

**State of California
Office of Administrative Law**

In re:
Fair Employment and Housing Council

Regulatory Action:

Title 02, California Code of Regulations

Adopt sections:

Amend sections: 12176, 12179, 12180

Repeal sections:

**NOTICE OF APPROVAL OF CHANGES
WITHOUT REGULATORY EFFECT**

**California Code of Regulations, Title 1,
Section 100**

OAL Matter Number: 2019-1029-02

OAL Matter Type: Nonsubstantive (N)

These changes without regulatory effect conform three regulations to the language of corresponding federal provisions so that, pursuant to Government Code section 12955.6, state regulations do not provide less fair housing protection for persons with disabilities than does federal law.

OAL approves this change without regulatory effect as meeting the requirements of California Code of Regulations, title 1, section 100.

Date: December 12, 2019



**Dale P. Mentink
Senior Attorney**

For: Kenneth J. Pogue
Director

Original: Kevin Kish, Director

Copy: Brian Sperber



Department of Fair Employment & Housing Fair Employment and Housing Council

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
800-884-1684 (voice) | 800-700-2320 (TTY) | California's Relay Service at 711
www.dfeh.ca.gov | email fehccouncil@dfeh.ca.gov

CHANGES WITHOUT REGULATORY EFFECT UNDER CALIFORNIA CODE OF REGULATIONS, TITLE 1, SECTION 100

Explanatory Statement

On September 16, 2019, the Office of Administrative Law approved a set of regulations entitled *Fair Housing Regulations* (2019-0802-01 SR) submitted by the Fair Employment and Housing Council of the Department of Fair Employment and Housing. These regulations are to become effective on January 1, 2020. Under California Government Code Section 12955.6, the Fair Employment and Housing Act cannot provide fewer rights or remedies than under the federal Fair Housing Act, 42 U.S.C. section 3601 *et seq.* Federal law allows the denial of a request for a reasonable accommodation if the accommodation would impose an “undue financial and administrative burden.” (emphasis added). See Joint Statement of the Department of Housing and Urban Development and the Department of Justice on “Reasonable Accommodations Under the Fair Housing Act” (pages 7-8) (May 17, 2004)¹; HUD Occupancy Handbook (Section 2-43 (Limits on Obligations to Provide Reasonable Accommodation) at pages 2-39 to 2-41 and Exhibit 2-6) (June 2007)²; and HUD Office of Fair Housing & Equal Opportunity, Notice FHEO–2013–01, at 4 (April 25, 2013).³

Both the Fair Housing Act, 42 U.S.C. section 3604, and the regulations at 24 C.F.R. 100.204, require provision of reasonable accommodations under specified circumstances. While neither the statute nor the regulations specifically address *grounds for denial* of a request for reasonable accommodation, HUD has supplemented the regulations by specifying those grounds in the respective HUD guidance documents listed above. The guidance documents consistently use the phrase “undue financial *and* administrative burden” when interpreting the Fair Housing Act. The United States Dept. of Justice concurs with this term in the Joint Statement, *supra*. Under federal law, courts must defer to HUD’s regulatory guidance interpreting a statute when required because HUD is the regulatory agency charged with administering and enforcing the federal Fair Housing Act. See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842-43 (1984). “If *Chevron* deference is required, we must defer to the interpretation HUD advances unless it is “ ‘arbitrary, capricious, or manifestly contrary to the statute.’ ” *Household Credit Servs.*, 124 S.Ct. at 1743 (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778); *accord Evangelista v. Ashcroft*, 359 F.3d 145, 150 (2d Cir.2004) (same). So long as “the agency’s reading fills a gap or defines a term in a reasonable way in light of the Legislature’s design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding.” *Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998) (citation and internal quotation marks omitted).” *Kruse v. Wells Fargo Home Mortg., Inc.* (2d Cir. 2004) 383 F.3d 49, 55. And, California state courts must also defer to HUD’s regulatory guidance so long as federal law provides greater protections to members of protected classes. (California Government Code Section 12955.6). Therefore, FEHA regulations must defer to HUD’s

1 <https://archives.hud.gov/news/2013/huddojstatement.pdf>

2 https://www.hud.gov/program_offices/administration/hudclips/handbooks/hsg/4350.3

3 https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf

interpretations of the statute regarding the standard for denial of a request for a reasonable accommodation as reflected in its guidance documents, when those interpretations afford greater or additional protections. However, numerous provisions of the regulations in Article 18 (Disability) use the phrase “undue financial or administrative burden” (emphasis added). In light of California Government Code Section 12955.6, the Fair Employment and Housing Council has no choice but to change “or” to “and” in these regulations.

See *also* California Government Code 12926.1, which provides that FEHA must provide protections that exceed the requirements of the Americans with Disabilities Act.

The proposed changes without regulatory effect merely conform the phrasing of the legal standard to what the federal law requires.

Fair Employment & Housing Council
Changes Without Regulatory Effect to 2 CCR 12176, 12179, and 12180
(Standard for Denying a Reasonable Accommodation Request in Fair Housing Regulations)

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 7. Discrimination in Housing

TEXT

Text proposed to be added is displayed in underline type.

Text proposed to be deleted is displayed in ~~striketrough~~ type.

Article 18. Disability

§ 12176. Reasonable Accommodations.

(a) It is a discriminatory housing practice for any person to refuse to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity unless providing the requested accommodation would constitute an undue financial ~~or~~and administrative burden or a fundamental alteration of its program, or if allowing an accommodation would constitute a direct threat to the health and safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others, as defined in Section 12179(a)(5) or 12185(d)(9).

(b) Confidentiality Regarding Reasonable Accommodations

(1) All information concerning an individual's disability, request for an accommodation, or medical verification or information must be kept confidential and must not be shared with other persons who are not directly involved in the interactive process or decision making about the requested accommodation unless disclosure is:

(A) Required to make or assess the decision to grant or deny the request for accommodation;

(B) Required to administer or implement the requested accommodation;

(C) Authorized by the individual with the disability in writing; or

(D) Required by law.

(c) Requests for Reasonable Accommodations.

(1) The individual with a disability seeking a reasonable accommodation must make a request for such accommodation.

(2) The request for a reasonable accommodation may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on their behalf (“representative”).

(3) A request for a reasonable accommodation need not be made in a particular manner or at a particular time. An individual makes a reasonable accommodation request at the time they request orally or in writing, or through a representative, an exception, change, or adjustment to a practice because of a disability, regardless of whether the phrase “reasonable accommodation” is used as part of the request. A request for a reasonable accommodation may be made at any time, including during litigation, at or after trial.

(4) The duty to provide reasonable accommodations is an ongoing one. Some individuals with disabilities require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. Each request must be considered separately under the standards in this article.

(5) Adopting a formal procedure may aid individuals with disabilities in making requests for reasonable accommodations and may make it easier to assess those requests and keep records of the considerations given the requests. An individual requesting an accommodation may be asked to use a form or follow a particular procedure. However, a person may not refuse a request or refuse to engage in the interactive process because the individual with a disability or their representative did not use the preferred forms or procedures. The forms and procedures used may not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford an individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity, such as the information prohibited in section 12178.

(6) A person responsible for responding to accommodation requests must treat a request by an individual with a disability for assistance in completing forms or in following procedures, or a request for alternative methods of communication during the reasonable accommodation process, as a request for reasonable accommodations that must be responded to in the same manner as any other request. In many circumstances, such requests, or the person considering the request, may also be covered by the American with Disabilities Act and the provisions in the ADA and its accompanying regulations requiring the provision of auxiliary aids and services and alternative methods of communication.

(7) An individual with a disability may request a reasonable accommodation in financial policies or policies that impose a financial burden when such accommodations may be

necessary to afford an individual with a disability an equal opportunity under subsection (a) of this section, subject to the defenses in section 12179. Examples of such economic accommodations may include: waiving guest fees or other fees; waiving fees or providing additional time to pay fees for city clean-up of a property; and allowing a prospective tenant to use a co-signer when their limited income, so limited because of a disability, does not qualify them for the unit.

(8) Reasonable Accommodation Requests in Unlawful Detainer Actions.

(A) An individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action.

(B) A request for a reasonable accommodation in unlawful detainer actions can be made at any time during the eviction process, including at or after trial, and in certain circumstances after eviction. A reasonable accommodation request that is made during a pending unlawful detainer action is subject to the same regulations that govern reasonable accommodation requests at any other time. For example:

(i) Rowan is an individual with a disability who receives Social Security Disability on the sixth day of each month. He is served a three-day notice to pay rent or quit on the second day of the month, but is unable to pay until after the notice expires. As a result, the owner files an unlawful detainer action. At trial, Rowan requests an accommodation to pay his rent on the sixth instead of the first, including allowing a late payment for the month at issue in the trial. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~ and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed.

(ii) Chelsea is an individual with a physical disability. The owner filed a successful unlawful detainer action unrelated to her disability. Chelsea partially moved out the day after the trial, but was unable, without help, to move some larger items (e.g. her couch, bed and dresser) to her new apartment. Because of the disability, she could not lift or carry anything heavy. She requested some additional time as a reasonable accommodation to arrange for help to move her furniture. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~ and administrative burden as defined in section 12179 (for example if the owner has the capacity to leave the items in the unit for a period of time or if the unit is not re-rented), and engaging in the interactive process under section 12177 as needed.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 12179. Denial of Reasonable Accommodation.

(a) A requested accommodation may be denied if:

- (1) The individual on whose behalf the accommodation was requested is not an individual with a disability;
- (2) There is no disability-related need for the requested accommodation (in other words, there is no nexus between the disability and the requested accommodation);
- (3) The requested accommodation would constitute a fundamental alteration of the services or operations of the person who is asked to provide the accommodation;
- (4) The requested accommodation would impose an undue financial ~~or~~and administrative burden on the person who is asked to provide the accommodation; or
- (5) The requested accommodation would constitute a direct threat to the health or safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and such risks cannot be sufficiently mitigated or eliminated by another reasonable accommodation, pursuant to the following:
 - (A) A determination that an accommodation poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence, not on mere speculation or stereotype about the requested accommodation or a particular disability or individuals with disabilities in general;
 - (B) The assessment of whether the specific accommodation in question poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must be based on objective evidence, and not unsubstantiated inferences. The evidence must be sufficiently recent as to be credible. The assessment must consider:
 - (i) The nature, duration, and severity of the risk of a direct threat to the health and safety of others or of substantial physical damage to the property of others;
 - (ii) The likelihood that a direct threat to the health or safety of others or substantial physical damage to the property of others will actually occur; and
 - (iii) Whether there are any additional or alternative reasonable accommodations that will eliminate the direct threat to the health or safety of others or substantial physical damage to the property of others; or
- (6) If a support animal, as defined in subsection 12005(d)(1), is requested as a reasonable accommodation, the request may be denied if it would constitute a direct threat to the health or safety of others or would cause substantial physical damage to the property of others under Section 12185(d)(9).

(b) The determination of whether an accommodation poses an undue financial ~~or~~and administrative burden under subsection 12179(a)(4) must be made on a case-by-case basis and must consider various factors including:

- (1) The cost of the requested accommodation;
- (2) The financial resources of the person or persons who have a duty under the Act to provide the accommodation;
- (3) The benefits that a proposed alternative accommodation would provide to the individual with a disability;
- (4) The availability of alternative accommodations that would effectively meet the disability-related needs of the individual with a disability;
- (5) Where the entity being asked to make the accommodation is part of a larger entity, the structure and overall resources of the larger organization, as well as the financial and administrative relationship of the entity to the larger organization. In general, a larger entity with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller entity with fewer resources; and
- (6) Whether the need for the accommodation arises from the owner's failure to maintain or repair the property as required by law or contract, or to otherwise comply with related legal obligations.

(c) A fundamental alteration under subsection 12179(a)(3) is a requested accommodation that would change the essential nature of the services or operations of the person being asked to provide the accommodation. For example, if a landlord does not normally provide shopping for residents, a request to shop for an individual with a disability could constitute a fundamental alteration.

(d) A person cannot deny a request for a reasonable accommodation based on the person's or another individual's fears or prejudices about the individual's disability, nor can a denial be based on the fact that provision of a reasonable accommodation might be considered unfair by other individuals or might possibly become an undue burden if extended to multiple other individuals who might request accommodations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code, *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 12180. Other Requirements or Limitations in the Provision of Reasonable Accommodations; and Examples.

(a) Other requirements or limitations in the provision of reasonable accommodations include:

(1) It is unlawful to charge a fee or require an additional deposit or financial contribution as a condition of receiving, processing, or granting a reasonable accommodation.

(2) The fact that an accommodation may impose some cost on the person providing the accommodation is not grounds for denial of a request, so long as the cost does not constitute an undue financial ~~or~~and administrative burden, under section 12179.

(3) It is unlawful for a person to request or require that an individual with a disability or representative waive the right to request a future accommodation.

(b) Examples of Reasonable Accommodation:

(1) 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. 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 owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost of reserving a space is likely minimal in light of the overall budget of a 300 unit apartment complex, the accommodation does not constitute an undue burden as defined in section 12179(b). Since providing parking spaces is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(2) Miguel is an individual with cognitive impairments that limit his ability to manage his financial affairs. Miguel uses a third party representative payee. He requests that he be able to pay rent through the payee rather than pay directly from his checking account, and that any nonpayment notices be sent to his representative payee as well as himself. This accommodation is necessary because without it Miguel might not be able to pay rent in a regular and timely manner which is necessary for him to fulfill his obligation as a tenant. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget of most apartment complexes, the accommodation does not constitute an undue burden as defined in section 12179(b). Since processing rent payments is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in

section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(3) Abigail, an individual with a disability, receives only SSI (Supplemental Security Income), a government benefit based on her inability to work because of her disability. She requests that she be permitted to add a co-signer on her rental lease in order to meet the minimum income qualifications. If the combined income of Abigail and the co-signer constitutes sufficient income to meet the reasonable minimum income qualifications in light of Abigail's and the co-signer's other financial obligations, and if Abigail would not otherwise be able to rent this apartment, this accommodation may be necessary. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget of most apartment complexes, the accommodation does not constitute an undue burden as defined in section 12179(b). Since making changes to application and screening criteria is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12177(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(4) Tuan has quadriplegia and uses a power wheelchair, which can make it difficult for him to travel. He must make arrangements with a paratransit agency and it cannot always accommodate his requests without significant advance notice. He requests a reasonable accommodation for additional time to come into the mortgage lender's office to sign a loan modification application, even though the mortgage company's normal practice is to give little advance notice of the meeting. This accommodation may be necessary because without it Tuan may be unable to sign the loan modification application and so receive the loan. The mortgage company must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget, the accommodation does not constitute an undue burden as defined in section 12179(b). Since processing loan modification applications is part of the essential operations of the mortgage company, the accommodation is not a fundamental alteration, as defined in section 12177(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(5) Michiko requests an exception to her property's no-pets policy as a reasonable accommodation so that her friend Yoshi, who has a non-apparent disability, is able to visit with his emotional support animal. Yoshi, as an individual with a disability, is entitled to reasonable accommodations. Michiko may request such an accommodation on behalf of Yoshi. As the disability is non-apparent, the owner may request information establishing the disability and the disability-related need for the animal. Discrimination is prohibited against individuals associated with an individual with a disability. Denying Michiko the right to have visitors of her choice, like other tenants, because her visitor has a disability would constitute discrimination against Michiko because of her association

with an individual with a disability. Because without this accommodation Michiko will not be able to receive Yoshi as a visitor at her apartment, which is a standard benefit of being a leaseholder, this accommodation may be necessary to provide Michiko an equal opportunity to use and enjoy a dwelling, and is therefore a necessary accommodation. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179 and engaging in the interactive process under section 12177 as needed. Because the cost to process the request is likely minimal in light of the overall budget, the cost of providing an accommodation does not constitute an undue burden as defined in section 12179(b). Further, since determining the appropriateness of assistance animals is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts or unless the animal poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others, or unless Yoshi fails to provide the necessary information, the accommodation should be granted. (Note if Yoshi has a service animal, rather than a support animal, the animal would be permitted pursuant to subsection 12185(b) without the need to request an accommodation.)

(6) Marita wants to install a ramp to enable her son, who uses a wheelchair, to enter and leave her house without assistance. Given the small lot, the ramp will extend slightly beyond the permitted set-back requirements on Marita's lot but will still be within Marita's property line and will not cross a public right of way. Marita requests a reasonable accommodation from the city to modify the city's policy or ordinance regarding set-back requirements on her property. Because without the ramp Marita's son would not be able to use the house like any other dweller (coming and going without assistance), this accommodation is necessary to afford him an equal opportunity to use and enjoy a dwelling. The city must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost of processing and permitting her request is likely minimal in light of the city's overall budget, the accommodation does not constitute an undue burden as defined in section 12179(b). Since reviewing building alterations is part of the essential operations of the city, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted. The city must not charge Marita a fee for processing her request, whether or not it is granted, under section 12180(a)(1). (Note that reasonable accommodations may also be available to Marita if the ramp did extend beyond her property line into a public right of way, but a further interactive process might be warranted on those specific facts).

(7) Teresa lives in a second floor apartment in a medium-sized apartment building with a single elevator that was working when she moved in. Last month her leg was amputated and she now uses a wheelchair. The elevator in the building is broken. Teresa cannot leave her home without assistance on the stairs. She requests that the owner expedite repairs to the elevator and offer her the first available ground floor unit. Her request is

necessary because there is a nexus between Teresa's disability and her request; without the requested accommodations she will not be able to access her unit using the common area. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial ~~or~~and administrative burden as defined in section 12179 and engaging in the interactive process under section 12177 as needed. Because the repair would be required by law as part of the owner's obligation to maintain the apartment, and if the costs of the requested accommodations are not burdensome in light of the overall budget of the building, the accommodations would not constitute an undue burden as defined in section 12179(b). Since making repairs is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). See, section 12179(b)(6). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted. Depending on the time it takes to repair the elevator, or particular difficulties for Teresa, additional accommodation requests may be made that would need to be considered.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.