July 31, 2019

Fair Employment and Housing Council
c/o Brian Sperber, Legislative and Regulatory Council
Department of Fair Employment and Housing
320 West 4th Street, 10th floor
Los Angeles, CA 90013

Submitted electronically to: *FEHCouncil@dfeh.ca.gov*

SUBJECT: PROPOSED REGULATIONS – RELIGIOUS CREED AND AGE DISCRIMINATION

Dear Mr. Sperber:

The California Chamber of Commerce and the organizations listed below appreciate the opportunity to provide comments on the Proposed Regulations regarding Religious Creed and Age Discrimination.

Comments to Section 11016(b)(1)(B) – Pre-Employment Inquiries

This proposed section states that pre-employment inquiries regarding availability for work shall not be used to ascertain the applicant's religious creed, disability or medical condition. This section is unnecessary and duplicative in light of the fact that such inquiries into *any* protected category are already unlawful under FEHA. Therefore, this section should be deleted.

Moreover, while we understand and appreciate the goal of the Council to "provide guidance to employers on how to avoid asking impermissible scheduling questions and demonstrate how employers can do so by giving a practical example," we are concerned that the proposed language is too restrictive and gives the impression that the example listed is the only permissible question an employer may ask with regard to scheduling.

For example, many employers state the normal work hours for the job and, after making it clear that the applicant is not required to indicate the need for any religious-based absences during scheduled work hours, ask them whether they are otherwise available to work during those hours. Thereafter, after a position is offered the employer and employee may discuss any need for religious accommodation and whether an accommodation is possible.

We are concerned that the current proposed language could be read by some employers as an absolute limit on the manner in which they may request scheduling information, and the information that they may request. We would therefore request that this language be deleted or modified to make clear that this is merely one permissible manner of requesting such information and that, as long as not used to ascertain religious creed, an employer may make pre-employment inquiries regarding availability for work, as many employers currently do.

Comments to Section 11016(c)(3) – Schedule Information

This proposed section states that employment applications that request availability for work and other information "will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose. This appears to be a "backdoor" manner to create a presumption of discrimination for otherwise legitimate and common inquiries made by most employers. Therefore, this language is inappropriate and should be deleted.

Comments to Section 11016(c)(3)(A) – Online Application Technology

This proposed section purports to provide that "online application technology" that limits or screens applicants based on their schedule may have an adverse impact. However, current Section 11016(c)(3) already prohibits "separation or coding" of application forms to identify individuals on a protected basis. Therefore, the proposed addition related to "online application technology" is unnecessary and duplicative. The current regulatory language could be amended to state that forms "shall not be **manually or electronically** separated or coded," which would potentially clarify the issue without creating an entire duplicative new subdivision.

Comments to Section 11076(a) – Establishing Age Discrimination

In addition to being prohibited under FEHA, age discrimination is unlawful under federal law under the Age Discrimination in Employment Act of 1967 (ADEA).

Although the wording of FEHA and federal antidiscrimination laws differ in some particulars, the antidiscriminatory objectives and overriding public policy perspectives are identical; therefore, California courts refer to applicable federal decisions where appropriate. *Juell v. Forest Pharmaceuticals, Inc.*, 456 F. Supp.2d 1141 (E.D. Cal. 2006).

Therefore, we believe the Council should strive, where possible, to ensure consistency between the age discrimination provisions of FEHA and those of federal law. In fact, in the Initial Statement of Reasons, the Council refers to the ADEA and applicable federal case law for the argument that disparate impact discrimination is cognizable for age discrimination claims under federal law and therefore should be so under FEHA.

However, several aspects of proposed Section 11076(a) differ in application from the standard under the federal ADEA. Under the federal law, any employment practice that adversely affects individuals within the protected age groups on the basis of older age is discriminatory unless the practice is justified by a "reasonable factor other than age." 29 C.F.R. §1625.7(c).

Proposed Section 11076(a) departs from this framework and instead provides that an otherwise unlawful adverse impact may only be justified by "business necessity."

In addition, proposed Section 11076(a) states that a "presumption of discrimination may be established by a showing that a facially neutral practice has an adverse impact on applicants or employees over the age of 40…" However, this framework appears to contradict the standard articulated by the United State Supreme Court under the ADEA in *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). In *Smith*, the Court noted that it is not enough for a plaintiff to allege simply a disparate impact on older workers. Rather, the Court held that plaintiffs bringing ADEA claims based on "disparate impact" must (1) identify the specific practice that had an adverse impact on older workers, and (2) show that the employer's decision that resulted in a disparate impact was not based on a "reasonable factor other than age." The presumption proposed by the regulation appears to contradict the approach taken under federal law under the ADEA.

Moreover, proposed Section 11076(a) states that, "The practice may still be impermissible, even where a legitimate business necessity exists, where it is shown that an alternative practice could accomplish the business purpose equally well with a less discriminatory impact." This provision appears to contradict the very same precedent from the United States Supreme Court that the Council cites in support of its regulatory proposal in the Initial Statement of Reasons. *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005). In that decision, the Court noted that an employer is not required to show that it had absolutely no other, less discriminatory alternative to achieve its goal. "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Id*. at 1546.

For these reasons, we urge the Council to reconsider this language and the overall approach taken by the proposed language to be more consistent with the federal standard under the ADEA. To do otherwise will subject California employers to conflicting and different interpretations under state and federal law.

Comment to Section 11078(a) – Recruitment and Advertising

The proposal states that examples of unlawful requirements include a requirement that candidates be "digital natives." While use of such a term may be inappropriate, this enumeration of examples could lead to confusion for employers over whether they can still inquire into certain skill sets or essential functions of the job, some which may include technological literacy. For this reason, inclusion of "examples" in regulatory language often causes more problems and confusion than it solves. In addition, there has been no explanation provided regarding authority (via case law, statistics or otherwise) for the proposition that these "examples" have been deemed unlawful. Therefore, we would propose deletion of specified examples of unlawful conduct.

Moreover, because the legality of an employer's actions may vary depending on the facts of a particular case and any affirmative defenses that may be presented, at a minimum it would be more appropriate to refer to these examples as "**potentially** unlawful."

Comment to Section 11079(a) – Advertisements

This section provides that advertisements for employment that a "reasonable person" would interpret as an "attempt" to deter or limit employment of people age 40 and over are unlawful. We have numerous concerns with this language. First, again, such conduct designed to deter or limit employment of people over age 40 is already unlawful so this provision is likely unnecessary. Second, it is inappropriate to incorporate a "reasonable person" standard into the law here, rather than an analysis of the actual intent or impact of an employer's conduct. Third, the language states that an "attempt" to deter or limit employment would be unlawful, regardless of whether there was an actual aggrieved applicant. All of this would serve to create confusion and lead to litigation over the meaning of these vague terms.

Moreover, proposed restrictions on advertisements raise significant First Amendment concerns, which would likely lead to protracted litigation. As currently drafted, the proposed subdivision, section 11079(a) of Article 10, is a content-based restriction on speech that cannot withstand constitutional scrutiny.

" 'As a general rule, laws that by their terms distinguish favored speech from disfavored speech ... are content-based. [Citations.]' " (*Snatchko v. Westfield, LLC* (2010) 187 Cal.App.4th 469, 481-482.) Content-based restrictions are "presumptively invalid" and subject to strict scrutiny. (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382.) To withstand strict scrutiny, a restriction must be necessary to serve a compelling government interest and "narrowly drawn" to achieve that end. (*Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 869) "Narrowly drawn" in such context means it is the "least restrictive means of achieving [the] compelling state interest." (*McCullen v. Coakley* (2014) 573 U.S. 464, 478.) " 'It is rare that a regulation restricting speech because of its content will ever be permissible.' " (*Brown v. Entertainment Merchants Association* (2011) 564 U.S. 786, 799.)

Here, no doubt the state's interest in prohibiting age discrimination is compelling, however, this particular proposed subdivision is not narrowly tailored to serve that interest, i.e., it is not the "least restrictive means" of achieving the interest. Rather, this proposed regulation raises a significant question about the potential scope of what language a reasonable person might "interpret" as an attempt to deter older workers. Due to the broad nature of the restriction, it seems likely that it will impermissibly restrict protected speech.

Even if a court considered employment advertising "commercial speech" and applied intermediate scrutiny to this regulation, it would still fail for the same reasons stated above. Under intermediate scrutiny, a regulation must still be narrowly tailored to achieve the government interest. (See *Board of Trustees of State University of New York v. Fox* (1989) 492 U.S. 469, 480 [regulatory fit does not need to be perfect, but must be a "means narrowly tailored to achieve the desired objective"]; *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 565 [In analyzing a commercial speech restriction "[t]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest [citation], nor can it completely suppress information when narrower restrictions on expression would serve its interest as well."].) The proposed regulation, as currently drafted, presents too many questions regarding its potential scope and

enforcement. Therefore, it is not sufficiently tailored to survive either strict or intermediate scrutiny under the constitution.

Finally, this section proposes to list examples of "prohibited advertisements." As stated above, inclusion of "examples" in regulatory language often causes more problems and confusion than it solves. In addition, there has been no explanation provided regarding authority (via case law, statistics or otherwise) for the proposition that these "examples" have been deemed unlawful. This section also proposes to list as an example of prohibited advertisements those that designate "recent college graduate." Inclusion of this example presumes that only individuals below the age of 40 are recent college graduates or students, which is not accurate. Therefore, we would propose deletion of specified examples of unlawful advertisements.

Similar to the comment above, because the legality of an employer's actions may vary depending on the facts of a particular case and any affirmative defenses that may be presented, if the language is not deleted it would be more appropriate to refer to these examples as "**potentially** unlawful."

Comment to Section 11079(b) – Pre-employment Inquiries

This section proposes to list examples of prohibited inquiries that would result in the identification of persons on the basis of age. As stated earlier, we have concerns regarding the inclusion of specific examples of conduct in regulatory language. While well-intentioned, inclusion of specific examples can sometimes cause more confusion rather than clarify lawful conduct. Here, we have particular concerns regarding the list of examples of prohibited inquiries including "graduation dates." Such information is often included by applicants themselves on resumes or otherwise voluntarily provided to the employer, without prompting by the employer. In some cases, graduation dates may be utilized to verify that education experience listed on resumes or applications is factual. Providing that "graduation dates" is categorically an unlawful inquiry may lead to confusion in these situations and therefore should be eliminated.

Moreover, inclusion of "graduation dates" here as a prohibited inquiry appears to contradict proposed Section 11079(c)(1), which states that requests for information "such as graduation date" is not, in itself, unlawful.

Comment to Section 11079(c)(1) – Applications

This proposed language states that employment applications that request such information "will be scrutinized to assure the request is for a permissible purpose and not for an unlawful purpose." As discussed previously regarding similar language contained elsewhere in the proposal, this appears to be a "backdoor" manner to create a presumption of discrimination for otherwise legitimate and common inquiries made by most employers. Therefore, this language is inappropriate and should be deleted.

Comment to Section 11079(c)(2) – Applications

This section proposes to prohibit "the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates." While we understand that this proposal is being made in the context of age discrimination against employees over the age of 40, we are concerned that this language could result in unnecessary confusion for employers. For example, existing law restricts the employment of minors in various manners, including the occupations in which they may work and the hours on which they may work. It is reasonable to allow employers to verify the age of applicants to ensure compliance with these laws. Therefore, we think the language in proposed Section 11079(c)(2) should be qualified and clarified that is does not prohibit online applications that use such information in order to ensure compliance with lawful age-related restrictions on employment. For example, the proposed language could be clarified to not apply to applicants under the age of 18 whose employment, including employment in certain occupations, is limited by existing law.

We appreciate your consideration of our concerns and comments.

Sincerely,

Ben Ebbink
California Chamber of Commerce

On behalf of the following organizations:

California Professional Association of Specialty Contractors (CALPASC)
California Restaurant Association

cc: Che Salinas, Office of the Governor

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