

**FAIR EMPLOYMENT AND HOUSING COUNCIL
EMPLOYMENT REGULATIONS REGARDING CRIMINAL HISTORY, THE CALIFORNIA FAMILY
RIGHTS ACT, AND THE NEW PARENT LEAVE ACT**

FINAL 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 11. California Family Rights Act and New Parent Leave Act

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets, and makes specific the employment provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. FEHA 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 veteran status of any person. More specifically, two bills from 2017 – AB 1008 (“the Fair Chance Act”) and SB 63 – added new sections to the FEHA that respectively “ban the box” by prohibiting employers from seeking criminal history information until a conditional offer of employment is made and enact the New Parent Leave Act (NPLA), thereby expanding parental leave rights at employers of 20-49 employees.

The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in Sacramento on October 23, 2019. The Council further solicited public comment on one modified text at two subsequent meetings: February 25, 2020, in Los Angeles and May 21, 2020, via teleconference.

The following list summarizes the Council’s amendments to the originally proposed text:
- Clarifying that employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee’s pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions;

- Clarifying that the requirements of Government Code section 12952 are in addition to the disparate impact component of Government Code section 12940;
- Defining “applicant” for the sake of the Fair Chance Act in order to ensure that an employer cannot evade the requirements of the law by having an individual lose their status as an “applicant” by working before undertaking a post-conditional offer review of the individual’s criminal history;
- Clarifying when employers may consider referral to or participation in a pretrial or post-trial diversion program;
- Clarifying that successful completion, or compliance with the terms and conditions, of probation or parole is a type of evidence that may demonstrate rehabilitation or mitigating circumstances;
- Clarifying that an applicant has five business days, not calendar days, to respond to a notice notifying them that an employer made a preliminary decision that their conviction history disqualifies them from the employment conditionally offered; and
- Amending the definition of “directly employs” so that it is clear who is a “covered employer” for the sake of the California Family Rights Act (CFRA) and NPLA.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council’s response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

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, or the expansion of businesses currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations 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.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11017.1(a):

Comment: Our comments primarily relate to the proposed regulation’s treatment of Government Code § 12952(d)’s exclusion of four enumerated types of employment from Section 12952’s general prohibition against inquiries into an applicant’s criminal history before an employer has extended that applicant a conditional job offer. In particular, we are concerned that the regulations as presently drafted could erroneously be interpreted in places as exempting hiring in those job categories from the FEHA’s general requirement that the adverse impact of a facially neutral selection device upon a protected classification be justified by business necessity. In light of these potential misinterpretations, we propose the Council insert language to clarify the meaning of those provisions. This could be accomplished by inserting language in § 11017.1(a) stating that nothing in these regulations should be understood as weakening existing legal requirements applicable to criminal inquiries undertaken in connection with the jobs enumerated at § 11017.1(a)(1)-(4), including without limitation that any such inquiries must be justified by business necessity if shown to adversely impact protected categories of applicants.

Council response: The Council agrees and has therefore added “though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subsections (c) and (e) – (i) of this regulation.”

Comment: We would urge the Council to clarify that any employer who violates the prohibition on inquiring into an applicant or employee’s criminal history prior to a conditional offer of employment may not then use an employee’s failure to disclose or disclosure against them. Currently, many employers continue to unlawfully ask for criminal history information on the job application. This creates a quandary for job applicants who risk raising red flags for potential employers by not answering, despite the illegality of the question. We would propose adding language, perhaps in § 11017.1(a), that states, for instance, “Employers who violate the prohibition on inquiring into criminal history information prior to a conditional offer of employment may not, after extending a conditional offer of employment, use an employee’s failure to disclose information or disclosure to make subsequent employment decisions, including denial of the position conditionally offered.” Alternately, the Council could insert

language in § 11017.1(d) after “solely or in part on the applicant’s conviction history” the following: “including the failure to disclose criminal history information or disclosures solicited prior to the conditional job offer,”. We believe that such a regulation is essential to effectuating the purpose of the statute.

Council response: The Council generally agrees with the first alternative language and has amended the provision, with nonsubstantial changes for clarity, accordingly. The Council’s modified language addresses the comment’s concern about employers punishing applicants for failing to disclose criminal history the employer was not legally entitled to inquire about at that phase of the application process. The Council’s modified language deviates from the comment’s proposed language so that it is not susceptible to an interpretation that the underlying criminal history itself is rendered off limits to an employer later on in the application process solely by virtue of making a prohibited early inquiry. That more expansive interpretation would be outside the scope of the Ban the Box law.

Section 11017.1(b)(2):

Comment: Subsection (b)(2) should make clear that a labor contractor or union hiring hall must comply with the procedures described in the regulations when inquiring about criminal history or when seeking that information through other means. In the proposed regulations, subsection (b)(2) indicates that a labor contractor or union hiring hall must comply with the hiring procedures described in the regulations when “re-conducting an inquiry” into criminal history. Elsewhere, the regulations are more specific, noting that employers are prohibited from “inquiring about criminal history” or “seeking such information through other means.” To avoid confusion, the language in subsection (b)(2) should mirror the language in subsection (a).

The end of the last sentence of subsection (b)(2) includes a caveat to the statement that labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) when seeking to exclude a worker from a pool after conducting a subsequent background check or inquiry based on conviction history information that was already considered and deemed not disqualifying after a previous background check or inquiry. The caveat, however, is a bit confusing and may lead labor contractors to take an overly broad view of what is considered a “new material development.” It appears that the proposed regulations attempt to create exceptions for situations involving (i) changes to the characteristics and duties of the jobs to which members of the pool will be assigned change, such that those changes would materially alter the individual assessment; (ii) changes to the laws governing the jobs to which members of the pool will be assigned, such that the exception in subsection (a)(4) applies to the position); or (iii) new material facts about the worker’s past conviction(s) are revealed. The third example, however, can be misinterpreted as creating a large loophole that labor contractors can exploit. What qualifies as new information or data about the particular conviction? Employers could twist this exception to allow them to remove a worker from a pool just because they learned some relatively insignificant fact about a previously disclosed conviction. The proposed regulations also appear to list changes in experience requirements for the pool as a change that would render someone ineligible following a subsequent background check, but that type of

change is separate and irrelevant to the situation in which a labor contractor removing someone from an applicant pool because of conviction history. The Council should clarify the confusing language at the end of subsection (b)(2) to make clear that the exception is rather narrow.

In sum, we suggest the following changes to subsection (b)(2):

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history, or seeks such information through other means, to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry or search, labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) if they disqualify a worker from retention in a pool based on conviction history information that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments, such as (i) changes to job duties of the positions to which members of the pool will be assigned, or (ii) legal requirements changes to the laws governing the positions to which members of the pool will be assigned, such that the exception in subsection (a)(4) newly applies ~~or experience or data regarding the particular convictions involved~~.

Council response: The Council disagrees with this comment. The Council believes that its references to re-conducting inquiries are sufficiently clear when read in context with subsection (b) and (b)(1). Moreover, the Council believes that its reference to “new material developments” involving “experience or data regarding the particular convictions involved” is appropriately included as a possible basis for a labor contractor or hiring hall to disqualify a worker from retention in a pool despite reaching a prior conclusion in the past when the criminal history information was originally considered. While the comment rightly points out there may be instances when employers offer rationales that do not amount to truly material developments, those instances can be addressed on a case by case basis through enforcement proceedings and fact finder determinations. Those hypothetical instances do not undermine the notion that labor contractors or union hiring halls should not be barred from reconsidering criminal history if truly material developments in experience or data warrant it.

Section 11017.1(b)(3):

Comment: Subsection (b)(3) of the proposed regulations states that a labor contractor and union hiring hall must comply with the procedures described in the regulations. However, because of renumbering in the latest version of the proposed regulations, it cross-references only subsections (a) through (c), whereas subsection (d) must additionally be followed by employers, including labor contractors and union hiring halls. This cross-reference should be corrected to avoid confusion about whether labor contractors and union hiring halls must comply with the individual assessment and notice provisions of the regulations.

In addition, the description of the potential exemption pursuant to subsection (a)(1)-(4) is confusing because it appears to indicate broader exemptions than included in subsection (a), which are limited to specific positions that are exempted from the hiring requirements. This could be made clearer by adding a few clarifying words to subsection (b)(3).

Thus, the Council should modify the text of subsection (b)(3) of the proposed regulations to read as follows:

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) through ~~(c)~~(d), unless the specific position is exempted pursuant to subsection (a)(1)-(4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subsection (a)(1)-(4).

Council response: The Council agrees and has amended the provision accordingly.

Section 11017.1(b)(4):

Comment: In addition to the definitions provided in § 11017.1(b)(4), we would urge the Council to clarify Government Code § 12952's use of the term "applicant." In our experience, applicants with conditional offers of employment sometimes begin working prior to receiving the results of their background check. The Council may wish to clarify that the restrictions in § 11017.1(d) apply to such individuals. It would be contrary to the statutory intent if an employer could evade Government Code § 12952's requirements by simply allowing a job seeker to work for a limited period of time, transforming them from an applicant to an employee.

Council response: The Council agrees and has therefore added: "'Applicant' includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an 'applicant' by working before undertaking a post-conditional offer review of the individual's criminal history."

Comment: I suggest adding "conditional offer" to the definitions because the term is used throughout the regulation and providing a definition will add clarity. Below is a suggested definition of "Conditional Offer":

"Conditional offer of employment" means an employer's offer of employment to a person that is contingent on the person meeting one or more additional requirements, in contrast to an unconditional offer of employment, which imposes no additional requirements on the recipient other than to accept or reject the offer.

Council response: The Council disagrees that the references to conditional offers of employment are confusing in the context of the references in the regulations. Consequently, the Council does not believe that defining the term would aid clarity and in fact might invite further confusion.

Section 11017.1(c)(1):

Comment: The Council wisely added "inquiring into" to the first sentence of subsection (c). This addition should be retained because employers are prohibited from asking about certain types of criminal record information at any point in the hiring process. (For example, CA Labor Code

Section 432.7 states that employers “shall not ask” about certain record information.) The mere inclusion of questions about certain types of records could deter individuals from applying or lead them to withdraw from the application process because they assume they have no shot at the job if they reveal it, and many applicants are not sufficiently familiar with California law to know that the employer is prohibited from rejecting them based on such information.

In addition, the Council deleted an overly broad exception from the start of subsection (c). In the previous draft of the proposed regulations considered by the Council at the July 3, 2019 meeting, the small exception to the rule was stated before the rule, which was confusing and made the exception seem broader and more important than it is. The Council is right to reverse that order and state the broad rule first. The exceptions to the rule are limited, and they are clearly stated in subsection (c)(1), which is the only subdivision of subsection (c) to which those exceptions apply. Describing the exception in the first paragraph of subsection (c) implies that the exception is relevant to all seven subdivisions of subsection (c), and the Council is wise to remove reference to the exception from that paragraph and list it only once—in subsection (c)(1).

Council response: The Council appreciates the feedback and maintained the part of the regs that the commenter wrote in support of.

Section 11017.1(d)(2)(C):

Comment: Subsection (d)(2)(C) describes the notice that an employer must provide to a job applicant from whom it intends to withdraw a conditional offer as well as how the applicant may respond to that notice. We suggest the following two changes.

At the July 3, 2019 meeting, the Council discussed potentially adding successful completion of probation or parole as an additional example of rehabilitation that a job applicant could present to the employer to demonstrate his or her current fitness for the position. Complying with the terms and conditions of probation or parole is not easy (as such requirements are often burdensome) and is something toward which a job applicant may point to demonstrate rehabilitation. In addition, the Council should consider listing letters of reference as an additional example of rehabilitation and present fitness for the job. Job applicants are often confused about what type of rehabilitation information to provide to an employer. Providing this additional example of rehabilitation information in the regulations will help guide applicants with records (or any advocate advising them) toward providing relevant and useful rehabilitation evidence.

The last clause of the last sentence of subsection (d)(2)(C) states that “the applicant shall be permitted no less than five additional days to respond to the notice before the employer’s decision to rescind the employment offer becomes final.” The statute, and elsewhere in the regulations, however, specify that the relevant time period is five business days, which will typically increase the total amount of time during which a job applicant may respond. To avoid confusion, this sentence should be adjusted to clarify which days are counted toward the time limit.

These two changes should be made to the text of subsection (d)(2)(C) such that it reads as follows:

(C) An explanation of the applicant’s right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging either the factual accuracy of the conviction history report, and/or evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but ~~is~~are not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state or local bonding program; successful completion, or compliance with the terms and conditions, of probation or parole; letters of reference; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the factual accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant’s assertion, then the applicant shall be permitted no less than five additional business days to respond to the notice before the employer’s decision to rescind the employment offer becomes final.

Council response: The Council agrees that “successful completion, or compliance with the terms and conditions, of probation or parole” should be added to the list of types of evidence that may demonstrate rehabilitation or mitigating circumstance and that the five days should be business days, so it amended the provision accordingly. However, the Council disagrees that letters of reference should be added to the list because a letter is a method of delivering information, not a substantive example of evidence of mitigating circumstances like the other examples. It depends on what is contained in the letter and who the letter is from. In any event, many of the substantive examples listed, such as the length and consistency of employment history before and after the offense or conduct, or the facts or circumstances surrounding the offense or conduct, are likely to be communicated by the applicant through a letter of reference.

Section 11017.1(c)(6):

Comment: We also commend the Council for cross-referencing the consumer report laws in the regulations, whose overlap with these regulations is substantial. To further avoid confusion and ensure compliance, we would urge the Council to include in § 11017.1(c)(6) that information prohibited from inclusion in consumer reports by the Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act may not be used by employers to make employment decisions.

Council response: The Council disagrees with the expansive nature of the proposal, since the proposed language would involve addressing and prohibiting from use types of information

unrelated to criminal history that is outside the scope of the Ban the Box law and the FEHA regulations more generally.

Section 11017.1(h):

Comment: The Council should delete the word “Permitting” from the heading of subsection (h) because it misstates the law on this point and is at odds with the body of that subsection. Both the California Fair Chance Act and the current version of section 11017.1 of Title 2 of the California Code of Regulations (as adopted in 2017) include provisions that limit employer liability when a federal or state law restricts employment based on conviction history. Subsection (a) of the proposed regulations clearly articulates the employer liability exceptions under the Fair Chance Act, and subsection (h) of the proposed regulations (previously subsection (f) of section 11017.1 of Title 2 of the California Code of Regulations) describes the instances in which an employer is entitled to a rebuttable defense to an adverse impact claim under FEHA.

In order to ensure that employers properly interpret and implement these related provisions, we urge the Council to make a minor correction to the heading of subsection (h) of the proposed regulations, which currently reads, “Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.” That heading is currently at odds with the content of that subsection and should be adjusted to make clear that the rebuttable defense applies only when a federal or state law or regulation requires consideration of a worker’s criminal history—not to situations in which a licensing law or regulation merely permits consideration of an individual’s record.

This change to the heading would correct a misstatement of law and accurately reflect the text of the subsection, which limits the rebuttable defense to situations in which a law mandates or requires certain limitations: “Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.” In addition, the Council’s final statement of reasons, issued along with the 2017 regulations, explains that changes to the subsection were made “to clarify that the rebuttable defense addressed applies to ‘mandatory’ criminal history screening.” The Council clearly did not intend for the rebuttable presumption provision to apply to the much broader set of laws and regulations that merely permit consideration of an arrest or conviction record (including a broad array of occupational licensing laws). Correcting the subheading to reflect the Council’s intent and accurately summarize the law will reduce confusion among employers and workers alike.

We recommend that the Council modify the heading of section 11017.1, subsection (h) to delete the word “permitting” and thus correct the misstatement of law currently contained in the subheading:

(h) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

Council response: This comment addresses existing regulatory language that was not revised in this rulemaking and is thus outside the scope of this rulemaking. The Council disagrees with the comment's position that changing the heading of this provision would promote clarity or be more accurate. The heading is consistent with the scope of text of the provision, which addresses both examples of laws that mandate consideration of criminal history and also examples of laws that merely permit such use. The comment is correct that only compliance with laws mandating a particular screening process constitutes a rebuttable presumption, but that proposition is already adequately and clearly stated in the final sentence of the regulation.

Section 11087(d)(1):

Comment: As a result of the amendments to §§ 11008(d)(1) and (2), subsection 11087(d)(1) in the CFRA/NPLA regulations is now inconsistent with § 11008(d) in several ways. First, a counting mechanism that relies on 20 working weeks is not based on any of California's statutes; instead, it replicates the wording in Title VII, 42 USC § 2000e(b) and the FMLA, 29 USC § 2611(4)(A). As always, our regulations must be based on state law, and federal law is a floor, not a ceiling, for protective coverage. Second, there is no longer any regulatory source for tying the definition of employer in CFRA/NPLA regulations to a time period to 20 workweeks in a past or current calendar year. Such verbiage has been rendered obsolete by the Council's newly-revised definition of "regularly employing." Third, § 11008 (d)(2) expressly states that for purposes of CFRA and the NPLA, employees must be counted in the same way as is described in § 11008(d)(1).

Another good reason to strive for consistency is that under California law, employees are entitled to both Pregnancy Disability Leave under the PDLA and CFRA leave, and the two leaves often run sequentially. Moreover, if an employee who is directly employed by an employer is discriminated against and/or denied reasonable accommodation on account of a disability, they might well file a complaint alleging violations of both CFRA and FEHA. In these kinds of cases, it would create an anomalous result if an employer were covered under PDL and FEHA, but not under CFRA.

Therefore, I suggest the subsection be amended as follows:

"Directly employs" means that the employer maintains an aggregate of at least 20 (NPLA) or 50 (CFRA) part or full-time employees on its payroll(s) to perform services for a wage or salary for any part of the day on which the unlawful conduct occurred or on a "regular basis" as that term is defined in subsection 11008(d)(1)(A). for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase "current or preceding calendar year" refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA or NPLA leave, leave of absence, disciplinary suspension, or other leave, are counted.

Council response: The Council agrees and has amended the provision accordingly.

General:

Comment: The Fair Chance Act does not address the State of California as a prospective employer, and the hiring practices currently in place, for applicants or prospective employees who have a felony conviction (State or Federal). Specifically, it does not address administrative support positions within the various departments of the State.

Council response: The Council disagrees with this comment's understanding of the scope of coverage under the law. The Fair Chance Act does apply to state and local government employers as do these regulations. While administrative support positions are not specifically addressed in the regulations, the provisions provided are applicable to those positions along with all other positions not specifically exempted. It is true that the federal government is not bound by state laws or regulations such as The Fair Chance Act and these regulations.

Comment: The Fair Chance Act does not address which positions are barred or restricted from hiring people with a felony (State or Federal) record of conviction, in administrative support positions, within the State of California? Specifically, those with FEDERAL felony convictions, of non-violent, white-collar "crimes."

Council response: While administrative support positions are not specifically addressed in the regulations, the provisions provided are applicable to those positions along with all other positions not specifically exempted. The exempted positions are detailed in section 11017.1 (a)(1)-(4). The law and these regulations do not provide bright line determinations regarding particular criminal convictions; rather, they provide the factors to use in analyzing whether a particular conviction is likely to impact an applicant's performance on the job.

Comment: The Fair Chance Act is not being enforced when a private employer makes an adverse decision against an employee who has been on the job over 30 days for self-disclosure of a past criminal conviction that has no bearing on the job at hand.

Council response: Government Code section 12952 – the Fair Chance Act – pertains to conduct *before* hire. Broadly, the purpose of the law is to enable employers to assess all applicants regardless of criminal history as individuals rather than summarily screening them out of the hiring process. However, the regulations also make clear that certain forms of criminal history cannot be considered by employers, both before and after hire, and includes provisions addressing disparate impact and disparate treatment in the use of criminal history in employment decisions.

Comment: The Council's proposed regulations will go a long way toward restoring hope and opportunity for the nearly one in three Californians who have an arrest or conviction record and will improve employer compliance with the law.

Council response: The Council appreciates the feedback.

COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

Section 11017.1(d)(2)(C):

Comment: The Council should revise the proposed regulations to calculate the date a notice preliminarily rescinding a job offer is deemed received by business days. As currently written, proposed regulations use the "mailbox rules" outlined under CCP § 1013 to calculate when such notices sent through mailing methods sent without delivery confirmation are deemed received. While we acknowledge that this proposed regulation reflects the practical needs of employers to fill job positions in a timely matter, the proposed regulation is insufficient given the realities of these mailing methods and the unique challenges faced by justice-involved persons. To better reflect these realities, the Council should use business days to calculate the time by which a notice is deemed received for several reasons.

First, these mailing methods can cause significant delays in receipt during periods of inclement weather, holidays, and other unpredictable events. Further, documents sent through these mailing methods are at risk of getting lost, and there is no way to track whether such mail sent was even received.

Second, although we appreciate the Council's decision to calculate applicants' time to respond to these notices based on the date of receipt of such notices, the proposed method to calculate the deemed date of receipt runs the inevitable risk of reducing the amount of time applicants have to respond to such notices. As a result, applicants lose time to respond each day a notice is delayed. Notices that arrive outside of the timeframes outlined in this proposed regulation make it impossible, if not extremely difficult, for applicants to obtain critically important documents like: court records, character references, letters of support, and records of disabilities from their doctor or therapist. Further, these challenges are intensified for applicants living in poverty or experiencing homelessness, which is a stark reality for many justice-involved persons. Applicants living in poverty or who are homeless may lack the ability to check their mail daily and will likely lose the opportunity to procure the documents necessary to humanize themselves and let employers know that they are much more than their criminal record history.

Third, calculating the deemed date of receipt for notices based on business days brings the regulations in harmony with the text and purpose of the FCA. The FCA explicitly states that applicants have at least five business days to respond to notices preliminarily rescinding a job offer and gives applicants an additional five business days if they seek to challenge inaccurate records listed on their conviction history report. Thus, it is clear that business days, as opposed to calendar days, is the method by which the legislature sought to calculate time periods in the statute.

Fourth, there is recent precedent for the use of other calculation methods other than the mailbox rules. For example, AB 2243 (Reg. Sess. 2017-2018) amended the Civil Code to use court days instead of calendar days to calculate time for tenants to respond to eviction notices and lawsuits. To wit, the Legislature enacted AB 2243 to better protect tenants in the eviction process and prevent avoidable evictions. Similarly here, a deviation from the mailbox

rules is necessary to allow applicants to effectively participate in the hiring process on fair terms. For these reasons, we urge the Council to modify its proposed regulations to calculate the time by which a notice is deemed received by using business days.

Council response: The Council disagrees that the regulations should deviate from the “mail box rule” when determining receipt of notices required by the law. The “mail box rule” represents the legislature’s determination of when documents mailed by various formats are deemed to have been received. It broadly applies to many other forms of important notice documents and there is not a compelling basis to deviate from it here. The calendar days provided in the regulations for purposes of determining when notice is received is different than the response windows afforded applicants upon receipt. Those response windows are business days, as indicated in both the statute and these regulations.

General:

Comment: We strongly believe the proposed regulations will help reduce the employment barriers faced by justice-involved persons and promote their successful reentry into society.

Council response: The Council appreciates the feedback.

Comment: The proposed regulations must provide guidance on how applicants can protect and assert their rights under the FCA when answering unlawful inquiries about their criminal records during the application process. The most common question we are asked when we are providing information about the FCA and other "ban the box" laws, is how an applicant should respond when asked about his or her criminal record before being given a conditional job offer. Despite the passage of these laws, inquiries into a person's criminal records - in interviews, on job applications, or otherwise - remain rampant. For example, our clients frequently report that when completing online applications they cannot even complete such applications without first disclosing their convictions. Further, clients and our community partners share applications with us that still contain questions inquiring into applicants' criminal records.

Unfortunately, despite our extensive experience working on this issue, we do not have a good answer for applicants facing these issues. Applicants are literally stuck between a rock and a hard place. If applicants exercise their rights under the FCA and refuse to disclose their criminal records, they may be denied employment or not allowed to submit the job application itself. Alternatively, if applicants forego their rights and disclose their convictions, they lose both their rights under FCA and likely the job. Even responses that allow an applicant to state their willingness to submit to a background check give an employer the strong impression that the applicant has a criminal record and is being evasive about the issue.

While we counsel applicants about their right to file a complaint with the Department when they encounter such unlawful practices, many of the people we serve do not utilize this complaint process. This appears to be for several reasons. First, many applicants are not interested in pursuing litigation or punitive measures and instead simply want to work as soon

as possible, so they can support themselves and their families. Second, the complaint process does not adequately protect applicants in real time when they are being asked unlawful questions about their criminal records. Simply put, the relatively lengthy complaint process does not provide recourse for applicants who simply want to complete the application process and find a job as soon as possible. Third, filing a complaint does not necessarily mean an applicant will be offered the job in the long run.

In light of the problems described above, we urge the Council to revise its proposed regulations to clearly outline applicants' rights when asked unlawful questions regarding their criminal record history. Ideally, the proposed regulations should make clear that applicants have the right to answer "no" to unlawful questions about their criminal records. Such an interpretation of the FCA is necessary to ensure that employers cannot unlawfully elicit criminal record history information before an offer is given and then deny applicants based on this information for pretextual, non-discriminatory reasons. At minimum, the proposed regulations should provide guidance on how applicants can protect themselves in situations where disclosure is necessary to complete the pre-offer job application process and when asked unlawful questions about their criminal records. By doing so, the Council will ensure that applicants are adequately protected and prevent employers from circumventing the goals of the FCA by engaging in illegal inquiries.

Council response: The Council addressed this issue in 11017.1(a): "Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered." The regulations make clear that these types of pre-conditional offer inquiries are impermissible. Violations of the law and these regulations will need to be addressed through enforcement and education efforts.

PUBLIC HEARING COMMENTS MADE OCTOBER 25, 2019 [Government Code Section 11346.9(a)(3)].

Dale Brodsky commented on the text originally noticed to the public. She submitted written comments that included all of her oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE FEBRUARY 25, 2020 [Government Code Section 11346.9(a)(3)].

Jarrell Mitchell of Neighborhood Legal Services of Los Angeles County commented on the text noticed for the 15-day comment period. He submitted written comments that included all of his oral comments and additional comments, which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE MAY 21, 2020 [Government Code Section 11346.9(a)(3)].

No one commented about these regulations at this meeting. There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council voted 6-0 to submit this draft to the Office of Administrative Law as the final version of the regulations.