

# FAIR EMPLOYMENT AND HOUSING COUNCIL

## Employment Regulations Regarding Religious Creed and Age Discrimination

### INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

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

As it relates to employment, the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) prohibits harassment and discrimination because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and/or veteran status of any person.

Pursuant to Government Code section 12935, subdivision (a), the Fair Employment and Housing Council (Council) has authority to adopt necessary regulations implementing the FEHA. This rulemaking action is intended to further implement, interpret, and/or make specific Government Code section 12900 et seq.

The specific purpose of each proposed, substantive regulation or amendment and the reason it is necessary are described below. The problem that a particular proposed regulation or amendment addresses and the intended benefits are outlined under each subdivision, as applicable, when the proposed change goes beyond mere clarification.

#### **§ 11016, Pre-employment Practices**

The purpose of this section is to outline general practices that are common to the early life cycle of all employment relationships – recruitment, pre-employment inquiries, and applications – rather than practices regarding a specific protected basis.

#### **§ 11016, subd. (b)(1)(A) Pre-Employment Inquiries: Direct Pertinence or Health or Safety**

The Council proposes to create a new subdivision consisting of what was previously the last sentence of § 11016, subd. (b)(1) regarding when an employer may inquire into the physical fitness, medical condition, physical condition, or medical history of applicants. This change is necessary to separate this rule from the more general rule in § 11016, subd. (b)(1) and restate it in clearer language.

#### **§ 11016, subd. (b)(1)(B) Pre-Employment Inquiries: Availability for Work**

The Council proposes to create a new subdivision prohibiting inquiries regarding an applicant's availability for work on certain days and times in order to ascertain an applicant's religious creed, disability, or medical condition and outlining what constitutes a permissible inquiry. This change is necessary to address a problem that the regulations previously have not explicitly addressed – namely that scheduling concerns can be used as a pretext to dissuade individuals from applying based on a protected basis. Also, the Council proposes to add that employers'

other, permissible inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds and give an example. This is necessary to provide guidance to employers on how to avoid asking impermissible scheduling questions and demonstrate how employers can do so by giving a practical example.

### **§ 11016, subd. (c)(3) & (c)(3)(A) Applications and Schedule Information**

The Council proposes to create two new subdivisions, the first reiterating that questions regarding scheduling and availability to work may be impermissible if used to deter applicants who are members of a protected class. Because of the potential for such questions to be unlawfully discriminatory, including by deterring members of protected classes from applying, the subdivision clarifies that such questions should be closely scrutinized by finders of fact in evaluating their legality. See, for example, 29 CFR 1625.4 stating that certain requests facially lawful under federal law will nonetheless be closely scrutinized to assure that they were made for a lawful purpose. The second subdivision applies this rule to online application technology. This change is necessary to address those situations where these technologies are used pretextually to obtain information that can be used in a discriminatory way or the possibility that their use can result in a disparate impact upon protected classes. These subdivisions thus clarify what employers may and may not ask applicants, including through the use of online application technologies, and how to ask if necessary.

### **§ 11076, Establishing Age Discrimination**

The purpose of this section is to explain how to prove age discrimination, both with disparate treatment and disparate impact theories.

#### **§ 11076, subd. (a) How Employers Discriminate Based on Age**

First, the Council proposes to add denial of employment to the actions for which considering age may be discriminatory. This addition is necessary to clarify and enumerate a clear, but unstated, form of disparate treatment as it relates to age. Second, the Council also proposes to add that the disparate impact theory of discrimination may establish age discrimination if “a facially neutral practice has an adverse impact on applicants or employees over the age of 40.” This addition is necessary to clarify that age discrimination – which is limited to “any individual who has reached a 40th birthday” by Government Code section 12926(b) – does not have to be intentional and the disparate impact theory is an alternative, previously unenumerated way of proving it. Similarly, disparate impact discrimination is cognizable under the federal law that prohibits age discrimination, the Age Discrimination in Employment Act of 1967, for both employees and applicants. (See *Smith v. City of Jackson*, 544 U.S. 228 (2005); 29 U.S.C. § 623(a)(1); EEOC, *Disparate Impact and Reasonable Factors Other Than Age under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19080, (Mar. 30, 2012), codified at 29 C.F.R. § 1625.7.) Third, the Council proposes to add that, as with other types of discrimination, the affirmative defense of business necessity is applicable, but a plaintiff may show that “an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.” This affirmative defense is cross-referenced and spelled out in § 11010, subd. (b) and its inclusion is necessary to clarify the affirmative defense’s relevance to disparate impact in age discrimination claims, particularly because it is enumerated in a different article of the regulations. Finally, the Council proposes to add that “[i]n the context of layoffs or salary reduction efforts that have an adverse impact on employees over the age of 40, an employer’s preference to retain lower paid

workers, alone, is insufficient to negate the presumption.” This addition is necessary to clarify an often misunderstood facet of the law and reiterate the legislative findings in Government Code section 12941: “The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination.” Finally, the Council proposes to delete the specific subdivisions in the reference note because subsequent relettering from enacted legislation has rendered them obsolete, and it is the existing convention of the Council and California Code of Regulations to include section numbers without subsection letters.

### **§ 11078, Pre-Employment Practices**

The purpose of this section is to outline unlawful behavior related to two pre-employment practices: recruitment and advertising.

#### **§ 11078, subd. (a)(1) Recruitment**

The Council proposes to add three examples that constitute unlawfully refusing to consider applicants because of their age: “a maximum experience limitation; a requirement that candidates be “digital natives” (an individual who grew up using technology from an early age); or a requirement that candidates maintain a college-affiliated email address.” These additions are necessary to update the regulations with examples that were either uncommon or nonexistent when the regulations were originally promulgated but that now appear in job qualifications that may be inadvertently discriminatory.

### **§ 11079, Advertisements, Pre-Employment Inquiries, Interviews and Applications**

The purpose of this section is to outline when the content of advertisements, pre-employment inquiries, interviews and applications can be discriminatory and generally to clarify that bona fide occupational qualification is an available affirmative defense to a claim of age discrimination in each context.

#### **§ 11079, subd. (a) Advertisements**

The Council proposes to add a subdivision regarding advertisements to this section by specifying that advertisements “that a reasonable person would interpret as an attempt to deter or limit employment of people age 40 and over are unlawful” and providing examples of prohibited advertisements. These additions are necessary to clarify what practices may have the effect of deterring applicants age 40 or older from applying and to clarify what terminology employers must avoid in order to avoid inadvertently signaling an age preference and to clarify the standard to be applied when analyzing whether a particular advertisement deters or limits the employment of people age 40 and over.

#### **§ 11079, subd. (b) Pre-Employment Inquiries**

The Council proposes to provide examples of prohibited inquiries “that would result in the direct or indirect identification of persons on the basis of age.” These additions are necessary to clarify what amounts to unlawful behavior and guide employers on the propriety of commonly asked, but often unlawful, questions. The Council also proposes to add that the bona fide occupational qualification affirmative defense is applicable in this situation. This is necessary to clarify that

that component of Fair Employment and Housing Act jurisprudence is applicable in this context as well.

**§ 11079, subd. (c) Applications**

The Council proposes to change the requirement from “serious and fair” to “equal” regarding the consideration employers must give to the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because such individual is over 40. This is necessary to give a clear, consistent standard that employers can use rather than the subjective “serious and fair.”

**§ 11079, subd. (c)(1)-(2) When Applications Are Unlawful**

The Council proposes to add that a “request for information that could lead to the disclosure of the applicant’s date of birth or age...is not, in itself, unlawful. However, the application’s request for such information may tend to deter older applicants or otherwise indicate discrimination against applicants who are over 40. Employment applications that request such information will be closely scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose.” Because of the potential for such questions to be unlawfully discriminatory, including by deterring members of protected classes from applying, the subdivision clarifies that such questions should be closely scrutinized by finders of fact in evaluating their legality. See, for example, 29 CFR 1625.4 stating that certain requests facially lawful under federal law will nonetheless be closely scrutinized to assure that they were made for a lawful purpose. The Council also proposes to add examples regarding online job applications that would violate the aforementioned rule. These additions are necessary to clarify what amounts to unlawful behavior and to update the regulations with examples that were either uncommon or nonexistent when the regulations were originally promulgated. The Council also proposes to add that the bona fide occupational qualification affirmative defense is applicable in this situation. This is necessary to clarify that that component of Fair Employment and Housing Act jurisprudence is applicable in this context as well.

**TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS**

The Council did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing the adoption of these regulations.

**REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES**

The Council has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Council invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

**REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

**EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The proposed amendments describe and clarify the Fair Employment and Housing Act without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations, and reducing litigation costs for businesses.

**ECONOMIC IMPACT ANALYSIS/ASSESSMENT**

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs; the creation of new businesses or the elimination of existing businesses; the expansion of businesses currently doing business within the state; or worker safety and the environment because the regulations centralize and codify existing law, clarify terms, and make technical changes without affecting the supply of jobs or ability to do business in California. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for employees and employers to understand their rights and obligations and reducing litigation costs for businesses.