

**CIVIL RIGHTS COUNCIL
MODIFICATIONS TO FAIR EMPLOYMENT AND HOUSING ACT FAIR HOUSING REGULATIONS
FINAL STATEMENT OF REASONS**

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Civil Rights Department

Chapter 5. Civil Rights Council

Subchapter 7. Discrimination in Housing

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

This rulemaking action implements, interprets, and makes specific the fair housing provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 *et seq.* As it relates to housing, the FEHA prohibits harassment and discrimination because of the race, color, religion, national origin, ancestry, physical disability, mental disability, genetic information, marital status, familial status, sex, gender, gender identity, gender expression, sexual orientation, source of income, military and/or veteran status of any person, or any basis prohibited by section 51 of the Civil Code.

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

The Council heard public comment on the originally proposed text at a remote public hearing on April 3, 2023. During a subsequent remote meeting held on April 28, 2023, and the 15-day public comment period that followed, the Council solicited further public comment on modifications to the original text. The Council approved an unmodified text at its August 29, 2023 meeting. The following list summarizes the Council’s amendments to the originally proposed text:

- Clarifying the definition of “facially discriminatory policy” to indicate that a “facially discriminatory policy” is one that requires *or allows* adverse action based on a protected characteristic.
- Adding language to proposed section 12140.1 “Source of Income Discrimination in Housing Other Than Rental Housing Covered by Section §12141” to mirror the language of the statute in Government Code section 12955(c).
- Clarifying in proposed section 12140.1 that providing insurance to housing providers is a covered real-estate transactions.
- Adding language to section 12141. “Source of Income Discrimination in Rental Housing” to mirror the language of the statute in Government Code section 12955(c).

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 APRIL 3, 2023, PUBLIC HEARING BEFORE THE CIVIL RIGHTS COUNCIL [GOVERNMENT CODE SECTION 11346.9(A)(3)].

Comments from Councilmembers

No comments.

Public Comments

No comments.

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

Article 3: Intentional Discrimination

§ 12040. Definitions

Comment: To eliminate ambiguity, the Council proposes to change the word “takes” to “requires” in the definition of “facially discriminatory policy.” We are concerned that the proposed change narrows the definition and fails to fully capture the instances in which a facially discriminatory policy is covered by this regulation. We suggest amending the definition by changing the word “takes” to “requires or allows” to ensure it articulates the scope of the definition by including written policies that not only require adverse action based on a protected class, but those that *allow* for it as well. For example, a housing provider having a listing that says “voucher tenants will be considered on a case by case basis.” We therefore suggest the following revision (note that throughout these comments, we have directly copied language from the Council’s proposed changes including strike throughs and underlined words; bolded strike throughs represent suggested deletions; bolded underlined words represent suggested additions):

(c) “Facially discriminatory policy” (sometimes referred to as “express classification”) means a written policy that explicitly conditions a housing opportunity on a protected basis, ~~takes~~ requires or allows adverse action based on a protected basis, or directs adverse action to be taken based on a protected basis.

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

§ 12042. Burdens of Proof and Types of Evidence in Intentional Discrimination Cases

Comment: The Council is proposing changing language in section 12042(c)(1) from the word “takes” to “requires.” Here again, we are concerned that the proposed change narrows the definition and fails to fully capture the instances in which a facially discriminatory policy is covered by this regulation. We suggest amending the definition by changing the word “takes” to “requires or allows” to ensure it articulates the scope of the definition.

(c) Direct evidence means evidence that, if believed, proves that discriminatory intent was a factor motivating the respondent’s challenged practice without inference or presumption.

(1) Direct evidence includes an express condition stated orally or in writing that either conditions a housing opportunity on a protected basis, ~~takes~~ requires or allows an adverse action based on a protected basis, and/or directs an adverse action to be taken based on a protected basis.

The Council’s proposed changes to section 12042(f) regarding the respondent’s burden of proof to avoid liability for a facially discriminatory policy articulates the standard the

respondent must meet to ensure proper application of the regulations.

Council Response: The Council declines to adopt the suggested language because it does not add clarity. Although allowing an adverse action *may* in some cases constitute direct evidence, that is not necessarily true in all instances. For that reason, the Council both declined to add the “allows as” language in subsection 12042(c)(1) but also ensured that the list of items included in the subsection is non-exhaustive.

Article 13: Consideration of Income

§ 12140. Definitions

Comment: We support the proposed changes to section 12140(b) with additional examples of “lawful, verifiable income.” Explicitly protecting tenants that utilize federal, state and local rental assistance programs created in response to the COVID-19 pandemic helps vulnerable tenants who suffered financial impacts due to the pandemic and is consistent with Health and Safety Code §50897.1(i). This addition is a necessary update to the regulations because the federal Emergency Rental Assistance Program did not exist when these regulations were initially drafted. Protecting tenants that receive all types of rental assistance is also consistent with Government Code §12927(i), which refers broadly to federal, state, and local assistance.

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.

§ 12140.1 Source of Income Discrimination in Housing Other than Rental Housing Covered by Section §12141

Comment: Newly added section 12140.1 articulates that source of income protections are not limited to rental housing. Below we suggest several changes to further delineate the scope of these protections.

We recommend including additional language to section 12140.1(b) to clarify the regulation and align it with Government Code section 12955(c).

(b) For any person to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale of a housing accommodation that indicates any preference, limitation, or discrimination or an intention to make that preference, limitation or discrimination because of source of income;

Council Response: The Council agrees with this comment and proposes to adopt the suggested language. In addition, the Council proposes to adopt this language in section 12141(a)(8) for the

same reasons set forth by this comment.

Comment:

We also recommend adding language to section 12410.1(h) and (j) that would require insurance companies to comply with fair housing laws. Courts have recognized that insurance companies that refuse to provide insurance, or provide such insurance on less favorable terms, to landlords who rent units to Section 8 Housing Choice Voucher holders are discriminating based on characteristics protected by the federal Fair Housing Act.² Section 12410(h) is equivalent to Section 3605 of the FHA and courts have held that Section 3605 covers insurance.³

(h) For any person or other organization or entity whose business involves real estate-related transactions, which includes providing rental property and other insurance to housing providers, to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of source of income or the source of income of any household members, or persons to whom they provide services;

(j) For any person to deny a person access to, or membership or participation in, a multiple listing service, real estate brokerage organization, or other service, because of their source of income or the source of income of any household members, or persons to whom they provide services;

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

- Adding the following double underlined language to (h): “For any person or other organization or entity whose business involves real estate-related transactions, which includes providing insurance to housing providers, to discriminate against any person in making available a transaction, or in the terms and conditions of a transaction, because of source of income;”

However, the Council declines the commenter’s additional suggested changes because they are duplicative of the prohibitions and protections already set forth in the proposed regulations, and they do not add clarity.

§ 12141. Source of Income Discrimination in Rental Housing

Comment: The Council’s proposed additions to section 12141(a) will clarify that housing applicants are protected (not just tenants) and that it is an adverse action for a landlord or a landlord’s agent to seek to discriminate on the basis of source of income by “Terminating or threatening to terminate participation in a rental assistance program.” The additional example helps protect tenants who rely on rental assistance programs from discriminatory actions or threats of their landlord which can result in the loss of their assistance. We suggest amending the example to clarify that the adverse action would occur when due, in whole or in part,

because of source of income.

(a) It is unlawful for a landlord or a landlord's agent to discriminate on the basis of the source of income by which a tenant or applicant for tenancy pays part or all of their rent by taking an "adverse action" as defined in section 12005(b). For purposes of this section, additional examples of "adverse action" include:

(7) Terminating or threatening to terminate participation in a rental assistance program due, in whole or in part, because of source of income;

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. In addition, the Council declines to adopt this suggestion because it does not add clarity.

Article 18: Disability

§ 12181. Other Requirements or Limitations in the Provision of Reasonable Modifications; and Examples

Comment: The proposed changes to section 12181(n)(3) provide helpful clarity to the examples of reasonable modifications. We suggest the Council include an additional sentence to highlight the homeowners' association's responsibility to maintain the modification to the common area which will benefit all the tenants. This change would align with the requirements of section 12181(i).

(n) Examples of Reasonable Modification:

(3) Example of factors to be considered in responding to a request for a reasonable modification in a common interest development: Aki is a member of a homeowners' association because she owns an interest in a condominium unit. Aki is deaf and would like to install a blinking doorbell to their apartment. This requires modifications to the front doorbell to the condominium complex and to the doorbell in Aki's unit. Aki has arranged for a community organization to pay for the modifications. Aki asks the homeowners' association permission to make the modifications. ~~The homeowners'~~ homeowners' association must consider the request under these regulations, including sections 12176 through 12181. It is unlawful for the owners' association to refuse to permit Aki to make the modifications, regardless of any provisions in the common interest development's governing documents. The source of the funding for the modifications is irrelevant. Further, the homeowner's association may not condition the approval of the modifications by requiring restoration of the former doorbells when Aki sells the condominium unit, because restorations can only be required for interior rental unit modifications, and even then, only when reasonable to do so. The owners' association can require that Aki provide

reasonable assurances that the work will be done in a competent manner and that any required building permits will be obtained. **Finally, the owner's association will be responsible for maintenance of the modified front doorbell because it will be used by other tenants and the public as well as the tenant with the disability.**

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.

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

General:

No Comments.

Council Response:

N/A.