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**VIA ELECTRONIC MAIL ONLY**

Fair Employment and Housing Council  
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**RE: PUBLIC COMMENT REGARDING PROPOSED MODIFICATIONS TO EMPLOYMENT REGULATIONS REGARDING CRIMINAL HISTORY**

Dear Council Members:

Root & Rebound (R&R) is pleased to offer the following comments on the Council's proposed regulations regarding the consideration by employers of applicants' criminal history under the Fair Employment & Housing Act ("Act"). We thank the Council for its important work in this area and for the opportunity to comment on the proposed regulations.

R&R is a nonprofit public interest organization and reentry service provider that often supports individuals with potential claims under the Act, including representation of their complaints before the Department of Fair Employment and Housing ("Department").

We strongly support revisions to Title 2, Section 11017.1 of the Code of Regulations proposed by a coalition of reentry advocacy organizations. (See attached.) 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 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 and 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 in real life in any 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. The coalition makes a number of proposals to make the forms prepared by the Council a more effective tool to enforce compliance with the Act.

### **Overview of the Fair Chance Act**

The Fair Chance Act, as codified in Section 12952 of the Government Code and Title 2, Section 11017.1 of the Code of Regulations, mandates that covered employers must conduct “an individualized assessment 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,” taking into account 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. (Gov’t C., § 12952, subd. (c)(1)(A); 2 Code of Reg., § 11017.1(d)(1).)

The regulation further explains that “[t]he standard for determining what constitutes a direct and adverse relationship . . . is the same standard” for establishing that denial of employment based on a conviction record is job-related and consistent with business necessity under the Fair Employment and Housing Act and, by implication, Title VII of the Civil Rights Act of 1964. (2 Code of Reg., § 11017.1(d)(1) & (g).)

The Act also requires that employers consider evidence of inaccuracy in the conviction history report, rehabilitation, and mitigating circumstances submitted by the applicant “before making a final decision.” (Gov’t C., § 12952, subd. (c)(4); 2 Code of Reg., § 11017.1(d)(3).)

### **Level of Specificity in Individualized Assessment**

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.

### **Two Individualized Assessments**

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 (2) 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.

### **Additional Measures to Correct Employer Biases**

The proposed revisions include a number of additional changes to 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. Relevant provisions are proposed as subparagraph (A) of paragraph (3) of subdivision (a), paragraph (7) of subdivision (b), item (iv) of subparagraph (H) of paragraph (1) of subdivision (c), and paragraph (3) of subdivision (c).

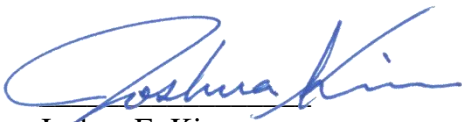
The proposed revisions also identify a number of presumptions that most employers routinely make and explicitly prohibit them in subparagraph (H) of paragraph (1) of subdivision (c). For example, a plea of nolo contendere does not establish the truth of the underlying offense, and the

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.

### **Conclusion**

The Fair Chance Act requires that employers set aside irrational biases against the formerly-incarcerated or convicted applicants 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 revisions to the regulation proposed by our coalition, irrational biases and individualized assessment are mutually exclusive. We encourage the Commission to adopt the proposed revisions 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 convicted individuals.

Sincerely,



Joshua E. Kim  
National Director of Litigation for Economic Opportunity  
Root & Rebound

ATTACHMENTS