

FAIR EMPLOYMENT AND HOUSING COUNCIL
Employment Regulations Regarding Definitions; Harassment and
Discrimination Prevention and Correction; and Training

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 1. General Matters; Article 2. Particular Employment Practices

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and/or veteran status of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed, substantive regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification.

§ 11008, Definitions

The purpose of this section is to define terms used throughout the “Discrimination in Employment” subchapter of the regulations. The Council proposes to amend the definition of “employer.” This change is necessary to implement, interpret, and make specific a definition of “employer” that is consistent and does not conflict with the Act’s definition of “employer” in Gov. Code section 12926(d).

At the Council’s public meeting on July 17, 2017, a stakeholder brought to the Council’s attention that 2 CCR 11008(a)(1) was being interpreted so as to deny FEHA protections to employees who otherwise would be covered by the Act. The speaker described a situation where a small employer was accused of not hiring a job applicant because the person was pregnant. Specifically, the employer claimed that because it had not been in business for twenty consecutive calendar weeks in the preceding year, it was not an employer under the Act. This interpretation of the term “regularly employing” would allow employers to freely discriminate for a period of time after starting a business and is unsupported by the statute.

In relevant part, Gov. Code sec. 12926(d) defines “employer” as follows: “‘Employer’ includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities....” The statute’s implementing regulation at 2 CCR 11008(a)(1) provides as follows: “‘Regularly employing’ means employing five or more individuals for each working day in any twenty consecutive calendar weeks in the current calendar year or preceding calendar year.” Thus, the regulation imposes a 20-week period of employment, pins it to the calendar year, and requires the 20 weeks to be consecutive; whereas, FEHA contains no such limitations.

Although FEHA pre-dated Title VII of the federal Civil Rights Act of 1964,¹ section 11008(b)(1) appears to have been derived, at least partially, from the definition of “employer” contained in Title VII and its implementing regulation at 29 CFR 825.105. Section 2000e (b) provides as follows: “The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees² for each working day in each of twenty or more calendar weeks in the current or preceding calendar year....” However, section 11008(a)(1), is even more restrictive than Title VII, in that it requires the 20 workweeks to be “consecutive.”

There is no good reason for California to adopt or follow the Title VII definition in this circumstance. As noted above, the wording of the federal and state statutes are significantly different. Moreover, since its inception, the policy behind FEHA has been to expand, not restrict, the rights of Californians to be free from discrimination in the workplace. “Regularly employing” should be viewed as an expansive term, rather than one that restricts protections under the Act. Accordingly, there is no legal justification for adopting a more restrictive standard than is established by California’s own governing statute.

This is borne out by the policy statements codified in FEHA and by numerous California courts that have interpreted the Act. First, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protected by FEHA to be “civil rights,” the Legislature has made it clear that the Act’s provisions must be broadly interpreted. (See, Gov. Code §§ 12920 and 12921). Taking up this call, courts have consistently held that FEHA must be “liberally construed.” (See, e.g., *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Commission* (1985) 39 Cal.3d 422.) As one court put it, the Legislature intended FEHA “to amplify” the rights of victims of discrimination. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.)

Given the mission of the statute, it is reasonable to conclude that the term “regularly employing” is intended to amplify, not to limit protections. Thus, in *Robinson v. Fair Employment and Housing Commission* (1992) 2 Cal.4th 226, 243, the Supreme Court applied a “liberal construction” analysis to affirm the Commission’s jurisdiction over a small employer who had six part-time and full-time employees such that on only two days per week were there as many as five employees. Broadly interpreting the statutory definition, the court concluded that the number

¹ 42 U.S.C. sec. 2000e(b)

² The numerosity requirement for discrimination, retaliation, and opposition claims under FEHA is five employees (Government Code section 12926(d)); for the California Family Rights Act, the numerosity requirement is 50 employees (Government Code section 12945.2); and for harassment, the numerosity requirement is one employee (Government Code section 12940(j)(4)).

of persons on the payroll, not the number working on any particular day, is determinative of the number of employees an employer “regularly employs.” As such, part-time employees, even if they do not work every day, must be included in counting.

Very recently, the Iowa Supreme Court resolved a dispute under the Iowa Civil Rights Act (ICRA), which has the same “regularly employing” language as FEHA. *Simon Seeding and Sod v. Dubuque Human Rights Commission* (2017) 895 N.W.2d 226. In that case, a landscape company with seasonal operations claimed it was exempt under the ICRA because it had fewer than the four-employee minimum during a 20-workweek period. Citing *Robinson*, the Iowa Supreme Court rejected the employer’s argument. Like FEHA, the Iowa statute contains no 20-week limitation, and the Iowa Supreme Court refused to graft Title VII’s definition into the state law, as a federal court in Iowa previously had done. Instead, the court held that payroll approach should be used to count employees to determine the small-employer exemption, “without regard to the number of weeks individual employees worked.” (*Id.* at p. 443.)

The Council believes that in reaching its conclusions regarding the proper definition of “regularly employing,” the Iowa Supreme Court wisely and cogently relied on California Gov. Code section 12926(b) and California jurisprudence in *Robinson* to reach a just conclusion. Taking guidance from these cases, the Council has concluded that the current regulation, 11008(a)(1), impermissibly circumscribes the protections afforded by FEHA and offers the amendment to correct the problem. Accordingly, the Council proposes to revise the definition of “regularly employing,” add a definition of “regular basis,” elaborate on how to count employees, and uniformly apply the counting standards throughout the FEHA. This is necessary to clarify otherwise subjective terms and ensure consistency throughout the FEHA.

§ 11023, Harassment and Discrimination Prevention and Correction

The purpose of this section is to detail employers’ duty to prevent and correct harassment and discrimination, the required contents of harassment and discrimination policies, and the dissemination and translation of such policies. The Council proposes to call the document that employers must distribute to employees a “publication on harassment” rather than “DFEH-185 brochure on sexual harassment.” This change is necessary since the document must cover more than just sexual harassment, does not have to be in the form of a brochure, and does not have to follow the Department’s old numbering convention. This change is technical in nature and better implements Government Code section 12950. Similarly, the Council proposes to add that employers must distribute their harassment, discrimination, and retaliation prevention policy. This addition too is technical and clarifies that it is not sufficient to merely have a policy; it must be distributed per Government Code section 12950(b). Finally, the Council proposes to add that “[i]n addition to the actions described above, every employer shall post a poster developed by the Department regarding transgender rights in a prominent and accessible location in the workplace.” This is necessary to implement SB 396 (Stats. 2017, ch. 858) – which added that exact language as Government Code section 12950(a)(2).

§ 11024, Sexual Harassment Training and Education

The purpose of this section is to address the more nuanced rules regarding harassment prevention training and education that is mandated by Government Code section 12950.1. Covered topics are definitions, training requirements, training objectives and content, remedies for failure to comply with training requirements, and compliance guidance. The Council proposes to

incorporate SB 396 which added the following to Government Code section 12950.1 as subdivision (c): “An employer shall also provide training inclusive of harassment based on gender identity, gender expression, and sexual orientation as a component of the training and education specified in subdivision (a). The training and education shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas.” Accordingly, the Council proposes to use broader terms when referring to what the training must include, including in the title of the section, to encompass gender identity, gender expression, and sexual orientation in addition to sex. This is necessary to implement the statute and clarify the regulations. Also, in section 11024(a)(3), the Council proposes to add that “employee” includes interns, unpaid volunteers, and persons providing services pursuant to a contract for the purposes of the section regarding harassment and training. As above, this addition implements the FEHA – in this case Government Code section 12940(j)(1) – which sets a lower numerosity requirement of one employee for harassment claims and includes interns, unpaid volunteers, and persons providing services pursuant to a contract, groups that should both know how to prevent harassment and be aware of their rights. Finally, in section 11024(a)(6), the Council proposes to add “under the means described in section 11008(d)” after “Having 50 or more employees’ means employing or engaging 50 or more employees or contractors.” This is necessary for clarity, namely reminding the reader of amendments to a different section, and to ensure that the same methodology is universally employed to ascertain the FEHA’s coverage.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, 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 invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments describe and clarify the Fair Employment and Housing Act without imposing any new burdens. Their adoption 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.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs; the creation of new businesses or the elimination of existing businesses; the expansion of businesses currently doing business within the state; or worker safety and the environment because the regulations centralize and codify existing law, clarify terms, and make technical changes without affecting the supply of jobs or ability to do business in California. 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.