

COMMENTS ON ATTACHMENT D FROM
COUNCILMEMBER SCHUR 083016

Fair Employment & Housing Council Proposed Text
of Housing Regulations Regarding
Harassment; Liability for Harassment; Retaliation; and Select
Disability Sections, Including Assistive Assistance Animals

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment &
Housing Chapter 5. Fair Employment &
Housing Council Subchapter 3. Discrimination
in Housing

TEXT

Article 1. General Matters

§§ 11098.1 – 11098.2. [Reserved]

§ 11098.1 – Statement of Purpose [Reserved]

§ 11098.2 – Authority and
Scope [Reserved]

§ 11098.3. Exemptions [Reserved]

§ 11098.34. Definitions.

As used in this subchapter, the following definitions shall apply unless
the context otherwise requires:

(a) “Aggrieved Person” includes any person who claims to have been
injured by a discriminatory housing practice; or believes that they will be
injured by a discriminatory housing practice that is about to occur;

(b) “Housing Accommodation” or “Dwelling” includes:

(1) any building, structure, or portion thereof that is used or occupied

Commented [DS1]: I recommend that we identify some of the primary articles, and perhaps subsections, that we will be drafting, so that we can avoid a major renumbering or re-organization. We can reserve the text, but at least set out the structure. I've made some recommendations throughout the document.

Commented [DS2]: I recommend including the italicized phrase from the HUD statute and regs for consistency. See 42 U.S.C 3602(i) and 24 CFR 100.20. This provides additional clarity that you can seek injunctive relief for discriminatory conduct that is about to occur. And note that under H&S Code Sec. § 12955.6, our regulations cannot provide “fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) 1 and its implementing regulations (24 C.F.R. 100.1 et seq.), or state law relating to fair employment and housing as it existed prior to the effective date of this section” although it can be construed to provide for greater rights and remedies to aggrieved persons. I also would note that this includes people associating with people with disabilities, and people perceived as having a disability.

Commented [DS3]: I recommend that we reverse the terms, and use the term dwelling throughout, to avoid confusion with the term ‘reasonable accommodation,’ to make the language clearer to lay readers, and to provide consistency with the federal regulatory term. So I would say “Dwelling” or “Housing Accommodation” includes....

as, or designed or intended to be used or occupied as, a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household, and includes all public and common use areas associated with it, if any;

(2) any vacant land that is offered for sale or lease for the construction of any building, structure, or portion thereof intended to be used or occupied as a residence; ~~or~~

(3) ~~all D~~wellings includes but is not limited to all dwellings covered by the federal Fair Housing Act, 42 U.S.C. Sec. 3601 et seq.; ~~such as~~ single family homes; ~~;~~ apartments; ~~;~~ condominiums; ~~;~~ rooms; ~~;~~ ~~single-room occupancy hotel rooms~~; transitional housing; ~~;~~ supported housing; ~~;~~ residential motels or hotels, including single room occupancy hotels; ~~;~~ boardinghouses; ~~;~~ shelters; ~~;~~ cabins and other structures housing migrant farmworkers; ~~;~~ hospices; ~~;~~ manufactured homes; ~~;~~ mobile homes and mobile home spaces; ~~;~~ floating homes and floating home spaces, communities and live aboard marinas; ~~;~~ bunkhouses; ~~;~~ ~~and~~ recreational vehicles used as a home or residence; and group and congregate living arrangements, whether licensed or unlicensed, such as dormitories, group homes, supported housing, drug and alcohol sober living homes and treatment homes, and long term care nursing homes and facilities.

Commented [DS4]: These proposed additions/modifications are also in the recommendations from Housing Committee 2.

(c) "Housing provider" includes "owner" and "person" as those terms are defined in Government Code section 12927.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

§ 11098.4. Liability for Discriminatory Housing Practices.

(a) Direct Liability.

(1) A person is directly liable for:

(A) The person's own conduct that results in a discriminatory housing practice.

(B) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct.

(C) Failing to fulfill a duty to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person knew or should have known of the discriminatory conduct. The duty to take prompt action to correct and end a discriminatory housing practice by a third-party can be derived from an obligation to the aggrieved person created by contract or lease (including bylaws or other rules of a homeowners association, condominium, or cooperative), or by federal, California, or local law.

(2) For purposes of determining liability, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction.

(b) Vicarious Liability. A person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice, if the discriminatory housing practice is committed within the scope of the agent or employee's employment or agency.

Commented [DS5]: I recommend that the primary term be "Person", and that "Person" include "owner" and "Housing provider" as subcategories. The use of the term "housing provider" as an overall term will be very confusing in a number of situations, such as where we are discussing blockbusting, real estate sales and transactions, lending, and governmental land use practices. See also sections such as 11098.4, where "person" should be the broadest possible definition.

This is consistent with the definition of "person" in Sec. 12927, which defines "owner" as a subset of person and does not use the term "housing provider." I cannot find the term "Hsg Provider" in FEHA or FHA, but may have missed it.

I recommend that we add narrower definitions of "owner" and "housing provider" that are more consistent with the statute and those terms as commonly used, to be used when discussing particular discriminatory acts where those terms are relevant. See the definitions recommended by Housing Committee 2 for use in their sections.

In addition, HUD uses the term "person in the business of selling or renting dwellings", which might be closer to what we usually mean by housing provider? See the proposed definitions for "Housing Provider", "owner" and "Person" from Housing Committee 2, which we needed for our sections.

Commented [DS6]: I recommend that this section be the next Article, labeled Discriminatory Housing Practices, and that we reserve some sections before this to describe covered practices. These seem to fall within substantive regulations, not the Introductory "general matters".

Commented [DS7]: The draft repeatedly uses the term Discriminatory Housing Practice without a definition. Can we provide one? See the definition of Housing Practice submitted by Housing Committee 2, as needed for our sections. FHA defines a "discriminatory housing practice" as "an act that is unlawful under" any of the sections of the act. 42 U.S.C. 3602(f)

Commented [DS8]: This last phrase is not found in the federal regulations. I recommend deletion. There may be situations outside the scope or agency/employment for which the person should still be vicariously liable. If we do leave the last phrase in, it needs to have a parallel construction, as I have edited.

(1) Whether a discriminatory housing practice occurs within the scope of employment or agency is a question of fact. However, a discriminatory housing practice can be found to occur in the scope of employment or agency even if it violates an employee's or agent's official duties, does not benefit the employer or principal, is willful or malicious, or disregards the employer's or principal's express orders.

(2) An agent or employee shall be considered to be acting within the course and scope of the employment or agency relationship if his or her discriminatory housing practice occurs incidental to the agent's or employee's job-related tasks. This includes, but is not limited to, being on the premises of a dwelling for work-related reasons such as conducting repairs.

Commented [DS9]: These two subparagraphs are not in the HUD regulations. If we believe they accurately represent the law, I recommend that be revised to cover agents as well as employees, to be consistent with the main paragraph, and I have provided edits to that effect.

(c) A person may be directly liable for a discriminatory housing practice, regardless of whether the person's employer or principal knew or should have known of the conduct or failed to take appropriate corrective action.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

Article 2. Harassment and Retaliation

§ 11098.5. Harassment.

(a) Quid pro quo and hostile environment harassment because of a protected class may violate various provisions of FEHA, depending on the conduct. The same conduct may violate one or more of these provisions. It shall be unlawful for a housing provider to harass any person in connection with the sale or rental of a dwelling on account of a person's membership in a protected class. Harassment includes conduct which deprives or interferes with the right to live in a discrimination-free housing environment. Harassment includes both quid pro quo harassment and hostile environment harassment.

(1) Quid pro quo harassment. Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to any of the following: the sale, rental or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; ~~or~~ the availability, terms, or conditions of a residential real estate-related transaction; or land use actions by government. An unwelcome request or demand may constitute quid pro quo harassment even if a person acquiesces in the unwelcome request or demand.

(2) Hostile environment harassment. Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with any of the following: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision or enjoyment of services or facilities in connection therewith; or the availability, terms, ~~or~~ conditions of a residential real estate-related transaction. or land use

Commented [DS10]: I believe we should reserve some articles for the primary sections describing and regulating different types of discriminatory conduct, perhaps tracking the federal regulations and/or 12955. One possibility is:
Article 3: Sale and Rental of Property
Article 4: Real Estate Transactions
Article 5: Loans and Financial Transactions
Article 6: Inquiries, Advertising and Statements
Article 7: Blockbusting
Article 8: Disability Discrimination
Article 9: Source of Income Discrimination
Article 10: Aggregate Income
Article 11: Senior Housing Discrimination
Article 12: Land Use Practices
Article 13: Harassment and Retaliation (which would apply to all of the above)

Commented [DS11]: This definition is too narrow, as it applies by its terms only to sales or rentals. I recommend we use the term person, applying it broadly to all discriminatory conduct, as we did in the preceding section. I have suggested the language from the federal regulations, which is broader.

Commented [DS12]: The proposal uses protected class and protected basis. See the proposed Definition of "Protected Classes" submitted by Housing Committee 2, as needed for our sections.

Commented [DS13]: We need to define this term. See recommendation by Housing Committee 2, as we also use this term in our sections.

Commented [DS14]: Since the California statute has stronger language on land use, I recommend we include this here to be explicit harassment of any kind is prohibited in the context of local government land use regulation.

actions by government. Hostile environment harassment does not require a change in the economic benefits, terms, or conditions of the dwelling or housing-related services or facilities, or of the residential real-estate transaction.

Commented [DS15]: Since the California statute has stronger language on land use, I recommend we include this here to be explicit that harassment of any kind is prohibited in the context of government land use regulation as well as other covered conduct.

(A) Whether hostile environment harassment exists depends upon the totality of the circumstances.

(B) The severity of the harassment is judged from the perspective of a reasonable person in the aggrieved person's position, considering all the circumstances.

Commented [DS16]: This paragraph is not in the HUD regulations, and I recommend deletion, in the absence of clear case law authority.

(C) Factors to be considered to determine whether hostile environment harassment exists include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.

(D) Evidence of psychological or physical harm is relevant in determining whether a hostile environment was created, as well as the amount of damages to which an aggrieved person may be entitled. However, neither psychological nor physical harm must be demonstrated to prove that a hostile environment exists.

(E) A single incident of harassment because of a protected class may constitute a discriminatory housing practice, where the incident is severe, or evidences a quid pro quo.

~~(E)~~—(F) Title VII affirmative defense. The affirmative defense to an employer’s vicarious liability for hostile environment harassment by a supervisor under Title VII of the Civil Rights Act of 1964 does not apply to cases brought pursuant to the housing discrimination provisions of FEHA.

(b) Harassment in housing includes, but is not limited to:

(1) Verbal harassment, e.g. epithets, derogatory comments or slurs related to membership in a protected classbasis;

(2) Physical harassment, e.g. assault, impeding or blocking movement, or any physical interference with normal movement, when directed at an individual related to membership in a protected basis;

(3) Visual forms of harassment, e.g., derogatory posters, cartoons, drawings, writings, or other documents related to membership in a protected basis;

(4) Unwelcome sexual conduct, or other unwelcome conduct, linked to the person’s sex, gender, sexual orientation;

(5) Any coercion, intimidation, threats, or interference with an individual’s exercise or enjoyment of a housing benefit or other rights protected under FEHA. related to membership in a protected basis;

(6) Imposing different terms, rules, conditions, privileges, facilities, or services in connection with a housing benefit,

Commented [DS17]: This provision is in the HUD regs, with a compelling explanation in HUD’s comments on the regulations. Housing is a very different situation than a job, and HUD specifically rejected this defense in the housing context. As noted above, we cannot construe the state statute to provide fewer protections than the federal law, so I recommend inclusion of this provision. See 12955.6

Commented [DS18]: I recommend that we be consistent as to the term “Protected Class” or “Protected Basis,” and the term should be defined. It seems like we were usually class consistently above, which is consistent with the federal regulations.

Commented [DS19]: See note above.

Commented [DS20]: See note above

Commented [DS21]: Should we mirror the categories in the employment regs and use the same definitions? I think this is broader than sex.

Commented [DS22]: Prohibitions on harassment are not restricted to harassment based on a protected class. See 12955(f), prohibiting harassment when it is in retaliation for a broad range of conduct.

service or accommodation related to membership in a protected basis; or

Commented [DS23]: See note above re class/basis.

(7) Revealing private information about an individual, without their consent, to a third party related to membership in a protected basis.

Commented [DS24]: While I generally support some restrictions on this, I believe it is too broad unless we define "private information." Does it include providing information about the tenancy to the IRS as part of an owners' tax returns? Providing information to a census taker? Does it include credit information? think this is a useful addition, but the term "private information" would need to be defined and more explanation is needed as to what third parties are permissible and which aren't, depending on the nature of the private information. Certainly medical information and information about disability should be shared among housing management staff only on a "need to know" basis and should not otherwise be shared. However, the language is broad and requires clarification.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code.

§ 11098.6. Retaliation.

(a) It shall be unlawful for any housing provider take adverse action against any person for engaging in a protected activity when the dominant purpose for the adverse action is retaliation.

Commented [DS25]: See my comments above about the use of this term. Retaliation is prohibited by lenders, government (land use), real estate brokers, etc. Also, I believe we need to elaborate on "dominant purpose" so that it we are not interpreting FEHA in a manner that is less protective than federal law.

(b) "Adverse action" includes, but is not limited to, harassment, eviction, a change in the terms and conditions, a denial or restrictions on a sale or financial transaction, a change in the provision of real-estate related services, or any other discrimination made unlawful by the FEHA.

Commented [DS26]: I recommend that all definitions go in the definition section, for ease of use and to prevent confusion by using similar terms differently in different parts of the regulations. I've suggested some changes to make it clear that it covers more than landlord tenant situations. Not sure I've captured it as broadly as possible.

(c) "Protected activity" includes, but is not limited to, opposition toof practices made unlawful under the FEHA, informing law enforcement agencies of practices believed unlawful under the

FEHA or informing them of information related to protected basis, testifying or assisting in any proceeding regarding unlawful activity proceeding under FEHA, asserting one of rights protected by the FEHA or other state or federal laws, aiding or encouraging a person to exercise their rights under the FEHA, or making a request for a reasonable accommodation.

Commented [DS27]: 12955 (f) refers to testifying or assisting in "any proceeding under this part", not just proceedings regarding unlawful activity,

(d) "Dominant purpose" means a purpose that is a substantial motivating factor in the harassment, eviction, or other adverse actions challenged as retaliatory. A substantial factor motivating the adverse action is a factor that a reasonable person would consider to have contributed to the action. It must be more than a remote or trivial factor. It does not have to be the only cause of the adverse action.

Commented [DS28]: I recommend that this definition go in the definition section. I know that case law has been developing around mixed motive situations. I am not sure if this definition is consistent with the federal law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

Article 3. [Reserved]

Article 4. Disability

§ 11098.23. Definitions.

As used in this article, the following definition shall apply unless the context otherwise requires:

Commented [DS29]: As many of these terms are also used in other parts of the statute/regulation, I recommend that we put all definitions in the definition section at the beginning.

~~(a) "Assistive Assistance animal" means an animal that is used to assist, support, or provide services to a necessary as a reasonable accommodation for a person with a disability.~~

Commented [DS30]: The term used by HUD, DOJ and others is "assistance animal"

(a)

Commented [DS31]: This definition is circular. I recommend we use the HUD definition - Animals that are used to assist, support, or provide services to persons with Disabilities. 24 CFR 5.303.

(1) Specific examples include, but are not limited to:

(A) "Guide dog," as defined at Civil Code section 54.1, trained to guide a blind or visually impaired person.

(B) "Signal dog," as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hearing impaired person to sounds.

(C) “Service dog,” as defined at Civil Code section 54.1, or other animal individually trained to the requirements of a person with a disability.

~~(D) “Support dog” or other animal that provides emotional, cognitive, or other similar support to a person with a disability, including, but not limited to, people with mental health disabilities, traumatic brain injuries or mental disabilities, such as major depression, intellectual disabilities. A “support animal” may constitute a reasonable accommodation in certain circumstances. As in other contexts, whether a support animal constitutes a reasonable accommodation requires an individualized analysis reached through the interactive process.~~

~~(D)~~

(2) An assist~~ance~~ive animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.

Commented [DS32]: I recommend striking the discussion of what constitutes a reasonable accommodation from the definition, and putting in in the relevant section, for clarity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.24. [Reserved]

§ 11098.25. [Reserved]

§ 11098.26. Reasonable Accommodations.

(a) A ~~housing provider~~ person has an affirmative duty to make reasonable accommodations when such accommodations may be necessary to afford a person with a disability, ~~or a person associated with a person with a disability, equal opportunities in they to use and enjoy a dwelling unit and public and common use areas; the sale, rental or availability of a dwelling and public and common use areas; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; the availability, terms, or conditions of a residential real estate-related transaction; or land use actions by government., .~~ Such accommodations include, but are not limited to, exceptions to standard rules, policies, ordinances, statutes, regulations, practices, or services because of the person's disability.

(1) For example:

(A) A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a no pets policy. It is a violation of this section for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

(B) Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first come first served basis. John applies for housing in Progress Gardens. John has a mobility disability and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not

Commented [DS33]: We may wish to note that we are not addressing reasonable modifications yet.

Commented [DS34]: As noted above, this term is too restrictive, and reasonable accommodations are not limited to rental/sale of housing.

Commented [DS35]: There is current case law saying that people associated with people with disabilities may be entitled to accommodations as well.

Commented [DS36]: I recommend we define "public and common use areas"

have to walk very far to get to his apartment. It is a violation of this section for the owner or manager of Progress Gardens to refuse to make this accommodation. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. ~~The accommodation is reasonable because it is feasible and practical under the circumstances.~~

Commented [DS37]: This is not the standard. Accommodations must be granted unless they are a) a fundamental alteration, or b) an undue burden.

(C) A person with a mental health disability requests to her pay rent through a third-party payee rather than pay her rent directly from her checking account.

Commented [DS38]: I recommend we add some examples in contexts other than rental housing, and even in the rental context, examples with guests, , etc. There are a number of types of disabilities that might require use of a third party payee.

(b) A ~~housing provider person~~ may only deny a requested accommodation if, after engaging in the interactive process as outlined in section 11098.29:

(1) The ~~applicant or resident or person requesting the accommodation, or on~~ whose behalf the accommodation was requested, is not a person with a disability;

Commented [DS39]: Again, this is too narrow, reasonable accommodations are available in a variety of settings.

(2) There is no disability-related need for the requested accommodation; or

(3) The accommodation is not reasonable, meaning it would impose an undue hardship as defined in section 11098.28.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods / Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.27. Assistive Assistance Animals as a Reasonable Accommodation.

(a) If the requested accommodation is for an assist~~ance~~ive animal, the request may also be denied if:

(1) The specific assist~~ance~~ive animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation; or

(2) The specific assist~~ance~~ive animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation. Breed, size, and weight limitations may not be applied to an assist~~ance~~ive animal.

(3) A determination that an assist~~ance~~ive animal poses a direct threat of harm to others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence about the specific animal's actual conduct – not on mere speculation or fear about the types of harm or damage an animal may cause and not on evidence about harm or damage that other animals have caused. No species, breed, size, number, or other universal restrictions may be applied. The assessment of direct threat must consider:

(A) the nature, duration, and severity of the risk of injury;

(B) the probability that injury will actually occur; and

Commented [DS40]: This is not the correct legal standard. It conflates several terms. "Reasonableness" is not a defense. An accommodation must be granted unless it is either a) a fundamental alteration (i.e. a tenant wants the landlord to pay for a live in aid, which is a fundamental change in what the landlord does, which is just provide housing) OR it is an "undue burden," which is either an undue financial or administrative burden when the entire resources of the owner or entity is considered.

Commented [DS41]: I recommend we add a section distinguishing between the right to have a *service animal* without an accommodation process, under related civil code statutes and in common and public areas which are also covered by the ADA. Particularly with service animals, the standard that DOJ set in the ADA context is that you can only ask 1) is it a service animal, and 2) what service does it provide. See also Civil Code Sections, which require a landlord to accept service animals (guide dogs) without an accommodation process. Support animals are not addressed by the ADA, except through an accommodation process.

(C) whether there are any reasonable accommodations that will eliminate the direct threat.

(b) A person who is granted accommodation of an assist~~ance~~ive animal shall not be required to pay any pet fee, rent, or other additional fee, including additional security deposit or liability insurance, to have the animal in his or her residence. However, a person who is granted accommodation of an assist~~ance~~ive animal may be required to cover the costs of repairs for damage the animal causes to the dwelling unit or the common areas, excluding reasonable wear and tear, if it is the housing provider's practice to assess such damages.

~~(c) Any state and local requirements regarding animals apply equally to assistive~~assistance~~ animals including, but not limited to, requirements that an animal be licensed, vaccinated, and/or sterilized. A housing provider is permitted to request verification that an assistive~~assistance~~ animal is in compliance with any applicable requirements.~~

Commented [DS42]: Again, this is too narrow, does not address other fair housing contexts.

Commented [DS43]: Need to define more narrowly.

Commented [DS44]: I do not believe there is support for this in the law. Particularly with service animals, the standard that DOJ set in the ADA context is that you can only ask 1) is it a service animal, and 2) what service does it provide. See also Civil Code Sections, which require a landlord to accept service animals (guide dogs) without an accommodation process. there is no legal authority for an owner or landlord to ask about or require compliance with licensing rules, which are unrelated to direct threat issues. It is possible, although I haven't researched it, that compliance with vaccination laws (i.e. rabies shots) would be a permissible requirement in light of the direct threat analysis. There is some law saying that assistance animals are not exempt from licensing requirements when those requirements are applied by local governments, but this does not give owners or individuals other than the licensing agencies the right to enquire about such licenses or require them.

(d) A housing provider may impose other reasonable conditions on an assistive assistance animal to ensure it is under the control of the applicant or resident. These conditions may not be more restrictive than those imposed upon other animals on the property.

Commented [DS45]: Different term?

(e) Invitees to the property shall be granted accommodation for assistive assistance animals, in accordance with the restrictions above.

Commented [DS46]: Define?

Commented [DS47]: See note above about a right to have service animals in common/public areas as of right, without an accommodations process.

(f) If someone requests an accommodation, including, but not limited to, use of an assistive assistance animal, and the person's disability is not readily apparent, then the housing provider may require verification of disability pursuant to section XXX of these regulations.

Commented [DS48]: The remaining provisions in (f) through (g) are not unique to service animals and should be included in the reasonable accommodations section.

(1) Similarly, if the disability is known but the disability-related need for the assistive assistance animal is not, the housing provider may ask the individual to provide documentation of the disability-related need for an assistive assistance animal.

~~(g) A qualified health care provider, as defined in section 11098.30, must have specific knowledge of the patient's medical condition based on an individualized examination and not operate primarily to provide certifications for assistive animals.~~

Commented [DS49]: People who can document a disability are not limited to health care providers. Health Care providers are a subset of people who can provide appropriate variation.

~~(1) If medical information is provided by a qualified health care provider who does not have specific knowledge based on an individualized examination and operates primarily to provide certifications for assistive animals, then the housing provider may request information verifying the need for an accommodation from a qualified health care provider and continue to engage in the interactive process.~~

Commented [DS50]: I recognize the issue raised by online services, but I believe these provisions as drafted impose restrictions not warranted by law, and have a great deal of ambiguity about who they cover and their scope. If there is a question about the reliability of the documentation, the interactive process should be used to resolve the problem. For example, a doctors office might provide a verification based on records of many years, not a recent examination. A social worker would provide verification based on his/her experiences with the person with a disability, and would not have conducted an individualized exam, and may not know about the individual's general medical condition (which is very different that the individuals' disability.)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.28. Undue Hardship.

(a) A housing provider may deny a requested accommodation as not reasonable if the accommodation would impose an undue hardship on the housing provider. An undue hardship would impose significant difficulty or expense ~~or would constitute a fundamental alteration in the program or service. A fundamental alteration changes the essential nature of a provider's operations, such as shopping or cleaning for a resident.~~ The determination of whether an accommodation poses undue hardship must be made on a case-by-case basis involving various factors including, but not limited to:

- (1) the nature and cost of the requested accommodation;
- (2) the financial resources of the housing provider;

Commented [DS51]: Undue burden and fundamental alteration are very different. I recommend that we put them in different sections. This section addresses undue burden. Many of these factors are inapplicable to a fundamental alteration defense, which requires a different analysis.

Commented [DS52]: Again, not limited to rentals.

(3) the benefits that the accommodation or modification would provide to the ~~applicant or resident~~ person with a disability;

(4) the availability of alternative accommodations or modifications that would effectively meet the ~~applicant's or resident's~~ requestor's disability-related needs; and

(5) the existence of conflicting good faith requests for accommodations that cannot be reconciled through the interactive process.

(b) A housing provider cannot claim undue hardship based on the housing provider's or another resident's fears or prejudices toward the individual's disability, nor can undue hardship be based on the fact that provision of a reasonable accommodation or modification might be considered unfair by other individuals.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.

§ 11098.29. The Interactive Process.

(a) When needed to identify or implement an effective, reasonable accommodation for a person with a disability, ~~FEHA~~ the law requires a timely, good faith, interactive process between a ~~housing provider~~ person considering a request for accommodation and the person with a disability, or the individual's representative, who is requesting the accommodation.

(b) A ~~housing provider~~ person considering an accommodation request may not require that the request for accommodation be made in a particular manner or at a particular time. A person makes a reasonable accommodation request whenever she makes clear ~~to the housing provider~~ that she is requesting an exception, change, or adjustment to a rule, policy, practice, or service because of a disability, regardless of whether the phrase "reasonable accommodation" is used as part of the request. Adopting a formal procedure may aid persons with disabilities in making requests for reasonable accommodations or modifications and may make it easier to assess those requests and keep records of the considerations given the requests. However, a ~~housing provider~~ person considering a request for accommodation may not refuse a request or

Commented [DS53]: I do not believe this is a legal ground for denying an accommodation. While the situation does occasionally arise, I do not believe this accurately or completely describes the appropriate response.

Commented [DS54]: Term too narrow, both places in sentence.

Commented [DS55]: Again, these obligations are not limited to the landlord tenant context, and housing provider is a confusing term in this context, since as defined above it simply means any person. For example, lenders and local governments in the land use arena also have to make reasonable accommodations

refuse to engage in the interactive process because the requester did not use the ~~housing provider's~~ preferred forms or procedures or because the requester did not present sufficient proof of disability. A person responsible for responding to accommodation requests may assist someone in completing a form.

(c) The request for a reasonable accommodation ~~or modification~~ may be made by the applicant or resident with a disability, a family member, or someone else acting on behalf of the person with a disability.

(d) ~~All parties to the interactive process must make reasonable efforts to participate in the interactive process in good faith.~~ Direct communication between the ~~housing provider~~person considering the request for accommodation and person with a disability requesting the accommodation is not required, but any indirect communication must alert the ~~resident or applicant~~person with a disability that ~~the housing provider is considering~~

Commented [DS56]: See other notes about modifications

Commented [DS57]: This goes beyond the law, which does not impose specific obligations on the person requesting the accommodation.

various accommodations ~~or modifications are being considered~~ and that the resident or person requesting the accommodation has the right to participate in the discussion or interaction.

Commented [DS58]: See other notes re modifications.

(e) ~~The housing provider~~ A person considering a request for accommodation must grant the request, or else must engage in the interactive process. ~~upon receipt of a request for accommodation or modification.~~ The time necessary to complete the interactive process depends on many factors, including, but not necessarily limited to, the nature of the accommodations ~~or modifications~~ under consideration and whether it is necessary to obtain supporting information if the need for the accommodation ~~or modification~~ is not obvious or known to the housing provider. Notwithstanding such variables, the duration of the process should not exceed thirty calendar ~~days~~ from the date of the start of the interactive process. Any delay by the ~~housing provider~~ person considering the request for accommodation beyond the thirty calendar day timeline in completing the interactive process establishes a rebuttable presumption that the person considering the request for accommodation ~~housing provider~~ failed to engage in a good faith, interactive process. In ~~some~~ many cases, thirty calendar days may be unreasonable.

Commented [DS59]: See other notes re modifications.

Commented [DS60]: A request can simply be granted. The interactive process comes in only if it is not promptly granted.

Commented [DS61]: In many instances, 30 days is way too long, I am reluctant to identify it as a safe harbor. For example, an applicant for housing, or a person seeking a loan, is likely to lose the unit or the housing if the response takes 30 days. I think it is very rare for an interactive process to require that amount of time. Perhaps better to identify some criteria, rather than times?

(f) When, after engaging in the interactive process, a person considering the request for accommodation ~~housing provider~~ refuses a requested accommodation ~~because it is not reasonable~~, the person considering the request for accommodation ~~housing provider~~ must consider all alternative accommodations of which it is aware or that are brought to its attention by the applicant or resident. If an alternative accommodation would effectively meet the requester's disability-related needs and is not a fundamental alteration or undue burden ~~reasonable~~, the person considering the request for accommodation ~~housing provider~~ must grant it. In cases where the person considering the request for accommodation ~~a housing provider~~ believes that, while the accommodation requested by the applicant or resident is reasonable, there is an alternative accommodation that would be equally effective, the person considering the request for accommodation ~~housing provider~~ ~~should~~ may discuss with the individual if she is willing to accept the alternative accommodation. However, a person with a disability is not obligated to accept an alternative accommodation if she believes the alternative accommodation will not meet her needs and her preferred accommodation is reasonable.

Commented [DS62]: This is not the legal standard and no reference to the standard is needed here.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code; *Auburn Woods / Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 11098.30. Proof of Disability.

(a) A housing provider may not ask whether a person has a disability. If a person requests an accommodation, he or she need not a person to provide documentation showing the disability or disability-related need for an accommodation if the disability or disability-related need is readily apparent or already known to the provider.

(b) If the need for the requested accommodation or modification is not readily apparent, the housing provider may request that the applicant or resident provide documentation from a reliable third party who is in a position to know about the individual's disabilityqualified health care provider, as defined in subdivision (e) below, verifying that an accommodation or modification is necessary because the person has a disability and because the request ed for accommodation or modification would afford the person with a disability equal opportunity to use and enjoy a dwelling.

(+) Neither T the person with the disability nor the individual providing verification is not required to reveal a particular diagnosis or produce medical records. The person with a disability or the verifier should provide only information about how the disability restricts or limits the resident person with a disability in one or more major life activities, as compared to most people in

Commented [DS63]: I recommend we make it clear, consistent with FEHA and federal law, that it is generally impermissible to enquire whether someone has a disability. However, if they ask for an accommodation, then the inquiry can be made as set out here.

Commented [DS64]: We have not addressed reasonable modifications yet, so I don't think we should include the reference here. Once we include a provision on modification, it would make sense to include this phrase.

Commented [DS65]: See comment below.

Commented [DS66]: See note above.

(1) ~~the general population~~, and how the requested accommodation will enable the resident to have an equal opportunity to use or enjoy the housing.

Commented [DS67]: Not the legal standard.

(c) All information concerning a person's disability, request for an accommodation, or medical verification or information must be kept confidential and must not be shared with other persons unless disclosure is required to either make or assess the decision to grant or deny the request for accommodation ~~or modification~~, or disclosure is required by law.

Commented [DS68]: I agree that confidentiality is very important and legally required. However, this section may need clarification as to who is required to keep the information confidential, and how broadly it can be shared. For example, the manager of a building, or the real estate office, may need to let certain staff or others know about the accommodation in order to effectively provide the accommodation.

(d) If the requested accommodation is for an ~~assistive assistance~~ animal, the proof of disability must identify the specific species of animal needed for the reasonable accommodation.

(1) A reliable third party who is in a position to know about the individual's disability may be any of the following:

Commented [DS69]: I recommend we rephrase this, in order to prevent confusion. It is very confusing to include "a peer support group, a non-medical service agency, a social worker, or any reliable third party" within the definition of a qualified health provider, since they are not.

(⇒) A qualified health care provider, who can provide information verifying disability or the necessity of an ~~accommodation or modification~~, includes, but is not limited to:

(⇒) a medical or osteopathic doctor, physician, or surgeon, licensed in California or in another state or country, who directly treats or supervises the treatment of the applicant or resident; or

(⇒) a marriage and family therapist or acupuncturist, licensed in California or in another state or country, or any other persons who meet the definition of "others capable of providing health care services" under FMLA and its implementing regulations that became effective March 8, 2013 (29 C.F.R. § 825.125), including podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants; or

(⇒) a peer support group, a non-medical service agency, a social worker, or any reliable third party who is in a position to know about

| the individual's disability and need for the assistance animal.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12955, Government Code.