

Fair Employment & Housing Council Proposed Text of Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information

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

[All sections are additions to the CA Code of Regulations]

Article 4. Discriminatory Effect

§ 11098.04.1. Practices with a Discriminatory Effect.

(a) Liability may be established under the Act based on a Practice's discriminatory effect, as defined in paragraph (b) of this section, even if the Practice was not motivated by a discriminatory intent.

(b) A Practice has a discriminatory effect where it actually or predictably results in a disparate impact on an individual or group of individuals or creates, increases, reinforces, or perpetuates segregated housing patterns based on membership in a Protected Class.

(c) The burdens of proof for establishing a violation under this Article are set forth in section 11098.04.2.

(d) The Practice may still be lawful if supported by a legally sufficient justification, as defined in section 11098.04.3.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467.

§ 11098.04.2. Burdens of Proof in Discriminatory Effect Cases.

(a) The plaintiff has the burden of proving that a challenged Practice caused or predictably will cause a discriminatory effect.

(b) Once the plaintiff satisfies the burden of proof set forth in subdivision (a) of this section, the defendant has the burden of proving that the challenged Practice meets all of the prongs of a legally sufficient justification, as set forth in section 11098.04.3.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 42 U.S.C. § 3615; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 11098.04.3. Legally Sufficient Justification.

(a) A business establishment whose Practice has a discriminatory effect shall not be considered to have committed an unlawful housing Practice in violation of the Act if the business establishment can establish that:

- (1) The interest the Practice is designed to serve is necessary to the operation of the business;
- (2) The Practice is necessary to effectively carry out the substantial, legitimate, nondiscriminatory business interest that it is alleged to serve; and
- (3) The substantial, legitimate, nondiscriminatory business interest could not be served by another Practice that has a less discriminatory effect.

(b) In cases that do not involve a business establishment, the Person or Owner whose Practice has a discriminatory effect shall not be considered to have committed an unlawful housing Practice in violation of the Act if the Person or Owner can establish that:

- (1) The interest the Practice is designed to serve is necessary to achieve a substantial, legitimate, nondiscriminatory purpose;
- (2) The purpose is sufficiently compelling to override the discriminatory effect;
- (3) The Practice is necessary to effectively carry out the substantial, legitimate, nondiscriminatory purpose that it is alleged to serve; and
- (4) The substantial, legitimate, nondiscriminatory purpose could not be served by another Practice that has a less discriminatory effect.

(c) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

(d) For purposes of this Article, the term “business establishment” shall have the same meaning as in section 51 of the Civil Code.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 11098.04.4. Relationship of Legally Sufficient Justification to Intentional Violations.

A demonstration that a Practice is supported by a legally sufficient justification, as defined in section 11098.04.3, may not be used as a defense against a claim of intentional violations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *Johnson v. Macy* (C.D. Cal. Nov. 16, 2015) 145 F.Supp.3d 907; *Borja-Valdes v. City and Cnty. of San Francisco* (N.D. Cal. Sep. 18, 2015) 2015 WL 5522287; *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998.

§ 11098.04.5. Financial Assistance Practices with Discriminatory Effect

Practices prohibited under this section in connection with loans and financial assistance include, but are not limited to, the following:

- (a) Determining the type of loan or other financial assistance to be provided with respect to a Dwelling, or fixing the amount, interest rate, cost, duration, or other terms or conditions for a loan or other financial assistance for a Dwelling or which is secured by residential real estate that result in a discriminatory effect based on membership in a Protected Class; and
- (b) Servicing of loans or other financial assistance with respect to Dwellings, servicing of loans or other financial assistance which is secured by residential real estate, or providing such loans or financial assistance with other terms or conditions that results in a discriminatory effect based on membership in a Protected Class.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.120 et seq.; 24 C.F.R. § 100.500 et seq.

§ 11098.04.6. Residential Real Estate-Related Practices with Discriminatory Effect

Practices prohibited under this section in connection with a residential real estate-related transaction include, but are not limited to, the following:

- (a) Failing or refusing to provide to any individual information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or

different from that provided others, that result in a discriminatory effect based on membership in a Protected Class; and

(b) Providing, failing to provide, or discouraging the receipt of loans or other financial assistance in a manner that discriminates in their cost, rate of denial, or terms and conditions, or otherwise discriminates in their availability, that result in a discriminatory effect based on membership in a Protected Class.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.120 et seq.; 24 C.F.R. § 100.500 et seq.

Article 14. Discrimination in Land Use Practices

§ 11098.14.1. Definitions.

(a) “Public Land Use Practices” include all government regulation of land use in connection with existing or proposed housing, including:

(1) Ordinances, resolutions, actions, policies, decisions, authorizations, denials, approvals, zoning, use permits, variances, and other actions authorized under the California Planning and Zoning Law (Title 7 (commencing with section 65000)), the California Redevelopment Law (Health & Safety Code Sec.33320 et seq.), and other federal and state laws regulating the development and transfer of property;

(2) Other Practices related to regulation of land use; and

(3) Adoption or implementation of housing programs.

(b) “Private Land Use Practices” include all private contractual regulation of property, including covenants, deed restrictions, and other constraints on transfer or use of property, whether or not recorded with a county.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, 12956.2, Government Code.

§ 11098.14.2. Discrimination in Land Use Practices and Housing Programs Prohibited

Except as specifically provided in other statutes regulating land use practices, housing, and housing programs, and where those statutes are not in violation of federal fair housing laws, it shall be unlawful for the State, a city, county, city and county, any other local government agency, or any other Person or Owner, to do any of the following:

(a) Enact or implement Public or Private Land Use Practices that restrict or deny residence, land ownership, tenancy, or any other land use benefit or housing opportunities, or otherwise make

housing opportunities unavailable or deny Dwellings to individuals because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(b) Deny, restrict, condition, or render infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities, or otherwise make housing opportunities unavailable or deny Dwellings to individuals because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(c) Deny, condition, or make Public or Private Land Use decisions or authorizations, or impose different requirements than generally imposed, that restrict or deny housing opportunities or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or that otherwise make housing opportunities unavailable or deny Dwellings to individuals because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(d) Enact or implement Practices that provide different, limited, or no governmental services such as water, sewer, garbage collection, code enforcement, or other municipal services in connection with the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use or in connection with a Dwelling, or otherwise make unavailable such services, because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(e) Limit the use of privileges, services, or facilities associated with a Dwelling, or otherwise making unavailable such privileges, services or facilities because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(f) Use, approve of, or implement restrictive covenants that restrict sale or use of property on the basis of a Protected Class, or the intended occupancy of any Dwelling by individuals in a Protected Class, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void;

(g) Enact, implement, or operate housing programs or Practices that restrict or deny the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with a Dwelling or otherwise make housing opportunities unavailable or deny Dwellings to individuals because of membership in a Protected Class, or the intended occupancy of any Dwelling by individuals in a Protected Class;

(h) Refuse or fail to make reasonable accommodations in Public Land Use Practices, or ordinances, rules, policies, Practices or services related to the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with a Dwelling, pursuant to section 11098.26, including charging a fee for seeking or processing a reasonable accommodation, or using a variance or conditional use permit process rather than a reasonable accommodation process to respond to a request for a reasonable accommodations, if the process takes into consideration different criteria or processes than those required for consideration as a reasonable accommodation; and

(i) Refuse or fail to make reasonable modifications in housing programs or Dwellings when such modifications are required by law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. § 100.70 et seq.; 24 C.F.R. § 100.500 et seq.; *Turning Point, Inc. v. City of Caldwell* (9th Cir. 1996) 74 F.3d 941; *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

§ 11098.14.3. Land Use Practices with Discriminatory Effect

Practices prohibited under section 11098.14.2 shall be unlawful if they have a discriminatory effect on the basis of membership in a Protected Class unless a legally sufficient justification applies, pursuant to Article 4.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. § 100.70 et seq.; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467.

§ 11098.14.4. Specific Practices Related to Land Use Practices

It shall be an unlawful public land use practice to:

(a) Enact or enforce ordinances or practices requiring owners or persons to take actions against individuals based upon broad definitions of nuisance or unlawful conduct to the extent that such ordinances or practices restrict or deny residence, land ownership, tenancy, or any other land use benefit or housing opportunities, or otherwise make housing opportunities unavailable or deny dwellings to individuals because of membership in a protected class or the intended occupancy of any dwelling by individuals in a protected class, or have a discriminatory effect on the basis of membership in a Protected Class, unless a legally sufficient justification applies, pursuant to Article 4.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. § 100.70 et seq.; 24 C.F.R. § 100.500 et seq.

Article 18. Consideration of Criminal History Information in Housing

§ 11098.18.1. Discriminatory Effect of Criminal History Information.

Any Practice of a Person or Owner that includes the use of, inquiries about, or solicitation of information about criminal history is unlawful if it has a discriminatory effect, unless a legally sufficient justification applies under Article 4 and Government Code section 12955.8.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 11098.18.2. Discriminatory Statements Regarding Criminal History

A notice, advertisement, application, or other written or oral statement regarding criminal history or criminal records that conflicts with the provisions in this Article and Article 4 shall be a violation of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, and 12955.6, Government Code; 24 C.F.R. § 100.500 et seq.

§ 11098.18.3. Plaintiff's Burden of Proof in Discriminatory Effects Cases Related to Criminal History Information.

(a) Overbroad or arbitrary inquiries into or use of criminal history information in housing may have a discriminatory effect on members of Protected Classes. A discriminatory effect may be established through the use of conviction statistics or by any other evidence that establishes a discriminatory effect.

(b) State or national level statistics showing substantial disparities in the conviction records of individuals based on membership in a Protected Class are presumptively sufficient to establish a discriminatory effect of a Practice under Article 4, unless there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the relevant geographic area for the applicant pool, the types of convictions being considered, or the particular type of housing or housing related service. Regardless of the data used, determining whether a Practice results in a discriminatory effect is ultimately a fact-specific and case-specific inquiry.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code; *Dothard v. Rawlinson* (1977) 433 U.S. 321.

§ 11098.18.4. Establishing a Legally Sufficient Justification Relating to Criminal History Information

(a) Persons or Owners with a Practice of soliciting, inquiring about, or using criminal history information that has a discriminatory effect on individuals in Protected Classes must be able to prove that the practice meets all of the prongs of a legally sufficient justification under Article 4 and in this section.

(b) In order to meet their burden of establishing a legally sufficient justification under Article 4 and this section, Persons or Owners must:

(1) Identify a specific substantial, legitimate, nondiscriminatory interest supporting the Practice, such as a risk to the safety of its residents, employees, or property;

(2) Take into account the nature and severity of an individual's conviction and the amount of time that has passed since the criminal conduct occurred;

(3) Limit consideration to convictions that are directly related to an individual's capacity and likelihood of fulfilling the obligations related to the housing or services. (For example, a recent conviction for arson or possession of illegal weapons could be directly related to tenancy obligations, while a conviction for illegal gambling or a non-alcohol related traffic offense would not likely be directly related to tenancy or a real estate loan or transaction); and

(4) Prove that its Practice actually achieves the identified interest, which includes proving that its Practice accurately distinguishes between criminal conduct that poses a demonstrable risk to its proffered interest and criminal conduct that does not.

(c) Whether a less discriminatory alternative is sufficient to defeat an allegation of a discriminatory effect will depend on the particulars of the criminal history information Practice under challenge, provided that the implementation of the Practice does not violate section 11098.18.5.

(1) A Practice that takes into account individualized, mitigating information and evidence of rehabilitation before making an adverse decision may constitute a less discriminatory alternative. Such mitigating information could include, but is not limited to:

(A) Facts or circumstances surrounding the criminal conduct;

(B) The age of the individual at the time of the conduct;

(C) The amount of time that has passed since the conviction;

(D) Evidence that the individual has maintained a good tenant history before and/or after the conviction; and

(E) Evidence of rehabilitation efforts.

(2) Delaying obtaining or considering a third party report on criminal history until after an individual's financial and other qualifications are verified may constitute a less discriminatory alternative.

(3) If a Person or Owner has a policy on the use of criminal history in housing decisions, providing a copy or description of the policy to an individual upon request may constitute part of a less discriminatory alternative.

(4) If a Person or Owner's application form or other forms inquire about criminal history, including on the form space for an individual to explain or provide additional information about rehabilitation or other mitigating circumstances, or, alternatively, offering to meet with an individual upon request, may constitute a less discriminatory alternative.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 11098.18.5. Intentional Violations Liability and the Use of Criminal History

(a) Inquiries or solicitation of information about, or use of criminal history information in housing Practices, may be a discriminatory Practice if membership in a Protected Class is a motivating factor in the decision. This includes cases where selective use of the information is demonstrated to be a pretext for unequal treatment of individuals who are members of a Protected Class.

(1) For example, the fact that a defendant has acted upon criminal history information differently for a member of a Protected Class than the defendant has acted upon comparable information for another individual is strong evidence that the defendant was not considering criminal history information uniformly.

(2) Pretext also may be shown where evidence establishes that the defendant did not actually know of the individual's criminal record at the time of the alleged discrimination.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code; *Allen v. Muriello* (7th Cir. 2000) 217 F. 3rd 517; *Johnson v. Macy* (C.D. Cal. Nov. 16, 2015) 145 F.Supp.3d 907.

§ 11098.18.6. Specific Practices Related to Criminal History Information

(a) It is unlawful for a Person or Owner to:

(1) Use, inquire, or solicit information about any charge, arrest, indictment, or detention by any law enforcement or military authority that did not result, or has not yet resulted, in a conviction.

(2) Use, inquire, or solicit information about any referral to or participation in a pre-trial or post-trial diversion program; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

(3) Use, inquire, or solicit information about any criminal records that are dismissed, vacated, expunged, sealed or closed by judicial action or by statute; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person or Owner may use such information.

(4) Use a "blanket prohibition" that covers all individuals with any conviction record whatsoever, without distinguishing between criminal conduct that indicates a

demonstrable risk to the proffered substantial, legitimate, nondiscriminatory interest and criminal conduct that does not indicate such a demonstrable risk.

(b) There is a rebuttable presumption that a conviction that is seven or more years old does not indicate a demonstrable risk to the safety of residents, employees, or property.

(c) Persons or Owners who obtain investigative consumer reports or criminal history information from third parties are also subject to the requirements of applicable federal and state law regarding such reports, including the Fair Credit Reporting Act (15 U.S.C. Sect. 1681 *et seq.*) and the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code §§ 1785.2 *et seq.*, including California Civil Code §§ 1785.10 *et seq.* (Consumer Credit Reporting Agencies) and specifically including §§ 1787.20 *et seq.* and 1785.13, and §§ 1786.10 *et seq.*, (Investigative Consumer Reporting Agencies) specifically including § 1786.18 and § 1786.50.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 11098.18.7. Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

In some instances, Persons or Owners may also be subject to federal or state laws or regulations that require or prohibit consideration of certain criminal history information.

(a) Compliance by a Person or Owner with specific federal or state laws that require consideration of criminal history information constitutes a rebuttable defense to a discriminatory effect claim under the Act, e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. § 13663(a)).

(b) Failure of a Person or Owner to comply with specific federal or state laws that prohibit consideration of specific criminal history information, or require certain acts in regard to consideration of such history, shall constitute a violation of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 11098.18.8. Local Laws or Ordinances

In some instances, Person or Owners may also be subject to local laws or ordinances that provide additional limitations on the use of criminal history information. Nothing in this Article exempts Persons or Owners from compliance with those local laws or ordinances if those limitations are more protective of individuals in Protected Classes.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.