- Public Workshop and Review of Working Draft of Government Code Section 11135 Regulations
- Report from Subcommittee Regarding Public Civil Rights Hearings

IV. Approval of the Minutes

Attachment A: Minutes from December 11, 2017 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the December 11, 2017 meeting. During that meeting, the Council considered Proposed Fair Housing Regulations and initiated a rulemaking action; considered Proposed Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act and initiated a rulemaking action; reviewed Working Draft of Regulations Regarding Religious Creed and Age Discrimination; and considered Nonsubstantial Modifications to Text of Proposed Employment Regulations Regarding National Origin Discrimination and initiated a 15-day comment period. The Council approved the minutes unanimously, with one abstention.

V. Councilmembers' Reports

Chair Chaya Mandelbaum and Councilmembers

Councilmember Iglesias reported that he will be participating in a presentation on residential occupancy standards with HUD on April 17, 2018, in San Francisco.

Councilmember Ortiz reported that he will be participating in the Fair Housing Council of Riverside County's 2018 Housing Conference on April 19, 2018, in Riverside.

VI. Department of Fair Employment and Housing Report

Kevin Kish, Director, Department of Fair Employment and Housing

Director Kish announced that as a result of the implementation of DFEH's new case management system, CCRS, complainants are now experiencing a shorter turnaround time from intake submission to a determination of case acceptance.

Director Kish also announced that the Department's sexual harassment survey has been completed and is expected to be sent to employers in the next few weeks.

Lastly, Director Kish reported that by request of Governor Brown in the SB 491 veto message, the Department has convened an advisory group to report on the feasibility of local enforcement of anti-discrimination laws in California.

VII. Public Hearing: Proposed Fair Housing Regulations

Attachment B: Notice of Proposed Rulemaking

Attachment C: Initial Statement of Reasons

Attachment D: Proposed Fair Housing Regulations

Chair Mandelbaum introduced the proposed regulations and stated that the purpose of the hearing is to hear 45-day comments on the Fair Housing regulations.

The Council heard public comment from:

Whitney Prout, California Apartment Association: Ms. Prout thanked the Council for their work on the regulations, then expressed concern with the Council's stance on retaliation in section 12130 and asked that the Council consider a but-for causation standard for this with reason that it will be more in line with both the FHA and the dominant purpose standard required by the FEHA.

Ms. Prout also commented that she believes section 12185(b) expands the ADA limits on inquiries that can be made regarding service animals and asked that the Council consider amending this section to permit the housing provider to request verification of the two questions - is the animal a service animal required because of a disability and what work or task has the animal been trained to perform.

Finally, Ms. Prout expressed concern that Article 24 of the Proposed Fair Housing Regulations as written does not provide sufficient guidance for a housing provider to create a coherent criminal history information practice policy that's compliant with these regulations, and asked the Council to consider how housing providers would create a compliant practice.

Sanjay Wagle, California Association of Realtors: Mr. Wagle thanked the Council for its work on the regulations, then expressed concern with burden shifting in discriminatory effect cases in section 12062(a). Mr. Wagle stated that while the Council has placed this burden on the defendant, he believes the Council should instead continue following Government Code section 12955.8(b)(1), by not placing the burden on the defendant.

Mr. Wagle also commented on section 12185(b), stating disagreement with the Council's limitation to an inquiry for service animals to the two questions, and suggested that housing providers should be allowed to ask for verification in the context of service animals.

Councilmember Schur asked Mr. Wagle, given that the Government Code does not allocate the burden in the absence of direction from the Council, how he would propose that the courts would determine the appropriate burden. Mr. Wagle responded that he thinks the legislature left that open and presumably that leaves it open to the courts based on the facts and circumstances of the given case to make that determination. He further explained that he doesn't think that that provides sufficient direction for the Council to make that determination.

Janet Powers, Fiore, Racobs & Powers: Ms. Powers noted that in regards to section 12005(d), since the January 2018 reasonable accommodation case regarding the denial of a peacock on an airplane, requests for reasonable accommodations in community associations that she represents have risen approximately ten percent.

Ms. Powers suggested adding the term "HOA" to the definition of "persons" in section 12005(v), and expressed concern over the definitions of "(a) Direct Liability" and "(b) Vicarious Liability" as most of those serving in community associations have little to no training regarding the governance of the association or fair housing matters, therefore she will have a difficult time explaining to a board of directors as their legal counsel that they're going to have liability regardless of whether they knew or should have known about the conduct that resulted in the discriminatory housing practice. Ms. Powers would therefore like to see a reference to the fact that there may be differences in the standard of care.

Ms. Powers also raised issues with section 12120, stating that associations do not have specific authority in their governing documents to take on discrimination between tenants, and are unable to evict owners or tenants of owners due to discrimination. Ms. Powers requested that the Council give associations that authority to combat harassment of this nature.

Ms. Powers raised issues with section 12130, stating that HOAs have a variety of financial disclosure duties to their members that are imposed by the Davis-Stirling Common Interest Development Act, and she expressed concern that if HOAs disclose the fact that someone has filed a fair housing complaint, they may be in violation of the retaliation section while they are only trying to adhere to their responsibilities of disclosing certain information to their members.

Ms. Powers further requested that the Council add language from section 12270 to section 12162 - revealing private information to a third party about a person, without their consent, is acceptable if the activity regarding criminal background history is permitted by state or federal law.

In section 12178, Ms. Powers expressed concern regarding an individual's ability to self-verify a reasonable accommodation, and requested the Council clarify what a "credible statement" would be defined as.

Lastly, in section 12185, Ms. Powers requested associations be allowed to ask individuals more than the two

questions permitted by the ADA concerning service animals.

Diane Dumas: Ms. Dumas expressed concern that individuals are allowed more than one assistance animal, as discussed in section 12185(d)(4), and also had concerns regarding the use of the term “assistance animal” in addition to “emotional support animal” and “service animal.”

Sri Panchalam: Ms. Panchalam commented that the Council’s regulations are consistent with the ADA. She also commented that an emotional support animal can be just as valuable as a service animal, and that she appreciates the provision requiring that whoever is conducting an assessment of the requesting person should have personal knowledge of the person's disability. If there is additional information that is needed, it is because the person conducting the assessment doesn't have personal knowledge of the disability, therefore the person with the disability is allowed the opportunity to provide additional information in that circumstance.

Scott Chang, Housing Rights Center: Mr. Chang commented that in regards to section 12062(a), the Council appropriately assigned the burden of proof to the defendant. He explained that much of the information that determines whether or not there is a less discriminatory alternative is exclusively known by defendants, particularly in land use cases, and that there is also federal case law that supports this burden of proof.

Denise McGranahan, Legal Aid Foundation of Los Angeles: Ms. McGranahan urged the Council to adopt regulations regarding unlawful detainer cases, particularly the use of reasonable accommodations as defenses, since it is an issue that judges are unfamiliar with.

Ms. McGranahan also requested financial reasonable accommodations be considered to help prevent evictions under certain circumstances, including: waiving guest fees; making an exception to a policy of not accepting Section 8 vouchers; waiving a rule requiring that rent be paid on the 1st of the month; allowing the tenant to relocate to a different unit without an otherwise applicable rent increase; and allowing a prospective tenant to use a co-signer when their income is limited because of a disability and they would not otherwise qualify for the apartment.

Diana Prado, Eviction Defense Network: Ms. Prado thanked the Council for their work on the regulations, then expressed the importance of providing clarity with respect to the duty to grant a reasonable accommodation request during unlawful detainer proceedings. Ms. Prado additionally agreed with the Council’s understanding that an individual may need more than one assistance animal as an accommodation.

Adrienna Wong, ACLU of Southern California: Ms. Wong expressed support for the draft regulations and for the written comments that were submitted to the Council by the Western Center on Law & Poverty et al. Ms. Wong also expressed support for the regulations addressing consideration of criminal history information, and suggested the Council consider a criminal look back period that is shorter than seven years. She stated that while in the consumer context seven years has been recognized, based on their experiences, they have serious fairness and accuracy concerns about consideration of stale criminal records, so they have successfully pushed local public housing authorities for shorter look back periods. Therefore, they know that it's doable, practicable, legally supportable, and for the reasons stated in the written comments and in the relevant HUD guide.

Chair Mandelbaum thanked the public for providing comments and reminded people that the Council will accept written comments until 5pm. With that, Chair Mandelbaum declared that the public hearing was adjourned.

VIII. Public Hearing: Proposed Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

Attachment E: Notice of Proposed Rulemaking

Attachment F: Initial Statement of Reasons

Attachment G: Proposed Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

Chair Mandelbaum introduced the proposed regulations and stated that the purpose of the hearing is to hear 45-day comments on the Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act.

The Council heard public comment from:

Melissa Patack, Motion Picture Association of America: Ms. Patack expressed concern with section 11017.1 that prohibits the use of a background check until after a conditional offer of employment has been made as applied to a specific context in her industry, as she represents an industry that concerns children and those who are on set to educate the children, who are working as performers, and who also provide for their safety, health and welfare. These teachers are expected to work irregular shifts on an as-needed basis so there isn't the opportunity for the employer/producer to do a background check once they have made an offer to that particular teacher. Ms. Patack continued that there are two exceptions within the regulations that this issue could fall into, with clarification: by adding "including a position requiring a credential issued by the California Commission on Teacher Credentialing" to section 11017.1(a)(2)(A) or to section 11017.1(a)(2)(D). Ms. Patack requested that the Council give consideration to adding some clarity in these sections that currently provide for an exception.

Doug Boney, IATSE: In regards to section 11017.1, Mr. Boney expressed that given the intermittent nature of studio teacher's employment, the union representing studio teachers have agreed in collective bargaining to a background check that is conducted not after an offer has made by a production company, but prior to placement on an availability list, which acts as a roster of studio teachers. He expressed that this process is critical in this context. Otherwise, if each studio employer were required to conduct their background check after a conditional offer to hire the teacher off of the roster of studio teachers, studio teachers, especially those who had not worked for an employer in the recent past, would not be able to be hired when needed. Mr. Boney asked the Council to include in the regulations an acknowledgment that a collectively bargained procedure that provides studio teachers with at least as much protection as the statutory procedure satisfies requirements of Government Code Section 12952.

Sarah Glenn-Leistikow, Center for Employment Opportunities: In regards to section 11017.1, Ms. Glenn-Leistikow stated that she feels it is dangerous to allow employers to go around the regulations by allowing staffing agencies or contracting agencies to do background checks at impermissible times and then relaying that information to the employer such that the employer never did the background check, and urged the Council to be careful in their considerations on when the background check can be done and by whom. Ms. Glenn-Leistikow continued to explain that because the teaching credential is already heavily regulated and the information from the DOJ is immediately reported, there is an existing way in which you can make sure that you're not allowing people to maintain a credential when they shouldn't be because they worked with vulnerable populations. There are some narrow ways in which the issues that were important, that were already raised, are already addressed. She continued to urge the Council to be careful about allowing exemptions and writing in more exemptions into the clause because that can affect all sorts of people that are not in this particular situation.

Ms. Glenn-Leistikow further requested that the Council establish a rebuttable presumption that the employer failed to adequately conduct an individualized assessment, unless the employer recorded that assessment in writing.

Additionally, Ms. Glenn-Leistikow asked the Council to clarify that an employer is required to identify the source of conviction history information on which it bases its decision, even if the employer did not obtain the information from a conviction history report. She explained that the way the law and the regulations are currently written, there is a bit of ambiguity over if you have to provide the written document if it wasn't a formal criminal history conviction report.

Ms. Glenn-Leistikow also asked the Council to clarify the definition of inquiring into job applicants' conviction history before a conditional offer, and in doing so to include the use of Internet searches performed to uncover online evidence of conviction or history. Ms. Glenn-Leistikow requested the Council provide additional examples of evidence of mitigating circumstances or rehabilitation efforts to assist both the job applicants and the employers in understanding what mitigating circumstances may look like, and asked that the regulations provide clearer and more detailed guidance with regard to the local Fair Chance hiring laws. Additionally, she requested the Council reinsert the deleted language that describes the requirements of an individualized assessment for adverse employment actions other than hiring decisions, such as "promotion" and "termination." She explained that as it exists by deleting that, it becomes unclear to people that the existing DFEH regulations outside of the Fair Chance Act applies to those other points within an employee's cycle, such as promotion and termination.

Finally, Ms. Glenn-Leistikow asked the Council to clarify that the job applicant shall be permitted five additional business days, specifically inserting the word "business" into the last sentence of section 11017.1(c)(2)(C) to be consistent with the rest of the section, and the law on this point.

Chair Mandelbaum thanked the public for providing comments and reminded people that the Council will accept written comments until 5pm. With that, Chair Mandelbaum declared that the public hearing was adjourned.

IX. Report from Subcommittee Regarding Public Civil Rights Hearings

Councilmember Tim Iglesias

Councilmember Iglesias expressed gratitude for the abundance of help in organizing the upcoming civil rights hearing. He also noted that he hoped the hearing would provide a broader understanding of issues faced in the Central Valley.

X. Report on Emergency Regulations Regarding Gender-Neutral Facility Signage

Councilmembers Dale Brodsky and Lisa Cisneros

A. Discussion by Council

Councilmember Brodsky reminded the Council that the Gender-Neutral Facility Signage Regulations were in conflict with a Cal/OSHA regulation, so the subcommittee has been working with them to resolve the conflict that has been temporarily solved by the emergency regulations. Councilmember Brodsky then turned the discussion over to Deputy Director Holly Thomas to comment on this topic.

Ms. Thomas reported that the subcommittee met with Cal/OSHA and explained to them that the Council has only one additional 90-day extension available before the regulations lapse. Cal/OSHA informed the subcommittee that their board is considering drafting a regulation or guidance that would clarify the issue.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously voted to approve a motion to grant DFEH authority to extend the emergency regulations for an additional 90 days.

XI. Consideration of Employment Regulations Regarding Definitions; Harassment and Discrimination Prevention and Correction; and Training
Councilmembers Dale Brodsky and Lisa Cisneros

Attachment H: Text of Proposed Employment Regulations Regarding Definitions; Harassment and Discrimination Prevention and Correction; and Training

A. Discussion by Council

The subcommittee proposed a revised definition for “employer” after finding the current definition to be susceptible to different unintended interpretations.

Councilmember Cisneros noted additional modifications, including: addressing transgender rights in the required poster in section 11023(d); and including harassment based on sex, gender identity, gender expression, and sexual orientation in the training discussed in section 11024.

Councilmember Iglesias suggested additional modifications, including: clearly defining the text “the work week” in section 11008(d)(1)(B); and clearly defining the term “participants” in section 11008(d)(1)(C).

Chair Mandelbaum highlighted additional modifications, including: the addition of “outside of California” to section 11008(d)(1)(C); revising text “sexual harassment” to conform with the broader definition of harassment in section 11024(c)(1); removing the term “all” in section 11024(c)(2)(A); and removing the term “sexual” in section 11024(c)(1)(I).

B. Public Comment

The Council heard public comment from:

Chloe Hollett-Billingsley:

Ms. Hollett-Billingsley suggested reconsideration of eliminating the term “sexual” from “harassment” in section 12950.1, and requested the Council elaborate upon the required content involving gender identity, gender expression, and sexual orientation, as well as identify specific qualifications for trainers.

C. Action by Council

Hearing no further public comments, the Council made technical corrections and unanimously voted to approve a motion to adopt the draft regulations and allow the Department to prepare the rulemaking package and notice the draft regulations for public comment.

XII. Consideration of Unmodified Text of Proposed Regulations Regarding National Origin Discrimination

Chair Chaya Mandelbaum and Councilmember Dale Brodsky

Attachment I: Unmodified Text of Proposed Regulations Regarding National Origin Discrimination

A. Discussion by Council

Chair Mandelbaum and Councilmember Brodsky announced that, after reviewing the latest public comment and re-examining the past public comments and existing case law in the area, the subcommittee concluded that the prohibition on English-only rules during non-working hours is consistent with, and supported by, the FEHA.

Councilmember Ortiz expressed concern about potential unintended consequences.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and voted to approve a motion to adopt Attachment I, authorize the Department to submit the rulemaking package to the Office of Administrative Law, and authorize the Department to make any non-substantive/non-substantial changes as required by the Office of Administrative Law in order to approve the regulations. There was one “nay” vote.

XIII. Public Workshop and Review of Working Draft of Regulations Regarding Religious Creed and Age Discrimination

Councilmembers Lisa Cisneros and Joseph Ortiz

Attachment J: Working Draft of Regulations Regarding Religious Creed and Age Discrimination

A. Discussion by Council

Councilmember Ortiz announced that proposals are still pending regarding regulations for religious creed discrimination, however the subcommittee revised the draft regulations regarding age discrimination. Councilmember Ortiz further suggested modifying section 11079(a).

Chair Mandelbaum noted additional suggested modifications, including: revising the reference from “subsection (d) above” to read “subsection (i) below” in section 11075(h); revising text in sections 11076(a), 11078(a)(1), and 11079(c); and including additional guidance in regards to age discrimination in the context of efforts to reduce payroll or salaries in section 11076(a).

Councilmember Iglesias suggested additional modifications, including: changing “is tied to a” to “is justified

by”; changing “lesser” to “less”; rewording “supposed to” in section 11076(a); and clarifying who will “scrutinize” employment applications as described in section 11079(c).

XIV. Public Workshop and Review of Working Draft of Government Code Section 11135 Regulations
Councilmembers Dale Brodsky and Dara Schur

Attachment K: Working Draft of Government Code Section 11135 Regulations

A. Discussion by Council

Councilmember Brodsky said that the subcommittee is seeking input from the Council and the public for the draft regulations, including input on the placement of definitions within the regulations.

Chair Mandelbaum suggested additional modifications, including: reservations regarding the phrase “or sympathizes with” in section 12020(e); combining section 12020(m)(4) with 12020(m)(10); and reconsidering the scope of “an entire corporation” in section 12020(ii)(1)(C).

B. Public Comment

The Council heard public comment from:

Bill Lann Lee, Civil Rights Education and Enforcement Center

Mr. Lee concurred with the current direction of the regulations and noted that he prefers having the definitions presented upfront rather than within specific sections, and having consistent definitions throughout related statutes.

Director Kish noted the difficulty in implementing consistent definitions since definitions do vary based on individual substantive areas of the law, as with the term “age,” for example.

XV. Discussion Regarding Additional Subcommittee Assignments

Chair Chaya Mandelbaum and Councilmembers

A. Discussion by Council

In light of former Councilmember Harris stepping down from the subcommittee on Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act, Chair Mandelbaum inquired if anyone would like to join him on this subcommittee. Councilmember Ortiz volunteered to join.

B. Public Comment

None.

C. Action by Council

The Council moved, seconded, and unanimously voted to have Councilmember Ortiz join Chair Mandelbaum on the subcommittee.

XVI. Further Public Comment

None.

XVII. Adjournment

Chair Mandelbaum adjourned the meeting at approximately 3:30 PM.

Date: May 11, 2018

CHAYA MANDELBAUM

Chair

RENEE RONDINONE

DFEH Outreach and Education Specialist