

**TITLE 2. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING  
CONSIDERATION OF CRIMINAL HISTORY IN  
EMPLOYMENT DECISIONS REGULATIONS**

[Notice published February 19, 2016]

**NOTICE OF PROPOSED RULEMAKING**

The Fair Employment and Housing Council of the Department of Fair Employment and Housing (hereafter “Council”) proposes to amend section 11017 of and add section 11017.1 to Title 2 of the California Code of Regulations after considering all comments, objections, and recommendations regarding the proposed action.

**PUBLIC HEARING**

The Council will hold a public hearing at **10:00 a.m. on April 7, 2016**, at the following location:

Maudelle Shirek Building  
2134 Martin Luther King Jr. Way  
City Council Chambers, Second Floor  
Berkeley, CA 94704

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

**WRITTEN COMMENT PERIOD**

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Council. The written comment period closes at **5:00 p.m. on April 7, 2016**. The Council will consider only comments received by that time. Written comments can be mailed to:

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

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

## **AUTHORITY AND REFERENCE**

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

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

This rulemaking action clarifies, makes specific, and supplements existing state regulations interpreting the Fair Employment and Housing Act (FEHA) set forth in Government Code section 12900 et seq. As it relates to employment, the 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/or veteran status of any person.

In compliance with the Administrative Procedure Act, the Council proposes to adopt these rules as duly noticed, vetted, and authorized regulations. The broad objective of the proposed amendments is to describe how the consideration of criminal history in employment decisions may constitute a violation of the FEHA if it adversely impacts persons based on the protected classes above. This action has the specific benefit of creating a more comprehensive set of rules to ensure that employees and employers better understand their rights and duties, in turn reducing litigation costs and the burden on courts. Ultimately, the proposed action furthers the mission of the DFEH by protecting Californians from employment discrimination and by enforcing non-discrimination laws statewide.

The proposed amendments most notably clarify and/or articulate the following: (1) California employers are prohibited under the enumerated state laws from utilizing certain criminal background information in hiring, promotion, training, discipline, termination and other employment decisions; (2) the concept of adverse impact; (3) how to prove adverse impact; (4) the affirmative defense of job-relatedness and business necessity, including compliance with other laws permitting or requiring consideration of criminal history; and (5) adverse impact's less discriminatory alternatives doctrine.

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

## **DISCLOSURES REGARDING THE PROPOSED ACTION**

*The Council has made the following initial determinations:*

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

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

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

**Other non-discretionary cost or savings imposed on local agencies:** No additional costs or savings beyond those imposed by existing regulations.

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

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

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

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

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

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

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

## **CONSIDERATION OF ALTERNATIVES**

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

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

## **CONTACT PERSONS**

Inquiries concerning the proposed administrative action may be directed to:

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

The backup contact person for these inquiries is:

Nelson Chan, Chief of Public Policy and Education  
Department of Fair Employment and Housing  
2218 Kausen Drive, Suite 100  
Elk Grove, CA 95758  
Telephone: (916) 478-7248  
E-mail: [nelson.chan@dfeh.ca.gov](mailto:nelson.chan@dfeh.ca.gov)

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

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

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

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

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

modified regulations to the attention of Brian Sperber at the address indicated above. The Council will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

**AVAILABILITY OF THE FINAL STATEMENT OF REASONS**

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

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

**AVAILABILITY OF DOCUMENTS ON THE INTERNET**

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

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