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STATE OF CALIFORNIA  
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING  
COUNCIL MEETING

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

Transcript of Proceedings

State Capitol, Room 113  
1315 10th Street  
Sacramento, California

Wednesday, October 23, 2019

10:17 a.m.

Brittany Flores, CSR 13460

<p>1 APPEARANCES 2 COUNCIL MEMBERS: 3 Chaya Mandelbaum, Chairman 4 Dale Brodsky 5 Tim Iglesias 6 Joseph Ortiz 7 Dara Schur 8 9 Staff: 10 Brian Sperber, regulatory/legislative counsel 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 2</p>	<p>1 PROCEEDINGS: 2 October 23, 2019 3 4 CHAIRMAN MANDELBAUM: Great. Well, we are 5 at our public hearing. So we're going to go on the 6 record and start our public hearing. 7 So we are now on the record, and it is Wednesday, 8 October 23rd, and we're here at the State Capitol in 9 Sacramento. My name is Chaya Mandelbaum, chairperson of 10 the Fair Employment and Housing Council, and joining me 11 today are members of the council, Council Member Dale 12 Brodsky, Dara Schur, Tim Iglesias, and Joseph Ortiz. 13 Even though we've had an informal introduction 14 off the record, let me again welcome you to this hearing 15 portion of the meeting. The purpose of this hearing is 16 to receive public comment regarding issuance of 17 amendments to the FEHA's employment regulations that 18 relate to new legal provisions regarding criminal 19 history and employment and parental leave. This 20 rulemaking clarifies, makes specific, and supplements 21 any state regulations interpreting the FEHA that are set 22 forth in Government Code 13900, et seq. 23 The proposed regulations are slated to appear in 24 the California Code of Regulations Title 2, sections 25 11017.1 and 11087 through 96. Copies of the proposed</p> <p style="text-align: right;">Page 4</p>												
<p>1 INDEX 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 80%;"></td> <td style="text-align: right;">Page</td> </tr> <tr> <td>1. Introduction</td> <td style="text-align: right;">4</td> </tr> <tr> <td>2. Opening Comments</td> <td style="text-align: right;">4</td> </tr> <tr> <td>3. Public Comment</td> <td style="text-align: right;">7</td> </tr> <tr> <td>8. Adjournment</td> <td style="text-align: right;">13</td> </tr> <tr> <td>9. Reporter's Certificate</td> <td style="text-align: right;">14</td> </tr> </table> <p style="text-align: right;">Page 3</p>		Page	1. Introduction	4	2. Opening Comments	4	3. Public Comment	7	8. Adjournment	13	9. Reporter's Certificate	14	<p>1 amendments to the regulations are available at the front 2 of the room and are reflected in Attachment D to today's 3 materials and the notice and initial statement of 4 reasons are reflected in Attachment B and C, 5 respectively. The text of the Council's regulations is 6 also available on the Council's web page. 7 We're holding this meeting as part of our formal 8 rulemaking process, and it was noticed in the California 9 regulatory notice register to the public on September 6, 10 2019 and also via email sent to more than 7,500 11 individuals and stakeholders and through the Council's 12 web page. Pursuant to the notice, we're taking 13 testimony today on the proposed amendments and will also 14 accept written testimony -- or written comments rather 15 on the regulations until 5:00 o'clock today, October 16 23rd. So if you haven't already submitted, you can 17 submit your written comments to the Council at 18 FEHCouncil@DFEH.CA.GOV. Or you can mail them instead to 19 the Council in the DFEH's Los Angeles office located at 20 320 West 4th Street, 10th floor in LA 90013. You can 21 also give your written comments, if you brought them, to 22 Brian. And if you didn't bring a written comment to 23 provide to Brian today, make sure you get it in by 5:00 24 this afternoon. 25 Anyone who testifies here today will -- or</p> <p style="text-align: right;">Page 5</p>
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1 submits any written comments will receive a copy of any  
2 changes or amendments the Council makes to the proposed  
3 regulations and will also have an opportunity to submit  
4 comments if -- during a 15-day period if the Council  
5 makes substantive or substantial change to the proposed  
6 amendments after receiving public comment and also  
7 anyone who requests a copy, an opportunity to have that  
8 as well.  
9 So we'll consider all the commence made here  
10 today as well as all comments received in writing, and  
11 we'll respond to those comments in our final statement  
12 of reasons, which will be part of the rulemaking record.  
13 So as you can tell, this hearing's being  
14 transcribed by a court reporter, and the transcript of  
15 the hearing, as well as all written comments received,  
16 will also be part of the official rulemaking record.  
17 Because this hearing is being transcribed, as you'll  
18 notice, I am speaking a little bit slower than I would  
19 in the everyday course of conversation, and we would  
20 appreciate it if you would do the same so that our court  
21 reporter is able to take down testimony.  
22 You won't be sworn in when you testify, but we do  
23 ask that you come to the front of the room and speak  
24 into the microphone so that the court reporter can take  
25 down your remarks. Please start by stating and spelling

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1 your name and any affiliation that you are offering your  
2 remarks on behalf of. Also, if you're commenting on a  
3 specific regulation, it's helpful if you can identify  
4 the section and subsection of the regulations so that we  
5 can refer to it as you're providing your comments. So  
6 we'll hear testimony until all those wishing to testify  
7 today have had an opportunity to do so.  
8 Any initial questions?  
9 Seeing and hearing none, we're ready to begin.  
10 So if anyone would like to provide public comment on  
11 Attachment D, the proposed regulations, now would be a  
12 good time to come to the front.  
13 Brian, any email comments?  
14 MR. SPERBER: Internet's down.  
15 CHAIRMAN MANDELBAUM: Oh, okay.  
16 Well, why dope you -- why don't you --  
17 COUNCIL MEMBER BRODSKY: All right.  
18 CHAIRMAN MANDELBAUM: -- kick this off.  
19 MS. BRODSKY: All right. I have some  
20 comments.  
21 I'm Dale Brodsky as you know. I am a member of  
22 the council, but I'm making these comments not wearing  
23 that hat. I'm making these comments as a member of the  
24 public. I'm an attorney in practice. I have been  
25 working in the field of employment law for more than 40

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1 years and have been emersed in this -- in the statutes  
2 that we're addressing here for more -- for all of that  
3 time -- most of that time.  
4 So I do have a couple comments. I think that  
5 the, the regulation's really good. I just -- I just  
6 want to focus on two things. The first is a minor one  
7 with respect to the regulations on criminal history.  
8 When I looked at the definitions and, and read -- I  
9 mean, I think that there should be a definition of  
10 "conditional offer of employment" in 110 -- in 11017.1  
11 B-4. There are a bunch of definitions, and I'm going to  
12 submit something in writing in which I have a simple  
13 proposal for how to define that. It's because  
14 "conditional offer of employment" is so important in  
15 these regulations in terms of when an employer can  
16 request information and when they can't. And I thought  
17 it would be very helpful to have a definition on that.  
18 Do you want me to read my suggestion, or do you  
19 want to just take it by written --  
20 CHAIRMAN MANDELBAUM: Well, if it's going  
21 to -- if you're going to have it in writing, we'll see  
22 it in there --  
23 MS. BRODSKY: Okay.  
24 CHAIRMAN MANDELBAUM: -- but whatever you  
25 prefer.

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1 MS. BRODSKY: Okay. Then the, the second  
2 and only other suggestion I have has to do with request  
3 to the family -- the Family Rights Act and, and this is  
4 specifically about 11087 D-1, at page seven. The  
5 definition of "directly employed," and I would ask the  
6 Council to consider changing this definition to update  
7 it to make it consistent with the definition in -- of  
8 "employer" in 1108 -- sorry. 11008 subsection D.  
9 The -- as it's written now, the definition that's  
10 provided under these -- under the proposed regulations  
11 is, "directly employed means the employer maintains an  
12 aggregate of at least 20," and in parens, "NPLA, or 50,"  
13 in parens, "CFRA, part- or full-time employees on its  
14 payroll," in parens, "S, for each working day during  
15 each of 20 or more calendar workweeks in the current or  
16 preceding calendar year." I want to focus on that  
17 language. It's, it's, it's -- I -- in, in looking at  
18 it, I reviewed the legislative history from CFRA, which  
19 I have given Brian a copy of from when it was first  
20 enacted in 1991. I wanted to see whether there was any  
21 definition or any reason why that language had to be  
22 there. There's not. I looked at all caselaw that I  
23 could find on the subject, and I could not find any  
24 caselaw that justified having that definition.  
25 So with that background, what I then did was -- I

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<p>1 think there are four reasons why that language should be 2 changed and made consistent with 11008 D-1, which is the 3 definitional in our general FEHA employment regulations. 4 We've defined what regular -- what it means to be an 5 employer. And in that context, we changed -- we took 6 out language that was the language that's still in this 7 one that would have conditioned employers and would -- 8 said that employees had to be employed during 20 weeks 9 during the previous calendar -- or during the calendar 10 year. And we took that out and replaced it with a 11 different manner of counting. That was why the original 12 language, it was -- what the original language in our 13 Family Rights Act regulations, that I worked on a long 14 time ago, mirrored that. The language that had 15 previously existed as the definition of the "employer," 16 we changed that back in January. At our January 28th, 17 2019 meeting, we voted unanimously to approve amendments 18 to the employment regulations, which changed that 19 language, took that out, and provided a different 20 definition of "regular employee." 21 Nevertheless, as it's currently drafted, these 22 CFRA regulations still use that old wording. So really, 23 the -- I think we need to change it, first, because the 24 counting mechanism that is still there, the 50 -- having 25 to -- relying on 20 working weeks during the calendar</p> <p style="text-align: right;">Page 10</p>	<p>1 So for all those reasons, I really urge us to 2 change that, and I have proposed a very simple fix in my 3 written letter. And, and so the -- and then there's one 4 other suggestion that I had that I think that the 5 existing language has it -- says that "people on the 6 payroll." I'm suggesting that we omit "payroll," 7 because what the statute says is there have to be 8 employees who receive a -- wages of salary. That's much 9 more explicit than being on a payroll, because somebody 10 could be an employee and not be on the payroll or 11 someone who's not an employee could be on the payroll. 12 So you want to -- and that's -- in my letter, I, I have 13 a citation to some dicta in a Supreme Court decision in 14 which Justice Leah made a -- in a different -- slightly 15 different context but observed that as well. 16 So I would suggest just going back and using the 17 same wording -- wages and/or salary -- and that's also 18 incorporated in my written comment. So thank you. 19 CHAIRMAN MANDELBAUM: Thank you, Mrs. 20 Brodsky. 21 MS. BRODSKY: Hmm? 22 CHAIRMAN MANDELBAUM: Not "Council Member 23 Brodsky." 24 Any other -- no? Okay. So we don't have any 25 email comments.</p> <p style="text-align: right;">Page 12</p>
<p>1 year is not based on any California statute. It's 2 similar to -- it is the same as FMLA in Title 7, but 3 it's not in any California statute. 4 Secondly, now -- I mean before the two 5 definitions were mutually -- they were consistent; the 6 definition of the employer, directly employing and 7 regular employment for FEHA for -- were totally 8 consistent. Now there's no regulatory source for the 9 current -- the way that it's still written. 10 Third reason is that, in and of itself, 11008 D-2 11 expressly states that for the purposes of CFRA and NPLA, 12 employees must be counted in the same way as they're 13 described in 11008 D-1. So we've actually said that 14 ourselves; that that definition applies. So you 15 can't -- I mean, it doesn't make sense to have another 16 regulation that's inconsistent with that. 17 And fourth, the definition of employer for 18 Pregnancy Disability Leave Act does not require an 19 employee to have worked, you know -- to have -- you 20 don't have to have had 20 or 50 employees on the -- on 21 the books for 20 weeks. So now you've got PDL, 22 Pregnancy Disability Leave, which often runs 23 sequentially or, you know, with CFRA, which, as it's 24 written now, would be subject to two different counting 25 mechanisms, which doesn't make sense.</p> <p style="text-align: right;">Page 11</p>	<p>1 Anyone else want to provide public comment on the 2 proposed regulations regarding criminal history of the 3 California Family Rights Act as the New Parent Leave 4 Act? 5 COUNCIL MEMBER IGLESIAS: I forget; is it 6 appropriate for council members in this hearing to make 7 comments or no? 8 CHAIRMAN MANDELBAUM: I think it would be 9 the next one. So this is the draft we already voted on, 10 and then we'll amend it once we process the written 11 public comments and Mrs. Brodsky's oral public comment 12 and written comment. 13 So seeing no other people who are wishing to 14 provide public comment, we will conclude with our public 15 hearing portion of the meeting. So thanks to those who 16 plan to submit written comments. We look forward to 17 reading it. Please remember to get it in by 5:00 18 o'clock today. 19 So with that, the hearing portion of this meeting 20 is adjourned. 21 22 (Whereupon the proceeding concluded at 10:32 a.m.) 23 24 --o0o - 25</p> <p style="text-align: right;">Page 13</p>

1 I, Brittany Flores, a Certified Shorthand Reporter of  
2 the State of California, duly authorized to administer  
3 oaths, do hereby certify:

4 That the foregoing proceedings were taken before me  
5 at the time and place herein set forth; that a record of  
6 the proceedings was made by me using machine shorthand  
7 which was thereafter transcribed under my direction;  
8 that the foregoing transcript is a true record of the  
9 testimony given.

10 I further certify I am neither financially interested  
11 in the action nor a relative or employee of any attorney  
12 of party to this action.

13 IN WITNESS WHEREOF, I have this date subscribed my  
14 name.

15  
16 Dated: 11/6/2019

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18 \_\_\_\_\_  
19 Brittany Flores CSR 13460  
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