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 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...
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 Dwellings 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.
§ 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.
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.

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.
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.


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...
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.

(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.

(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.

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.

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

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.

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 class.

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


§ 11098.6. Retaliation.

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

(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.

(c) “Protected activity” includes, but is not limited to, opposition to 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 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.

(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.


Article 3. [Reserved]

Article 4. Disability

§ 11098.23. Definitions.

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

(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.

(i) 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.

(2) An assistance 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.
§ 11098.24. [Reserved]

§ 11098.25. [Reserved]


(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 the use and enjoyment of a dwelling unit or 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; or 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...
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.]

(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.

(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 on whose behalf the accommodation was requested, is not a person with a disability;

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

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

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.

Commented [DS39]: Again, this is too narrow, reasonable accommodations are available in a variety of settings.
(3) The accommodation is not reasonable, meaning it would impose an undue hardship as defined in section 11098.28.


§ 11098.27. Assistive Assistance Animals as a Reasonable Accommodation.

(a) If the requested accommodation is for an assistive animal, the request may also be denied if:

(1) The specific assistive 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 assistive 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 assistive animal.

(3) A determination that an assistive 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
(C) whether there are any reasonable accommodations that will eliminate the direct threat.

(b) A person who is granted accommodation of an assistance 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 assistance 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 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 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 inquire about such licenses or require them.
(d) A housing provider may impose other reasonable conditions on an assistive 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.

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

(f) If someone requests an accommodation, including, but not limited to, use of an assistive 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.

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

(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.


§ 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.


§ 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
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 and person with a disability requesting the accommodation is not required, but any indirect communication must alert the resident or applicant that the housing provider is considering the request for 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.

(e) The housing provider 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 in completing the interactive process beyond the thirty calendar day timeline in establishing a rebuttable presumption that the housing provider failed to engage in a good faith, interactive process. In many cases, thirty calendars days may be unreasonable.

(f) When, after engaging in the interactive process, a housing provider refuses a requested accommodation because it is not reasonable, the 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 housing provider must grant it. In cases where the 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 housing provider should 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.
§ 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 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 disability, qualified 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 requested accommodation or modification would afford the person with a disability equal opportunity to use and enjoy a dwelling.

Neither 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 inquire 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.
(a) The general population, and how the requested accommodation will enable the resident to have an equal opportunity to use or enjoy the housing.

(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.

(d) If the requested accommodation is for an assistive 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:

   (a) 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:

      (1) 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

      (2) 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

      (3) 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

Commented [DS67]: Not the legal standard.

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.

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