

CIVIL RIGHTS COUNCIL

MODIFICATIONS TO EMPLOYMENT REGULATIONS REGARDING CRIMINAL HISTORY

FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Civil Rights Department

Chapter 5. Civil Rights Council

Subchapter 2. Discrimination in Employment

Article 2. Particular Employment Practices

UPDATE TO INITIAL STATEMENT OF REASONS

Upon further discussion with the Office of Administrative Law, the Council removed the introductory paragraph and references to optional forms as non-substantive changes since the provisions are not regulatory.

Additionally, prior to the second 15-day public comment period, the Council struck “youth” and “childhood” from subsection (c)(1)(B)(i)(VII) and replaced it with new subsection (c)(1)(B)(i)(VIII) which states “The age of the applicant when the conduct occurred.” This was necessary because (c)(1)(B)(i)(VII) references instances of violence, duress, and other harm that may have contributed to the offense or conduct. The Council felt that including “age” in a separate subsection was necessary for clarity. The Council also added new subsection (c)(2)(D)(i)(V) which also includes “the age of the applicant when the conduct occurred.” This addition was necessary for consistency with subsection (c)(1)(B)(i)(VIII).

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 FEHA.

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. The Council anticipates that adoption of these regulations will benefit California businesses, workers, the State’s judiciary, and others 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 Section 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap state or federal statutes or regulations, which are 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 MADE DURING THE AUGUST 10, 2022 PUBLIC HEARING BEFORE THE CIVIL RIGHTS COUNCIL [GOVERNMENT CODE SECTION 11346.9(A)(3)].

Comments from Councilmembers

General comments:

Councilmember Comment: The Council should consider omitting the reference to Department materials and website addresses, which change much more frequently than the regulations.

Council Response: The Council declines to adopt this suggestion. The sample forms and notices from the Department provide useful guidance to the public. The references in the proposed regulations are general enough to apply even if the content or titles of the materials change. Also, although the proposed regulations generally mention the Department’s website, no address is included.

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Subsection 11017.1(a)(4)

Councilmember Comment: The last line of (a)(4) should read “(d) – (g)” instead of “(d) through (g).”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Subsection 11017.1(c)(2)(D)

Councilmember Comment: The language “should the applicant choose to respond” should be replaced with “if the applicant chooses to respond” because the “should” is a conditional verb that is a bit more confusing.

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Subsection 11017.1(b)

Councilmember Comment: A comma should be added before “such as” in the phrase “in any other subsequent employment decisions such as.”

Council Response: The Council declines to adopt this recommendation because it is not necessary to enhance the clarity of the regulation.

Subsection 11017.1(f)

Councilmember Comment: Instead of the language “including but not limited to gender, race, and national origin,” the language should reference all protected classes.

Council Response: The Council has not proposed any substantive changes to this language from the current version of the regulations and declines to adopt the suggested modification on that basis.

Subsection 11017.1(f)(4)(E)

Councilmember Comment: The language “to present evidence that the information is factually inaccurate” should be followed with the language “or there is evidence of rehabilitation or mitigating circumstances,” because that seems to be the other reason why an adverse action couldn’t or shouldn’t be taken. There should be a parallel with the mitigating circumstances provision in section 11017.1(c)(1)(D).

Council Response: The Council has not proposed any substantive changes to this language from the current version of the regulations and declines to adopt the suggested modification on that basis.

Subsection 11017.1(f)(5)

Councilmember Comment: Under the housing regulations, the burden to show that there are less discriminatory alternatives is on the respondent. The Council should consider the burden of proof in employment.

Council Response: The Council has not proposed any changes to this language from the current version of the regulations; it simply moved this language in its entirety from (i) to (f)(5). In any event, in the employment context, once an employer demonstrates that its decision was job-

related and consistent with business necessity, the burden to show less discriminatory alternatives shifts to the employee. Accordingly, the Council declines to propose further modifications in response to this comment.

Comments from the Public

Comment: Sandra Johnson, the Fair Chance Community Organizer with Legal Aid at Work (LAAW), highlighted several comments set forth in LAAW’s written comment letter.

Council Response: Summaries of and responses to these comments and others included in LAAW’s written comment letter are set forth below.

Comment: Molly Lao, Skadden Fellow with LAAW, highlighted several comments set forth in LAAW’s written comment letter.

Council Response: Summaries of and responses to these comments and others included in LAAW’s written comment letter are set forth below.

Comment: Noah Lebowitz, Chair of the California Employment Lawyer’s Association (CELA)’s Fair and Employment and Housing Council Regulations Committee, highlighted several comments set forth in CELA’s written comment letter.

Council Response: Summaries of and responses to these comments and others included in CELA’s written comment letter are set forth below.

Comment: Merve Hickok, the founder of aiethicist.org, highlighted several comments set forth in her written comment letter.

Council Response: Summaries of and responses to these comments and others included in Ms. Hickok’s written comment letter are set forth below.

Comment: Beth Avery, Senior Staff Attorney at National Employment Law Project (NELP), highlighted several comments set forth in NELP’s written comment letter.

Council Response: Summaries of and responses to these comments and others included in NELP’s written comment letter are set forth below.

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [GOVERNMENT CODE SECTION 11346.9(A)(3)] AND ADDITIONAL REVISIONS

General comments:

Comment: There needs to be a clear definition about “genetic information” What does this EXACTLY mean? What if a person has become genetically modified to be part robot and part human due to nano-technology or brain neuralinks? Shouldn't an employer know this about

someone who is hired? Please provide a clear definition about genetic information and if it entails machine meshing with biology due to the artificially contrived transhumanism era that may be thrust upon us through insidious deception. (Just as unlimited gender identities was thrust upon Calif citizens by DFEH in July 2017 without even a press release to notify the public that your department changed the construct of humanity.)

If employers are no longer allowed to do criminal background checks on people they hire, does this mean sex offenders will now become preschool teachers and have easy access to their prey?

I challenge the assumption that this will cost the state and tax payers no money. This will be very expensive. The safety of innocent victims does not carry a price tag. The irresponsible damage this brings on people, who are no longer being protected by just laws, will endanger lives and society.

Council Response: This comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: We appreciate the efforts put forth by the Council to improve and enhance the existing regulations under the Fair Employment and Housing Act (FEHA). We have engaged with the Council and its predecessor Commission multiple times over the past 10 years as active stakeholders and with our shared goal of crafting regulations with a clear eye towards enhancing voluntary compliance and reducing litigation. As a general matter, the Proposed Modifications to Employment Regulations Regarding Criminal History take great strides to reach that goal.

Council Response: The Council appreciates this comment.

Comment: [The regulation should] [r]educe employer ability to unfairly manipulate employees by threatening adverse employment action based on conviction or arrest history.

Anecdotal evidence indicates that people with records are treated by employers as a disposable subclass of workers that should be grateful for any job opportunity and willing to accept lower wages and worse working conditions. One way that workers with records can be forced to accept worse job quality and treatment by the employer is through express or implied threat by the employer of termination (or other adverse action) based on the individual's record. The regulations should close the ability of employers to hold a worker's conviction record over their head by further clarifying when and how employers may take adverse action based on arrest or conviction history.

While the regulations should not incentivize employers to conduct background checks that they otherwise would not, they may make clear that employers have a limited window to take adverse action based on a conviction record after learning about it. For example, if at the time of hire (or promotion or transfer, etc.), the employer learned of the job applicant's criminal record and did not then take adverse action (following the required individualized assessment procedures outlined in the regulations), the employer may not later initiate adverse employment action

against the worker based on his or her record (even if the employer then conducts an individualized assessment and demonstrates that the record is job related).

Closing this loophole would prevent employers from holding a worker's criminal record over his or her head. It would also prevent an employer from reluctantly hiring a person despite his or her record at times of low unemployment and then later terminating the employees with records for reasons unrelated to job performance when the labor market is not as tight. Employers would certainly retain the ability to later take adverse employment action based on legitimate reasons of job performance, but not based on the record information that was previously known.

The Council could implement this suggestion by inserting a new subsection that reads as follows:

An employer is prohibited from terminating or taking other adverse action based on an employee's arrest or conviction history if that criminal history was known either at time of hire (or promotion or transfer) or for at least [#] days before the adverse action was initiated. An employer is also prohibited from threatening an employee with any adverse employment action based on his or her arrest or conviction record.

Council Response: The Council declines to adopt the suggested language, which is duplicative in part of the prohibitions and protections already set forth in the proposed regulations. Also, the Council has proposed an introduction clarifying that an employer or other covered entity may not consider certain criminal records or information "in hiring, promotion, training, discipline, layoff, termination, and other employment decisions" unless an exception applies. In addition, and in response to later comments, the Council has also proposed amending the definition of "applicant" to include "an existing employee who is subjected to a review and consideration of criminal history because of a change in . . . practice."

Comment: [Several commenters] strongly support revisions to Title 2, Section 11017.1 of the Code of Regulations proposed by a coalition of reentry advocacy organizations. The proposed revisions come from the collective experience of their clients and the community of the formerly-incarcerated or convicted people regarding issues that can be, but are not, addressed in the current version of the regulation enacting the Fair Chance Act or the proposed modifications referenced in the Council's notice dated June 17, 2022. We believe that the revisions proposed by the coalition are not only consistent with the mandate of the Fair Chance Act but necessary for its effective implementation and enforcement.

The Fair Chance Act ("Act") was enacted in 2017 to "reduce the negative stigma of a conviction and increase a person's likelihood of being viewed as more than just his or her record [so they can be] ultimately hired." (2017 AB 1008, Assembly Floor Analysis, at p. 2.) To that end, the Act "tailor[s] hiring practices to reduce such stigma and offer workers with records a fair shot at employment." (*Ibid.*) Our experience over the past 5 years shows that the Act has had negligible impact on employer bias because employers find the individualized assessment standard difficult to implement a meaningful way.

The modifications referenced in the Council’s notice dated June 17, 2022, do not provide sufficient specificity for employers how to comply with substantive provisions of the Act. For example, the proposed modifications regarding requirements for an employer who intends to deny an applicant previously given a conditional offer of employment clarify what evidence of rehabilitation may be submitted but *not* how such evidence is to be evaluated. The revisions proposed by the coalition explicitly state that another round of individualized assessment is required. In addition, the provision of a form “individualized assessment” online is of limited or even questionable value without a corresponding explanation of how to conduct an individualized assessment consistent with the language and purpose of the Act. [A] coalition [of commenters] makes a number of proposals to make the forms prepared by the Council a more effective tool to enforce compliance with the Act.

Council Response: The Council addresses each of the coalition’s suggestions to each subsection below.

Comment: The Council’s and the Coalition’s common goal is to remediate the obstacles to employment that the formerly incarcerated population face. My clients who are seeking employment inform me that certain employers request expungement information about their convictions, regardless of the age of the conviction or the level of offense. I have learned that employers or their human services personnel are not lawyers and do not understand the conviction and/or post-conviction relief information—this is one of the issues that the Coalition’s proposed regulations addresses.

Council Response: The Council appreciates this comment. No further response is required by the Council because this comment is not asking for a particular change in the proposed regulations but rather is making a general statement.

Comment: Importantly, the Council’s proposed amended regulations include the following changes, which [we] urge[] the Council to retain in the final regulations:

- Inserts a succinct introductory paragraph to summarize the regulations and improve understanding of their overall effect.
- Reorganizes the information to better align with the chronological order of the hiring process, which seems more intuitive.
- Inserts short subheadings to help readers navigate the regulations.
- References to sample forms on the Department of Fair Employment and Housing (DFEH) website, including the sample individual assessment and reassessment forms.
- Inserts text making clear that employers violate the FEHA when they include certain statements on job advertisements or application forms that undermine the individualized assessment (such as “no felons” or “must have clean record”).

Council Response: The Council appreciates this comment.

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Introduction

Comment: [A coalition of commenters recommended adding the following language to the end of the Introduction:] The legislative intent of the Fair Chance Act is to eliminate barriers to employment for people with conviction histories. The Legislature cited studies showing people with conviction records have lower rates of turnover and higher rates of promotion on the job than other employees. Moreover, criminal justice histories are more common than is generally understood: the Legislature found that nearly one in three adults in California has an arrest or conviction record that could impede employment. The Legislature found that eliminating barriers to work for people with conviction histories will promote public safety (employment reduces recidivism), economic growth (people with conviction histories are under- and unemployed), and help ameliorate the adverse impacts of the criminal justice system on men and communities of color. And employment itself helps prevent recidivism, so employing someone with a conviction history reduces the risk that the person will pose a threat to the business.

Fair Chance Act legal standards are influenced by, but not identical to, the legal standards that govern disparate impact analysis under employment discrimination law. There are significant differences. First, under the Fair Chance Act, an applicant or employee is not required to demonstrate that a challenged employment policy (i.e., denying work or promotions based on conviction history) has a disparate impact on a protected group. Second, the Legislature adopted a Fair Chance Act legal standard – “directly and adversely related to the specific duties of a job.” This distinction is significant because the standard is not directly derived from disparate impact case law, which is more demanding in its plain language than the “job-related and consistent with business necessity” standard used in disparate impact cases. Despite these differences, the factors listed in this regulation as relevant to the “directly and adversely related to the specific duties of a job” standard may also be applicable to a “job-related and consistent with business necessity” analysis in disparate impact cases.

Except as expressly required by statute, employers have no obligation to check the criminal history of a job applicant or current employee, and an employer who chooses to do so incurs certain risks and burdens. The risks are that the employer will violate the above mentioned prohibitions and suffer the consequences. The burdens include the obligation to determine that the applicant’s history (i.e., conviction and post-conviction history considered in the appropriate factual and temporal context) has a direct and adverse relationship to the job's specific duties prior to withdrawing a conditional job offer. The employer must present (1) specific information about the applicant’s history as specified in these regulations and (2) general statistical or other information that establishes a direct and adverse relationship between the type of history the applicant has and substantial workplace risks that relate to the specific duties of the job. An employer cannot rely on speculation or “common sense” ideas about the risks that certain types of histories pose in the workplace.

Council Response: The Council agrees with this comment in part. Accordingly, it proposes the following modifications:

- Adding the following language to the introduction: “With limited exceptions, employers and other covered entities (‘employers’ for purposes of this section) have no legal obligation to check the criminal history of an applicant or current employee, and, if they choose to do so, they must abide by the legal limitations described in this section.”
- Replacing “particular position” with “specific duties.”

However, the Council has determined that reciting legislative findings or intent in the Introduction would not add clarity to the regulations, which are intended to provide straightforward and practical guidance for complying with the Fair Chance Act. Accordingly, it declines to adopt the suggested language reciting such findings or intent.

Comment: [Our organization] supports the addition of an introductory paragraph to summarize the important aspects of the regulations related to employer consideration of criminal history information but suggests making clear two additional key points in that introduction.

First, it may be helpful to employers and individuals with records alike to clarify the baseline and overall effect of the Fair Employment and Housing Act (FEHA) on employer consideration of criminal record information. Whereas many employers respond to fear, stigma, and racism by conducting unnecessary employee criminal background checks, the FEHA and regulations provide a check on that impulse by imposing some guardrails for how and when such background checks may be conducted. This baseline understanding can be succinctly explained in the first sentence of the introduction.

Second, employers and attorneys more familiar with disparate impact liability under FEHA may benefit from the regulations highlighting that, pursuant to the Fair Chance Act, workers need not demonstrate disparate impact on a protected group and employers face a more specific legal standard (“directly and adversely related to the specific duties of [the] job” as opposed to “job-related and consistent with business necessity”) when attempting to defend decisions to rescind a conditional offer based on criminal history.

These two suggestions could be implemented by changing the text of the introduction such that it reads as follows

“Introduction. **With limited exceptions, employers have no legal obligation to check the criminal history of a job applicant or current employee, and, if they choose to do so, they must abide by the legal limitations described in this section.** Employers and other covered entities (“employers” for purposes of this section) are explicitly prohibited under the Act and other state laws from inquiring into or considering certain enumerated criminal records and information in hiring, promotion, training, discipline, layoff, termination, and other employment decisions as outlined below. Unless an exception applies, the Act also prohibits employers from rescinding a conditional offer of employment because of an applicant’s conviction history unless and until, following an individualized assessment, the employer can demonstrate that the conviction has a direct and adverse relationship with the particular position for which the employer is hiring. **In such cases, job applicants are not required to demonstrate disparate impact on a protected group, and the “direct and adverse relationship” standard requires**

employers to more specifically justify decisions to rescind a conditional offer based on criminal history. Further, employers are prohibited under the Act from using any conviction history in employment decisions if doing so would constitute disparate treatment of, or have an unjustified adverse impact on, individuals on a basis protected by the Act.”

Council Response: The Council agrees with this comment in part and accordingly proposes to add the following sentence at the beginning of the introduction: “With limited exceptions, employers and other covered entities (‘employers’) for purposes of this section) have no legal obligation to check the criminal history of an applicant or current employee, and, if they choose to do so, they must abide by the legal limitations described in this section.”

The Council declines to go into further detail in the introduction regarding what is required to establish “disparate impact” and what constitutes a “direct and adverse relationship.” Adding such detail to the introduction would not enhance clarity to what is meant to be a brief overview of the regulations. However, the Council proposes to add language to subsection (c)(1) clarifying that an “individual assessment” is a “reasoned, evidenced-based determination.”

Comment: We propose that the Council consider adopting language making clear that (1) claims under the Act are subject to the same procedures for enforcement as the rest of the FEHA and (2) that all relief available under the rest of the FEHA is available under the Act. Despite its separate name, the Act was enacted as part of the California FEHA. Therefore, we believe that the regulations implementing the Act should cross-reference to the FEHA’s relevant sections. It should be clear that applicants and employees have a private right of action and can request a right-to-sue letter immediately. For example, the Council could adopt the following clarifying language in the regulations: “Fair Chance Act claims are subject to the procedures for unlawful employment practices set forth in Government Code § 12965. An individual may file a Fair Chance Act claim for investigation under 2 CCR § 10026, or request an immediate right-to-sue letter under 2 CCR § 10005.” We also propose that the Council consider adopting clarifying language that “all relief generally available under the FEHA is available for claims brought pursuant to the Fair Chance Act.”

Council Response: The Council agrees with this comment in part. The procedures for filing a complaint with the Department alleging a violation of the Fair Chance Act are the same as are the procedures for filing any other complaint of an employment-related FEHA violation. Accordingly, the Council proposes to add the following language to the introduction (rewording slightly to enhance clarity by avoiding multiple cross-references): “Claims under the Fair Chance Act, codified at Government Code section 12952, are subject to the procedures set forth in Article 1 of Chapter 7 of the Act, including Government Code section 12965, and the Department’s procedural regulations. An individual may file a complaint for investigation by the Department or may obtain an immediate right-to-sue notice.”

However, the Council believes that adding language that “all relief generally available under the FEHA is available for claims brought pursuant to the Fair Chance Act” would not add clarity to these regulations, in part because there are remedies in the FEHA only available for certain

violations (e.g., monetary penalties for failing to file a pay data report in compliance with Government Code section 12999). Accordingly, the Council declines to adopt such language.

Subsection 11017.1(a)

Comment: Article 2(a) of the modifications to the Code suggests that “employers are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant.” Further, Subsection 1 of the same Article states “Prohibited consideration under this subsection includes, but is not limited to, inquiring about criminal history through an employment application, background check, or internet searches.” There are 4 main concerns with this current wording:

- The wording, in its current form, prohibits employers to conduct web searches on “criminal history” specifically. However, it is widely known and evidenced that an employer does not need to specifically search for criminal history for this information to show in the search results. Employers can only search for the candidate’s name and access this information, and other protected category information (such as disability, sexual preferences, etc.) without admitting that they have ‘specifically’ inquired for these categories.
- Furthermore, online searches can be racially biased against black-sounding names. Academic research has shown that “ads suggesting arrest tend to appear with names associated with blacks, and neutral ads or no ads appear with names associated with whites, regardless of whether the company placing the ad reveals an arrest record associated with the name.”
- Similarly, the current wording prohibits “employers” to conduct an inquiry. Instead of a direct inquiry, employers widely utilize a variety of social media background check vendors to access similar information. This loophole for employers allows the vendors to parse all public information on the web (including criminal history) and provide a decision / rating / score / report to employers without disclosing the source of information.
- In either of the cases above, the applicants would have no way to know or evidence that a decision was made according to their criminal history and/or other protected category information disclosed in the process. Therefore, applicants could not have a way to redress or request correction. I sincerely hope that the Council takes these concerns into consideration and closes the loopholes in an effort to protect the civil rights of candidates.

Council Response: The Council presumes that the commenter is referring to subsections (a) and (a)(1) of the proposed regulations, as the cited language is set forth in those sections. This comment is not asking for a change in the proposed regulations but only providing information to the Council about some employers’ practices of searching for information relating to employees or applicants. Accordingly, no further response is required per Government Code section 11346.9(a)(3).

Comment: Job applicants with records are typically forced into a difficult situation when they are asked about their criminal record before they have received a conditional offer of

employment. First, it is often unclear to the applicant whether the employer is properly inquiring subject to an exception to the Fair Chance Act or if the employer is improperly asking about conviction history in violation of the law. [The regulations should] [r]equire employers to expressly assert that they are inquiring about conviction history pursuant to an exception in the Fair Chance Act and cite the underlying legal authority for that exception.

When an employer inquires about conviction history before a conditional offer, job applicants typically do not know whether they are being asked in violation of, or pursuant to a legitimate exception to, the Fair Chance Act. The Fair Chance Act includes an exception allowing employers to inquire about conviction history with respect to positions for which the employer is “required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history.” Individual job applicants cannot be expected to know whether a specific position to which they apply fits into that confusing exception.

Unlike job applicants, however, employers must ensure the legal basis for any exception to the Fair Chance Act allowing them to inquire about a job applicant’s criminal history before a conditional job offer. It is an employer’s burden to ensure that they are not violating the Fair Chance Act.

Nonsensically, the burden currently falls entirely on the job applicant to know whether an employer is, in fact, exempted from the Fair Chance Act. If they are unsure, they risk unnecessarily revealing their record early in the hiring process (thus forfeiting the intended benefit for the Fair Chance Act) or likely losing the job opportunity when they refuse to answer the question or argue with the interviewer about their rights under the Fair Chance Act.

Because of the lopsided information available to job applicants and employers, employers that believe they fall under an exception to the Fair Chance Act should be required to expressly inform the job applicant that the position/employer falls within an exception and cite the legal authority for that exception at the time they pose the criminal history inquiry. This additional information will help ensure job applicants with records that they are being asked pursuant to a legitimate legal exception and not in violation of their rights. Employers who perceive providing this simple information as too burdensome can avoid its requirements by simply delaying criminal-history-related inquiries until after extending a conditional job offer.

Council Response: The Council declines to adopt the suggested modification. The Council is not aware of sufficient legal authority for requiring an employer that believes it falls under an exception to the Fair Chance Act to expressly and affirmatively inform an applicant of and cite the legal basis for an exception when an employer makes an inquiry about an applicant’s criminal history.

Comment: Some employers take a variety of actions to avoid complying with the Fair Chance Act. Employers look for ways to uncover a record before a conditional offer as well as ways to rescind the conditional job offer after conducting the criminal background check purportedly

based on other reasons not related to the applicant's criminal history (even if the worker's criminal history is the real reason for rescinding the job offer).

While it is certainly difficult to prevent employers from taking these actions or to prove unlawful intent, clarifying through the regulations that these are not lawful loopholes is a first step toward enforcing against such behavior.

[The regulation should] [c]larify that employers may not seek criminal record information by requesting a job applicant's driving record unless the mandatory duties of the job include driving. Some individuals with records report their belief that employers request driving records as a workaround to avoid hiring individuals with records and complying with the Fair Chance Act. Workers with records report increasingly seeing job advertisements that require a driver's license and a good driving record when the job does not involve driving. This dissuades those individuals from applying for jobs, and they also perceive that it may cause them to lose job opportunities for which they do apply.

Driving records can indicate to an employer that a job applicant has a conviction or arrest history. For example, the driver's license of an individual with a criminal record may have been suspended because of warrants or other criminal violations.

The regulations should attempt to close this loophole by clarifying that a job advertisement may not require a driver's license or good driving record and the employer may not check a job applicant's driving history unless the mandatory duties of the specific job include driving. The regulations could also prohibit requesting a job applicant's driving history until after extending the individual a conditional job offer.

Council Response: The Council declines to adopt the suggested modification. The Council is not aware of sufficient legal authority for categorically prohibiting employers from requiring and/or checking an applicant's driving history or drivers' license unless the mandatory duties of the specific job include driving, or prohibiting employers from requesting an applicant's driving history until after a conditional offer is made. The Council notes that the regulations do not foreclose applicants from contending that any particular employment practice may have an adverse impact on applicants on a basis or bases protected by the Act.

Subsection 11017.1(a)(3)

Comment: [The regulation should] clarify who bears the burden of producing evidence necessary for individualized assessment and to identify prohibited and/or rebuttable presumptions.

The Act establishes that it is the employer's duty to justify an adverse employment decision made solely or in part on the basis of an applicant's criminal history. The employer must not transfer to the applicant the cost of complying with its duty under the Act by, for example, penalizing the applicant for failing to disclose information that the employer is not authorized to receive, such as obsolete information prohibited from inclusion in a commercial background

check report under Section 1786.18 of the Civil Code and information protected by the right to privacy. The Investigative Consumer Reporting Agencies Act, specifically, establishes restrictions on what information consumer reporting agencies can report.

Council Response: The Council declines to propose additional changes in response to this comment. The regulations clarify that an applicant is not required to produce evidence but may do so if they choose to. The regulation also identifies rebuttable presumptions where applicable.

In addition, the Council believes that the regulations are clear that an employer cannot penalize an applicant or employee for failing to disclose conviction history prior to receiving a conditional offer, unless subsection (a)(4) applies.

Comment: The Act forbids job postings with statements indicating that the employer will not consider anyone with a criminal history, employers still blatantly violate the Act—as demonstrated by the CRD’s independent enforcement efforts. It is thus no surprise that employers continue to ask questions about conviction history on the application itself or during interviews. To stop applicants from later being penalized for an employer’s violation of the law, and effectuate the Act’s purpose, we propose adding language that will insulate applicants who omit or disclose their criminal history during the application process.

To that end, [a coalition of commenters] propose[s the following modifications]:

- Adding “or disclosure of” after “failure to disclose” in subsection (a)(3)
- Adding subsection (a)(3)(A) to read: “Employers may not revoke a job offer based on an applicant’s non-disclosures or denials of convictions that the employer later discovers through a background check or other means that reveal convictions or other criminal history information that are not lawfully reported.”

Council Response: The Council declines to adopt the suggested language. Regarding the recommended addition of “or disclosure,” the Council agrees that an employer should not consider, prior to making a conditional offer, a pre-offer disclosure. To that end, the Council proposes adding the following language as new subsection (a)(6) (to which the Council subsequently proposed further clarifying language for the second 15-day comment period):

(6) If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer must not consider either:

(A) Any information the employer is prohibited from considering under subsection (b); or

(B) Any other conviction history information until after deciding whether or not to make a conditional offer of employment, unless subsection (a)(4) applies.

However, the current proposed language in (a)(3) is meant to protect applicants who do not disclose their conviction pre-offer in response to an unlawful inquiry; an employer cannot later fault them for dishonesty based on this failure to disclose. This subsection is not intended to

categorically prohibit post-offer consideration of any underlying conviction history that is disclosed pre-offer, as long as it is considered pursuant to the timing and processes prescribed by this regulation.

Regarding the second recommended addition, the Council believes that the regulations are clear that an employer cannot penalize an applicant or employee for failing to disclose conviction history prior to receiving a conditional offer, unless subsection (a)(4) applies.

Comment: [The regulations should] [p]rohibit employers from citing applicant dishonesty as a reason for not hiring him or her if the applicant denied having a record in response to a criminal history inquiry that was improperly posed before a conditional offer.

[E]ven if it is clear to the applicant that the employer is improperly asking about criminal history before a conditional offer in violation of the Fair Chance Act, the applicant remains in a difficult situation without a clear path to both enforce their rights and get the desired job. These situations can be improved by clarifying the employer's responsibility to both properly invoke exceptions to the Fair Chance Act and react to denials of a record and the applicant's options for responding to improper inquiries.

When an employer improperly asks a job applicant about his or her conviction history before a conditional offer, the job applicant left between a rock and a hard place. Currently, the job applicant lacks any meaningful option to both protect his or her rights under the Fair Chance Act and retain a fair chance to compete for the job opportunity.

The applicant's first option is to assert his or her rights under the Fair Chance Act and refuse to answer the question. However, the employer could easily hold that refusal to answer against the applicant, assume that the candidate has a significant criminal record, and eliminate the applicant from the applicant pool without citing criminal history as the reason.

The applicant's only other option is to deny having a criminal record. However, if the applicant's record is later discovered via a background check, many employers will cite applicant dishonesty as a reason to refuse to hire the individual. This loophole allows employers to circumvent the Fair Chance Act, and the regulations should clarify that such behavior is impermissible.

Specifically, the regulations should make clear both that a job applicant is permitted to deny having a record in response to improper employer inquiries and that an employer may not later point to this denial as an indication of applicant dishonesty and a reason to reject the candidate. This limitation should not be limited to situations in which the employer violated the Fair Chance Act by asking about conviction history before a conditional offer. As discussed above, when employers do not expressly invoke an exception to the Fair Chance Act and cite the relevant legal authority for that exception, job applicants should similarly be permitted to deny having a record. Furthermore, when employers inquire about arrests or other record information that they are not permitted to consider, the job applicant should also be permitted to deny having those types of records and not later be penalized for dishonesty

Council Response: The suggestions raised in this comment are addressed above.

Comment: [The regulations should] clarify limitations on how an employer may respond when criminal history information is disclosed by the applicant before a conditional job offer of employment.

The California Fair Chance Act does not include an exception for employers to consider criminal record information received before a conditional offer of employment even if that information was voluntarily disclosed by the job applicant. In fact, the Fair Chance Act clearly prohibits not just employer inquiries about criminal history but any consideration of criminal history information by the employer before a conditional offer. The reasons for that approach are obvious. Following a job interview, it can be very difficult for a factfinder to determine whether the job applicant disclosed record-related information in a truly voluntary manner or in response to an employer inquiry that violated the Fair Chance Act. Because of the stigma associated with a criminal record, employer assertions are often incorrectly credited over contrary assertions by the job applicant. Moreover, if a job applicant was not aware of their rights under the Fair Chance Act when they disclosed their record, that disclosure does not seem truly voluntary.

Because of these many layers of uncertainty, the regulations should clarify how an employer may and may not respond when criminal history information is revealed before a conditional job offer. For example, the interviewer may not abruptly end the interview and reject the applicant. The regulations should make clear that the employer may not consider the criminal record information until after a conditional offer and as part of an individualized assessment. Moreover, employers should be prohibited from asking probing follow-up questions about the applicant's past offense or conviction history. Instead, interviewers should be required to remind the applicant that, pursuant to the Fair Chance Act, they are not required to disclose information about their criminal history and that hiring staff will not consider the past record until after extending a conditional offer.

Because of the importance of this issue, some local regulations already address this type of situation. For example, New York City provides that an employer "should continue its hiring process and must not examine the applicant's conviction history information until after deciding whether or not to make a conditional offer of employment. If the applicant raises their criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant's criminal history further." (Citation omitted.) Somewhat similarly, Portland, Oregon provides that an employer "must disregard that information and must take reasonable steps to prevent further disclosure or dissemination of the [a]pplicant's [c]riminal [h]istory." (Citation omitted).

Council Response: The Council agrees with this comment. Accordingly, it proposes the addition of subsection (a)(6), which would include the following language (and to which the Council later proposed further modifications, explained below):

(6) If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer must not consider either:

(A) Any information the employer is prohibited from considering under subsection (b); or

(B) Any other conviction history information until after deciding whether or not to make a conditional offer of employment, unless subsection (a)(4) applies.

Subsection 11017.1(a)(4)

Comment: [A coalition of commenters recommends that subsection (a)(4)(A) should be revised in the following way:]

If the position is one for which ~~an employer-state or local agency~~ is otherwise required by law to conduct a conviction history background check where the employer is a state or local agency;

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: We urge the Council to consider adopting clarifying language in § 11017.1(a)(4). To avoid confusion with these regulations and other labor code and occupational licensing laws, we would propose the Council insert additional language explaining the scope of the exemption. For example, the following language could be added after the first sentence in § 11017.1(a)(4): “To be exempted, the employer or the employer’s agent itself must be required by law to conduct the criminal background check. A state, federal, or local law requiring that another entity, like an occupational licensing board, to conduct a criminal background check will not exempt an employer.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: We urge the Council to clarify that laws that “restrict employment based on criminal history” are “those that prohibit an individual with that particular conviction from holding the position sought by the applicant or where the employer is prohibited by law from hiring an applicant who has that particular conviction.” This clarification is supported by the intent of the Act, which is to “give applicants with a criminal record the opportunity to be judged on their qualifications not their criminal histories.” Furthermore, defining laws that restrict employment based on criminal history narrowly as prohibited by law would also “increase[] access to employment for people with conviction histories” as the law’s author intended. (Citation omitted.)

Council Response: This comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code Section 11346.9(a)(3).

Subsection 11017.1(b)

Comment: We propose that the Council consider adopting language in the proposed § 11017.1(b) to clarify that parole revocations are a type of criminal history information that employers shall be prohibited from considering as an arrest not followed by conviction. See Gov. Code § 12952(a)(3)(A). Parole revocations are not criminal in nature. According to one study, over one-third (35%) of all the recorded parole violations were for noncriminal, or “technical,” violations of the parole process, such as missing a supervisory appointment. Parole revocations are also not subject to the beyond a reasonable doubt standard, and are devoid of other critical protections that attach in a criminal process. Allowing employers to revoke jobs on the basis of technical parole revocations would be contrary to the purposes of the Act of not allowing arrests or detentions that are not followed by a criminal conviction to be considered by employers. Therefore, under § 11017.1(b)(1), we propose adding “including any revocation of parole, probation, or supervised release, or other proceeding or violation that does not require a determination of guilt beyond a reasonable doubt” after “An arrest or detention that did not result in conviction.”

Council Response: The Council declines to adopt the suggested language. The Council believes that the existing regulations, with the Council’s proposed modifications, sufficiently implement the statute.

Comment: [A coalition of commenters recommend that the following language should be added in a new subsection preceding (b)(6):] “Any revocation of parole, probation, or supervised release, or other proceeding or violation that does not require a determination of guilt beyond a reasonable doubt.”

Council Response: For the reasons set forth in the response to the preceding comment, the Council declines to adopt the suggested language.

Comment: The Act establishes that it is the employer’s duty to justify an adverse employment decision made solely or in part on the basis of an applicant’s criminal history. The employer must not transfer to the applicant the cost of complying with its duty under the Act by, for example, penalizing the applicant for failing to disclose information that the employer is not authorized to receive, such as obsolete information prohibited from inclusion in a commercial background check report under Section 1786.18 of the Civil Code and information protected by the right to privacy. (The Investigative Consumer Reporting Agencies Act, specifically, establishes restrictions on what information consumer reporting agencies can report.)

[A coalition of commenters recommends adding the following language to the end of what is currently 11017.1(b)(6): “Employers shall not make an adverse employment decision based on non-disclosures or denials of convictions that the employer learns about through a background check revealing convictions that are unlawfully reported.”

Council Response: The Council declines to adopt the suggested language. The statute and existing regulations set forth what type of criminal history an employer may and may not consider and the timing of such consideration.

Further, the Council believes that the regulations are clear that an employer cannot penalize an applicant or employee for failing to disclose criminal history prior to receiving a conditional offer, unless subsection (a)(4) applies.

Subsection 11017.1(c)

Comment: The Council should consider adopting language in the regulation’s introduction and § 11017.1(c)(1) or § 11017.1(c)(3) about the positive relationship that has been found between hiring persons with arrests and convictions records and the success of a business. For example, “employers are expected to know that various studies have documented the positive benefits of hiring persons with arrests and convictions records, such as increased retention and employee morale and subsequent decreased hiring costs. These positive benefits are countervailing considerations in the direct and adverse relationship test.” Many employers are unaware of the voluminous literature showing how hiring persons with arrest and convictions records can help a companies’ bottom line, including through increased retention.

Council Response: The Council declines to adopt the suggested language. The Council’s goal in the proposed revisions to subsection (c) is to provide guidance regarding how to implement the Fair Chance Act. Language referencing studies or their findings may be appropriate in legislative findings but would not provide additional clarity in the context of these regulations.

Comment: The regulations should clarify that employers may not rescind a conditional job offer by making a bad faith assertion that they have decided not to hire for the position or go in a different direction.

Workers with records report their conditional job offers being rescinded for a variety of reasons theoretically unrelated to their criminal records, but likely as a way to avoid conducting an individualized assessment and justifying the adverse employment decision in a FEHA-compliant way.

Academic researchers report learning in interviews with people with records that the job applicants have been given explanations such as “We decided to go a different direction,” or “We’ve decided not to hire for this position.” Nevertheless, the job applicants perceived that they were not hired because of their criminal records.

Although difficult to enforce, the regulations should nevertheless specify that employers are prohibited from declining to hire job applicants because of their criminal record and providing bad faith reasons for the adverse employment decision. The regulations could go further by specifying that the employer posting an advertisement for a similar job position within a relatively short time after rescinding the job offer can be used as evidence of bad faith.

Council Response: The Council declines to adopt the suggested modification. It believes that the existing regulations, with the Council’s proposed modifications, sufficiently implement the statute. In addition, as the commenter acknowledges, prohibiting employers from providing “bad faith” reasons would likely be difficult to enforce.

Comment: The regulations should expressly set forth a presumption that procedural requirements were not satisfied by the employer if written documentation was not maintained.

Pursuant to a recently passed law (SB 807 (2021)), California Government Code Section 12946 now requires employers to retain personnel records for applicants and employees for at least four years from the date the records were created or the date the employment action was taken. The regulations should expressly incorporate this requirement and make clear that it applies to records related to conditional offers, background checks, related notices, and the individualized assessments required by the Fair Chance Act.

While the Fair Chance Act does not require an employer to commit an individualized assessment to writing, an employer is required to maintain any written record of the individualized assessment that is created. The employer must also retain copies of written communication of a conditional offer, background check reports, preliminary and final notices provided to the applicant, any response from the job applicant to a preliminary notice, etc.

The regulations should make plain that an employer's inability to produce (e.g., to the DFEH or in discovery) copies of documents related to the individualized assessment creates a presumption that the procedural requirements were not followed and the required notices were not provided. Again, although the employer is not required by the Fair Chance Act to commit an individualized assessment to writing, the Council may nevertheless create a rebuttable presumption that the individualized assessment was not conducted if it was not committed to writing.

Council Response: The Council declines to adopt the suggested language. The Fair Chance Act sets forth which determinations must be in writing, and the Council declines to establish a rebuttable presumption not in the statute. While the Council declines to adopt language adding this rebuttable presumption, it acknowledges that lack of a writing may be probative of an employer's failure to conduct the individualized assessment in the absence of other evidence to the contrary.

Comment: The proposed modifications clarify what evidence of rehabilitation may be submitted during the individualized assessment, but not how such evidence is to be evaluated by an employer. Therefore, we urge the Council to adopt language clarifying the direct and adverse relationship standard. At a minimum, the direct and adverse relationship test is as demanding as the business necessity test. Therefore, the Council could adopt language in these regulations making plain that to justify the revocation of a job offer, an employer "must prove that there exists an overriding legitimate business purpose such that the [revocation] is necessary to the safe and efficient operation of the business" and that the challenged revocation "effectively fulfills the business purpose it is supposed to serve"—requiring employers to carry their burden to provide evidence of the adverse relationship between the job and the conviction at issue.

Council Response: The Council declines to adopt the suggested language. It believes that the existing regulations, with the Council's proposed modifications, sufficiently implement the statute. Subsection (c)(1)(A), with proposed modifications by the Council, provides that "[t]he

standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subsection (f)(4),” which provides greater detail on “Establishing Job-Related and Consistent with Business Necessity.”

Comment: The Council could further expound on the direct and adverse test by stating that employers may not rely on “tenuous or insubstantial bas[e]s” for their revocation. (*See Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1296 (8th Cir. 1975).) Unfortunately, our experience has been that employers rely on generalized concerns about “safety” to justify the revocation of job offers, in contravention to the Act’s stated policy objectives. The policy goals behind the Act, however, require more. As the Eighth Circuit observed in a seminal conviction records case under Title VII, the business necessity test “connotes an irresistible demand.” The Council could adopt this language to delineate the minimum requirements of the direct and adverse test. We also urge the Council to adopt language specifically that: “The fact that the applicant has completed a sentence for the conviction and is free from custody raises a rebuttable presumption that the applicant does not pose a substantial risk to public safety in ordinary circumstances.” This clarification would ensure that employers understand that the direct and adverse test requires more than a loose, articulable nexus between the conviction and the job duties—one that is at least as strong as the business necessity test, but likely even stronger.

Council Response: The Council agrees with this comment in part, to the extent it states that the decision to revoke an offer should not be made on a “tenuous or insubstantial” basis. Accordingly, it proposes to add language in subsection (c)(1) clarifying that an “individualized assessment” is “a reasoned, evidence-based determination.”

The Council declines to adopt the other suggested modifications. The Council declines to create additional requirements regarding showings of proof or a rebuttable presumption not found in the Fair Chance Act.

Comment: We urge the Council to clarify that there is presumptively not a direct and adverse relationship where a licensing entity has determined that the individual may perform the job. The Council could adopt language in §11017.(c)(1) that states: “Receipt of a benefit, privilege or right required for the performance of a job by a licensing, regulatory, or government agency or board, establishes a rebuttable presumption that the applicant’s conviction history is not directly and adversely related to the specific duties of the job. Examples of a benefit, privilege, or right include a license, certificate, authorization, or any other similar credential or criminal record exemption.” Such an addition would clarify the “direct and adverse” test standard, as well as serve to reconcile the various occupational licensing laws with the criminal history regulations.

Council Response: The Council agrees in part with this comment. The Council believes that a licensing entity’s determination that an applicant may perform the job is probative that the applicant’s conviction history might not be directly and adversely related to the specific duties of that job. However, it declines to create a rebuttable presumption not found in the statute. Accordingly, it proposes to add new subsection (c)(1)(A)(i): “An applicant’s possession of a benefit, privilege, or right required for the performance of a job by a licensing, regulatory, or

government agency or board is probative of the applicant’s conviction history not being directly and adversely related to the specific duties of that job.”

Comment: The Act does not explicitly define what constitutes a proper individualized assessment, referencing only the nature and gravity of the offense or conduct, the time since the offense or conduct and completion of the sentence; and the nature of the job as factors to be considered. This lack of specificity allows employers to easily articulate a relationship between circumstances of a job and any given criminal conduct by broadly defining either (or both). So offenses as disparate as murder and domestic battery are often grouped together as “crimes of violence” that supposedly warrant exclusion from a job with any human interaction. Similarly broad categories of “property crimes” and “sex crimes” warrant exclusion from a job with access to company property or money and access to vulnerable populations, respectively.

Such a broad generalization not only defeats the purpose of the Act but is prohibited under its plain language. The Act requires that employers conduct an individualized assessment to find a “direct and adverse relationship” between an applicant’s criminal history and “the specific duties of the job” to justify making an adverse employment decision based on the criminal history. In other words, an employer may not rely on general duties and/or justify its decision on the basis of an indirect relationship.

Proposed amendments to subdivision (c) of Section 11017.1 of the Code of Regulations incorporates and expands upon the EEOC guidance. First, the proposed revisions define “a direct and adverse relationship” as raising “substantial increased risk of crime while the applicant performs specific duties of the position” and “compared to the general population.” Next, “specific duties of the job” are distinguished from “general duties.” Finally, the proposed revisions incorporate and expand upon the elements of the so-called Green factors in the EEOC guidance by listing a number of subfactors under subparagraphs (D) through (G) of paragraph (1) of subdivision (c) that limit the employer’s tendency to generalize when making an individualized assessment.

The proposed revisions also identify a number of presumptions that most employers routinely make and explicitly prohibit them in subparagraph (H) of paragraph (1) of subdivision (c). For example, a plea of nolo contendere does not establish the truth of the underlying offense, and the employer is prohibited, consistent with the existing law, from making the conclusive presumption that the applicant has in fact committed the misdemeanor offense to which he or she pleaded nolo contendere. Additional biases are addressed in sections discussing subfactors relevant to the individualized assessment in paragraph (1) of subdivision (c), such as the baseless presumption that an individual convicted of committing a crime anywhere is capable of committing, or is likely to commit, a crime in the workplace; and the irrational fear that an employer’s existing safety protocols are inadequate to substantially mitigate risks of a potential crime.

Accordingly, [a coalition of commenters] recommends the creation of a new subsection, preceding what is currently 11017.1(c)(1). Relatedly, the coalition proposes to strike current subsection (c)(1)(A) as well as all language following the first sentence of (c)(1)(B) (including

(c)(1)(B)(i)-(iii)), the subject matter of which would be addressed in the new subsection proposed by the coalition. [The Council responds throughout the body of the proposed text, which would read as follows:]

(1) Direct and Adverse Relationship to the Specific Duties of the Job.

(A) Before an employer may make a final decision to withdraw a conditional offer of employment based in whole or in part on an applicant's conviction history, the employer must make two separate individual assessments that result in two separate determinations that the applicant's history (i.e., conviction and post-conviction history considered in the appropriate factual and temporal context) has a direct and adverse relationship to the specific duties of the job. These determinations must occur:

(i) When the employer first gathers and considers information about the applicant's conviction history and makes a preliminary decision to withdraw a conditional offer of employment pursuant to subsection (2); and

(ii) When, after receiving and considering information submitted by the applicant in response to the notice issued pursuant to subsection (3), the employer makes a final decision to withdraw a conditional offer of employment pursuant to subsection (4).

Council Response: The Council agrees that the regulations should clarify that both an "initial" individual assessment as well as a "reassessment" should be conducted pursuant to the Fair Chance Act, as the commenter suggested in its proposed subsection (c)(1)(A); accordingly, it proposes to make clarifying changes in subsections (c)(1) (now entitled "Initial Individualized Assessment" and (c)(3) (now entitled "Reassessment"). The Council addresses the additional proposed language from this comment below.

Comment (cont.):

(B) A conviction history has a "direct and adverse relationship with the specific duties of the job that justify denying the applicant the position" when evidence produced by the employer establishes that the applicant's conviction history, when considered in all of the relevant circumstances as outlined in this regulation, indicates that hiring the applicant would pose a substantial increased chance of crime while the applicant performs specific duties of the position. The increased chance must be substantial and there must be an increased risk when the applicant is compared to the general population.

Council Response: The Council declines to adopt language stating that the "direct and adverse relationship standard" requires a showing of "a substantial increased chance of crime." Requiring

that the increased chance be “substantial” and requiring a comparison to the “general population” is vague and would not add clarity.

Comment (cont.):

(C) The individualized assessments must include, at a minimum, consideration of the following factors:

(i) The nature and gravity of the offense or conduct;

(ii) The time that has passed since the offense or conduct and/or completion of the sentence; and

(iii) The nature of the job held or sought.

(D) First Mandatory Factor: Nature and Gravity of the Offense.

(i) The nature of the offense includes these subfactors:

(a) The specific personal conduct of the applicant that underlied the conviction. Employers are expected to know that a wide range of conduct may result in a conviction under particular criminal laws, and convictions may be based on indirect liability for other people’s actions (e.g., aiding and abetting liability).

(b) Whether the applicant pleaded nolo contendere (no contest), pleaded guilty, or was convicted after trial. Employers are expected to know that 94-97% of defendants enter into federal or state plea bargains not as an admission of guilt but because of the coercive power of large sentences.

(c) The context in which the offense occurred.

(d) If the applicant chooses to disclose the following prior to the first individualized assessment, an employer must consider the information provided as mitigating factors. The employer may not request this information from the applicant, nor may it seek this information from other sources.

(i) Whether provocation, duress, substance abuse or other mitigating factors contributed to the offense.

(ii) Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to

the offense. Employers are expected to know that it is illegal to discriminate on the basis of disability under state and federal law.

(iii) Whether youth, childhood trauma, victimization (including sexual or domestic violence or human trafficking) or similar factors contributed to the offense.

(ii) The gravity of the offense includes these subfactors:

(a) Whether the harm was to property or people

(b) The degree of the harm (e.g., amount of loss in a theft)

(c) The permanence of the harm

(iii) Factors not relevant to duties of the job may not be used as a basis for denial or revocation of employment. For example, an employer may not deny a position because of their own moral or societal disapproval or condemnation of the conviction.

(E) Second Mandatory Factor: Time Since Offense or Completion of Sentence

(i) Consideration of the time since offense or completion of sentence includes these subfactors:

(a) The amount of time that has passed since the conduct underlying the conviction, which may significantly predate the conviction itself. This passage of time is relevant even if the applicant was incarcerated for part of the time period, as rehabilitation and maturity often occurs during incarceration.

NOTE: If a conviction did not lead to incarceration, employers CANNOT consider the conviction after seven or more years have elapsed since disposition of the case (i.e., grant of probation or sentencing).

(b) When the conviction led to incarceration, the amount of time that has passed since the applicant's release from incarceration and the applicant's conduct during incarceration, including participation in work and educational or rehabilitative programming, and other prosocial conduct.

NOTE: Employers CANNOT consider any such conviction when seven or more years have passed since release from incarceration.

(c) The applicant's employment history since the conviction or completion of sentence. Evidence of previous employment in a job with similar duties, without negative incidents, establishes a rebuttable presumption that the conviction history is no longer directly and adversely related to the specific duties of the job.

(d) Whether the applicant's criminal history has been cleared for exercise of any benefit, privilege, or right by a licensing, regulatory, or government agency or board. Examples include a license, certificate, authorization, or any other similar credential or criminal record exemption. Receipt of such a benefit, privilege, or right required for the performance of a job establishes a rebuttable presumption that the applicant's conviction history is not directly and adversely related to the specific duties of the job.

(e) The applicant's community service and engagement since the conviction or completion of sentence, including religious, self-help recovery, and civic participation.

(f) The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured in the above subfactors.

(F) Third Mandatory Factor: Nature of Job

(i) Consideration of the nature of the job held or sought includes these subfactors:

(a) The specific duties of the job, which must be distinguished from general employee duties such as the duty while at work to act professionally and obey the law and workplace rules. The specific duties of the job must be consistently defined and enforced by the employer before they can be used to deny work based on a conviction history. Written, well-defined, and consistently applied job descriptions that predate the assessment by a substantial period of time, such as job descriptions found in job announcements or postings, are more likely to be found credible.

(b) Whether the context in which the conviction occurred is likely to arise in the workplace. If the conviction did not occur in the context of the workplace, there is a rebuttable presumption that the conviction is not directly and adversely related.

(c) Whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.

(d) When a conviction history raises legitimate employer concerns, if the employer has practices and policies in place to prevent the type of harm the employer is concerned about, there is a rebuttable presumption that the conviction is not directly and adversely related. For example, when a conviction history raises legitimate theft concerns, if the employer has cash handling, inventory control and theft prevention systems, practices or policies in place, there is a rebuttable presumption that the conviction is not directly and adversely related.

Council Response: The Council agrees with this comment in part. With regard to the mandatory factors that an employer must consider during an individualized assessment, the Council agrees that adding subfactors that an employer *may* consider provides helpful guidance. However, making consideration of these subfactors *mandatory* goes beyond the requirements of the statute. Accordingly, an employer *must* consider the “nature and gravity of the offense,” “the time that has passed since the offense or conduct and/or completion of the sentence,” and “the nature of the job held or sought,” and the Council proposes adding language stating that employers *may* consider many of the subfactors suggested by the commenter in its proposed subsections (c)(1)(D)-(F). To the extent the Council did not include particular subfactors suggested by the commenter, its declination to include those subfactors was based on its determination that those subfactors would not add clarity to the regulations.

Comment (cont.):

(G) Use of Subfactors

The presence of any one of the aforementioned subfactors may establish that the conviction history is not directly and adversely related to the specific duties of a job. There will be few if any cases in which all of these subfactors are relevant, and in some cases only a few will be relevant. Employers should not require applicants to meet any or a majority of the subfactors identified above. This list of subfactors is non-exhaustive; none of the above subfactors are required to show that the applicant is qualified for the job and that there is not a direct and adverse relationship between the convictions and the position in question. Employers should not conduct a quantitative analysis of the number of subfactors that do and do not apply to a particular candidate, but should consider the significance of each applicable subfactor with respect to the applicant’s qualification for the job.

Council Response: The Council declines to adopt the suggested language. The Council believes this addition would not add clarity to the regulations.

Comment (cont.):

(H) Prohibited Factors

(i) Employers may not deny a position because of disapproval or condemnation of the conviction history where the conviction history does not have a direct and adverse relationship to the specific duties of the job.

(ii) Employers may not deny a position on the assumption that an applicant's conviction history raises a general risk that the applicant will commit a crime on the job. The fact that the applicant has completed a sentence for the conviction and is free from custody raises a rebuttable presumption that the applicant does not pose a substantial risk to public safety in ordinary circumstances.

(iii) Employers may not rely on "common sense" beliefs that certain conviction histories are directly and adversely related to the specific duties of a job. Instead, the employer must demonstrate through evidence that a conviction history has such a relationship.

(iv) Employers cannot rely on information that was provided by a consumer reporting agency or background company in violation of the Investigative Consumer Reporting Agencies Act, California Civil Code § 1786.10, et seq. (ICRAA).

(v) Employers cannot deny employment because of a misdemeanor conviction that followed a no contest or nolo contendere plea, which cannot be used as an admission of responsibility in civil matters.

Council Response: The Council declines to adopt the "Prohibited Factors" suggested by the commenter in its proposed subsection (c)(1)(H). Factors (i), (ii), and (iii) are addressed elsewhere in the regulations. Regarding Factors (iv) and (v), the Council believes that the existing regulations, with proposed modifications by the Council, sufficiently implement the statute.

Comment (cont.):

(I) Examples of Conviction Histories that Are Not Directly and Adversely Related to the Specific Duties of a Job.

(a) An applicant was convicted five years ago of embezzling \$100,000 while working as a CFO. The position is bookkeeper for a large corporation with multiple layers of supervision and monitoring over the bookkeeper's handling of funds.

(b) An applicant has a conviction for a sex offense against a child who lived in his home. The job is in an office environment where children are not ordinarily present.

(c) An applicant has a conviction for domestic violence against his wife or elder abuse against his grandmother. The job requires the applicant to work with women or elderly people in an office, retail or other public commercial setting.

(d) An applicant was convicted as a youth of a violent offense against another youth and has only limited evidence of rehabilitation. The job is cashier at a retail store with supervision.

(e) An applicant was convicted of organized retail theft committed while under the influence of others as a victim of human trafficking. She is no longer being actively victimized and she has a documented record of psychological treatment and rehabilitation. The job is cashier or salesperson at a retail store or a warehouse worker.

(f) An applicant was convicted of child endangerment for driving under the influence with a child in the car. The job is child care with no driving responsibilities.

(g) An applicant was convicted of child endangerment for leaving a child with a relative or intimate partner who abused the child. The job is child care with no discretion to leave the child in other people's care or otherwise place a child in a position of potential mistreatment by non-employees.

(h) An applicant was convicted of felony murder but her role was as an accomplice to robbery under the influence of a pimp, who killed the victim during the robbery. The job does not provide a substantial opportunity for theft (e.g., an office worker) and the employer would not deny a job to someone with a robbery or theft conviction with similar mitigating circumstances. The job cannot be denied because the applicant's conviction is murder.

(i) An applicant was convicted of shoplifting a candy bar one year ago. The job is a cook in a busy kitchen and the applicant is under supervision.

(j) An applicant has a conviction for driving while under the influence five years ago. The applicant is actively engaged in recovery and has a record of post-conviction stable employment. The job is office worker or floor staff in a retail store.

(k) An applicant has a conviction for driving while under the influence and has a well-documented record of recovery and two years of stable employment as a transit driver without negative incidents. The job is driver of a truck or bus.

(J) Examples of Individualized Assessments Considering All Factors

(i) An applicant has a history of childhood trauma (domestic violence in the home, abandonment by parents as a young child). In her 30s and 40s, she suffered

from domestic violence and substance abuse, which contributed to a 15-year period of convictions (drug possession and thefts) and incarcerations. During her last incarceration, she engaged in psychological and substance abuse treatment and following her release she was clean and sober and not in abusive relationships. She then worked for six years as a paratransit driver for disabled people, earning employee of the month and driver of the year awards. The company is sold and the new owner conducts a criminal record check. The new employer should conclude her conviction history is not directly and adversely related to the specific duties of her paratransit driver job.

(ii) An applicant was convicted of misdemeanor shoplifting (stole clothes worth less than \$100 from a retail store to sell for cash while indigent; property returned after her arrest) 23 years ago. She has had stable employment ever since. She applied for a job as a cafeteria cook, where access to cash payments would be controlled by a point of sale (POS) system and record-keeping. The employer should conclude her conviction history is not directly and adversely related to the specific duties of her job.

(iii) An applicant was convicted of murder 28 years ago for killing her abusive boyfriend when she was 18 years old. She has had stable employment since her release from prison six years ago. She applied for a job assessing applicants' eligibility for public benefits, which might include some in-home visits. The employer should conclude her conviction history is not directly and adversely related to the specific duties of her job.

Council Response: The Council declines to adopt the examples set forth in proposed subsections (c)(1)(I)-(J) given that individualized assessments and reassessments require highly-specific analyses that are particular to each circumstance. The Council believes that the inclusion of the proposed brief examples may not account for all factors to be considered in a particular circumstance. Accordingly, the Council believes they would not provide further clarity.

Comment: Penal Code Section 1016 expressly prohibits nolo contendere pleas to misdemeanor charges being used against the defendant in a subsequent civil suit. Additional biases [include] the baseless presumption that an individual convicted of committing a crime anywhere is likely to commit a crime in the workplace; and the unsubstantiated fear that an employer's existing managerial, accounting, and safety and security protocols are inadequate to substantially mitigate risks of a potential crime.

An aim is to avoid "rough-cut measures of employment-related qualities" and instead ensure that employers "tailor their criteria to measure those qualities accurately." *Cf. El v. Pennsylvania Transportation Authority*, 479 F.3d 232, 240 (3rd Cir. 2007) (in Title VII employment-discrimination context). Spurious reliance on "common sense" assertions of business necessity is not adequate. *Id.* The same is true in the context of the Fair Chance Act.

The Fair Chance Act requires that employers set aside prejudicial biases against the formerly-incarcerated or applicants with conviction histories and, instead, individually assess whether the applicant’s conviction history has “a direct and adverse relationship with the specific duties of the job.” As recognized in the proposed revisions to the regulation, irrational biases and individualized assessment are mutually exclusive. We encourage the Commission to adopt the revisions recommended by the Coalition and thereby to cast aside irrational biases, however commonly-held, and to mandate the kind of individualized assessments that have a meaningful impact on the lives of the formerly-incarcerated or persons with conviction histories.

Council Response: This comment is addressed above in response to the recommended revisions by the Coalition.

Comment: The Fair Chance Act was enacted to reduce the stigma of a conviction in the employment process, and the reentry coalition’s proposed regulations will further this goal by limiting employer presumptions about people with conviction histories. We thank the Council for the opportunity to comment on their proposed regulations, and we believe the reentry coalition’s proposed regulations will help ensure that formerly incarcerated or convicted applicants have a fair opportunity to secure employment, as the Fair Chance Act intended.

Council Response: This comment is addressed above in response to the recommended revisions by the Coalition.

Comment: Under the current regulations, we frequently encounter employers who broadly interpret the Fair Chance Act’s “direct and adverse” language to find such a relationship between almost any conviction and the job sought and deny an applicant employment without serious consideration of rehabilitation or mitigation evidence. The impact of such a problematic practice on our clients is devastating; the loss of a job not only harms the individual client seeking to successfully re-enter the communities we serve, but also their ability to support their children and family members and escape poverty.

Council Response: This comment is not asking for a change in the proposed regulation but only providing information to the Council about the impact of some employers’ broad interpretation of the “direct and adverse” standard. Accordingly, no further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(c)(1)

Comment: The regulations should clarify that employers are required to hold open the position after extending a conditional offer and initiating a criminal background check until completing the full individualized assessment.

The operation of the Fair Chance Act clearly implies that an employer must hold open a job opening after extending a conditional job offer and while conducting an individualized assessment. Otherwise, employers could easily avoid hiring any person with a conviction or

arrest record by filling the position with another applicant while conducting the individualized assessment (i.e., preliminary assessment and notice, opportunity to respond, individual reassessment). Sometimes, even before receiving the results of a criminal background check, employers can infer that the individual has a conviction or arrest record based simply on how long it takes for the background check company to provide the background check report.

If employers are not required to hold open the job offer conditionally offered to a person with a record during the individualized assessment, the rights of people with records to a fair process and fair chance to be hired would be undermined. Therefore, the regulations should make plain that an employer is required to hold open a job position—and not fill it with another job applicant—after extending a conditional job offer and initiating a criminal background check.

Council Response: The Council declines to adopt the suggested language. The Council is not aware of sufficient legal authority for placing this additional categorical requirement on employers. The Council notes that the regulations do not foreclose an applicant or employee from contending that any particular employment practice may have an adverse impact on applicants or employees on a basis or bases protected by the Act.

Comment: We propose adding to § 11017.1(c)(1) that: ‘Any employer denying an applicant the employment position they were conditionally offered due to a delay in receiving results of a background check will be deemed to have revoked the job offer solely or in part on the applicant’s conviction history.’ Background checks for applicants with any arrest or conviction record typically take longer than those for individuals without records. For instance, the California Department of Justice (“DOJ”) takes an average of between 30 and 66 days after fingerprinting to send information to California Department of Social Services (“DSS”) for people with records, which is significantly longer than for individuals with no records. The Legislature’s use of the words “solely or in part” signals an intent to cover revocations in any way related to conviction history. Yet, employers may be confused about their obligations to follow the individualized assessment process, if they are revoking a job offer without having seen the results of the background check. Such a change would make clear that they are still obliged to follow the requirements of the Act in these circumstances, and prevent circumventing of the Act’s requirements.

Council Response: The Council declines to adopt the suggested language. The Council believes that the existing regulations, with the Council’s proposed modifications, sufficiently implement the statute.

Comment: Even assuming that the employer’s individualized assessment finds the requisite relationship based on the applicant’s criminal history report, the Act mandates that the employer must consider any evidence of mitigating circumstances and rehabilitation submitted by the applicant. In other words, the employer must re-evaluate the assessment in light of the additional information. Yet employers rarely change their initial assessment even when actual circumstances of the criminal offense show that it has no direct relationship to any specific duty of the job or substantial evidence of rehabilitation renders the presumed relationship (and substantial risks of a crime so identified in the individualized assessment) obsolete.

Proposed amendments to paragraph [(1)] of subdivision (c) make it explicit that the Act requires two individualized assessments. The first, preliminary assessment will likely utilize a smaller number of subfactors because the information available to the employer is limited to the applicant's background check report and his or her self-disclosure on an initial conviction questionnaire. If the applicant responds to the statutory notice of the employer's initial finding of a direct and adverse relationship and submits additional information, the employer must conduct a second assessment utilizing the same standard of "a direct and adverse relationship." The additional information provided by the applicant may alter the weight of one or more subfactors previously considered in the initial assessment or add a new subfactor not previously considered.

[Accordingly, a coalition of commenters recommends the following amendments to subsection (c)(1):]

- revising "Individualized Assessment" to read "Preliminary Individualized Assessment."
- adding the following language as a new subsection of (c)(1): "An employer who chooses to conduct a criminal background check on an applicant must make a reasoned, evidence-based determination about whether any disclosed conviction history has a direct and adverse relationship to the specific duties of the job. The employer must consider any mitigating or rehabilitative evidence it already has in its possession from the applicant."

Council Response: The Council agrees with this comment. Accordingly, it proposes to clarify in subsection (c)(1) that an individualized assessment is "a reasoned, evidenced-based determination." It also proposes to change the title of (c)(1) to "Initial Individualized Assessment" and the title of (c)(3) to "Reassessment," and to add "initial" before "individualized assessment" in (c)(2). Recognizing that the employer may have some mitigating information at the time it makes its initial assessment and additional information at the time of the Reassessment, the Council also proposes to add the following language in new subsection (c)(1)(C): "To the extent that any evidence of rehabilitation or mitigating circumstances, as described in subparagraphs (c)(2)(D)(i)-(ii), is voluntarily provided by the applicant before or during the initial individualized assessment, that evidence must be considered as part of the initial individualized assessment. In doing so, an employer may consider, but is not limited to considering, the factors set forth in subparagraph (c)(1)(B) and paragraph (c)(3) as they relate to the evidence of rehabilitation or mitigating circumstances."

Comment: [A coalition of commenters recommends striking the following from (c)(1):]

"(A) The standard from determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subsection (f)(4)."

Council Response: As stated above, the Council declines to adopt the language regarding the term "direct and adverse relationship" suggested by the coalition. Accordingly, it declines to strike the above language, which remains necessary to explain how to determine whether a "direct and adverse relationship" exists between an applicant's conviction history and specific duties of the job.

Comment: A coalition of commenters recommends striking the list of factors to be considered during an individual assessment from (c)(1)(B) and instead adding those factors and subfactors to a new subsection (c)(1) that the coalition has drafted.

Council Response: As noted above, the Council has implemented some of the coalition’s suggested revisions regarding these factors but has done so in the existing section (c)(1).

Comment: Our experience over the past five years shows that the Act has not had the hoped-for impact in part because employers find the individualized assessment standard difficult and confusing to implement. The revisions proposed by the coalition of reentry advocacy organizations provide greater specificity to guide employers in how to comply with the substantive provisions of the Act.

Council Response: This comment is addressed above in the Council’s response to the immediately preceding comment.

Subsection 11017.1(c)(2)

Comment: [A coalition of commenters recommended adding “as described in subsection [TBA]” following “If, after conducting an individualized assessment.”]

Council Response: The Council declines to adopt the suggested language because it would not add clarity to the regulation.

Subsection 11017.1(c)(2)(D)

Comment: In [subsections 11017.1(c)(2)(D)(i)-(ii)], the Council proposes to “expand the non-exhaustive list of examples of the substance of evidence that may be indicative of rehabilitation or mitigating circumstances.” (Initial Statement of Reasons at p. 4.) We applaud these efforts as they provide needed clarity and assistance to stakeholders. To these proposals, we offer the following modest revisions.

First, in keeping with the Council’s other non-substantive revisions to these regulations focused on the structure of the regulations, we suggest that the Council consider breaking out the lists in these subsections into subparagraphs. We believe this modification will enhance the clarity of the regulations.

Second, we suggest adding the verbiage “including in-custody programs” to the non-exhaustive lists in each of the subsections. This language will provide an umbrella inclusion of all the various programs available to incarcerated individuals that can be used to support showings of “rehabilitation or mitigating circumstances.”

[Accordingly, the commenter suggests the following amendments (suggested amendments denoted in bold):]

§ 11017.1(c)(2)(D)(i)

(i) ~~The types of Evidence of that may demonstrate~~ rehabilitation or mitigating circumstances may include, but ~~are~~ is not limited to:

a) the length and consistency of employment history before and after the offense or conduct;

b) the facts or circumstances surrounding the offense or conduct;

c) the applicant's current or former participation in self-improvement efforts, including but not limited to: school, job training, counseling, community service, and/or a rehabilitation program, including in-custody programs;

d) whether the conduct arose from the applicant's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses against the individual;

e) whether the conduct arose from the applicant's disability or disabilities and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation for the applicant's disability or disabilities;

f) the likelihood that similar conduct will recur;

g) whether ~~the individual~~ the applicant is bonded under a federal, state, or local bonding program; and/or

h) successful completion, or compliance with the terms and conditions, of probation or parole.

(ii) Documentary evidence may include, but is not limited to:

a) certificates or other documentation of participation in, enrollment in, or completion of an ~~and rehabilitation efforts such as~~ educational, vocational, ~~or training~~, counseling, community service, or rehabilitation program, including in-custody programs;

b) letters from current or former teachers, counselors, supervisors, co-workers, parole or probation officers, or others who know the applicant;

c) police reports, protective orders, and/or documentation from healthcare providers, counselors, or victim advocates who can attest to the applicant's status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable offenses;

d) documentation confirming the existence of a disability or disabilities; or

e) any other document demonstrating rehabilitation or mitigating circumstances.

Council Response: The Council agrees with this comment and proposes to adopt the suggested language (but using large Roman numerals in place of small letters for subsections (i) and (ii) to maintain consistency throughout the regulations).

Comment: The regulations should clarify that an employer may not require the applicant to submit additional information related to his or her criminal history until after the preliminary individual assessment.

Providing additional documentation and information to the employer is a burden on the applicant that can be costly, time-consuming, and stressful and therefore lead the job applicant to drop out of the hiring process. The Fair Chance Act was designed to prevent job applicants from needing to jump through such hoops until and unless the employer first determined through a preliminary individual assessment that the applicant's conviction history appears directly and adversely related to the duties of the specific job to which the worker applied—and then the employer is required to comply with specific procedural requirements.

Nevertheless, some employers request additional information and documentation from every job applicant whose background check reveals any record before considering whether the offense appears at all related to the duties of the job. This means that job applicants with old or clearly unrelated records are regularly asked to collect and submit detailed information regarding their past records. If they fail to provide all of the requested information and/or documents, they may be eliminated from the applicant pool for failing to submit required paperwork—regardless of whether the underlying conviction would have been considered disqualifying via a preliminary individual assessment.

Further complicating the worker's predicament, if the job applicant submits incomplete information (either unintentionally or because they were unable to satisfy a burdensome request), he or she risks the employer later determining that the applicant was dishonest during the application process and rescinding the job offer on that basis—again, regardless of whether the underlying conviction is considered disqualifying via an individual assessment.

Many employers also demand this additional information and documentation on an extremely short timeline. Some employers regularly require the submission of information in as little as two days (including even hard to-obtain and unreliable sources of information, such as police reports). As a result, job applicants must not only pay to quickly obtain those records from the appropriate government repository, but often they must pay substantial amounts to overnight those records to the employer. Job applicants unable or unwilling to jump through these hoops frequently either drop out of the hiring process or are eliminated from the applicant pool for failing to submit required documents on the required timeline.

These types of employer requests represent clear attempts to skirt the requirements of the Fair Chance Act. First, as noted above, job applicants should not need to provide any additional documentation regarding their record (beyond the background check report obtained by the employer) until and unless the employer first preliminarily assesses that the conviction history is directly and adversely related to the specific duties of the job. Second, because the employer demands additional information and documentation before making a preliminary decision that the applicant's conviction history disqualifies the applicant, job applicants are deprived of the procedural protections required by the Fair Chance Act, including the requirement that applicants be given at least five business days to respond (and five additional business days to obtain and provide government records).

The regulations should address these potential loopholes by expressly prohibiting employers from requesting additional information and documentation from the job applicant regarding his or her record unless and until the employer first preliminarily determines that the record is directly and adversely related to the specific duties of the job that justify denying the job and then provides the required preliminary notice and opportunity to respond.

One way in which these clarifications might be incorporated into the current regulations is by adjusting the text of subheading (c) of the proposed regulations (such that it is not limited to situations when employers intend to rescind a conditional offer and inserting an additional subparagraph to make clear that information and documentation may not be required by the employer—especially not before a preliminary decision and notice.”

Council Response: The Council agrees with this comment and accordingly proposes to add the following language to subsection (c)(2)(D)(i): “Any such evidence of rehabilitation or mitigating circumstances is optional and may only be voluntarily provided by the applicant.” The Council also proposes to add the following language to subsection (c)(2)(D)(ii): “Any such documentary evidence is optional and may only be voluntarily provided by the applicant.” The Council also proposes to add the following language as new subsection (c)(2)(D)(iii)(2): “An employer is prohibited from ... [r]equiring an applicant to submit any of the additional evidence described in this paragraph at any time in the hiring process.”

Comment: We applaud the Council's inclusion of additional explanations and examples of evidence an individual may provide to demonstrate rehabilitation and/or mitigation in new §§ 11017.1(c)(2)(D)(i) and (ii). However, we are concerned that, despite the permissive “may” in the regulations, employers may require applicants to submit such evidence—requiring disclosure of sensitive information that an applicant may not themselves choose to disclose or documents that may contain prohibited information. For example, many employers have begun requiring that applicants produce police reports as part of the individualized assessment process—revoking a job offer if the applicant does not produce it. Yet, police reports often contain prohibited information that employers may not request or consider. We [along with a coalition of commenters] propose further clarifying § 11017.1(c)(2)(D) by adding to subsection (i) that: “All of this evidence of rehabilitation and/or mitigating circumstances is optional and may only be voluntarily provided by the applicant.” We [along with a coalition of commenters] propose adding to subsection (ii) that: “All of this documentary evidence is optional and may only be

voluntarily provided by the applicant.” Moreover, we [along with a coalition of commenters] suggest the Council adopt clarifying language (potentially as subsection (iii)) that: “The employer shall not request specific documents or evidence from the applicant in response to the notice of preliminary decision, including, but not limited to, police reports or court documents. The employer shall not require that the applicant disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses, or of the existence of a disability or disabilities. It is in the discretion of the applicant to provide any of the documentation or information in subsection (i)-(ii). An employer may not disqualify an applicant from the employment conditionally offered for failing to provide any specific type of evidence or documents.”

Council Response: The Council agrees with this comment and accordingly proposes to adopt the language set forth in its response to the immediately preceding comment.

Comment: The regulation should clarify that, even after the preliminary notice, an applicant may voluntarily provide additional information after receiving a preliminary notice – but an employer may not require it.

In addition to prohibiting employers from demanding record-related information before a preliminary individual assessment and notice, the regulations should clarify the voluntary nature of submitting additional information and documentation after the preliminary notice. The Fair Chance Act’s procedural requirement to allow sufficient opportunity to respond following a preliminary notice was designed to offer job applicants a voluntary opportunity to provide additional information to clarify information related to their record and any inaccuracies and provide mitigating information and evidence of rehabilitation.

Employers already frequently require a variety of documentation and information from job applicants to supplement their background check reports. As described above, obtaining and submitting additional information and documentation can be burdensome, stressful, and costly for the job applicant. If job applicants are unable to timely provide the requested information, they may be rejected by the employer for failing to satisfy requirements of the hiring process. Or, if they submit incomplete information (or make a mistake as they hastily compile the copious requested information), they may be rejected on the basis of dishonesty for omitting relevant details.

As currently written, the proposed amendments to the regulations take some steps to make clear that any response from the job applicant is voluntary. The proposed amendments also list helpful suggestions for what types of mitigating information the job applicant may submit. However, given the apparent regularity with which employers require additional documentation and information from job applicants, the regulations should expressly prohibit employers from doing so. Of particular note, sensitive information regarding domestic violence or a disability as well as unreliable police reports should never be requested by an employer.

The Council could implement these suggestions (and correct a grammatical error impacting the meaning of subsection (c)(2)(D)) by changing the text of subsection (c)(2) such that it reads as follows [suggested amendments denoted in bold underline or strikethrough]:

(D) An explanation informing the applicant that, should the applicant choose to respond, the response may include submission **of either or both of the following types of evidence**: evidence challenging ~~either~~ the accuracy of the conviction history report that is the basis for the preliminary decision to rescind the offer, **or** evidence of rehabilitation or mitigating circumstances, ~~or both~~

.....

(iii) The employer shall not request specific documents, evidence, or supplemental information from the applicant in response to the notice of preliminary decision. The documents, evidence, and supplemental information listed above in subsections (c)(2)(D)(i)-(ii) may be voluntarily provided by the job applicant and may not be required by the employer. An employer may not rescind a job applicant's conditional offer or otherwise disqualify a job applicant for failing to provide any specific type of evidence, documents, or supplemental information.

(E) Notice of the deadline by which the applicant **may voluntarily** ~~must~~ respond (which must be at least five business days from the date of receipt of the notice).

Council Response: The Council agrees with this comment and proposes to adopt substantially similar language to that suggested by the commenter in new subsection (c)(2)(D)(iii)(3): “An employer is prohibited from ... [r]equiring an applicant to provide a specific type of documentary evidence (e.g., a police report as evidence of domestic or dating violence), or disqualifying an applicant from the employment conditionally offered for failing to provide any specific type of documents or other evidence.” The Council further proposes to amend the language of subsection (c)(2)(E) to read, “Notice of the deadline for the applicant to respond, if the applicant chooses to do so.”

Comment: We urge the Council to adopt regulations that clarify that employers are required, as part of the individualized assessment described in § 11017.1(c)(1), to consider that the fact that the individual is seeking work is itself a positive, mitigating circumstance that acts as a counterweight in the direct and adverse relationship test. As we learned from Professor Sugie, who testified at the November 17, 2020, hearing hosted by the Council, that an individual is actively searching for work is one of the most important predictors of whether an individual is in fact ready to work and avoid unlawful activity. Yet, in the dozens of cases we have been involved with, not once have we seen an employer consider the applicant's effort in applying to work with them as a countervailing factor.

Council Response: The Council agrees with this comment and accordingly proposes to include the following language as new subsection (c)(2)(D)(i)(VIII): “The fact that the applicant is

seeking employment.” The Council later proposed renumbering this subsection, as explained below.

Subsection 11017(c)(2)(C) & (E)

Comment: Proposed subdivision (c)(2)(E) does not address how emailed notices will be treated for purposes of calculating the actual deadline to respond to a notice of preliminary decision. The subdivision also creates ambiguity as to how the employer should calculate and include the specific response deadline in the notice. This deadline is an extremely important procedural protection that gives the applicant/employee a meaningful opportunity to respond and utilize the protections of the Fair Chance Act.

Many of the notices of preliminary decision we have seen are sent to applicants by email. The regulation only addresses delivery in two situations: 1) delivery in a format that provides confirmation of receipt, or 2) mailing without confirmation of receipt. (Proposed 2 C.C.R. 11017.1(c)(2)(E).) It is unclear whether email is permitted under this section or – if email is permitted – how email should be treated. Because emails often do not provide “read receipts” or other confirmation of delivery, notice sent via email should not be classified as notice delivered in a format that provides for tracking.

Under other rules of noticing, such as the Code of Civil Procedure, email service is deemed completed two business days after it is sent. (Code of Civ. Proc., § 1010.6(a)(4)(B).) We propose specifically addressing whether email is permitted for delivery of a notice of preliminary decision, and – if so – stating that it is deemed received 2 business days after sending.

Council Response: The Council agrees with this comment and proposes to adopt the following language as new subsection (c)(2)(E)(iii): “If notice is transmitted through email, the notice shall be deemed received two business days after it is sent.”

Comment: The proposed regulation states the notice of preliminary decision must include “[n]otice of the deadline by which the applicant must respond (which must be at least 5 business days from the date of receipt of the notice).” (Proposed 2 C.C.R. 11017.1(c)(2)(E).) However, an employer may not be able to determine the response deadline at the time the notice is served via a format that provides tracking because the date of receipt may be unknown to the employer. If the employer cannot determine the response deadline before serving the notice, the employer cannot provide the response deadline in the notice. It is unclear how the employer is supposed to determine this date. For mailing without tracking, the employer can simply add five business days to the date of mailing to determine the earliest deadline under the regulation.

For notice served with tracking, where the receipt date may be unknown at the outset, the employer is left to guess when the mail will be delivered in order to calculate and state the deadline to respond. That runs counter to the interests in providing clear guidance to the employer and protecting the applicant’s/employee’s right to respond. This issue should be clarified so the employer is able to provide a response deadline in the notice that is certain and clear. We respectfully request the committee resolve these issues before finalizing these

regulations. One solution is to apply the same deadline that is used for non-tracked notices (i.e., five, ten, or twenty-days from the day the notice is sent), unless it is known at the time of service that the notice will be delivered at a later date.

Council Response: The Council declines to adopt the suggested modification. The deadline to respond set forth in the notice need not be a date certain. Rather, an employer would be in compliance with the regulation by simply stating in the notice that the applicant “has five days after receipt” of the notice to respond.

Comment: One of the recurring Fair Chance Act Problems we notice in our practice is that many employer notices are confusing, overbroad, and incomplete. Employers often combine the notice of preliminary decisions with notice pertaining to ICRAA and other types of notice, resulting in multi-page notices with explanations and exceptions that apply to different states. Requiring employers to provide the notice of preliminary decision in a document consisting solely of the notice and applicable attachments would make it easier for applicants to understand the notice and respond within the deadline with evidence of rehabilitation or mitigation.

Council Response: The Council declines to adopt the suggested modification. The proposed regulations state that an employer may use the Department’s templates for such notices. The Council believes that the existing regulations, with the Council’s proposed modifications, sufficiently implement the statute.

Subsection 11017.1(c)(3)

Comment: [A coalition of commenters recommends amending the title and first sentence of subsection (c)(3) as follows (the commenters additions are bolded):] “**Second Individualized Assessment and Final Decision.** The employer shall conduct **another individualized assessment, taking into account all** information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment **because the applicant’s conviction history has a direct and adverse relationship to the specific duties of the job.**”

Council Response: The Council agrees with this comment in part. Accordingly, it proposes to replace the current title of this section (“Final Decision”) with “Reassessment” (a slight variation of “Second Individualized Assessment”). The Council declines to adopt the remainder of the suggested language. It is stated elsewhere in the regulations and would not add clarity to this subsection.

Additional revisions: The Council proposes to add a title to this subsection (“Final Decision”). This is necessary for clarity, given the restructuring of (c)(3), which previously was titled “Final Decision” and in the proposed language would be titled “Reassessment.”

The Council also proposes to replace the reference in subsection (c)(4)(C) to “the “Department of Fair Employment and Housing” to “the Department.” This is necessary for clarity, as the Department’s name has been changed to the Civil Rights Department.

Subsection 11017.1(d)(3)

Comment: Proposed regulation 2 C.C.R. § 11017.1, subd. (d)(3), states that when a labor contractor or union hall is re-conducting an inquiry for an individual, they cannot disqualify that individual from a pool or availability list “based on conviction history 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.” One of the examples of a “new material development” is “changes to ... experience.” Inclusion of change in experience is confusing, and potentially misleading. This is particularly confusing because a change in an individual’s experience would be a positive factor upon re-application to the hiring pool. The person’s experience would either be the same as the past or it would have increased in the intervening time period. The word “experience” should be deleted from this paragraph to eliminate this confusion, or more clarity should be provided.

Council Response: The Council declines to adopt this suggested language. The Council did not propose modifications to this subsection other than moving it in its entirety to a different section of the regulations; accordingly, this comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(f)(3)

Comment: We propose clarifying that an employer with a policy or practice of considering background check delays against an applicant has a policy or practice with adverse impact. We recommend adding to § 11017.1(f)(3), after “characteristics protected by the Act” the clarification that: “State- or national-level statistics that show a substantial disparity based on conviction history and any characteristic protected by the Act are presumptively sufficient to establish an adverse impact.” Because there is a well-documented relationship between delays and the presence of an arrest or conviction history, and even more voluminous research about how the collateral consequences of arrests and conviction records fall disproportionately on communities of color, particularly Black individuals, we believe this clarification is essential to effectuating the Act’s purpose.

Council Response: The Council declines to adopt the suggested language. The Council believes that the proposed regulations appropriately set forth the framework for adverse impact. The proposed regulations do not foreclose applicants or employees from relying on any particular type of evidence to establish that a particular policy or practice has an adverse impact on applicants or employees on a basis or bases protected by the Act.

Subsection 11017.1(f)(4)

Comment: For clarity and consistency, the word “exclusion” should be replaced with “denial” throughout this section.

Council Response: The Council declines to adopt the suggested language. The Council did not propose any modifications to this language; accordingly, this comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: This subsection includes the following statement: “. . . the policy as applied to the applicant or employee is not job-related and consistent with business necessity.” This phrasing conveys that the policy must not be job-related, but should be consistent with business necessity. The phrasing should be changed to: “. . . the policy as applied to the applicant or employee is neither job-related nor consistent with business necessity” to clarify the references to both job-related and consistent with business necessity are in the negative.

Council Response: The Council declines to adopt the suggested language. The Council did not propose any modifications to this language; accordingly, this comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: Subdivision (f)(4)(D) states that an employer must provide “a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied . . .” The section does not give any guidance or further information on what a “reasonable opportunity” looks like. The regulations should provide a minimum time frame for a “reasonable opportunity.” We propose that “reasonable opportunity” means, at minimum, the time frames outlined in subdivision (c)(2)(E), but explains that this could mean a longer time frame depending on the individual’s circumstances.

Council Response: The Council declines to adopt the suggested change. The Council did not propose any modifications to this language; accordingly, this comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: In order for the applicant or employee to have a meaningful “reasonable opportunity to demonstrate the exclusion should not be applied,” the individual must have access to the policy on which the employer is relying in applying an exclusion. Without access to this policy, the individual cannot assess and respond to its validity as applied to them. The proposed regulations should be amended to include a requirement that the employer provide this policy to the applicant in these situations.

Council Response: The Council declines to make the suggested modification. The Council did not propose any modifications to this language; accordingly, this comment is not responsive to the text noticed for the 45-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: The Council should modify the language in § 11017.1(f)(4)(D) of the draft regulations, concerning the notice to an adversely impacted employee of the reasons for their exclusion. Rather than simply notifying the employee “that they have been screened out because

of a criminal conviction,” we believe that the employee’s ability to respond effectively to the disqualification would be made far more meaningful if the employer were required: (1) to specify, if more than one conviction appeared on the background report, which conviction(s) were found disqualifying; and (2) to provide reasoning as to why they were found disqualifying. Instead of the bare knowledge that a conviction was disqualifying, (1) and (2) taken together, would enable the unsuccessful applicant to provide a more informed response.”

Council Response: The Council agrees in part with this comment and accordingly proposes modifying subsection (f)(4)(D) such that an applicant or employee should be given notice “if more than one conviction appeared on the background report, which conviction(s) were found disqualifying.” The Council does not agree to adopt the second suggested modification. It believes that the existing regulations, with the Council’s proposed modifications, sufficiently implement the statute.

Subsection 11017.1(g)

Comment: The Council should reduce confusion about the meaning of subsection (g) by deleting the words “Permitting or” from the heading of that subsection.

As currently written, the heading of subsection (g) of the proposed regulations (previously subsection (h) of section 11017.1 of Title 2 of the California Code of Regulations) misstates the law and is at odds with the meaning of the rest of that subsection because it implies that a law that merely “permits” (and does not require) an employer’s consideration of criminal history is sufficient to constitute a rebuttable defense to an adverse impact claim under the Act. Both the California Fair Chance Act and section 11017.1 of Title 2 of the California Code of Regulations 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 (g) of the proposed 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 (g) 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 a worker’s criminal 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.

Specifically, we recommend that the Council modify the heading of section 11017.1, subsection (g) to delete the words “permitting or” and thus correct the misstatement of law currently contained in the subheading: (g) Compliance with Federal or State Laws, Regulations, or Licensing Requirements ~~Permitting or~~ Requiring Consideration of Criminal History.

Council Response: The Council agrees with this comment and proposes to adopt the suggested revision.

Subsection 11017.1(h)

Comment: In this newly added section, the Council seeks to provide guidance to employers who seek the federal Work Opportunity Tax Credit (WOTC) regarding maintaining compliance with FEHA. As the IRS describes it, the WOTC is designed as an incentive for employers to hire “individuals from certain targeted groups who have consistently faced significant barriers to employment.” Included in those “targeted groups” is what the Internal Revenue Code terms a “qualified ex-felon.”(26 USC § 51(d)(1)(C) & (d)(4).)

We generally applaud these new provisions as they provide clarity and assistance to employers who wish to take advantage of this tax incentive program. However, we are concerned about the amount and nature of information that is required to be provided by the applicant in the process of the employer’s applying for the credit. The regulation, as currently proposed, makes efforts to ensure the information required to qualify for the WOTC is used exclusively for that purpose. However, we believe the current language does not go far enough. We are particularly concerned with the detailed and revealing information required by Question 17 (and subsequent suggested documentation) of the U.S. Department of Labor Employment and Training Administration form 9061. While we understand the Council has no authority to address the substance of that particular question, we believe the Council should add language to Section 11017.1(h) to ensure that the information provided is not disseminated any further than necessary to enable the employer to apply for the WOTC. The regulations should instruct employers to maintain the forms and any documents or information used to complete the forms in confidential files separate from the applicant’s general personnel file. The regulation should further provide that employers are required to inform applicants that the required information will be used solely for purpose of applying for WOTC and will be maintained in confidential files.

Council Response: The Council agrees with this comment. Accordingly, it proposes to adopt the following language as new subsection (h)(3): “An employer must maintain any forms,

documents, or information used to complete the forms described in this subsection in confidential files separate from the applicant's general personnel file and shall not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC."

Subsection 11017.1(i)(1)

Comment: [A coalition of commenters proposes adding the following sentence at the end of subsection (i)(1):] "'Applicant' includes an individual applying for employment and an employee under consideration for a promotion."

Council Response: The Council agrees with this comment and proposes the addition of language, which varies slightly from that recommended by the commenter, stating that the definition of "applicant" also includes "existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer."

Comment: We ask that the Council consider additional language that makes clear the Act applies to individuals who have been working with an employer for a period of time prior to the revocation. The Council's regulations already define "applicant" in such a manner, but we would suggest the Council consider adding language that clarifies that these provisions apply to changes in ownership in the company, changes in human resources procedure, applications for promotion, or different companies becoming involved. For example, the Council could adopt language at the end of § 11017.1(i)(1) that "applicant" includes "an existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, or policies and procedures of an employer or whom is applying to a new position or is under consideration for promotion."

[Similarly, a coalition of commenters recommended adding the following language at the end of subsection (i)(1):] "'Applicant' includes an individual applying for employment and an employee under consideration for promotion."

Council Response: The Council initially declined to adopt the suggested language, but upon receiving further information from the commenter in a subsequent comment period, agreed with the reasoning in the comment and proposed to add substantially similar language. The Council revised the definition of "applicant" such that it also includes "existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer; and an existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, policy, or practice."

Subsection 11017.1(i)(2)

Comment: [A coalition of commenters recommend adding the following to the definition of "employer" at the end of subsection (i)(2):] "any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an

employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: We urge the Council to adopt language in § 11017.1(i)(2) that further defines an “Employer” as: “(2) “Employer” includes a labor contractor and a client employer; any direct and joint employer; any entity that evaluates the applicant’s conviction history on behalf of an employer or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list.” As the Council is aware, the FEHA defines an employer as “any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly” Gov. Code § 12926(d). A third party like a background check company may therefore be liable under FEHA where it exerts control over access to the job market or employment opportunities, and its discriminatory conduct interferes with an applicant’s access to the same, and where it acts as an agent of the direct employer. FEHA also makes it an unlawful practice for “any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under their part, or to attempt to do so.” Gov. Code § 12940(i). The clarification we suggest would ensure that these provisions apply to Fair Chance Act claims, as part of the FEHA.”

Council Response: The Council agrees for the most part with this comment but proposes to adopt the slightly varied language suggested in the immediately preceding comment.

COMMENTS MADE DURING THE DECEMBER 13, 2022 CIVIL RIGHTS COUNCIL MEETING [GOVERNMENT CODE SECTION 11346.9(A)(3)].

Comments from Councilmembers

General

Councilmember Comment: Globally, consider changing references to “paragraph” and “subparagraph” to “section” and “subsection,” for consistency.

Council Response: The Council agrees with this comment and proposes to make the suggested modifications.

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Introduction

Councilmember Comment: Consider whether to keep this section as an “Introduction” or make it its own subsection. If kept as an introduction, consider whether each of the two paragraphs should be numbered.

Council Response: The Council declines to propose further modifications in response to this comment. For clarity and ease of administration, the Council proposes to leave the structure of the Introduction as originally proposed.

Subsections 11017.1(a)(4) and (a)(5)

Councilmember Comment: It appears that the close parenthesis at the end of the language in subsection (a)(4) has been stricken, in which case it should be reinstated.

Council Response: The Council agrees with this comment and proposes to make the suggested modification.

Councilmember Comment: Subsection (a)(5) should be incorporated into subsection (a)(4).

Council Response: The Council declines to make the suggested modification because it believes the proposed change would not add clarity. Subsection (a)(5) provides additional guidance regarding (a)(4)(A) and (D) and thus would not apply to the entirety of (a)(4).

Subsection 11017.1(a)(6)

Councilmember Comment: The use of “either/or” in this subsection is confusing and may inadvertently suggest that an employer can consider (A) but not (B) or vice versa. Consider clarifying by using “both” or in some other way.

Council Response: The Council agrees with this comment and proposes to modify the language such that it reads as follows:

(6) If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer must not consider any information the employer is prohibited from considering under subsection (b). In addition, an employer is prohibited from considering any other conviction history information until after making a conditional offer of employment, unless subsection (a)(4) applies.

Councilmember Comment: In subsection (a)(6)(B), for clarity, consider replacing “after deciding whether or not to make a conditional offer of employment” to “after making conditional offer of employment.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Subsection 11017.1(c)(1)

Councilmember Comment: Much of the “evidence” suggested in the phrase “reasoned, evidence-based determination” would likely not be available to the employer (nor could the employer request it) until after the initial assessment.

Council Response: The Council declines to propose additional modifications in response to this comment. When an employer intends to rescind a conditional job offer based on a finding that the conviction history has a direct and adverse relationship with the position, that determination cannot be based on stereotypes. There must be some connection between the conviction history and the position. Subsection (c)(1) is not meant to suggest that the applicant has to provide rehabilitative or mitigating evidence at that stage, but rather that the initial determination by the employer must be based on evidence and not assumptions or stereotypes.

Councilmember Comment: The term “individual assessment” is a term of art in the disability context, so it may be confusing to also use that term here. Also, the language following the hyphen in the definition of “initial individualized assessment” may narrow the definition in a way the Council does not intend. If the Council decides to use that term, they should consider deleting all language after the hyphen (“a reasoned, evidence-based determination of whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position”). Also, the language “reasoned, evidence-based” is duplicative of the guidance provided in subsection (c)(1)(B).

Council Response: The Council declines to propose additional modifications in response to this comment. The term “individualized assessment” is used in the Fair Chance Act. Further, the language in this subsection following “reasoned, evidence-based determination” is in the current version of the regulation. Finally, although subsection (c)(1)(B) provides detailed guidance regarding the appropriate method of conducting an individualized assessment as required under the Fair Chance Act, the Council believes that emphasizing the requirement that the assessment be reasoned and evidenced-based is necessary for clarity.

Councilmember Comment: In this subsection, the terminology “direct and adverse relationship” is used, while in subsection (f) the term used is “adverse impact.” The terminology should be consistent.

Council Response: The Council declines to propose additional modifications in response to this comment. Subsection (c) sets forth guidance specifically related to the Fair Chance Act, which uses the phrase “direct and adverse relationship.” Subsection (f) addresses situations in which consideration of criminal history may result in “adverse impact” based on one or more characteristics protected by the FEHA.

Councilmember Comment: Instead of a dash before “a reasoned, evidence-based determination,” consider starting a new sentence.

Council Response: The Council declines to adopt this stylistic change because it would not add clarity to the regulations.

Subsection 11017.1(c)(1)(A)

Councilmember Comment: In subsection (c)(1)(A)(i), the Council should replace the word “probative” with “determinative.”

Council Response: The Council declines to adopt the suggested language. Receiving a benefit or license may not in every circumstance serve as a perfect proxy to determine that an individual’s conviction history is not directly and adversely related to the specific duties of a particular job. Accordingly, the use of the word “probative” strikes an appropriate balance.

Subsection 11017.1(c)(1)(B)

Councilmember Comment: Consider making the first and second sentences of subsection (c)(1)(B) separate subsections.

Council Response: The Council declines the suggested modification because it does not believe it would add clarity to the regulations.

Councilmember Comment: In subsection (c)(1)(B)(i)(f), consider replacing “mental impairment” with “mental disability.” In the same subsection, consider including language tying this factor to consideration of whether the disability can be mitigated through reasonable accommodation or has been eliminated by medical treatment or otherwise.

Council Response: The Council agrees in part with this comment and proposes to revise the modified language as follows [added language denoted in bold]:

Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to the offense **or conduct, and if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated by treatment or otherwise;**

The Council does not agree that “mental impairment” should be replaced with “mental disability,” as the language of the subsection already states that it is referring to disabilities. Accordingly, the Council declines to adopt that language.

Councilmember Comment: The list in subsection (c)(1)(B)(i)(g) does not include “stalking” or “dating violence,” whereas other similar lists in the draft regulations do include these factors.

Council Response: The Council agrees with this comment and proposes revisions to ensure consistency in regard to such lists throughout the regulations.

Councilmember Comment: In subsection (c)(1)(B)(i), should the phrase “[c]onsideration of this factor may include” read “must include?”

Council Response: The Council believes that “may include” is appropriate. Pursuant to the statute, the mandatory factors that must be considered are “the nature and gravity of the offense or conduct,” “the time that has passed since the offense or conduct and/or completion of the sentence”; and “the nature of the job held or sought.” The subfactors that the Council sets forth in this subsection are for the purpose of providing guidance regarding what elements may be helpful to consider when evaluating these factors. Accordingly, the Council declines to propose further modifications in response to this comment.

Subsection 11017.1(c)(2)(D)

Councilmember Comment: The Council should consider including guidance on how an employer should consider evidence challenging the accuracy of a conviction history report.

Council Response: The Council declines to adopt the suggested modification. The initial proposed modifications to the regulations did not propose to detail the process by which an employer should evaluate evidence of factual inaccuracies within a conviction history report. Accordingly, such a change would be outside the scope of this rulemaking.

Councilmember Comment: The Council should provide greater detail as to why and how that “[t]he fact that the applicant is seeking employment” (subsection (c)(2)(D)(i)(VIII)) could be relevant (e.g., by clarifying that evidence of currently seeking employment is relevant where the applicant had not sought employment in the past).

Council Response: The Council declines to adopt the suggested modification. The very fact that an applicant is seeking employment demonstrates that they are making an effort to participate in rehabilitative activities and contribute to society.

Councilmember Comment: To the end of subsection (c)(2)(D)(i)(V), the Council should add “or has been mitigated or eliminated by medical treatment or otherwise.” Similarly, the Council should add to the end of subsection (c)(2)(D)(ii)(IV) “including whether the disability has been mitigated or eliminated by treatment or otherwise.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Councilmember Comment: The Council should further explain the inclusion of “bonding programs” in subsection (c)(2)(D)(i)(VII).

Council Response: The Council declines to adopt the suggested modification. The Council did not propose any modifications to this language; accordingly, it is outside the scope of this rulemaking.

Councilmember Comment: The Council should consider adding to subsection (c)(2)(D)(iii) that an employer is prohibited from requiring evidence in the form of medical records or diagnoses.

Council Response: The Council agrees with this comment and proposes adopting the following language as (c)(2)(D)(iii)(V):

(iii) An employer is prohibited from the following actions:

[...]

(V) Requiring an applicant to produce medical records and/or disclose the existence of a disability or diagnosis.

Subsection 11017.1(h)

Councilmember Comment: The Council should consider clarifying that an employer should notify an applicant why their conviction history information is being gathered in the instance of applying for a Worker Opportunity Tax Credit.

Council Response: The Council declines to adopt this suggested modification. To apply for a Worker Opportunity Tax Credit, an employer asks whether an applicant is a member of one of several groups, including (but not limited to) individuals with prior felony convictions. The form itself asks whether an applicant meets any of the various criteria – it does not require that they specify whether they meet the specific prior felony criterion. Further, the proposed regulation states that the employer cannot ask for this information in a way that would lead the applicant to identify with specificity that they have a prior conviction history.

Subsection 11017.1(i)

Councilmember Comment: The Council should consider moving these definitions to the beginning of the section, immediately following the introduction. Definitions are typically the first subsection in a section.

Council Response: The Council declines to adopt the suggested modification. It is necessary for clarity that the prohibitions set forth in subsection (a) headline the regulation. Also, changing all lettering throughout the proposed regulation at this point in the rulemaking process would add administrative complexities that would outweigh a potential benefit from reorganization.

Comments from the Public

Comment: Molly Lao from Legal Aid at Work (LAAW) highlighted several comments set forth in LAAW's written comment letter.

Council Response: Summaries of and responses to these comments and others included in LAAW’s comment letter are set forth below.

Comment: Joshua Kim from Root and Rebound noted that some employers revoke a conditional job offer when a criminal history background check is delayed.

Council Response: The Council declines to make further modifications in response to this comment for reasons set forth above in its response to substantially similar comments made during the 45-day public comment period.

Comment: Brenda Lebsack agreed with Councilmember Schur noting that words really matter. Small changes in word choice make a difference in meaning.

Council Response: This comment is not asking for a change in the proposed regulation but rather making a statement. Accordingly, no further response is required per Government Code section 11346.9(a)(3).

Comment: Bruce Wolf made several comments on disclosing disability or health records, stating that following the ADA on disclosure is probably the best approach to take; noting that there are classifications of temporary versus permanent disabilities; and noting that placing definitions in the front is standard constitutional construction. Wolf also asked if the goal of these amendments is to increase disclosure and exposure to employers.

Council Response: To the extent this comment recommends that the Council reference the Americans with Disabilities Act in this regulation, the Council declines to do so. As an initial point, the relevant statute and standards are in the FEHA rather than the ADA. In any event, as noted above, the Council proposes to adopt recommended language to clarify that employers are prohibited from requesting disclosure of disability or diagnosis as well as medical records; additional references to the ADA or the FEHA would not add clarity. The remaining comments are statements or inquiries rather than recommended changes to the proposed regulations. Accordingly, no further response is required per Government Code section 11346.9(a)(3).

**COMMENTS RECEIVED DURING THE FIRST 15-DAY COMMENT PERIOD
[GOVERNMENT CODE SECTION 11346.9(A)(3)] AND ADDITIONAL REVISIONS**

General

Comment: We thank the Council for its important work in this area and for the opportunity to comment on the proposed regulations. We also thank the Council for considering and adopting many of the suggested amendments from our written comment submitted during the 45-day comment period.

Council Response: The Council appreciates this comment.

Comment: It appears that in the state of California, the criminal has more rights than its law abiding citizens. Does this mean sex offenders and child molesters will be hired as preschool teachers and sports' coaches / teachers because employers are not obligated to do background checks? This is the most irresponsible regulation I've ever seen. It's a betrayal of trust to the constituents you serve. How is this in the best interest of law abiding citizens and how does this protect the most vulnerable in our society such as children and the elderly? If your goal is to increase trauma, violence and crime, then well done. You are removing safeguards to protect the innocent. Would you hire a nanny for your children without getting a background check on that individual? No, of course not. There is no common sense in this regulation. You continue to betray the trust of Californians with regulations like these that will give former criminals more license with decreased accountability. When those with criminal histories are given trust too quickly (before it is fairly earned), you remove the freedoms of those who are trying to follow the laws and even incentivize citizens to break the law, especially since our radical teachers' union advocates for defunding the police and making our law enforcers impotent. Will former Cartel be our future security guards? Will former thieves be working in the jewelry shops? Will former sex offenders be our school counselors and psychologists? If you think giving more freedoms to those who have not earned it is going to make our society more compassionate, kind and safe, you have not studied history or human psychology. Californians are not naïve. We see what's going on. Thousands of criminals are being let out of jails, borders are open so Fentanyl can flood our streets and human traffickers can exploit immigrant orphans, criminals are being given scholarships to attend college. We have cartoons coming out telling children that bad guys are good, fun, and trustworthy. Do I believe in Redemption? Absolutely! But redemption does not come when evil is rewarded, and that is what California continues to do at every turn... calling it "kind, compassionate, equitable, etc." No, this is not equitable and kind, this is an intentional creation of societal mayhem and moral deterioration so government can step in and "save the day" with tyrannical militant control. It doesn't take a law degree to have common sense. [removed unrelated portion regarding gender identity]

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. No further response is required per Government Code Section 11346.9(a)(3).

Comment: Is the goal of these amendments to increase disclosure and exposure to employers?

Council Response: The goal of these amendments is to provide further clarity as to the application of the Fair Chance Act.

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Introduction

Comment: We renew our recommendations that the Council adopt language in the regulation's introduction providing context on the circumstances that commonly result in convictions and describing the positive effects of hiring persons with arrests and convictions records. We ask that

the Council include language requiring employers “to know that a wide range of conduct may result in a conviction under particular criminal laws, and convictions may be based indirect liability for other people’s actions (e.g., aiding and abetting liability).” We also request including the fact that “employers should know that 94 to 97% of defendants enter into federal or state plea bargains not as an admission of guilt, but because of the coercive power of large sentences.” Many employers are also unaware of the voluminous literature showing how hiring persons with arrest and convictions records can help a companies’ bottom line, including through increased retention. To address this knowledge gap, we urge the Council to include the following language in the introduction: “Employers are expected to know that various studies have documented the positive benefits of hiring person with arrests and conviction records, such as increased retention and employee morale and subsequent decreased hiring costs. These positive benefits are countervailing considerations in the direct and adverse relationship test.” We previously requested that this text be included after the introduction, but understand that the Council may be hesitant to include this language in later sections. We believe that this language is similar to the most recent additions made by the Council to the introduction, and therefore believe that it may be better suited to inclusion there.

Council Response: Although it appreciates the context, the Council declines to adopt the suggested language for reasons set forth in its earlier response to this suggestion.

Comment: We thank the Council for adopting language to make it clear that claims under the Fair Chance Act are subject to the procedures set forth in Article 1 of Chapter 7 of the Act in the introduction. We recommend that the Council also include clear reference to an individual’s ability to file a Fair Chance Act claim for investigation under 2 CCR § 10026 or request an immediate right-to-sue letter under 2 CCR § 10005. We also renew our recommendation that the council consider adopting clarifying language that “all relief generally available under the FEHA is available for claims brought pursuant to the Fair Chance Act” as part of the final paragraph of the introduction.

Council Response: The Council declines to adopt the suggested language. The current version of the proposed modified text states that an individual may file a complaint for investigation or request immediate right-to-sue notice; that language also includes reference to the procedures set forth in Government Code section 12965. The Council does not agree that cross referencing specific regulations would add further clarity to the regulations.

The Council again declines to adopt the suggested language regarding “all relief generally available under the FEHA” for the reasons it set forth in its earlier response to this suggestion.

Subsection 11017.1(a)(1) (and (c)(2)(B))

Comment: In multiple sections of Modified Text of Proposed Modifications, the text refers to “inquiring about criminal history through an employment application, background check, or internet searches.” The wording, in its current form, prohibits employers to conduct web searches on ‘criminal history’ specifically. Employers can still search for the candidate’s name on the internet or social media (without intent for criminal history) and access this information, as well

as other protected category information (such as disability, sexual preference, ethnicity, race, etc.). Furthermore, online searches can be racially biased against black-sounding names. Academic research has shown that, without intent to search for criminal history or any mention related to crime, “ads suggesting arrest tend to appear with names associated with blacks, and neutral ads or no ads appear with names associated with whites.” Such ads do not require an actual arrest record but act as clickbait. Similarly, the current wording still prohibits ‘employers’ to conduct an inquiry. Instead of a direct inquiry, employers widely utilize social media check vendors/platforms. Such third-party social media check platforms can return information including criminal history, or even inference to a criminal activity which never happened. This loophole for employers allows the vendors to parse all public information on the web and provide a decision / rating / score / report to employers without disclosing the source of information. Some AI-based job application systems can review an applicant’s resume and public information and make incorrect correlations or inferences and eliminate the applicant from the application process. In other words, the application system may have ‘no’ questions related to criminal history, but the system can still reject a candidate. In all of the cases above, the applicants would have no way to know or evidence that a decision was made according to their criminal history and/or other protected category information disclosed in the process. Therefore, applicants could not have a way to redress or request correction. *[The commenter went on to recommend the following:]*

- The wording should be changed to “inquiring about a candidate ~~criminal history~~ through an employment application, background check, social media or internet searches.”
- Similar changes should be made in the regulations related to ‘housing’ applications. Internet, social media, or commercial tenant screening algorithmic systems are prone to similar issues and can result in discriminatory outcomes. Especially the vendors of screening systems are not regulated and do not have any responsibility to correct the erroneous reports provided to landlords.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(a)(3)

Comment: We renew our request that the Council consider the inclusion of language that will insulate applicants who omit or disclose their criminal history during the application process. As raised in our prior comments and demonstrated by the CRD’s independent enforcement efforts, employers continue to ask questions about conviction history on job applications and during interviews, in violation of the Act. We propose adding “or disclosure” after “failure to disclose criminal history” in Section 11017.1(a)(3) in order to protect applicants from later being penalized for an employer’s violation of the law. We also propose adding clarifying language to this section, stating that “Employers may not revoke a job offer based on an applicant’s non-disclosures or denials of convictions that the employer later discovers through a background check or other means that reveal convictions or other criminal history information that are not lawfully reported.”

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Comment: We thank the Council for adopting language as Section 11017.1(a)(5) clarifying the scope of the exemptions to the prohibition against inquiring about or using conviction history before a conditional offer of employment has been made. We urge the Council to also clarify in this subsection that laws that “restrict employment based on criminal history” are “those that prohibit an individual with that particular conviction from holding the position sought by the applicant or where the employer is prohibited by law from hiring an applicant who has that particular conviction.” This clarification is supported by the intent of the Act, which is to “give applicants with a criminal record the opportunity to be judged on their qualifications not their criminal histories.” This additional change to define laws that restrict employment based on criminal history narrowly as prohibited by law would also “increase[] access to employment for people with conviction histories” as the law’s author intended.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(b)(1)

Comment: We renew our recommendation that the Council include parole revocations as a type of criminal history information that employers cannot consider as an arrest not followed by conviction. Because parole revocations are not criminal in nature, often resulting from “technical” violations of the parole process, not subject to the beyond a reasonable doubt standard, and otherwise devoid of other protections that attach in a criminal process, it would be inappropriate and contrary to the intent of the Act to allow employers to consider parole revocations during the hiring process. We urge the Council add “including any revocation of parole, probation, or supervised release, or other proceeding or violation that does not require a determination of guilt beyond a reasonable doubt” after “An arrest or detention that did not result in conviction” in Section 11017.1(b)(1). This language would clarify that employers are prohibited from revoking conditional offers of employment on the basis of technical parole revocations.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons it set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(c)(1)

Comment: We recommend that the Council consider adding language that will help protect applicants with any arrest or conviction record whose background checks may take longer than those for individuals without records. The Council should add the following language to Section 11017.1(c)(1): “Any employer denying an applicant the employment position they were conditionally offered due to a delay in receiving results of a background check will be deemed to have revoked the job offer solely or in part on the applicant’s conviction history.” Background checks for applicants with any arrest or conviction record typically take longer than those for individuals without records. For instance, the California Department of Justice takes an average of between 30 and 66 days after fingerprinting to send information to California Department of Social Services for people with records, which is significantly longer than for individuals with no records. The Legislature’s use of the words “solely or in part” signals an intent to cover revocations in any way related to conviction history. Yet, employers may be confused about their obligations to follow the individualized assessment process, if they are revoking a job offer without having seen the results of the background check. Such a change would make clear that employers are still obliged to follow the requirements of the Act in these circumstances, and prevent circumventing of the Act’s requirements.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons it set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Comment: It would be helpful to add a subsection to (c)(1) clarifying an employer is prohibited from revoking a conditional job offer based on a delay in or failure to obtain an applicant’s criminal history information.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(c)(1)(A)

Comment: We urge the Council to adopt language that defines the direct and adverse relationship standard. We remain concerned that the regulations do not adequately define the standard by which employers should evaluate evidence of rehabilitation, and that the requirements of the direct and adverse relationship are vaguely defined. This could be remedied by adopting language in these regulations making plain that to justify the revocation of a job offer, an employer “must prove that there exists an overriding legitimate business purpose such that the [revocation] is necessary to the safe and efficient operation of the business” and that the challenged revocation “effectively fulfills the business purpose it is supposed to serve.”

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth

in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Comment: While we applaud the Council’s inclusion of language in (c)(1)(A)(i) clarifying that, where a licensing entity has determined that an applicant may perform a specific job, it is probative of a direct and adverse relationship not existing, we would urge the Council to considered changing “probative” to “determinative” in (c)(1)(A)(i) to clarify the [direct and adverse] standard in this context.

Council Response: The Council declines to adopt the suggested language for the reasons set forth above in response to the same suggestion made during the December 13, 2022 meeting of the Civil Rights Council.

Comment: We recommend that the Council adopt language that: “The fact that the applicant has completed a sentence for the conviction and is free from custody raises a rebuttable presumption that the applicant does not pose a substantial risk to public safety in ordinary circumstances.” This clarification would ensure that employers understand that the direct and adverse test requires more than a loose, articulable nexus between the conviction and the job duties—one that is at least as strong as the business necessity test, but likely even stronger.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to the same suggested revision to the modified text. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(c)(1)(B)

Comment: We recommend that the Council add language prohibiting employers from considering convictions when more than seven years have passed since an applicant has been incarcerated. We urge the Council to add the following language as a subsection (c)(1)(B)(ii): “The employer cannot consider any such conviction when seven or more years have passed since an applicant’s conviction date.” This language would clarify how the Act interacts with the Investigative Consumer Reporting Agency Act (ICRAA), particularly with regard to ICRAA’s prohibitions on the disclosure of records that are seven or more years old.

Council Response: The Council declines to adopt the suggested language. The Council is not aware of sufficient legal authority for categorically prohibiting employers from considering conviction history that is at least seven years old.

Subsection 11017.1(c)(2)(D)

Comment: In subdivisions (c)(2)(D)(i) and (c)(2)(D)(ii) propose adding a statement that says certain evidence “is optional and may only be voluntarily provided by the applicant.” To ensure that applicants are not prevented from receiving help with submitting evidence, we propose the

statement be amended as follows: “. . . is optional and may only be voluntarily provided by the applicant or by another party at the applicant’s request.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language.

Comment: We thank the Council for adding language to Sections (c)(2)(D)(i) and (ii) to clarify that submitting evidence of rehabilitation or mitigating circumstances is optional and may only be voluntarily provided by the applicant, and for creating subsection (c)(2)(D)(iii). We also commend the Council for including “the fact that the applicant is seeking employment” as one type of evidence that an applicant may submit after receiving notice of a preliminary decision that the applicant’s conviction history was the basis of a disqualification from a conditionally offered employment opportunity. Because some Council Members expressed confusion with this provision, the Council may consider adding the following language: “Employers are expected to know that various studies have documented the positive benefits of hiring person with arrests and conviction records, such as increased retention and employee morale and subsequent decreased hiring costs. These positive benefits are countervailing considerations in the direct and adverse relationship test.” In addition, the Council may consider adding language explaining that research has shown that one of the best predictors of whether a person will recidivate is (1) whether they are actively seeking work and (2) whether they have secured high-quality employment. Therefore, for every applicant, assuming the employer is providing high-quality employment, this should be a countervailing factor in the direct and adverse relationship test that weighs towards hiring the applicant. The fact that a person is applying for a job itself demonstrates that the applicant is unlikely to re-offend and that there is no adverse relationship between their conviction and the job.

Council Response: The Council declines to adopt the suggested language on the basis that it does not provide regulatory guidance but rather offers policy considerations.

Subsection 11017.1(f)(3)

Comment: We urge the Council to clarify in these regulations that an employer with a policy or practice of considering background check delays against an applicant has a policy or practice with adverse impact. We ask that the Council amend Section 11017.1(f)(3) to state: “State- or national-level statistics that show a substantial disparity based on conviction history and any characteristic protected by the Act are presumptively sufficient to establish an adverse impact.” We believe this clarification is essential to effectuate the Act’s purpose due to the well-documented relationship between delays and the presence of an arrest or conviction history, and the voluminous research about how the collateral consequences of arrests and conviction records fall disproportionately on communities of color, particularly Black individuals.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(f)(4)(B)

Comment: We recommend defining the direct and adverse relationship test in subsection (f)(4)(B) using language that other advocates have proposed: “A conviction history has a ‘direct and adverse relationship with the specific duties of the job that justify denying the applicant the position’ when evidence produced by the employer establishes that the applicant’s conviction history, when considered in all of the relevant circumstances as outlined in this regulation, indicates that hiring the applicant would pose a substantial increased chance of crime while the applicant performs specific duties for the position. The increased chance must be substantial and there must be an increased risk when the applicant is compared to the general population.”

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(f)(4)(D)

Comment: We thank the Council for including our suggested language in Section 11017.1(f)(4)(D) requiring an employer to notify an adversely impacted employee of which conviction led to the applicant’s disqualification for an employment opportunity if the applicant has more than one conviction appearing on a background report. We further recommend that the Council also adopt regulations that require an employer to provide reasoning as to why a specific conviction was found to be disqualifying. This addition, in conjunction with the language the Council has already adopted, would enable an unsuccessful applicant to provide a more informed response and more specific evidence of rehabilitation or mitigating circumstances for reassessment.

Council Response: This comment is not responsive to the text noticed for the first 15-day comment period. The Council declines to adopt the suggested language for the reasons set forth in its earlier response to this suggestion. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(i)

Comment: We thank the Council for amending the definition of “applicant” in subsection (i)(1) to include “existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer,” and for adopting suggested language to more clearly define who is an “employer” for purposes of the Act in subsection (i)(2). Despite these changes, the Council’s most recent modifications do not explicitly apply to changes in ownership in the company, changes in human resources procedures, or when different companies become involved in the management of the employer. Therefore we recommend that the Council include the following language as part of the definition of “applicant” in subsection (i)(1): “an

existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, or policies and procedures of an employer.”

Council Response: The Council agrees with this comment and proposes to adopt the suggested language with a slight change, using instead the language “ownership, management, policy, or practice.”

COMMENTS MADE DURING THE FEBRUARY 21, 2023 CIVIL RIGHTS COUNCIL MEETING [GOVERNMENT CODE SECTION 11346.9(A)(3)].

Councilmember Comments

Councilmember Comment: In both subsections (c)(1)(B)(VI) and (c)(2)(D)(i)(VI), the Council should strike “or eliminated” from the phrase “whether the disability has been mitigated or eliminated by treatment or otherwise.” Current law clarifies that an individual still has a disability even if it is mitigated by treatment or otherwise.

Council Response: The Council acknowledges that an individual with a disability is protected under state and federal antidiscrimination law even if their disability has been mitigated by treatment or otherwise. However, the Council declines to strike the phrase “or eliminated” as it provides clarity in the context of this particular regulation and does not diminish, nor is intended to diminish, the rights available to individuals with disabilities.

Comments from the Public

Comment: Sandra Johnson from Legal Aid at Work (LAAW) asked the Council to consider adding language to protect applicants with a conviction history whose background checks could take longer than applicants without a conviction history and who are denied employment opportunities as a result of this delay.

Council Response: This recommendation was set forth in written comments previously provided by LAAW and is responded to above.

Comment: Bradan Litzinger from LAAW highlighted several comments set forth in LAAW’s previously submitted written comment letter.

Council Response: Summaries and responses to these comments and others included in LAAW’s previous written comment letter are set forth above.

COMMENTS RECEIVED DURING THE SECOND 15-DAY COMMENT PERIOD [GOVERNMENT CODE SECTION 11346.9(A)(3)] AND ADDITIONAL REVISIONS

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Subsection 11017.1(a)

Comment: As currently drafted, 2 C.C.R. § 11017.1(a) provides that, except for specific exemptions in subsection (a)(4), employers are prohibited from considering criminal history prior to a conditional offer of employment. Additionally, subsection (a)(5) provides that, in order for the exemptions in (a)(4) to apply, “the employer or the employer’s agent **must be required by law** to conduct the criminal background check” (emphasis added). Both subsections conflict with Labor Code Section 432.7(f).

Specifically, Labor Code Section 432.7(f)(1) provides:

(f) (1) Except as provided in paragraph (2), this section does not prohibit an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, from asking an applicant for employment either of the following:

(A) With regard to an applicant for a position with regular access to patients, to disclose an arrest under any section specified in Section 290 of the Penal Code.

(B) With regard to an applicant for a position with access to drugs and medication, to disclose an arrest under any section specified in former Section 11590 of the Health and Safety Code, as it read on January 1, 2019.

As Labor Code Section 432.7(f) permits health facilities to inquire about sex offenses for applicants with regular access to patients and to inquire about substance abuse offenses with access to drugs and medication, this law should be reflected with an explicit exemption under subsection (a)(4). Additionally, as Labor Code Section 432.7(f) is permissive, but unquestionably necessary for the creation of a safe and secure health care facility, health facilities should be explicitly excluded from subsection (a)(5).

Therefore, [the commenter] recommends the following clarifications:

*(4) The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subsections (b) and (d) **and** (g)):*

(A) If the position is one for which an employer is otherwise required by law to conduct a conviction history background check where the employer is a state or local agency;

(B) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(C) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; ~~or~~

(D) If the position is in a health facility and has regular access to patients or access to drugs and medication, as described in Section 432.7(f) of the Labor Code; or

~~(D)~~ ***(E) If the position is one that an employer or an employer’s agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the ~~Security~~ Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).***

(5) Except as provided in Labor Code Section 432.7(f), ~~For~~ for the exemptions set forth in subsection (a)(4) to apply, the employer or the employer’s agent must be required by law to conduct the criminal background check. A state, federal, or local law requiring another entity, such as an occupational licensing board, to conduct a criminal background check will not exempt an employer from the prohibitions set forth in this subsection and other requirements of this section.

These modifications will resolve the conflict between subsection (a) and existing law for health facilities, ensuring precision and reducing compliance concerns.

Council Response: The Council declines to adopt the suggested language. This comment was not raised in a previous comment period and is not responsive to the language noticed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: Proposed section 2 C.C.R. § 11017.1(a) conflicts with Labor Code Section 432.7(f). The proposed regulation provides that the employer “must be *required* by law” to conduct a criminal background check for the exemptions in (a)(4) to apply (emphasis added). Labor Code Section 432.7(f) *explicitly permits* health facilities to inquire about sex offenses for applicants with regular access to patients and to inquire about substance abuse offenses with access to drugs and medication. Health facilities covered by Labor Code Section 432.7(f) should therefore also be permitted to inquire or use criminal history before a conditional offer for these specific purposes.

Council Response: The Council declines to adopt the suggested language. This comment was not raised in a previous comment period and is not responsive to the language noticed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Additional revisions: The Council proposes the addition of language to subsection (a)(5) to clarify that the requirement in that subsection applies only to the exemptions set forth in (a)(4)(A) and (a)(4)(D) (circumstances in which the employer or employer’s agent is required by law to conduct a criminal background check).

Subsection 11017.1(b)

Comment: Similarly, subsection (b) references Labor Code Section 432.7 in addressing the consideration of certain types of criminal history. However, these cross-references need to be explicit and embedded in the text, not set off by parentheses. Moreover, as these cross-references point to limited exclusions, that direct reference provides clarity and minimizes potential for confusion or abuse.

Therefore, [we] recommend[] the following clarifications [to subsections (b)(1), (2), and (4):

(b) Prohibition of Consideration of Certain Types of Criminal History. Employers are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history prior to making a conditional offer, both after a conditional offer has been made, and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

*(1) An arrest or detention that did not result in conviction, **except as provided in Labor Code section 432.7 and Government Code section 12952** (~~Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or her their own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions);~~*

*(2) Referral to or participation in a pretrial or post-trial diversion program, **except as provided in Labor Code section 432.7 and Government Code section 12952** (~~Labor Code section 432.7 and Government Code section 12952);~~*

[...]

*(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law, **except as provided by Labor Code Section 432.7** (~~Labor Code section 432.7); and~~*

Council Response: The Council declines to adopt the suggested language. This comment was not raised in a previous comment period and is not responsive to the language noticed for the second 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(b)(2)

Comment: While not part of the proposed modifications to the regulations, we did still want to provide a concern raised by our membership about this section conflicting with federal law. Subsection (b)(2) prohibits consideration of participation in a pre-trial diversion program in making an adverse employment decision. Financial institutions such as banks are governed by federal FDIC rules. Those federal regulations specifically require banks to consider pre-trial diversion programs essentially as convictions that may disqualify someone from employment:

Pretrial Diversion or Similar Program (Program Entry) These programs go by several different names, but they generally remove the defendant from the ordinary channels of prosecution so that the defendant may complete program conditions. Once the defendant meets the conditions, either the prosecutor or the court will dismiss, reverse, or reduce the charges. If, after successful completion of a Program Entry, the initial charge for a covered offense is reduced to a charge for an offense that is not a covered offense, or is dismissed, the offense will require an application unless the initially charged offense is de minimis. **Section 19 treats Program Entries the same as convictions.**

See FDIC Regulations, available at:

<https://www.fdic.gov/regulations/applications/resources/brochure-section-19-rule.pdf> (emphasis added).

Therefore, the California law conflicts with federal law governing banks, which could cause confusion and result in non-compliance with one or the other law. We would propose addressing this by adding the following language to (b)(2):

(2) Unless otherwise required by law, referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952).

Council Response: The Council declines to adopt the suggested language. As the commenter acknowledges, this comment is not responsive to the text noticed for the second 15-day comment period. Further, although the commenter's letter notes that it made this same comment in an earlier submitted letter, the Council has confirmed with the commenter that it sent no other letter to the Council throughout this rulemaking process. Additionally, as the commenter also acknowledges, this language was not part of the proposed modifications in this rulemaking and is therefore outside the scope of the rulemaking process. No further response is required per Government Code section 11346.9(a)(3).

Subsection 11017.1(b)(6)

Comment: Regulation 11017.1 section (a) provides that employers are prohibited from considering the criminal history of an applicant for employment until after a conditional offer of employment has been extended, except as provided under subsection (a)(4). Subsection (a)(4) (A)-(D) provide the circumstances for exceptions when an employer can inquire about and consider criminal history before making a conditional offer of employment. However (a)(4) also provides that, regardless of the (A)-(D) exceptions, the employer is "still subject to the requirements in subsections (b)" and (d)-(g).

Then, under (b)(6), the employer is made subject to subsections (c)(1)-(5). In effect, the requirements and prohibitions of subsection (c)(1)-(5) are imputed back into those circumstances under (a)(4) when employers have exceptions to the prohibitions. Therefore, the cross reference to subsections (c)(1)-(5) in subsection (b)(6) contradicts the exemptions. This creates inconsistency within the regulations and with Government Code section 12952, subdivision (d) – which the regulations cannot contradict and are supposed to implement. Also, [the commenter]

notes that section (c) does not include a subsection (5). [The commenter] believes the cross reference to subsections (c)(1)-(5) is an error and the intent is to instead cross reference subsections (b)(1)-(5). This would be consistent with the regulatory scheme and law.

Council Response: The Council agrees that the cross-reference to subsections (c)(1)-(5) is a typographic error and proposes to change the cross-reference to (b)(1)-(5).

Subsection 11017.1(c)(1)(A)(i)

Comment: This proposed language provides that “the possession of a benefit, privilege, or right required for the performance of a job by a licensing, regulatory, or government agency or board is probative of the applicant’s conviction history not being directly and adversely related to the specific duties of that job.” We have two concerns with this language.

First, not all state or board licensing procedures may take into account criminal history relevant to a specific job. The licensing procedure may also not capture convictions that take place subsequent to the issuance of the license. The regulations should note that there may be some exceptions to the fact that obtaining a license is indicative that the conviction history is not “directly and adversely related” to the specific duties of the job.

Second, we would request clarification of the term “licensing.” For example, some of our members read this to include a driver’s license because the term is undefined and a driver’s license is a license issued by a government agency that may be required for specific jobs. That would mean that any Californian with a driver’s license is essentially assumed to be fit for a job, regardless of their driving record. This would be nonsensical and should be clarified in the regulations.

Council Response: The Council declines to propose further modifications in response to this comment. As the commenter acknowledges, this comment is not responsive to the text noticed for the second 15-day comment period. Further, although the commenter’s letter notes that it made this same comment in an earlier submitted letter, the Council has confirmed with the commenter that no other letter was sent to the Council throughout this rulemaking process. No further response is required per Government Code section 11346.9(a)(3).

COMMENTS MADE DURING THE APRIL 3, 2023 CIVIL RIGHTS COUNCIL MEETING [GOVERNMENT CODE SECTION 11346.9(A)(3)].

No comments.

COMMENTS RECEIVED DURING THE THIRD 15-DAY COMMENT PERIOD

General Comments

Comment: In the state of California criminals will soon have more rights than law abiding citizens. What the Calif Civil Rights Dpt is proposing is not in the best interest of cultivating a

safe and fair society. People with criminal backgrounds should absolutely be under scrutiny by employers. I am all for providing second chances and opportunities, however, trust must be earned not given on a silver platter. With this policy, we will have former thieves working in jewelry shops. We will have former sex offenders as preschool and special education teachers, placing our most vulnerable citizens at risk for the sake of "non-discrimination." We will have former rapists working in health spas. Squatters will have more rights than responsible property owners. Home invaders will have more rights than the hard-working occupants of those homes. These policies sound like a set up in becoming a third world country where lawlessness, corruption and mayhem rule the day and where the rich cartel have the power to control neighborhoods through fear. Will the Calif Civil Rights governor appointees soon rule to remove police and replace them with social workers? This would be the icing on the cake and it would come as no surprise. Marxism 101 - Under the communist paradise there will be no more social injustice, and everybody will be treated equally. The sum of violent actions by radical Marxists is alleged to actually be a good thing, because this may potentially accelerate the advent of the great socialistic utopia.

Council Response: This comment is not responsive to the text noticed for the third 15-day comment period. No further response is required per Government Code section 11346.9(a)(3).

Comment: I noticed an inconsistency with the subsection indentation. Each subsection is indented within its parent, except the capital letters. Was this done on purpose? I found it jarring. Currently, lowercase letters are farthest to the left, numbers are indented from lowercase letters, capital letters are on the same vertical line with numbers, lowercase roman numerals are indented from the capital letters, uppercase roman numerals are indented from the lowercase roman numerals.

Council Response: This comment is not responsive to the text noticed for the third 15-day comment period. No further response is required per Government Code Section 11346.9(a)(3).

Article 2 Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Subsection 11017.1(g)

Comment: When I read each of the two items [in subsection (g)] independently as its own sentence, the second one doesn't quite read right – "compliance with federal or state laws or regulations that requiring that an employee or applicant possess..." 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.

My comment is that the two actions (mandate, requiring) are in different forms and it makes an awkward sentence. I suggest changing "requiring that" to "require," [to read] "Compliance with federal or state laws or regulations that mandate particular criminal history screening processes

or require an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

Council Response: This comment is not responsive to the text noticed for the third 15-day comment period. No further response is required per Government Code Section 11346.9(a)(3).