STATE OF CALIFORNIA

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

COUNCIL MEETING

Re: Public Hearing on the Proposed Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

Transcript of Proceedings

State Capitol, Room 113
1315 10th Street
Sacramento, California

Wednesday, October 23, 2019
10:17 a.m.

Brittany Flores, CSR 13460
APPEARANCES

COUNCIL MEMBERS:
Chaya Mandelbaum, Chairman
Dale Brodsky
Tim Iglesias
Joseph Ortiz
Dara Schur

Staff:
Brian Sperber, regulatory/legislative counsel

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CHAIRMAN MANDELBAM: Great. Well, we are at our public hearing. So we're going to go on the record and start our public hearing.

So we are now on the record, and it is Wednesday, October 23rd, and we’re here at the State Capitol in Sacramento. My name is Chaya Mandelbaum, chairperson of the Fair Employment and Housing Council, and joining me today are members of the council, Council Member Dale Brodsky, Dara Schur, Tim Iglesias, and Joseph Ortiz.

Even though we've had an informal introduction off the record, let me again welcome you to this hearing portion of the meeting. The purpose of this hearing is to receive public comment regarding issuance of amendments to the FEHA's employment regulations that relate to new legal provisions regarding criminal history and employment and parental leave. This rulemaking clarifies, makes specific, and supplements any state regulations interpreting the FEHA that are set forth in Government Code 13900, et seq.

The proposed regulations are slated to appear in the California Code of Regulations Title 2, sections 11017.1 and 11087 through 96. Copies of the proposed amendments to the regulations are available at the front of the room and are reflected in Attachment D to today's materials and the notice and initial statement of reasons are reflected in Attachment B and C, respectively. The text of the Council's regulations is also available on the Council's web page.

We're holding this meeting as part of our formal rulemaking process, and it was noticed in the California regulatory notice register to the public on September 6, 2019 and also via email sent to more than 7,500 individuals and stakeholders and through the Council's web page. Pursuant to the notice, we're taking testimony today on the proposed amendments and will also accept written testimony -- or written comments rather on the regulations until 5:00 o'clock today, October 23rd. So if you haven't already submitted, you can submit your written comments to the Council at FEHCouncil@DFEH.CA.GOV. Or you can mail them instead to the Council in the DFEH's Los Angeles office located at 320 West 4th Street, 10th floor in LA 90013. You can also give your written comments, if you brought them, to Brian. And if you didn't bring a written comment to provide to Brian today, make sure you get it in by 5:00 this afternoon.

Anyone who testifies here today will -- or
submits any written comments will receive a copy of any changes or amendments the Council makes to the proposed regulations and will also have an opportunity to submit comments if -- during a 15-day period if the Council makes substantive or substantial change to the proposed amendments after receiving public comment and also anyone who requests a copy, an opportunity to have that as well. So we'll consider all the commences made here today as well as all comments received in writing, and we'll respond to those comments in our final statement of reasons, which will be part of the rulemaking record. So as you can tell, this hearing's being transcribed by a court reporter, and the transcript of the hearing, as well as all written comments received, will also be part of the official rulemaking record. Because this hearing is being transcribed, as you'll notice, I am speaking a little bit slower than I would in the everyday course of conversation, and we would appreciate it if you would do the same so that our court reporter is able to take down testimony. You won't be sworn in when you testify, but we do appreciate it if you would do the same so that our court reporter can take down your remarks. Please start by stating and spelling your name and any affiliation that you are offering your remarks on behalf of. Also, if you're commenting on a specific regulation, it's helpful if you can identify the section and subsection of the regulations so that we can refer to it as you're providing your comments. So we'll hear testimony until all those wishing to testify today have had an opportunity to do so. Any initial questions? Seeing and hearing none, we're ready to begin. So if anyone would like to provide public comment on Attachment D, the proposed regulations, now would be a good time to come to the front. Brian, any email comments? MR. SPERBER: Internet's down. CHAIRMAN MANDELBAM: Oh, okay. COUNCIL MEMBER BRODSKY: All right. CHAIRMAN MANDELBAM: -- kick this off. MS. BRODSKY: All right. I have some comments. I'm Dale Brodsky as you know. I am a member of the council, but I'm making these comments not wearing that hat. I'm making these comments as a member of the public. I'm an attorney in practice. I have been working in the field of employment law for more than 40 years and have been emersed in this -- in the statutes that we're addressing here for more -- for all of that time -- most of that time. So I do have a couple comments. I think that the, the regulation's really good. I just -- I just want to focus on two things. The first is a minor one with respect to the regulations on criminal history. When I looked at the definitions and, and read -- I mean, I think that there should be a definition of "conditional offer of employment" in 110 -- in 11017.1 B-4. There are a bunch of definitions, and I'm going to submit something in writing in which I have a simple proposal for how to define that. It's because "conditional offer of employment" is so important in these regulations in terms of when an employer can request information and when they can't. And I thought it would be very helpful to have a definition on that. Do you want me to read my suggestion, or do you want to just take it by written -- CHAIRMAN MANDELBAM: Well, if it's going to -- if you're going to have it in writing, we'll see it in there -- MS. BRODSKY: Okay. CHAIRMAN MANDELBAM: -- but whatever you prefer.
think there are four reasons why that language should be changed and made consistent with 11008 D-1, which is the definitional in our general FEHA employment regulations. We've defined what regular -- what it means to be an employer. And in that context, we changed -- we took out language that was the language that's still in this one that would have conditioned employers and would -- said that employees had to be employed during 20 weeks during the previous calendar -- or during the calendar year. And we took that out and replaced it with a different manner of counting. That was why the original language, it was -- what the original language in our Family Rights Act regulations, that I worked on a long time ago, mirrored that. The language that had previously existed as the definition of the “employer,” we changed that back in January. At our January 28th, 2019 meeting, we voted unanimously to approve amendments to the employment regulations, which changed that language, took that out, and provided a different definition of “regular employee.” Nevertheless, as it's currently drafted, these CFRA regulations still use that old wording. So really, the -- I think we need to change it, first, because the counting mechanism that is still there, the 50 -- having to rely on 20 working weeks during the calendar year is not based on any California statute. It's similar to -- it is the same as FMLA in Title 7, but it's not in any California statute.

Secondly, now -- I mean before the two definitions were mutually -- they were consistent; the definition of the employer, directly employing and regular employment for FEHA for -- were totally consistent. Now there's no regulatory source for the current -- the way that it's still written.

Third reason is that, in and of itself, 11008 D-2 expressly states that for the purposes of CFRA and NPLA, employees must be counted in the same way as they're described in 11008 D-1. So we've actually said that ourselves; that that definition applies. So you can't -- I mean, it doesn't make sense to have another regulation that's inconsistent with that.

And fourth, the definition of employer for Pregnancy Disability Leave Act does not require an employee to have worked, you know -- to have -- you don't have to have had 20 or 50 employees on the -- on the books for 20 weeks. So now you've got PDL, Pregnancy Disability Leave, which often runs sequentially or, you know, with CFRA, which, as it's written now, would be subject to two different counting mechanisms, which doesn't make sense.

So for all those reasons, I really urge us to change that, and I have proposed a very simple fix in my written letter. And, and so the -- and then there's one other suggestion that I had that I think that the existing language has it -- says that "people on the payroll." I'm suggesting that we omit "payroll," because what the statute says is there to be employees who receive a -- wages of salary. That's much more explicit than being on a payroll, because somebody could be an employee and not be on the payroll or someone who's not an employee could be on the payroll.

So you want to -- and that's -- in my letter, I, I have a citation to some dicta in a Supreme Court decision in which Justice Leah made a -- in a different -- slightly different context but observed that as well.

So I would suggest just going back and using the same wording -- wages and/or salary -- and that's also incorporated in my written comment. So thank you.

CHAIRMAN MANDELBAUM: Thank you, Mrs. Brodsky.

MS. BRODSKY: Hmm?

CHAIRMAN MANDELBAUM: Not "Council Member Brodsky,"

Any other -- no? Okay. So we don't have any email comments.

Anyone else want to provide public comment on the proposed regulations regarding criminal history of the California Family Rights Act as the New Parent Leave Act?

COUNCIL MEMBER IGLESIAS: I forget; is it appropriate for council members in this hearing to make comments or no?

CHAIRMAN MANDELBAUM: I think it would be the next one. So this is the draft we already voted on, and then we'll amend it once we process the written public comments and Mrs. Brodsky's oral public comment and written comment.

So seeing no other people who are wishing to provide public comment, we will conclude with our public hearing portion of the meeting. So thanks to those who plan to submit written comments. We look forward to reading it. Please remember to get it in by 5:00 o'clock today.

So with that, the hearing portion of this meeting is adjourned.

(Whereupon the proceeding concluded at 10:32 a.m.)

--oo0o -
I, Brittany Flores, a Certified Shorthand Reporter of the State of California, duly authorized to administer oaths, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney of party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: 11/6/2019

____________________________________
Brittany Flores CSR 13460