

**FAIR EMPLOYMENT AND HOUSING COUNCIL
EMPLOYMENT REGULATIONS REGARDING RELIGIOUS CREED AND AGE DISCRIMINATION**

FINAL 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 2. Particular Employment Practices; Article 8. Religious Creed Discrimination; Article 10. Age Discrimination

UPDATED INFORMATION [Government Code Section 11346.9(a)(1)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA 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 veteran status of any person.

Specifically, this rulemaking action most notably clarifies what pre-employment practices—recruitment, inquiries, applications (both off and online)—may violate the FEHA, provides examples of how employers may successfully navigate the law, and describes when and how the affirmative defense of business necessity may be invoked.

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.

The Council heard public comment on the originally proposed text at a public hearing in Oakland on July 31, 2019. The Council further solicited public comment on one modified text at two subsequent meetings: October 23, 2019, in Sacramento and February 25, 2020, in Los Angeles.

The following list summarizes the Council’s amendments to the originally proposed text:

- replacing antiquated, lengthy language about “minorities” with a more modern rendering—“an individual who is a member of an underrepresented protected class covered by the Act”;
- clarifying the circumstances when an employer may ask pre-employment questions about the physical fitness, medical condition, physical condition, or medical history of applicants;
- adding examples of (im)permissible pre-employment inquiries and advertisements;

- clarifying that an application's request for information related to schedule and availability for work may not be used to ascertain an applicant's religious creed, disability, or medical condition and how to properly request information about schedule and availability for work;
- clarifying the proper rendering of the business necessity affirmative defense (i.e. "job-related and consistent with business necessity");
- clarifying that online application technology that limits or screens out applicants based upon age may violate FEHA;
- clarifying that the prohibition against applications being separated or coded includes both manual or electronic separating and coding;
- clarifying that the FEHA's age discrimination provisions apply to individuals age 40 and older;
- clarifying when the presumption of age discrimination applies, including in the context of layoffs or salary reduction efforts;
- replacing "an attempt to deter or limit" with "detering or limiting" in order to eliminate the need to infer intent when analyzing the lawfulness of advertisements; and
- deleting a confusing, partially duplicative subdivision regarding when an application's request for information that could lead to the disclosure of an applicant's date of birth or age is lawful.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council's response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act for the reasons described below.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

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, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations 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.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11016(b)(1)(A):

Comment: The proposed modification to this section has the potential to create confusion due to the lack of consistency in language between this section and various sections of the regulations related to disability discrimination. The proposed new section takes, with some minor alterations for flow, verbatim its language from the current Section 11016(b)(1). However, that language is inconsistent with no fewer than four sections of the disability regulations: Section 11070 (Pre-employment Inquiries), Section 11071 (Medical & Psychological Examinations & Inquiries), Section 11065 (Defenses), and Section 11067 (Definitions).

For instance, the phrase “if the inquiry or request for information is directly pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger their health or safety or the health or safety of others. . .” is problematic for several reasons. First, nowhere in Section 11070 does the verbiage “directly pertinent to the position” nor “directly related to a determination . . .” appear. Those phrases similarly do not appear in Section 11065 definitions. Rather, Section 11070 and 11065 use “job related” and “business necessity” to outline when a disability-related inquiry is permissible. Also, the current language in Section 11016(b)(1)(A) does not reflect any of the detailed provisions relevant to the analysis of the defense of threat to health or safety of self or others reflected in Section 11067. As a result of these inconsistencies, the reader of the regulations is left potentially confused over which rule applies.

We believe the solution should be simple and propose the following modification to the proposed Section 11016(b)(1)(A):

(A) An employer may make, in connection with prospective employment, an inquiry as to, or request information, regarding the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of Sections 11067, 11070 and 11071 of these regulations.

This revision will enhance clarity and consistency throughout the regulations and direct readers to the sections of the regulations that provide detailed, instructive guidance for navigating the FEHA’s provisions.

Council response: The Council agrees and has adopted the suggested revision.

Section 11016(b)(1)(B):

Final Statement of Reasons for Employment Regulations
Regarding Religious Creed and Age Discrimination

Comment: This proposed section states that pre-employment inquiries regarding availability for work shall not be used to ascertain the applicant's religious creed, disability or medical condition. This section is unnecessary and duplicative in light of the fact that such inquiries into any protected category are already unlawful under FEHA. Therefore, this section should be deleted.

Moreover, while we understand and appreciate the goal of the Council to "provide guidance to employers on how to avoid asking impermissible scheduling questions and demonstrate how employers can do so by giving a practical example," we are concerned that the proposed language is too restrictive and gives the impression that the example listed is the only permissible question an employer may ask with regard to scheduling.

For example, many employers state the normal work hours for the job and, after making it clear that the applicant is not required to indicate the need for any religious-based absences during scheduled work hours, ask them whether they are otherwise available to work during those hours. Thereafter, after a position is offered the employer and employee may discuss any need for religious accommodation and whether an accommodation is possible.

We are concerned that the current proposed language could be read by some employers as an absolute limit on the manner in which they may request scheduling information, and the information that they may request. We would therefore request that this language be deleted or modified to make clear that this is merely one permissible manner of requesting such information and that, as long as not used to ascertain religious creed, an employer may make pre-employment inquiries regarding availability for work, as many employers currently do.

Council response: The Council disagrees that this subdivision should be deleted. It is true that employers may not make pre-employment inquiries regarding availability for work into any protected category since that is already unlawful under FEHA. However, the Council and Department has often seen those impermissible inquiries in the context of religious creed, disability, and medical condition, so reiterating the general rule in a protected category-specific context can only serve to provide further clarity. Moreover, while use of "such as" demonstrates that the enumerated question is an example of what employers may ask rather than an exhaustive list containing the only question an employer may ask, the Council agrees that further clarification could be helpful and therefore added the second question.

Section 11016(c)(3):

Comment: This proposed section states that employment applications that request availability for work and other information "will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose. This appears to be a "backdoor" manner to create a presumption of discrimination for otherwise legitimate and common inquiries made by most employers. Therefore, this language is inappropriate and should be deleted.

Council response: The Council agrees that the original language was not as clear as possible and deleted it. The Council replaced it with a clearer formulation of the principle—schedule and availability for work cannot be used as a pretext to ask about protected characteristics like religious creed, disability, or medical condition—along with examples of permissive inquiries.

Section 11016(c)(3)(A):

Comment: This proposed section purports to provide that “online application technology” that limits or screens applicants based on their schedule may have an adverse impact. However, current Section 11016(c)(3) already prohibits “separation or coding” of application forms to identify individuals on a protected basis. Therefore, the proposed addition related to “online application technology” is unnecessary and duplicative. The current regulatory language could be amended to state that forms “shall not be **manually or electronically** separated or coded,” which would potentially clarify the issue without creating an entire duplicative new subdivision.

Council response: The Council disagrees that the two subdivisions are duplicative. Whereas “separation or coding” deals with applications that are accepted but flagged and potentially segregated based on a protected characteristic, “limiting or screening” refers to online job applications that use automated selection criteria so that applications may not even be accepted or processed because of threshold questions based on protected characteristics. However, in the next subdivision, ultimately numbered 11016(c)(4), the Council did clarify that separating or coding can be done both “manually or electronically.” Unrelatedly, the Council added “job-related and consistent with” before “business necessity” to accurately state the affirmative defense.

Section 11076(a):

Comment: Our only issue with the proposed modification is that we believe it potentially gives the reader a mistaken impression that a claim brought pursuant to Section 12941 can only be brought in either a group or class action. That impression derives from the proposed language being stated in the plural as opposed to alternatively in the singular and the plural. A simple modification to those phrases should alleviate any potential confusion deriving from the regulation.

Council response: The Council agrees that the subdivision could be clearer and therefore added “(s)” after “applicant,” “employee,” and “worker” to emphasize that age discrimination claims can be brought as both individual and group claims.

Comment: In addition to being prohibited under FEHA, age discrimination is unlawful under federal law under the Age Discrimination in Employment Act of 1967 (ADEA).

Although the wording of FEHA and federal antidiscrimination laws differ in some particulars, the antidiscriminatory objectives and overriding public policy perspectives are

identical; therefore, California courts refer to applicable federal decisions where appropriate. *Juell v. Forest Pharmaceuticals, Inc.*, 456 F. Supp.2d 1141 (E.D. Cal. 2006).

Therefore, we believe the Council should strive, where possible, to ensure consistency between the age discrimination provisions of FEHA and those of federal law. In fact, in the Initial Statement of Reasons, the Council refers to the ADEA and applicable federal case law for the argument that disparate impact discrimination is cognizable for age discrimination claims under federal law and therefore should be so under FEHA.

However, several aspects of proposed Section 11076(a) differ in application from the standard under the federal ADEA. Under the federal law, any employment practice that adversely affects individuals within the protected age groups on the basis of older age is discriminatory unless the practice is justified by a “reasonable factor other than age.” 29 C.F.R. §1625.7(c).

Proposed Section 11076(a) departs from this framework and instead provides that an otherwise unlawful adverse impact may only be justified by “business necessity.”

In addition, proposed Section 11076(a) states that a “presumption of discrimination may be established by a showing that a facially neutral practice has an adverse impact on applicants or employees over the age of 40...” However, this framework appears to contradict the standard articulated by the United State Supreme Court under the ADEA in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). In *Smith*, the Court noted that it is not enough for a plaintiff to allege simply a disparate impact on older workers. Rather, the Court held that plaintiffs bringing ADEA claims based on “disparate impact” must (1) identify the specific practice that had an adverse impact on older workers, and (2) show that the employer’s decision that resulted in a disparate impact was not based on a “reasonable factor other than age.” The presumption proposed by the regulation appears to contradict the approach taken under federal law under the ADEA.

Moreover, proposed Section 11076(a) states that, “The practice may still be impermissible, even where a legitimate business necessity exists, where it is shown that an alternative practice could accomplish the business purpose equally well with a less discriminatory impact.” This provision appears to contradict the very same precedent from the United States Supreme Court that the Council cites in support of its regulatory proposal in the Initial Statement of Reasons. *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). In that decision, the Court noted that an employer is not required to show that it had absolutely no other, less discriminatory alternative to achieve its goal. “Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.” *Id.* at 1546.

For these reasons, we urge the Council to reconsider this language and the overall approach taken by the proposed language to be more consistent with the federal standard under the ADEA. To do otherwise will subject California employers to conflicting and different interpretations under state and federal law.

Council response: The Council disagrees. Government Code section 12941 explicitly states the Legislature’s intent that age discrimination not be analyzed under a different standard than other forms of discrimination, in contrast to federal law:

“The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in [the Council’s regulations].”

Therefore, while it is true that state and federal law have consistent anti-discrimination policy goals, the discrepancy pointed out in the comment is one of the “particulars” in which the two bodies of law are different. Moreover, the use of “job-related and consistent with business necessity” is merely reiterating the law as it applies to all protected bases as stated in 2 CCR 11010(b); there is not a different standard for age discrimination as there is for the other protected bases.

Section 11078(a):

Comment: The proposal states that examples of unlawful requirements include a requirement that candidates be “digital natives.” While use of such a term may be inappropriate, this enumeration of examples could lead to confusion for employers over whether they can still inquire into certain skill sets or essential functions of the job, some which may include technological literacy. For this reason, inclusion of “examples” in regulatory language often causes more problems and confusion than it solves. In addition, there has been no explanation provided regarding authority (via case law, statistics or otherwise) for the proposition that these “examples” have been deemed unlawful. Therefore, we would propose deletion of specified examples of unlawful conduct.

Moreover, because the legality of an employer’s actions may vary depending on the facts of a particular case and any affirmative defenses that may be presented, at a minimum it would be more appropriate to refer to these examples as “**potentially** unlawful.”

Council response: The Council disagrees that the regulation would cause confusion because it is clear that the examples are about absolute requirements rather than skill sets or essential functions. Moreover, the Council disagrees about the lack of value in giving examples and thinks examples can clarify otherwise complicated black letter law. In this case, the Council drew from its own experience and that of the Department to enumerate requirements that they have seen employers list that are facial violations—not potential violations—of the Fair Employment and Housing Act.

Section 11079(a):

Comment: This section provides that advertisements for employment that a “reasonable person” would interpret as an “attempt” to deter or limit employment of people age 40 and

over are unlawful. We have numerous concerns with this language. First, again, such conduct designed to deter or limit employment of people over age 40 is already unlawful so this provision is likely unnecessary. Second, it is inappropriate to incorporate a “reasonable person” standard into the law here, rather than an analysis of the actual intent or impact of an employer’s conduct. Third, the language states that an “attempt” to deter or limit employment would be unlawful, regardless of whether there was an actual aggrieved applicant. All of this would serve to create confusion and lead to litigation over the meaning of these vague terms.

Moreover, proposed restrictions on advertisements raise significant First Amendment concerns, which would likely lead to protracted litigation. As currently drafted, the proposed subdivision, section 11079(a) of Article 10, is a content-based restriction on speech that cannot withstand constitutional scrutiny.

“ ‘As a general rule, laws that by their terms distinguish favored speech from disfavored speech ... are content-based. [Citations.]’ ” (*Snatchko v. Westfield, LLC* (2010) 187 Cal.App.4th 469, 481-482.) Content-based restrictions are “presumptively invalid” and subject to strict scrutiny. (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382.) To withstand strict scrutiny, a restriction must be necessary to serve a compelling government interest and “narrowly drawn” to achieve that end. (*Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 869) “Narrowly drawn” in such context means it is the “least restrictive means of achieving [the] compelling state interest.” (*McCullen v. Coakley* (2014) 573 U.S. 464, 478.) “ ‘It is rare that a regulation restricting speech because of its content will ever be permissible.’ ” (*Brown v. Entertainment Merchants Association* (2011) 564 U.S. 786, 799.)

Here, no doubt the state’s interest in prohibiting age discrimination is compelling, however, this particular proposed subdivision is not narrowly tailored to serve that interest, i.e., it is not the “least restrictive means” of achieving the interest. Rather, this proposed regulation raises a significant question about the potential scope of what language a reasonable person might “interpret” as an attempt to deter older workers. Due to the broad nature of the restriction, it seems likely that it will impermissibly restrict protected speech.

Even if a court considered employment advertising “commercial speech” and applied intermediate scrutiny to this regulation, it would still fail for the same reasons stated above. Under intermediate scrutiny, a regulation must still be narrowly tailored to achieve the government interest. (See *Board of Trustees of State University of New York v. Fox* (1989) 492 U.S. 469, 480 [regulatory fit does not need to be perfect, but must be a “means narrowly tailored to achieve the desired objective”]; *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 565 [In analyzing a commercial speech restriction “[t]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest [citation], nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”].) The proposed regulation, as currently drafted, presents too many questions regarding its potential scope and enforcement. Therefore, it is not sufficiently tailored to survive either strict or intermediate scrutiny under the constitution.

Finally, this section proposes to list examples of “prohibited advertisements.” As stated above, inclusion of “examples” in regulatory language often causes more problems and confusion than it solves. In addition, there has been no explanation provided regarding

authority (via case law, statistics or otherwise) for the proposition that these “examples” have been deemed unlawful. This section also proposes to list as an example of prohibited advertisements those that designate “recent college graduate.” Inclusion of this example presumes that only individuals below the age of 40 are recent college graduates or students, which is not accurate. Therefore, we would propose deletion of specified examples of unlawful advertisements.

Similar to the comment above, because the legality of an employer’s actions may vary depending on the facts of a particular case and any affirmative defenses that may be presented, if the language is not deleted it would be more appropriate to refer to these examples as “**potentially** unlawful.”

Council response: First, while the Council agrees that it is unlawful to deter or limit employment of people over age 40 with or without this subdivision, the Council disagrees about the lack of value of reiterating that point for clarity. Because this section already addressed pre-employment inquiries, interviews, and applications, the Council thinks that advertisements fit naturally in this section.

Second, a “reasonable person” standard is not mutually exclusive with an analysis of actual intent or the impact of an employer’s conduct. In fact, a seminal advertising case dealing with whether a plaintiff was aggrieved since he did not apply for the position in question used the reasonable person standard: The court relied on the fact that the plaintiff “reasonably believed that the job application to [the employer] would be ... futile.” (*Hailes v. United Air Lines* (5th Cir., 1972) 464 F.2d 1006, 1008.)

Third, the Council agrees that “an attempt to deter or limit” could be confusing and changed it to “detering or limiting” in order to eliminate the need to infer intent.

Fourth, the comment’s First Amendment analysis is misplaced since the First Amendment cannot be used to justify illegal behavior. In the advertisement context, *Pittsburgh Press Co. v. Human Rel. Comm’n* (1973) 413 U.S. 376, 389 upheld the prohibition of discriminatory job advertisements since there is no First Amendment interest when “the commercial activity itself is illegal.” The Fair Employment and Housing Act plainly prohibits discrimination on the basis of age in, *inter alia*, Government Code section 12940(a).

Finally, like above in section 11078(a), the Council disagrees about the lack of value in giving examples and thinks examples can clarify otherwise complicated black letter law. In this case, the Council drew from its own experience and that of the Department to enumerate types of prohibited advertisements that they have seen employers use that are facial violations of the Fair Employment and Housing Act. As it relates to preferences for “recent college graduates” in particular, the EEOC has used that example as one that “may discourage ... people over 40 from applying and may violate the law.” (<https://www.eeoc.gov/laws/practices/index.cfm>.) The Council emphasizes that the key to analyzing whether an advertisement is prohibited in the age discrimination context is “imply[ing] a preference for employees under the age of 40.”

Section 11079(b):

Comment: This section proposes to list examples of prohibited inquiries that would result in the identification of persons on the basis of age. As stated earlier, we have concerns regarding the inclusion of specific examples of conduct in regulatory language. While well-intentioned, inclusion of specific examples can sometimes cause more confusion rather than clarify lawful conduct. Here, we have particular concerns regarding the list of examples of prohibited inquiries including “graduation dates.” Such information is often included by applicants themselves on resumes or otherwise voluntarily provided to the employer, without prompting by the employer. In some cases, graduation dates may be utilized to verify that education experience listed on resumes or applications is factual. Providing that “graduation dates” is categorically an unlawful inquiry may lead to confusion in these situations and therefore should be eliminated.

Moreover, inclusion of “graduation dates” here as a prohibited inquiry appears to contradict proposed Section 11079(c)(1), which states that requests for information “such as graduation date” is not, in itself, unlawful.

Council response: As above, the Council disagrees about the lack of value in giving examples and thinks examples can clarify otherwise complicated black letter law. In this case, the Council drew from its own experience and that of the Department to enumerate types of prohibited pre-employment inquiries that they have seen employers use that are facial violations of the Fair Employment and Housing Act. As it relates to inquiries about graduation dates, there is no FEHA implication if an applicant volunteers the information; this subdivision pertains to inquiries made by employers. Regarding using graduation dates to verify applicants’ education, it is a facial violation of the law if made as a pre-employment inquiry. Employers can use other means to ascertain the veracity of applicants’ education, for example, calling the schools themselves post-offer.

The Council agrees that former section 11079(c)(1) conflicted with 11079(b) and, as discussed immediately below, deleted the former to reconcile the two and comport with the law.

Section 11079(c)(1):

Comment: The proposed new Section 11079(c)(1) should be revised because it is inconsistent with both the statute and Section 11016(b). The proposed first sentence of this section reads:

(1) An application’s request for information that could lead to the disclosure of the applicant’s date of birth or age (such as graduation date) is not, in itself, unlawful.

This provision conflicts directly with the following long-existing language in Section 11016(b):

Inquiries that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense

The only exception to the general rule stated in Section 11016(b) is if that inquiry is justified by a permissible defense – a defense that must be affirmatively proved by the employer. Thus, it is a general rule that making an inquiry that “could lead to the disclosure of the applicant’s date of birth or age” is “in itself, unlawful.” We suggest the language excerpted above from the proposed Section 11079(c)(1) be stricken.

Council response: The Council agrees that the excerpted language was an inaccurate rendering of the law and deleted it, along with the rest of the subdivision, to eliminate confusion and enhance clarity.

Comment: This proposed language states that employment applications that request such information “will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.” As discussed previously regarding similar language contained elsewhere in the proposal, this appears to be a “backdoor” manner to create a presumption of discrimination for otherwise legitimate and common inquiries made by most employers. Therefore, this language is inappropriate and should be deleted.

Council response: The Council agrees that the subdivision was an unclear rendering of the law and deleted it to eliminate confusion and enhance clarity.

Comment: In spite of employers' claims to the contrary, many use school attendance and/or graduation dates (high school or college) as an applicant filter. The employers' claims are disingenuous. If age is truly a bona fide occupational qualification, the employer should state it in the job description, along with the reason why age is a qualification. After an offer has been made and accepted, the employer can verify age. Accordingly, subdivision (c)(1) should be amended as follows:

(1) An application’s request for information that could lead to the disclosure of the applicant’s date of birth or age (such as high school or college graduation dates) is ~~not, in itself,~~ unlawful. ~~However, the application’s request for such information may tend to deter older applicants or otherwise indicate discrimination against applicants who are over 40.~~ Employment applications that request such information will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose. If age is a bona fide occupational qualification for the position at issue, it is permissible to establish age only after a bona fide employment offer has been made.

Council response: The Council agrees that a bona fide occupational qualification is the only reason an employer could ask for school attendance and/or graduation dates on an application, or in any other pre-employment context for that matter. Therefore, the Council deleted this subdivision entirely because subdivision (b) already says that and applies to all pre-employment contexts, not just applications.

Section 11079(c)(2):

Comment: This section proposes to prohibit “the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates.” While we understand that this proposal is being made in the context of age discrimination against employees over the age of 40, we are concerned that this language could result in unnecessary confusion for employers. For example, existing law

restricts the employment of minors in various manners, including the occupations in which they may work and the hours on which they may work. It is reasonable to allow employers to verify the age of applicants to ensure compliance with these laws. Therefore, we think the language in proposed Section 11079(c)(2) should be qualified and clarified that it does not prohibit online applications that use such information in order to ensure compliance with lawful age-related restrictions on employment. For example, the proposed language could be clarified to not apply to applicants under the age of 18 whose employment, including employment in certain occupations, is limited by existing law.

Council response: The Council agrees that this section does not apply to minors and that there are some situations where an employer may lawfully screen for age in an online job application. However, the regulation as proposed is already clear that it applies to “applicants that are age 40 and over” and that the prohibition does not apply if there is a bona fide occupational qualification. Therefore, the Council declines to make the suggested revision since both concepts are already incorporated.

Other:

Comment: I want to thank the Council for its excellent work in revising the prior regulations.

Council response: The Council appreciates the feedback.

COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

No one submitted any comments for this comment period.

PUBLIC HEARING COMMENTS MADE JULY 31, 2019 [Government Code Section 11346.9(a)(3)].

Noah Lebowitz of the California Employment Lawyers Association and Alan Reinach of the Church State Council commented on the text noticed for the 45-day comment period. They submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

Comment: Bruce Wick of the California Professional Association of Specialty Contractors thanked the Council for the work on the regulations. He commented that hiring staff and growing a company comes with liability risks, and companies would benefit more from education rather than additional regulation. Mr. Wick asked the Council to reexamine the regulations and scale back anything unnecessary or duplicative.

Council response: The Council responded to specific questions regarding the regulations’ necessity above, only duplicated text to the extent necessary to satisfy the “clarity” standard of

the Administrative Procedure Act, and was generally mindful of the complexity of growing a company when writing the regulations.

PUBLIC HEARING COMMENTS MADE OCTOBER 23, 2019 [Government Code Section 11346.9(a)(3)].

No one commented in person on the text to be noticed for the 15-day comment period.

PUBLIC HEARING COMMENTS MADE FEBRUARY 25, 2020 [Government Code Section 11346.9(a)(3)].

No one commented in person on the text noticed for the 15-day comment period.

There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council unanimously voted to submit this draft to the Office of Administrative Law as the final version of the regulations.