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FAIR EMPLOYMENT AND HOUSING COUNCIL

MEETING AND HEARING

ELIHU M. HARRIS STATE BUILDING
1515 Clay Street, Room 7
Oakland, California 94612

APRIL 7, 2016

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TRANSCRIPT OF PROCEEDINGS

PUBLIC HEARING: PROPOSED REGULATION
CONCERNING THE USE OF CRIMINAL HISTORY
IN EMPLOYMENT DECISIONS

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REPORTED BY: MAXIMILLIAN A. CONTRERAS, CSR NO. 13876

FILE NO.: AA03716

<p>1 2 FAIR EMPLOYMENT AND HOUSING COUNCIL 3 MEETING AND HEARING 4 5 ELIHU M. HARRIS STATE BUILDING 6 1515 Clay Street, Room 7 7 Oakland, California 94612 8 APRIL 7, 2016 9 10 11 12 13 TRANSCRIPT OF PROCEEDINGS, taken at 14 Elihu M. Harris State Building, 1515 Clay Street, 15 Room 7, Oakland, California 94612, commencing at 16 10:25 AM, Thursday, April 7, 2016, before 17 Maximillian A. Contreras, CSR No. 13876. 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 2</p>	<p>1 INDEX 2 3 PAGE 4 PUBLIC COMMENT BY NAYANTARA MEHTA..... 9 5 PUBLIC COMMENT BY AARON BURRIS..... 56 6 PUBLIC COMMENT BY KAREN SHAIN..... 82 7 PUBLIC COMMENT BY NOAH LEBOWITZ..... 89 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 4</p>
<p>1 APPEARANCES 2 3 COUNCILMEMBERS PRESENT: 4 CHAYA MANDELBAUM, Chairperson 5 DALE BRODSKY, Councilmember 6 CHANEE FRANKLIN MINOR, Councilmember 7 TIM IGLESIAS, Councilmember 8 PATRICIA PEREZ, Councilmember 9 DARA SCHUR, Councilmember 10 KEVIN KISH, DFEH Director and Ex Officio member 11 12 DFEH STAFF PRESENT: 13 BRIAN SPERBER, Legislative and Regulatory Counsel 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 3</p>	<p>1 OAKLAND, CALIFORNIA 2 THURSDAY, APRIL 7, 2016, 10:25 AM 3 4 CHAIRPERSON MANDELBAUM: So we are on the 5 record. It is Thursday, April 7th, 2016, and we are 6 here in the Elihu M. Harris State Building located at 7 1515 Clay Street in Oakland, California. 8 My name is a Chaya Mandelbaum, Chairperson of 9 the Fair Employment and Housing Council, and joining me 10 today are members of the Fair Employment and Housing 11 Council, Councilmembers Dale Brodsky, Chanee Franklin 12 Minor, Patricia Perez, Dara Schur, and Tim Iglesias, as 13 well as Ex Officio member and Director of the Department 14 of Fair Employment and Housing, Kevin Kish. 15 Even though we've made initial introductions, 16 let me again welcome you to this public hearing. The 17 purpose of this hearing is to receive public comment 18 regarding the issuance of amendments to the Fair 19 Employment and Housing Act regulations concerning the 20 use of criminal history in employment decisions that are 21 being proposed by the Fair Employment and Housing 22 Council. 23 This rulemaking action clarifies, makes 24 specific, and supplements existing state regulations 25 interpreting the FEHA set forth in Government Code</p> <p style="text-align: right;">Page 5</p>

<p>1 Section 12900, et seq. As it relates to employment, the 2 FEHA prohibits harassment and discrimination because of 3 race, religious creed, color, national origin, ancestry, 4 physical disability, mental disability, medical 5 condition, genetic information, marital status, sex, 6 gender, gender identity, gender expression, age, sexual 7 orientation, and military, and veteran's status. 8 The proposed regulations are slated to appear 9 in the California Code of Regulations, Title 2, 10 Sections 11017 and 11017.1. Copies of the proposed 11 amendments, the FEHA regulations concerning the use of 12 criminal history in employment decisions are available 13 in the front of the room and are reflected in 14 Attachment D to today's materials. The notice and 15 initial statement of reasons are reflected in 16 Attachments B and C, respectively. The text of the 17 Council's proposed regulations also available from the 18 Council's Web page, www.dfeh.ca.gov/fehccouncil.htm. 19 The Council is holding this hearing as part of 20 its formal rulemaking process. We noted this public 21 hearing more than 45 days ago in the California 22 Regulatory Notice Register published February 19 of 23 2016, and also via e-mail sent to more than 7,500 24 individuals and stakeholders, and also on the Council's 25 Web page.</p> <p style="text-align: right;">Page 6</p>	<p>1 The Council will respond to each comment in writing in 2 its final statement of reasons which will become part of 3 the Council's rulemaking record. 4 This hearing is being transcribed by a 5 certified court reporter, and the transcript of the 6 hearing as well as all written comments received will be 7 part of the Council's rulemaking record. Because this 8 hearing is being transcribed, it is critical that anyone 9 speaking does so clearly and that only one person speak 10 at a time. You'll not be sworn in when you testify. 11 However, we ask that you come to the front of your room 12 and speak into the microphone so the court reporter can 13 take down your testimony. 14 Please begin by stating and spelling your name 15 and stating your affiliation. Also, if you're 16 submitting on a specific regulation, please identify the 17 specific section and subsection of the regulations that 18 we may refer to as you speak. We will hear testimony 19 until all those wishing to testify today have had an 20 opportunity to do so. 21 Anyone have any questions before we begin? 22 Seeing none, let's start. So we'll invite 23 public comment, and whoever gets to the desk first or 24 wishes to start us out. 25 ///</p> <p style="text-align: right;">Page 8</p>
<p>1 Pursuant to that notice we are taking 2 testimony today on the proposed amendments to the FEHA 3 regulations. We will also accept written comments on 4 the proposed regulations until 5:00 PM today, April 7th. 5 You may e-mail written comments to the Council at 6 fehccouncil@dfeh.ca.gov. If you prefer, you may send 7 mail to the Council care of Brian Sperber at the DFEH's 8 Los Angeles office located at 320 West 4th Street, 9 10th Floor, Los Angeles, California 90013. 10 If you brought a written copy of your comments 11 and you do not or have not and don't plan to separately 12 submit them via e-mail, please give a copy to 13 Brian Sperber and he will be able to collect them for 14 public comment at the end of today's deadline. 15 Anyone who testifies here today or submits 16 written comments will receive a copy of any changes or 17 amendments the Council makes to its proposed amendments 18 to the FEHA regulation, as well as anyone who makes a 19 request. Also, anyone who testifies or submits written 20 comments will have a 15-day period within which to make 21 written comment on any further changes to the proposed 22 amendments to the FEHA regulations that are made by the 23 Council during this rulemaking process. 24 The Council will consider each comment made 25 here today as well as all written comments received.</p> <p style="text-align: right;">Page 7</p>	<p>1 PUBLIC COMMENT BY NAYANTARA MEHTA 2 MS. MEHTA: Hi everyone, good morning. 3 I am Nayantara Mehta. I'll spell it. My 4 first name is N-A-Y-A-N -- oh, sorry. The green light 5 is on. Okay. 6 My first name is N-A-Y-A-N-T-A-R-A, and the 7 last name is M-E-H-T-A. I'm looking at you because I'm 8 assuming you're taking this down. And I work at the 9 National Employment Law Project, and I'm here to just 10 reiterate some of the comments that we've already 11 submitted in writing. We sent in our written comments 12 late last month. 13 So the main thing is to, again, thank the 14 Council for putting forward these proposed regulations 15 that very closely mirror the federal EEOC guidelines for 16 employers in the consideration of criminal records in 17 employment decisions. And the reason this is so 18 important is that there is so much bias against people 19 with criminal records in every context, really. But in 20 the employment context in particular is what the 21 National Employment Law Project is focused on. 22 And any guidance and structures for employers 23 that help them more objectively consider applicants and 24 think about what a record means and how it relates to 25 the job, we think, is helpful in at least lowering some</p> <p style="text-align: right;">Page 9</p>

1 of the barriers to employment for people with records.
2 So we don't think that this is going to remove
3 all the problems in discrimination, but we think this is
4 at least a step toward helping people with records be
5 considered fully as applicants, not just as somebody
6 with a record who gets immediately rejected. So that's
7 the general appreciation to the Council for putting
8 forward these comments, and we hope they'll be a model
9 for other states to do something like this.
10 I did just want to flag a couple of areas
11 of -- I'm focusing my -- I don't actually know how long
12 I have. I should have checked.
13 CHAIRPERSON MANDELBAUM: There isn't a
14 specific time, so take your time.
15 MS. MEHTA: Okay. I know there's a big --
16 a long agenda today. So I flagged in the comments some
17 of the areas that we're particularly appreciative of,
18 but in my comments today I'm going to speak just about
19 the areas that I think could be strengthened.
20 And so to refer to the section I am talking
21 about, the first point is that the -- what I mentioned
22 and I think you all intended for this to be the case
23 that the proposed regulations pretty closely mirror the
24 EEOC guidelines for employers, and I think there are a
25 couple of places where they could be even more closely

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1 aligned to. Because they use similar terminology, but
2 in a way that creates potentially some confusion because
3 it's not exactly the same process.
4 So there could be some areas -- and I'm
5 referring in particular to Section 11017.1 -- where
6 we're talking about the individualized assessment of the
7 bright-line rules of -- I'm sorry. What is the
8 subsection? I believe subsection (e).
9 Where there's mention of the "Green factors,"
10 the three Green factors which are looking into what was
11 the actual offense, what was the nature and gravity of
12 the offense, how long ago it occurred, and then what is
13 the nature of the job the applicant is looking for, and
14 then there is discussion of bright-line
15 disqualifications, and then there's discussion of
16 individualized assessment.
17 And in my -- in our initial reading of it, it
18 wasn't entirely clear what the process, if there was one
19 process an employer had to go through. So we just
20 recommend that the proposed regulations made clear that
21 the process for the employer is to apply the three Green
22 factors which are very good and already there, but then
23 to make it clear that the individualized assessments as
24 the EEOC defines it is explicitly part of the process
25 that the employer uses to consider an applicant.

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1 And so that includes notice to the individual
2 that he or she has been screened out because of their
3 conviction, an opportunity for the individual to present
4 reasons why they shouldn't be screened out including
5 evidence of rehabilitation, and then the employer will
6 consider whether they in fact should get screened out
7 based on that evidence of rehabilitation and other
8 mitigating information.
9 So it's just --
10 CHAIRPERSON MANDELBAUM: One question about
11 that point.
12 MS. MEHTA: Yeah, sure.
13 CHAIRPERSON MANDELBAUM: And certainly, we've
14 heard from your colleagues some of the empirical
15 evidence that supports an individualized assessment.
16 But my reading of the EEOC guidance is not that they
17 explicitly say that that's not required; that it's a
18 bright-line policy, is well thought out and supported,
19 and sufficiently circumspect that you don't have to go
20 through it. It's certainly recommended, but not
21 something that's required by the guidance.
22 Are you reading that differently?
23 MS. MEHTA: So I guess there could be a couple
24 of different situations. There might be a bright-line
25 policy which is sufficiently well thought out. But what

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1 I'm proposing is -- what I'm assuming is applying to a
2 lot of situations where the employer maybe hasn't
3 thought through all of the different disqualifications
4 and potential areas of concern, and so they're
5 considering an applicant without necessarily having
6 thought about what are the deal breakers for the job.
7 But even so, I mean, we're in general not in
8 favor of bright-line disqualifications, just because
9 there are almost always mitigating circumstances.
10 I mean, there are certain situations where the job is so
11 connected to the criminal activity that it doesn't make
12 sense to hire somebody with that record. But outside of
13 those kinds of situations, we really do strongly
14 recommend having this whole process to reduce the --
15 to reduce the sort of preemptive discrimination against
16 people with records without considering the full person,
17 and then also when the person is in front of you.
18 So then the second area --
19 COUNCILMEMBER PEREZ: Actually, I've got some
20 questions on that area too.
21 MS. MEHTA: Sure, yeah.
22 COUNCILMEMBER PEREZ: As I read the other
23 relevant factors that you propose that we include, my
24 first concern is that many of the items that are listed
25 are very subjective. It would be really -- I think from

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1 an employers perspective, very difficult, for example,
2 to consider character references that, you know, then do
3 you have to go check out the person who's giving a
4 character reference to make sure that that's a valid
5 reference? And it seems like it could end up becoming
6 more problematic. And my guess is that most people will
7 have people who will say this person has rehabilitated.
8 MS. MEHTA: Yes.
9 COUNCILMEMBER PEREZ: So that's an example.
10 But even things like the facts and circumstances
11 surrounding the events or the conduct seems like that
12 might get into, you know, privacy issues and maybe
13 disclosing information. It just -- a lot of the factors
14 seem to be, number one, to just be so subjective.
15 I guess I want to hear a little bit more about
16 how they add to those. The way that I read it, those
17 three Green factors, while maybe not as detailed, if
18 approached correctly with the right attitude by the
19 employer, in my mind, it would suffice. And I'm
20 hesitant to say let's put in these additional other
21 factors that would, I think, complicate matters more.
22 MS. MEHTA: Yeah. I take your point that
23 these are ultimately subjective decisions that an
24 employer's making. And the reason that we think that
25 it's important to include information like this in the

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1 application process and in the review process is
2 because, getting back to that point I made about there
3 being a lot of bias often unrecognized by the people who
4 hold it against people with records. And there have
5 been studies about how much having a record reduces your
6 chances of a callback.
7 So while you're right that this kind of
8 information is subjective and can be assessed different
9 ways by different employers, we think having more
10 information is better than less information for an
11 employer.
12 And you'll recognize that it requires
13 employers to maybe do a little bit more in the process
14 for somebody with a record. But frankly, we think
15 that's outweighed by the need to get people with records
16 into jobs and that, you know, in any sort of policy
17 decision where you're putting obligations on a
18 particular class of people, it's going to create a
19 little bit more effort on their part.
20 But ideally, this will get normalized in a way
21 where the more people with records are in jobs and just
22 people's colleagues and employees, that this would be
23 less necessary in the future.
24 COUNCILMEMBER PEREZ: And do you think that
25 the current language will prohibit employers, just with

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1 those three factors that are more general in nature,
2 from seeking this type of information? Or is it that
3 you're afraid that because of the inherent bias, they
4 just won't go that step?
5 MS. MEHTA: The latter. We're not concerned
6 that an employer wouldn't find out more, but that
7 employers may be clear to not be motivated to find out
8 more or would not even be encouraged to find out. So we
9 think the benefit of having this in the regulations is
10 that there is a process that these employers have to go
11 through.
12 So I think a helpful example is -- some of you
13 may be aware New York City last year passed one of the
14 strongest fair chance hiring laws in the country, the
15 Fair Chance Act, and it includes both a "Ban the Box"
16 component but also a similar kind of consideration of
17 somebody's record and requires an employer to go through
18 a fairly explicit process and there's actually a form
19 the employer has to use if they're going to reject
20 somebody based on their criminal record.
21 And it comes across initially as kind of
22 formalistic and, you know, that there's very specific
23 language. But the whole point of it is to try to
24 introduce as much as possible. In innovator, what is a
25 subjective assessment is to try to introduce as much

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1 objectivity as possible to make the employer think
2 through who this person is and what they are beyond
3 their record.
4 COUNCILMEMBER PEREZ: And what I would, I
5 think, call these factors and probably others that can
6 be included is the best practice that I think are
7 encompassed by the general guidance that we're giving
8 employers right now based on the Green factors.
9 And that really ultimately is my concern, but
10 I'm not sure that our regulatory powers or the
11 regulation process is necessarily the right -- you know,
12 the analogy that I'm thinking of is that the
13 individualized assessment almost becomes similar
14 analogous the interactive process in the disability and
15 other foundation requests where you're kind of engaging
16 this good-faith exchange of information. I know it's
17 not exact, but that's where my mind goes.
18 And so similarly, I think that there are -- we
19 delineate our regulations for disability, for pregnancy,
20 and for religion some very general factors saying these
21 are the requirements in order for it to be good faith
22 and mutual. But we don't necessarily say, "And here's
23 how you do that," because it's going to be so unique
24 depending on things like industry and department and
25 company size in addition to individual factors about the

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1 individual.
2 So that's one comment that I have. But
3 related to that, what struck me that I hadn't actually
4 thought of prior to reading your comments, which were
5 excellent by the way. They were very well-thought out.
6 But what dawned on me is that if the intent is to make
7 sure that the employer is giving this actual thought,
8 actual analysis, being as objective as they can be in
9 sort of a subjective space, then again, kind of using
10 the analogy of the interactive process, it seems to me
11 that we might then need to also put in factors that the
12 employer could consider on the other side.
13 So, you know, if this person is saying, "Here
14 are the explanations that sort of tell you why I should
15 fall outside of this general rule," then it seems to me
16 that the employer should also be able to say, "Well,
17 here's why our particular company, industry, department,
18 culture, employees, whatever it may be, kind of counters
19 that." So I have more, but let me stop there.
20 MS. MEHTA: Yeah. I guess I would say that
21 the employers already have an incentive to not hire
22 people with records based on for all the reasons that I
23 think we're aware of. And I would say that an
24 organizational culture is not a legitimate reason, just
25 because if you're going to say something like, "Well, we

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1 don't like having people with records in our environment
2 because that's not the kind of person we hire," that's
3 exactly what these regulations are trying get at, which
4 is that that's not an okay --
5 COUNCILMEMBER PEREZ: No. Just to be clear,
6 that's not the kind of culture I was thinking of. I was
7 thinking like it's a daycare center, you know --
8 MS. MEHTA: Sure, yeah.
9 COUNCILMEMBER PEREZ: You know, the
10 "environment" perhaps is a better word.
11 MS. MEHTA: Mm-hmm, yeah. And I think that a
12 lot of those things can be gotten at by the employer
13 thinking through what the nature of their work is and
14 what kinds of offenses or convictions would disqualify
15 somebody either in a bright-line kind of way or in a way
16 where they're kind of watching with -- there are certain
17 heightened risk offenses.
18 So I feel like there's a process on -- I can't
19 really comment on what the role of the regulatory
20 process is in getting at some of these. You know, I'm
21 just going to come back to argue which is that while
22 acknowledging that having more steps for the employer
23 creates more work for the employer, that is outweighed
24 by what that those extra steps accomplish; that they
25 introduce a level of -- some level of objectivity into

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1 the process that is not otherwise there and employers
2 are not incentivized to use. And by requiring it or
3 strongly encouraging it, it gives people with records
4 the best shot to be considered.
5 COUNCILMEMBER BRODSKY: Can I ask you kind of
6 related to that. I'm looking at the language that has
7 been proposed here in number (2), (e), to necessarily
8 relate it.
9 "In demonstrating the policy or practice
10 of considering conviction history and
11 employment decisions is appropriately tailored
12 to the job for which it's used ... requires
13 that an employer either to demonstrate
14 bright-line [or] --"
15 And then one of the things that the language
16 that's used here is that the criteria is "necessarily
17 related" or the -- is that what you're looking at?
18 Is that where you're going at in trying to describe
19 where this procedure process or kind of analysis, that
20 the individualized analysis? Because I'm a little bit
21 bothered by that. That seems a little amorphous to me,
22 "necessarily related to the job."
23 But I'm trying to figure out if that's where
24 you would add more in terms of the what the employer's
25 responsible for doing.

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1 MS. MEHTA: I'm maybe not quite understanding
2 the question.
3 COUNCILMEMBER BRODSKY: Well, if you look at
4 the wording, number (2), and it says that -- it's a long
5 sentence, so I have to go back and figure out -- it's a
6 very long sentence. In fact, it's the whole thing.
7 So if you just read number (2):
8 "Demonstrating that a policy or
9 practice of --"
10 Trying see if I can figure out a way to
11 shorten it.
12 "... requires that the employer either
13 demonstrate that any bright-line, across the
14 conviction disqualification can properly
15 distinguish between applicants or employees
16 that do not pose an unacceptable level of risk
17 and that the conviction used to disqualify, or
18 otherwise grossly impact, have a direct and
19 specific negative bearing --"
20 Which is another clause that I'm a little
21 unsure about.
22 "-- on the person's ability to perform the
23 duties or responsibilities necessarily related
24 to employment position or that an employer
25 conduct an individualized assessment of the

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1 circumstances or qualifications."
2 So, I guess, where do you propose putting in
3 something about the process that the employer has to do?
4 Maybe that's --
5 MS. MEHTA: So I think essentially what we're
6 responding to is that this section is a little bit
7 confusing. And --
8 COUNCILMEMBER BRODSKY: When you say "this
9 section," are you looking at number (2)?
10 MS. MEHTA: Yeah, that you just read out loud.
11 Yeah. That it's offering what looked like two different
12 options, and we think it could be streamlined to -- in
13 one way to make it clear that the appropriate process is
14 to apply those three Green factors and the
15 individualized assessment. So look at the nature of the
16 job, conviction, how long ago it occurred; but also do
17 that notifying of the applicant and collect
18 information -- mitigating information from them and then
19 make the decision.
20 So that should all be part of the process of
21 best practice or requirement for employers. And then
22 there is that scenario where there might be some
23 bright-line rules -- some bright-line situations where
24 somebody with a certain conviction would potentially
25 never be able to overcome.

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1 COUNCILMEMBER BRODSKY: Yeah, I know. I get
2 that part. I just I don't know where you put it. I
3 don't remember from your comments if you proposed
4 alternative language.
5 MS. MEHTA: We did, and we did around the
6 individualized assessment part.
7 COUNCILMEMBER BRODSKY: Okay, but that's
8 not -- that's not exactly giving us -- I mean, I think
9 it would be helpful to know how you would actually
10 change number (2) to reflect more -- to divide it up, if
11 you will, or somehow clarify.
12 COUNCILMEMBER PEREZ: If I understand it
13 correctly, I think you wanted to do two separate. So
14 rather than one long sentence, have one section say
15 certainly there is a very limited circumstance under
16 which a bright-line rule can be applied with all of the
17 appropriate, you know, job-related language, et cetera,
18 period.
19 In other cases, there could be -- there should
20 be an individualized assessment when the bright rule --
21 bright-line rule test doesn't apply. What you would
22 like as an addition to that situation the Green factors
23 being put into the regulations to have in addition the
24 bullet points that you have in your letter that go
25 beyond just the Green requirements.

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1 MS. MEHTA: That's right. And there is some
2 discussion of the independent factors in the
3 individualized assessment as they're defined in the EEOC
4 guidance elsewhere. It's just -- so I wish I had a very
5 straightforward, "This is how I think it should be
6 organized." But I think maybe -- to think a little bit
7 more about, like, what we would think might be a good
8 rewriting of this section, but I think that's what we're
9 getting at.
10 And we have maybe a little bit some
11 reservations even about the bright-line disqualification
12 in general, just because we're worried. You know, the
13 concern is always that if that is available as an
14 option, that employers will overuse it but recognize
15 that there are some situations where that might apply.
16 But I think that what Councilmember Perez suggested
17 accurately reflects that.
18 Does that make sense?
19 COUNCILMEMBER BRODSKY: Yeah. Although, I'm
20 not sure even in dividing it into two sentences actually
21 meets what you want in terms of articulating the
22 process. I think it would need more than that than just
23 dividing it into two sentences. I do at a minimum think
24 it needs to be divided into two sentences, however.
25 ///

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1 COUNCILMEMBER PEREZ: And then from a
2 documentation, recordkeeping, I know that later you
3 talked about some suggestions for actual recordkeeping
4 requirements; so we can talk about those later.
5 But I know you mentioned an example of
6 New York. But is your -- is your vision of this that in
7 an individualized assessment situation, which in your
8 view should happen in the vast majority of the cases
9 because the bright-line rule should be pretty narrow.
10 Is -- and we haven't even developed a form,
11 but do you seize that the employer should be keeping an
12 actual written record of? Should the applicant be sent
13 a formal letter? Should it just be -- you know, how
14 does this -- how does the employer then prove that they
15 have complied with this assessment?
16 MS. MEHTA: Yeah, I think that our general
17 recommendation is that things should be in writing and
18 as formal as possible in terms of notifying the
19 applicant of whether they are potentially going to be
20 disqualified or that have been disqualified and for the
21 employer to have to articulate its reasons for why --
22 why a prospective employee is not able to overcome the
23 concerns of the employer.
24 COUNCILMEMBER PEREZ: But -- so that's step
25 one. So step one is: We have determined that somebody

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1 with this type of a conviction is going to be flagged as
2 somebody who may not be able to be hired for this
3 position. You have been convicted of this crime; we're
4 letting you know; we're giving you a copy of it.
5 We invite you to provide us with additional information
6 if you feel that you fall outside of that -- of that
7 rule.
8 So that person then submits, let's say, some
9 of the stuff that you have outlined in the bullet point.
10 The employer considers it and either says, you know,
11 "Your documentation is good. We see that you fall
12 outside of that scope and we're going to hire you," or
13 they say, you know, "For whatever reason, we still think
14 that you're not the right person to hire as a result of
15 it." At that stage is what I'm talking about.
16 MS. MEHTA: Yes.
17 COUNCILMEMBER PEREZ: Do you then set that the
18 employer -- is your expectation that the employer then
19 sends a letter to the applicant stating exactly why?
20 MS. MEHTA: That would be our recommendation,
21 that employers be very explicit about that.
22 And again, it's requiring the employer to
23 really think through, "Is this a deal breaker for them?"
24 Are they just being -- are they just making assumptions
25 about the person as opposed to really looking at a

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1 person and their qualifications.
2 COUNCILMEMBER PEREZ: And I'm in complete
3 agreement with that philosophy. I'm just not quite
4 convinced yet that necessarily spelling out those bullet
5 points is necessary in order to get to that.
6 MS. MEHTA: Yeah. I mean, I think that it's a
7 balance. And the New York example I brought us up is on
8 the side of being very explicit and very clear, "This is
9 what you have to do." And, you know, we lean in that
10 direction just because of our concern that employers,
11 given an opportunity not to have to articulate things
12 will fall back on their sort of biases and prejudices.
13 Again, without trying to vilify employers, the
14 natural sort of cultural permeation of bias against
15 people with records; that they're untrustworthy.
16 CHAIRPERSON MANDELBAUM: I've got one more
17 comment.
18 MS. MEHTA: Speak.
19 CHAIRPERSON MANDELBAUM: We've been going for
20 a while. I don't know if you have some more things that
21 you'd like to say before we interrupt you again.
22 MS. MEHTA: No, go for it.
23 CHAIRPERSON MANDELBAUM: So we've reviewed a
24 lot of the literature surrounding this topic and
25 certainly read a lot of the public comment to date.

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1 And one sort of outside-the-box question I
2 have is -- as much as there's, you know, a necessary and
3 rightfully-so discussion about the statistical
4 correlations related particularly to race and national
5 origin with respect to convictions and then, of course,
6 the disparate impact analysis -- why not gender?
7 How come no one talks about gender?
8 Presumably gender is the -- I would think by far and
9 away the largest correlation statistically on a
10 protected category. Why is that not mentioned in any
11 letters, literature?
12 MS. MEHTA: I don't know if I can answer that.
13 I mean, I think that the racial and ethnic disparities
14 are so great that they cover a greater number of people
15 in that sense -- people of both genders -- in terms of
16 establishing the disproportionate impact of the criminal
17 justice system.
18 So in your -- maybe I'm not just not totally
19 understanding. So you mean potentially because men are
20 so overrepresented in the criminal justice system?
21 CHAIRPERSON MANDELBAUM: Yeah. I mean, I get
22 sort of on a policy level why people don't want to talk
23 about this topic through the lens of reverse gender
24 discrimination. But when you're just thinking about
25 disparate impact -- and particularly I'm considering the

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1 comments that Professor Zatz provided in the concept of
2 the zone of interest standard which is basically if
3 you're impacted by a criminal history record and
4 you're -- it doesn't matter if you're African-American;
5 if it has a disparate impact, that's unlawful on that
6 basis and you're impacted if you're within that zone of
7 interest potentially.
8 So I'm just curious since the statistical
9 correlation is probably the highest in gender, why
10 no one's approaching this through the lens of -- well,
11 this is almost always the case in terms of statistical
12 correlation, and then you're within the zone of interest
13 potentially.
14 MS. MEHTA: Yeah. I'm not a statistics or
15 research person, but one potential thing that just comes
16 to mind is that they're -- the looking at the numbers
17 comparing race and ethnicity, there's more of a -- there
18 is less of a difference in terms of the commission of
19 crimes; and there's more of a difference in terms of
20 people who are actually arrested and incarcerated.
21 And when it comes to gender lines, that might
22 be a different kind of analysis. It might be that men
23 commit more -- I not sure. So I'm saying this and now
24 I'm like I wish I hadn't at this point. I'm not sure if
25 it's clear or not. But there might be something that.

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1 Or as more and more women are entering the
2 criminal justice system, there might be more focus on
3 it. And I don't know; maybe Karen, when she comes up
4 and gives her comments, has some thoughts on this.
5 But yeah --
6 COUNCILMEMBER FRANKLIN MINOR: Also, my
7 thoughts are that race and ethnicity don't -- they
8 include gender, you know. And that's very commonly
9 a situation that comes out a lot in the feminist
10 movement and the movements for racial justice, where you
11 have African-American women, there's folks say, "Ain't I
12 a woman? And I'm black."
13 So all of those, the issue of race and
14 ethnicity, if there's a disparate impact, it's
15 necessarily going to impact the women and men who are
16 subscribed to that race or that ethnicity.
17 So I'm guessing that because of that, the
18 racial rend and the ethnicity rend is the primary focus.
19 CHAIRPERSON MANDELBAUM: I mean, I get all
20 this from a policy and an intellectual standpoint. Just
21 strictly on the law though, I think there's an argument
22 to be made that for some reason isn't being made that,
23 you know, once you demonstrate a disparate impact, then
24 it comes down to the analysis of, you know, whether
25 that's justified under business necessity.

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1 And given the fact that people can fall within
2 a zone of interest and be impacted even if they don't
3 fit within that subcategory, it seems like the easiest
4 statistical demonstration of disparate impact would be
5 gender. And so I'm just surprised given that fact that
6 it gets barely any mention at all in the literature on
7 this topic.
8 COUNCILMEMBER BRODSKY: Can I just ask
9 procedurally, are we going to be discussing as a council
10 the phrasing of this separate from taking public
11 comment? Because if so, I'll wait to make my comments
12 later.
13 CHAIRPERSON MANDELBAUM: Yeah, I think we can
14 do that because we'll -- obviously,
15 Councilmember Schneiderman and I will be --
16 COUNCILMEMBER BRODSKY: Okay. Because
17 otherwise I could do it in the context of asking the
18 question, but I think probably we could put it away.
19 CHAIRPERSON MANDELBAUM: Okay, let's do that.
20 COUNCILMEMBER PEREZ: I actually have more
21 questions.
22 MS. MEHTA: Sure.
23 COUNCILMEMBER SCHUR: And I do too.
24 COUNCILMEMBER PEREZ: So I'm going to give you
25 a scenario that I just made up in my mind while

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1 everybody else was talking.
2 So you've got an employer whose business --
3 its own business has nothing to do with services to
4 children. Whatever, you know, some industry. And a
5 person applies with a conviction that has to do with a
6 crime against a child. It happens that this particular
7 company has an on-site daycare center; so it wouldn't
8 come up, obviously, as part of the job industry company.
9 And maybe a bright-line rule isn't established
10 because the business that the company conducts doesn't
11 have anything to do with children. Somebody applies
12 with that conviction; you go through the process, write
13 a letter saying "here's why." You know, objectively
14 speaking, this is reason that we give.
15 So it could be a million different examples;
16 that's just the one that comes to mind immediately for
17 me. So the first question for me is, so you send that
18 letter. What happens then? Does the employee then say,
19 you know, "I understand"? Does the employee appeal?
20 Is the employer still going to be potentially subject to
21 liability even though they've actually gone through the
22 process?
23 And I will admit that I have a Pollyanna
24 attitude about everyone involved and really do think
25 that in my perfect world, employers are doing the right

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1 thing and employees are doing the right thing and people
2 are at least recognizing the biases and doing the best
3 they can to combat those.
4 So that's my first question, is what happens
5 then in that process?
6 MS. MEHTA: So I guess I would say that if the
7 employer appropriately assessed the conviction and there
8 really was like a legitimate concern, that --
9 COUNCILMEMBER PEREZ: Because it's not
10 job-related.
11 MS. MEHTA: Right. But because of the
12 specifics of that job proximity to the daycare rendered
13 some issue.
14 COUNCILMEMBER PEREZ: And that's the kind of
15 example I was thinking of when I earlier said would it
16 be fair for the employer to also use factors, the
17 bullet-pointed factors such as -- that's what I meant by
18 "culture." Not the culture that "we don't like felons,"
19 but a culture of our particular environment is unique.
20 So is that contemplated under your thoughts
21 that the employer would be able to take those types of
22 things into consideration?
23 MS. MEHTA: I think that fully comes under the
24 process, the third of the Green factors -- one of the
25 Green factors, the nature of the job encompasses where

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1 the person works and -- or can encompass where the
2 person works and who they have access to and what
3 populations they might be coming into contact with.
4 So that to me seems like something that the
5 employer can consider in the process.
6 COUNCILMEMBER PEREZ: I do too, but it's not
7 job-related. And so that's what --
8 COUNCILMEMBER BRODSKY: Going into a very
9 fact-specific situation where -- then you're going to
10 get an employee who ends up suing or the applicant ends
11 up suing, then the employer raises that as a defense,
12 and then, you know.
13 COUNCILMEMBER PEREZ: Well, my only question
14 for you is whether you were contemplating that type of
15 specific factors related to this company or this job or
16 this department.
17 MS. MEHTA: I think there are more factors
18 than we can even consider; right? Like, every job is
19 specific. Like, the details are specific. And as long
20 as the employers are fairly considering the job and the
21 applicant, that's the main concern. That this can
22 result in the employer saying, "No, I'm sorry. We like
23 you, but we can't offer you this job for XYZ reason."
24 And the whole point of having this fairly
25 specific process is that it actually does provide some

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1 protection to the employer. It's not an arbitrary
2 decision; it's a well-thought-through decision.
3 COUNCILMEMBER PEREZ: Right. And then the
4 second part of that question is now tied to the
5 statistical information on the disparate impact issue.
6 So let's say that in the scenario I just gave
7 you the applicant is either African-American or Latino.
8 Does the fact that that individualized assessment was
9 done, presumably with a full, fair analysis, et cetera;
10 does that now negate the racial factor, ethnicity
11 factor?
12 MS. MEHTA: You know, I don't do litigation in
13 this area.
14 COUNCILMEMBER PEREZ: Neither do I.
15 MS. MEHTA: And so I'm curious if Noah, when
16 he --
17 Okay, he doesn't. I mean, it's a good
18 question. And because I don't know the steps that
19 happened in litigation with these sorts of cases, I'm
20 hesitant to answer it on just based on my, like, "This
21 is my impression of things."
22 But yeah, I mean, that is something that is a
23 legal question that is answerable, but I'm not sure I'm
24 the person to answer it.
25 COUNCILMEMBER FRANKLIN MINOR: I would just

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1 like to comment briefly on the example of a sex offender
2 or someone with crimes against children. That's a very
3 specific type of violation that easily could be -- we
4 could easily put a provision specifically dealing with
5 convicted sex offenders or crimes against children.
6 I think that that's the only situation where
7 this would be applicable. I would think, okay, if I
8 have a business and someone was convicted of welfare
9 fraud or someone shoplifted some clothes, you know. And
10 I have a company that has nothing to do with clothes or
11 anything, and there happens to be a retail store next
12 door. I mean, that would not apply.
13 You know, so I think the only situation where
14 this applies is for sex offenders and children -- you
15 know, crimes against children. And there are a lot of
16 laws out there that deal with this and that deal with
17 mandatory reporting, that deal with Megan's list or
18 always having public information regarding specific type
19 of events.
20 So I think that if we're really legitimately
21 concerned with that specific type of crime, we can put a
22 provision that deals with that. But I think outside of
23 that, what you have proposed I am completely supportive
24 of it.
25 MS. MEHTA: And I would actually argue that --

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1 I totally understand where you're going with the crimes
2 against children being in a different category. But
3 that that's a whole other thing, that sex offenses lump
4 in a lot of different things including somebody -- like,
5 conduct between a minor and somebody who is just a year
6 old.
7 You know, so there's a lot of things that get
8 put into that and I would hesitate to say, "Okay, we'll
9 cordon off sex offenders as the legitimately-bad
10 category of people that we want to be careful and still
11 want to know was the deal -- what actually happened in
12 that.
13 COUNCILMEMBER PEREZ: My example was not meant
14 to imply any of that. It was just the first one that
15 came to mind where the environmental factors --
16 MS. MEHTA: No, but that is an easy direction
17 to go in, which is to say like, that's a whole other bad
18 category, and even that category is more complicated.
19 COUNCILMEMBER FRANKLIN MINOR: So that's why I
20 would argue to stay away from it completely, simply
21 because that's not what we do. You know, we don't have
22 the expertise in that area. That's why, you know, so I
23 would shy away from that 100 percent and support the
24 provisions as you proposed.
25 COUNCILMEMBER SCHUR: I have a question on a

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1 different part of your letter, but is it time to look to
2 that?
3 I was intrigued by your point for in terms of
4 requiring state licensing boards to evaluate the adverse
5 impact. And I'm not sure we have -- I mean, we could --
6 we don't have any direct authority to change the
7 conduct, but we can conceivably hold hearings or do
8 other things. I think licensing boards are a huge
9 component of the problem. I ran into this recently in
10 another context, and I had a specific question for you
11 which is -- I understand that 12944 has this provision
12 about adverse impact.
13 What I wanted you to make out is about how you
14 reconcile that with Business and Professions Code 480
15 which specifically gives licensing boards the ability to
16 deny a license for someone who has been convicted of a
17 crime. I mean, that's what it says, "without any
18 limitations."
19 MS. MEHTA: Well, we think that's too broad.
20 COUNCILMEMBER SCHUR: I know. But if we're
21 going to take the honorable appearance and do some work
22 in this area, we would need to understand how to
23 reconcile these potentially conflicting issues. Or if
24 there's any work being done around the breadth of the
25 licensing disqualification because, you know, if you

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1 have any insights on that at all.
2 MS. MEHTA: We are actually in the process of
3 finalizing a report on barriers to licensing. That
4 doesn't only look at California but is a nationwide and
5 state-by-state comparison; and so we're going to be
6 doing a lot of work around publicizing this and trying
7 to get states to do what we're recommending here in
8 California, which is to do whatever they are legally
9 authorized to do to require more scrutiny of how
10 licensing decisions are made.
11 COUNCILMEMBER SCHUR: Yeah, I just ran across
12 it in the context where I thought the imposition of
13 extremely broad criminal prohibitions was really
14 inappropriate. And yet they justified it through this
15 statute and I was hard-pressed to tell them they
16 couldn't do it.
17 I mean, they could argue that they had a
18 choice, instead of who gives them a choice. But they
19 couldn't argue that they couldn't do it because they
20 think it might trump what we've gotten on this
21 prohibition law. Or maybe not, I don't know. I'm
22 looking to the guidance --
23 MS. MEHTA: And I don't know the answer to
24 that, yeah.
25 COUNCILMEMBER SCHUR: Okay. That was my

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1 question. Thanks.
2 MS. MEHTA: Okay. So the next point I would
3 make, we already kind of touched on it which is to
4 provide a little bit more guidance. We recommend that
5 the regulation should provide a little bit more guidance
6 to a job seeker on how they would actually make a case
7 that they suffered disparate adverse impact.
8 And what we recommend is that the potential
9 plaintiff be able to rely on state-level statistics that
10 show the disparate impact across the state. And so
11 we're echoing comments that were made by Professor
12 Noah Zatz and Mark Bendick who is an economist; so I
13 don't necessarily have a whole lot to say beyond that.
14 There are -- every study you look at shows the
15 overwhelming disparity in terms of arrests and
16 incarceration rates for, in particular, African-American
17 and Latino populations throughout California. And we
18 think that should be sufficient and it should be clear
19 in the proposed regulations -- final regulations that
20 that is sufficient.
21 Similar to how the EEOC lays out in the
22 federal guidance for employers, that national-level
23 statistics are sufficient because they are so pervasive,
24 the levels of discrimination. The numbers might be
25 slightly different from one state to another, but they

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1 are all troubling in ways that are sufficient for a job
2 seeker to be able to say that they have suffered a
3 disparate impact.
4 COUNCILMEMBER BRODSKY: And actually, that
5 comment goes to what I was going to discuss with the
6 Council, which is the wording in (a) and (d) about
7 showing an adverse impact on individuals. I don't --
8 I think that's somewhat a misnomer. It's because the
9 adverse impact is on a group. The individual happens to
10 fall within that group that is being adversely impacted,
11 but you can't -- the concept of adverse impact is one
12 that encompasses a group. It contemplates a group; it
13 doesn't contemplate one person.
14 So I thought that we should somehow
15 consider -- I'm wondering if you have a suggestion for
16 that because that's -- and maybe I'm misreading too much
17 into it. Maybe you think it's okay the way it is. But
18 it seems to be kind of misleading.
19 So it's in (a) and then it's again in (d).
20 We have an adverse impact on individuals in both cases,
21 and I think that the wording is just a little bit
22 confusing.
23 MS. MEHTA: That didn't jump out to me as an
24 issue because this is going to be the individual making
25 a claim, but being able to rely on these broader

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1 statistics.
2 COUNCILMEMBER BRODSKY: Exactly. And I think
3 the way that it's written, it doesn't exactly -- it
4 implies that the adverse impact would be on the
5 individual. But that's not really how it seems to me
6 the concept applies.
7 MS. MEHTA: But I think in the specific
8 situation, the consideration of that individual's
9 criminal record has an adverse impact on them.
10 COUNCILMEMBER BRODSKY: Yes. But I think that
11 do you -- do you see any problem with the way it's
12 worded?
13 MS. MEHTA: I didn't see a problem with that.
14 COUNCILMEMBER BRODSKY: Okay.
15 CHAIRPERSON MANDELBAUM: One question I have
16 on the statistical -- on disparate impact: I mean,
17 certainly I think there's overwhelming empirical
18 evidence about the state -- on a statewide level or
19 national level, the disparate impact particularly on
20 race and national origin.
21 I was interested in and I found persuasive
22 some empirical evidence that Professor Zatz provided
23 that that continues even depending on the education
24 level. So even a job that requires some college, for
25 example, that you see that. In fact, I think it's more

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1 pronounced, even.
2 The one sort of reservation I have on that
3 grounds is that there are scenarios. And I guess you
4 could sort of reverse the presumption once they've
5 established this, then the employer can show in this
6 context of this job. Which is sort of what the EEOC
7 does, at least for cases before they commission.
8 But I think the reason why I'm still sort of
9 hesitant on that front is: A.) I don't know that we
10 have the authority to reverse. I mean, at the end of
11 the day, it's the plaintiff's burden of proof to
12 demonstrate disparate impact in the first instance. And
13 the cases that they cite EEOC don't do that.
14 They cite the District Court decision in (l),
15 which was affirmed, and they cite Green. And both of
16 those found disparate impact in part based on national
17 statistics and statewide statistics. But not
18 exclusively; they didn't pronounce that presumption.
19 They said, "Okay, you have these statistics. You have
20 testimony by this expert."
21 So I have a reservation with just making an
22 across-the-board presumption, even though that will be
23 true in almost every instance. But given the burden of
24 proof on the plaintiff, I don't know that that's within
25 our authority to pronounce in the first place.

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1 MS. MEHTA: Yeah, I don't know what your
2 authority is either, but I think there's a couple of
3 different options. You could do what Professor Zatz
4 mentions in his letter. I can't remember if we ended up
5 suggesting this in ours, but to make a rebuttal of the
6 presumption; to create a rebuttable presumption.
7 But you don't even have to go that far. Just
8 to allow the use of state-level statistics so the
9 applicant doesn't have to go looking for statistics in
10 their local area or their industry, so it allows them to
11 make their case using state-level statistics. So it
12 doesn't necessarily automatically create a presumption,
13 but it allows them to use that data as part of their
14 case.
15 COUNCILMEMBER BRODSKY: Why wouldn't they have
16 the right to do that even without a regulation? I mean,
17 obviously they can raise that. You know, why do they
18 need a regulation to rely on for that?
19 MS. MEHTA: I think my concern would be if
20 it's not clear what they're permitted to rely on, then
21 an employer would seek to refute statewide data saying,
22 "No, that's not industry-specific," or "That's not
23 specific to our county or to our specific situation."
24 So it's just acknowledging that finding the
25 data is not necessarily that easy for an individual

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1 applicant or for a potential plaintiff; so it basically
2 supplies them with, "Here's the information you can use
3 to make your case similar to how the EEOC does it."
4 COUNCILMEMBER PEREZ: So this is -- again, and
5 I know you're not a litigator and I've even been for a
6 decade, so it just might be my ignorance as to how --
7 when this comes up. But am I correct that you're
8 talking about an individual discrimination claim, is it
9 as a result of the imposition of that bright-line rule?
10 Is it as a result of the imposition of an individual
11 assessment where the employer still believes that this
12 person should not be hired? Is it in both
13 circumstances?
14 MS. MEHTA: I think -- so my understanding is
15 it would apply where there's just a rule that the
16 applicant believes unfairly or has an adverse impact on
17 them because of their race, but then also potentially as
18 it applies to them.
19 COUNCILMEMBER PEREZ: Okay. Because my
20 question is, if it's in the track of the individualized
21 assessment, it goes back to the question I asked earlier
22 which I know you don't know the answer to, but I guess I
23 posed to district council members. It just doesn't make
24 logical sense to me that if we are requiring the
25 employer to go through an individualized assessment,

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1 that the employee who was denied the job can still say,
2 "I was disparately impacted based on statistics."
3 Does that make sense.
4 MS. MEHTA: It does, but it also doesn't seem
5 appropriate to say that if all an employer has to do is
6 go through some sort of an analysis and that's enough
7 and the applicant loses their opportunity bring a suit,
8 if they disagree or they think that the employer in fact
9 did not fairly assess them.
10 COUNCILMEMBER PEREZ: So it would be -- in the
11 suit, the employee would say that the factors used
12 either wasn't analyzed correctly or it was tainted by
13 some bias; and in order to prove that, the statistical
14 evidence would come in?
15 MS. MEHTA: Exactly. The applicant would be
16 able to bring in statistical evidence to show adverse
17 impact to bring the initial suit so that they would come
18 under the jurisdiction of FEHA to begin with.
19 And then the employer would be able to show
20 all of the information that they presumably went through
21 in the analysis.
22 COUNCILMEMBER PEREZ: Because I guess maybe
23 this is where you're going, which is I see that as being
24 more relevant in step 3, perhaps to show pretext; not
25 necessarily in step 1. Okay, thank you.

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1 MS. MEHTA: Yeah, so I think the adverse
2 impact doesn't come in unless they're contemplating a
3 suit. It's not coming in until the employee or
4 potential employee says, "Hey, wait a minute. I'm not
5 getting the job. I was turned down for the job, and I'm
6 going to" -- and I don't know the statistics, but I have
7 to assume it's a tiny percentage of all applicants who
8 were rejected for jobs.
9 But that if they do decide to bring a suit,
10 and you know, there are cases of egregious employer
11 conduct where they have -- even despite rules against
12 blanket bans on hiring people with felonies or something
13 like that, you still see that.
14 And so being in situations like that where the
15 employer is pretty clearly discriminating against
16 certain people with records or certain types of records
17 in a way that just is not justified. So, yeah.
18 COUNCILMEMBER IGLESIAS: Going to the issue of
19 statistics in these plaintiffs' case, I understand and I
20 think I would agree with you that it would be helpful
21 for the regulation to specify that to the degree that
22 the plaintiffs' part of their prima fascia case rested
23 on statistics, that that part could rest on state
24 statistics; that that would be sufficient.
25 MS. MEHTA: Yes.

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1 COUNCILMEMBER IGLESIAS: Because there has
2 been in disparate impact litigation lots of fights about
3 what level and range of statistics are going to be
4 appropriate. That brings me actually to a point I was
5 going raise anyway.
6 In section 11017.1(d), where it talks about,
7 says, "Consideration of Other Criminal Convictions and
8 Potential Adverse Impact."
9 "Depending upon the factors such as the
10 type of convictions considered, the job
11 position, the geographic bounds of the
12 applicant pool."
13 So for me, that relates to the statistical
14 issue about what statistics are going to be relevant.
15 And I noticed that in that regulation that factor is
16 mentioned here, but there's no parallel mention of it in
17 (e)(2) below.
18 So I'm a little confused about what role that
19 factor is supposed to play and how it plays into the
20 potential statistical showing for plaintiff's disparate
21 impact. I'm not sure where that factor came from. It's
22 not one of the Green factors, as I understand it; so I'm
23 not sure what the source of it is or what it's doing.
24 CHAIRPERSON MANDELBAUM: Which factor?
25 COUNCILMEMBER IGLESIAS: Geographic bounds of

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1 the applicant pool.
2 CHAIRPERSON MANDELBAUM: Oh, well that comes
3 from -- so that's the underlying demonstration that
4 there is a disparate impact. So in that initial
5 analysis, Green and other cases go through all right.
6 What does it like in Missouri; is this still true?
7 Would this type of law or screening create a disparate
8 impact on a protective basis?
9 COUNCILMEMBER IGLESIAS: So it does go to what
10 would be sufficient showing for the plaintiff's case as
11 far as the statistics; is that right?
12 CHAIRPERSON MANDELBAUM: In the first instance
13 this shows that there was a disparate impact.
14 Consequently, that this is a civil rights issue; a FEHA
15 issue -- title 7 issue.
16 COUNCILMEMBER IGLESIAS: Okay. And then so I
17 guess then that goes to this issue of -- I would be
18 confused as either a plaintiff or a defendant about
19 whether that means state, local, or what that means.
20 CHAIRPERSON MANDELBAUM: I think that depends.
21 That's the problem, I think, with the sweeping
22 assumption. The typical job, lets say, that's posted
23 online, that may be difficult to know what the
24 geographic bounds of an applicant pool.
25 But if you're in a specific area and you're

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1 hiring a job where are all of the applicants -- all the
2 advertisement and applicants come from a specific area,
3 say, Atlanta, Georgia, then that's the relevant group
4 within which to make the inquiry of whether it's
5 creating a disparate impact.
6 COUNCILMEMBER IGLESIAS: So in other words
7 what you're saying is that it would be very
8 job-specific. So if I'm a potential plaintiff, I would
9 have to find out from an employer what was the scope of
10 the people who applied for this job. And that would
11 help then determine what I would need to show?
12 CHAIRPERSON MANDELBAUM: Well I mean, that's
13 part of disparate impact analysis, period. So point
14 well taken in terms of if there's a way to clarify kind
15 of what can be used in that analysis. But that's just
16 part of underlying disparate impact analysis that you --
17 I mean, you can't say if I'm looking at a job in
18 San Diego and everyone's in San Diego, it makes no
19 difference whether that would create a disparate impact
20 in North Carolina. It's just not --
21 COUNCILMEMBER SCHUR: Can I just ask a
22 question about that?
23 Because these days our job applicant pools are
24 incredibly mobile, particularly given the Internet. And
25 people do move cross-country for jobs and they do move

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1 cross-state and cross-town for jobs. And so I'm just
2 going back to thinking that a rebuttable presumption
3 around state and national data makes sense given the
4 fact that our culture is a very mobile culture.
5 And so it's not -- the impact is not limited
6 to people in the immediate vicinity of the job because
7 people move all the time for jobs. So I just wanted to
8 think about that factor as well as thinking about what
9 the presumptions might be in the use of state data.
10 CHAIRPERSON MANDELBAUM: Yeah.
11 MS. MEHTA: And I would just say that I don't
12 think there's any state where you're not going to see
13 statistical evidence showing a disparate impact. So we
14 were assuming California -- looking at California
15 statistics because it is California regulations. But
16 you're right that applicants can be coming from all over
17 the country.
18 So that's why we think it's helpful to clarify
19 that state-level statistics are sufficient even if
20 you're just hiring in San Diego or state or
21 national-level statistics are sufficient. Just to make
22 it clear that this is what we mean when we say the
23 "geographic bounds."
24 Because like you said, Councilmember Iglesias,
25 I don't know that an applicant would know how to

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1 interpret this language.
2 DIRECTOR KISH: Can I jump in for one second?
3 It actually strikes me -- we've been going for
4 a little bit more than an hour now, but not everybody
5 might understand the process of what's going to happen.
6 And so I'd just like to jump in and lay that out because
7 it also might help streamline the conversation going
8 forward.
9 So after today's meeting, the subcommittee
10 will consider all of the written and oral comments and
11 produce another draft. They don't have to make changes
12 to the draft, but if they choose to do so they will
13 produce it. They have to provide regular notice before
14 the next council meeting, unless that's not right;
15 right?
16 MR. SPERBER: They'll put out a draft for the
17 whole Council to consider after a 15-day comment period.
18 DIRECTOR KISH: Right. So they'll do a draft;
19 they'll notice it for another meeting, and then after
20 that meeting there will be a further 15-day comment
21 period?
22 CHAIRPERSON MANDELBAUM: Right, right. It'll
23 be introduced and then it'll be discussed by the full
24 Council, the revised draft, and voted on or modified at
25 that meeting. And then ultimately --

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1 DIRECTOR KISH: So I'm actually really
2 enjoying this conversation. But I think it might make
3 sense to take a poll of other people who want to speak
4 on this particular draft regulation, and then divvy up
5 our time accordingly.
6 CHAIRPERSON MANDELBAUM: Fair point.
7 MS. MEHTA: So I can probably wrap up because
8 I feel like we've touched on a lot of our comments. One
9 of them was the exception around licensing or sort of
10 subsumes licensing into creating a presumption of
11 business necessity.
12 So I'm talking about subsection (f),
13 "Compliance with Federal or State Laws, Regulations, or
14 Licensing Requirements Permitting or Requiring
15 Consideration of Criminal History." Our concern with
16 that section is that it just lumps together way too many
17 scenarios.
18 Some scenarios where there's a third party
19 that's doing the assessment, like a licensing body or
20 certification body that may have its own conviction
21 restrictions. But we think in those sorts of situations
22 the employer in question shouldn't be able to say just
23 because that certificate-giving body isn't going to give
24 a certificate, that that gives us a businesses
25 necessity.

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1 So we think in those scenarios it should be
2 sufficient to say -- to ask, "Can you get the license or
3 certification?" And if "yes," then we'll consider you
4 with the same criteria. If not, then we can't consider
5 you. So that's a different scenario than when an
6 employer is itself required to disqualify somebody based
7 on an existing state or federal law that says you cannot
8 hire somebody with X, Y, and Z conviction.
9 So we just think it just throws too many
10 different situations into one category and gives
11 employers basically a free pass to say it was business
12 necessity. So we think it is much better to specify if
13 there are certain bright-line disqualifications as we
14 discussed earlier, to make clear what that process looks
15 like. And then to still to go back to the case-by-case
16 kind of analysis which will allow employers to
17 disqualify people as needed based on their conviction.
18 And then I think we've really touched on
19 pretty much everything else, and unless there are any
20 questions, I will let somebody else talk.
21 CHAIRPERSON MANDELBAUM: Thank you very much.
22 COUNCILMEMBER SCHUR: And I just want to say
23 how polite I found your comments in particular.
24 MS. MEHTA: Thank you.
25 COUNCILMEMBER SCHUR: And as well as

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1 Professor Zatz's. And I know other people approved of
2 many of your other comments. But that thoroughness was
3 extremely helpful.
4 MS. MEHTA: Good, thanks.
5 CHAIRPERSON MANDELBAUM: So it's around 11:30,
6 and we certainly will continue the public hearing.
7 I just want to check in with our court reporter and also
8 Councilmembers.
9 Do we want to keep going? Would you want a
10 10 minute break?
11 THE REPORTER: A 10 minute break is good.
12 CHAIRPERSON MANDELBAUM: What?
13 THE REPORTER: A 10 minute break would be
14 great, yes.
15 COUNCILMEMBER IGLESIAS: All right. Let's do
16 a 10 minute break and be back at 11:40 and we'll
17 continue our public hearing.
18 (Off the record at 11:27 AM.)
19 (On the record at 11:43 AM.)
20 CHAIRPERSON MANDELBAUM: The meeting is called
21 back to order as is the public hearing. And we'll
22 continue taking public comments and testimony regarding
23 the draft-adapted proposed regulation concerning the use
24 of criminal history in employment.
25 So is there additional public comment on that

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1 front?
2 If you could just come forward and introduce
3 yourselves.
4 PUBLIC COMMENT BY AARON BURRIS
5 MR. BURRIS: Thank you.
6 My name is Aaron Burriss, and I am the face of
7 what these regulations are around criminal disparate
8 impact.
9 I was recently released from prison after
10 22 years on a life term. I've been out about 7 months,
11 and I'm down here today to talk about the struggle of
12 getting employment.
13 And, I mean, we'd like to believe the
14 employers are doing the right thing when they tell me,
15 "I can't hire you basically because you're not right for
16 the job," or, "You lack the skills." But in three
17 specific instances -- that I will not go into names of
18 who they were; two in the City, one in Oakland -- I've
19 basically been told, "It's your felony."
20 And the truth is I do have a violent felony.
21 I don't have a drug conviction; I went to prison for
22 murder. I was in a gang as a young man. I was in a
23 prison gang, and I have a very, very messed up past.
24 But I got my life together on the inside.
25 I began doing self-help groups. I became a substance

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1 abuse mentor. I received five trades. I began college.
2 I turned my life around. And eventually the day came
3 that I sat in front of the Board of Prison Terms. And
4 they said, "You have earned the chance at a life back in
5 society."
6 And coming out here and getting employment is
7 one of the hardest things for me. I am fortunate in
8 that I'm also a disabled military veteran; so I have
9 some help on that front. But I'm also a member of a
10 group called "All Of Us Or None," which is to end
11 discrimination against people that have an incarceration
12 history.
13 I have a felony conviction, but I want to call
14 it an incarceration history. Because it polarizes the
15 word. It really does. The second I say, "Hey, I've a
16 felony and it's pretty violent," I'm out. I'm the odd
17 man out. There's not a choice between me and three
18 other people.
19 And the truth is that I have the skills.
20 I can build the house that you live in by myself.
21 Without a doubt. All I need is a set of blueprints and
22 stuff to do it and I can do it. And I received those
23 skills inside the Department of Corrections. And this
24 is going to sound crazy as an ex-criminal, but I'm
25 grateful to them for the skills that they gave me.

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1 I really, really did apply myself to learn while I was
2 in.
3 There's this word I keep hearing, this
4 "disparate impact." It's all braided for playing by the
5 rules, but employers don't. And there needs to be a
6 mechanism in place where I can report what's happening
7 where it doesn't come back on me. Because for instance,
8 I turned in an application in San Francisco to someone
9 and I put the truth on there. Yes, I have a felony
10 conviction. Didn't ask for what, but "Do you have a
11 felony conviction?"
12 And this was supposed to be gone or was on the
13 application or whatever, and I walked out and I happened
14 to just go back in to buy something. It was balled up
15 and being thrown in the trash. By the manager -- from
16 the person who gave it to the manager.
17 And I didn't want to get into it. I don't
18 want those problems. I don't want that -- I don't want
19 to have to -- I don't have money. I can't go to court
20 to sue these people. I don't have money to go sue these
21 people. But my understanding is from "Ban the Box," the
22 ultimate punishment at the end of the day in
23 San Francisco is a \$50 dollar fine.
24 So I got to ask, what's the ultimate
25 punishment at the end of the day for people in

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1 Oakland -- because that's where we're talking about --
2 that are going to do this? What's the punishment, \$50
3 bucks?
4 I'll be honest with you. If I own a business
5 and I'm Joe Citizen; no criminal felony, I'm
6 straight-laced. I own a business and it's only
7 \$50 bucks and I don't have to have a guy work for me
8 that I just don't trust, I get it. Rather than just be
9 straight up and say, "Look, it's your employment
10 history."
11 I agree with the comment Ms. Chanee said. At
12 no point should a sex offender be working anywhere
13 around children. Those regulation are cut and dry.
14 That should be in place and they should be part of this
15 and they should be so implicit.
16 But I don't have one item of fraud. I don't
17 have one item of theft. I don't have none of that.
18 When I was in the military, I had top secret clearance,
19 top secret access. I was in communications. You know
20 how hard it is for me to get a job and get trust?
21 Pretty hard. It's pretty hard.
22 Now, I won't tell you. I worked off of an
23 application out here, a day-to-day application. And
24 that's fine. But I recently got married in February,
25 and I have a 25-year-old son and my wife has five

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1 children, and I'm trying feed my family. And I need a
2 job. And I don't have a 401(k), because I made a
3 mistake as a 22-year-old man, and that's my fault. And
4 I have responsibility for that.
5 All I want is a fair shot. A fair shot. So
6 that the guy doesn't go, "You know what, I'll pay
7 \$50 bucks." Or, "Who cares? You're just not right for
8 the job."
9 When I tell you that it's not just me, I'm a
10 huge part of the lifer community out here. I went
11 through transition in San Francisco. I recently
12 transferred my parole out. The guys that are finding
13 work, they're not finding the work that they need.
14 They're finding through temp agencies. They're finding
15 lower-level jobs. A lot of the guys are working for the
16 pit stop service through the City of San Francisco.
17 The parole has set up that job.
18 It's hard out here. And I mean, it's not just
19 hard for me. It's hard for your average citizen out
20 here right now. We're coming out of a recession. We're
21 coming out of this huge breakdown in society. Out here,
22 it's hard just getting a job. And how do you plan for
23 your future?
24 I mean, for the last 20 years on TV, aren't we
25 still talking about what's going to happen on social

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1 security? Does my social security exist? Is there a
2 plan? Seems there's a plan every year and everybody's
3 playing with my money. When I turn 65, am I going to
4 get it? I don't know.
5 But I know that I have children to provide
6 for, and I know that the attitude of the community, me
7 coming back to it, has been very effective. That's
8 true. But it hasn't been like that for everybody.
9 But I'm pretty charismatic. I get out there.
10 I go help people. I get involved in the community.
11 I still teach at the transitional program, through
12 Drug Awareness. I still go over there. I teach stress
13 management -- anger management. I give back. A lot of
14 these guys don't have that in them. They're just happy
15 to be free, and they're running into resistance out
16 here.
17 So the other point that I want to talk about
18 was blending in groups of discrimination, because you
19 asked the question about gender. And she also
20 commented -- Ms. Minor commented about it. The truth is
21 that we live in a world that, for any reason, there is
22 multiple categories I can go into that I can be
23 discriminated. You can discriminate me because I'm a
24 vet, you can discriminate me because came out of prison,
25 because I'm a dude.

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1 You know, then there's always the women and
2 the glass ceiling and there's always -- you know,
3 there's the elderly thing. I've actually seen it. I've
4 got a guy came out of prison with me, he's 72 years old.
5 And they told him straight out, "You're too old."
6 "You're too old." And I thought that man might cry.
7 72 years old, breaking out like a baby because he's come
8 back to society and he doesn't see the value in himself
9 because society doesn't recognize it.
10 And I'd like to tell you that every person
11 coming out of prison is not the same. There are some
12 people that are coming back to your community, they got
13 the same plans as when they left: They're going back to
14 the street corner. They're going back to their
15 homeboys. They're going back to the drugs. They're
16 going back to -- whatever it is, they're going right
17 back to it. That's the truth. But there is a good,
18 high percentage of people that need the receptiveness
19 from the community to change their life.
20 I was a substance abuse mentor for the
21 Centerpoint program on the inside at Avenal State
22 Prison. I volunteered my time. And the turnaround, we
23 all know, is right around 75 to 83 percent for
24 recidivism. Okay, what ends that is if you get them out
25 of there and give them a job. They need that. They

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1 need that embracement. Because you can't get out of the
2 Department of Corrections now without getting a GED.
3 That's part of the HD program. They push the education.
4 We all know that if you raise your education
5 one level, whether it's just to get your GED or whether
6 it's to your post-secondary education, 75 percent chance
7 you're not coming back. Whatever level it is, doesn't
8 matter. Just raise it one level, 75 percent chance
9 you're not coming back. If you're involved in the arts
10 and crafts program on the inside, 75 percent chance
11 you're not coming back.
12 But when we come to the community, all that's
13 really available is transitional programs. The
14 funding's not there. It's just not; there's not money
15 there. And the sad part is that if you're not willing
16 to invest into a "returning citizen," quote, unquote,
17 there are people that will. And they run gangs. And
18 they know these people.
19 My homeboys have reached out since I've been
20 out, and I've witnessed the truth. I've been offered a
21 lot of things: transportation, money, and drugs. And
22 I've turned down all three because I don't want that.
23 I don't want that for my wife. I want my wife, I want
24 my kids, I want a good life, I want a home. I want to
25 own a home. I don't want to go to jail. I want to have

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1 good neighbors. I want a pet. I want to go out in my
2 community.
3 Me and my wife go out on Wednesday nights.
4 And since my motorcycle accident, we have them do feed
5 the homeless help. And we're part of different groups
6 and we get involved and we go do things, and it's
7 because I see myself as part of a community. Before I
8 went to prison, I never did. I'd never seen myself as
9 part of a community.
10 So I have to know -- and what I came out here
11 today is, what's going to be the bottom line for an
12 employer that just looks at you and plays the game?
13 Because we can get caught up in the legalese and lawyers
14 and the arguments and regulations and the papers.
15 I understand these because I read them for
16 years under title 15 on the inside. I want to know what
17 rules apply to my life. The changes and everything
18 coming down from the board, I listen. I read. So I
19 understand what's going on here, and it looks great on
20 paper. But at the end of the day, what's the
21 punishment?
22 And I have one more thing I have to ask.
23 LinkedIn, everyone knows what LinkedIn is? Yeah, I'm on
24 there. I've been offered a job with a major beverage
25 company in Atlanta. When I went from Avenal, I worked

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1 in metal fabrication plant and my supervisor was by the
2 name of Jaime Escovela and Brad Mobley and they still
3 run the CALPIA plant down there. And they gave me the
4 job skills for this.
5 I was offered a job that pays \$195,000 dollars
6 a year in Michigan as management in a plant. I was
7 offered a job in Pittsburg in metalworking. Colorado
8 was construction, and there was I think another one in
9 Washington that had to do with the DMV frames. You guys
10 all know the cubicles at DMV? I built those for two
11 years from the ground up. I understand how to do it.
12 All of those jobs were great, and I was
13 offered that until one thing: the felony. And that's
14 mine to own. I did what I did, and I take full
15 responsibility for what I did. But I never reached the
16 application place. They don't have those laws in place
17 there.
18 And it would be great, but I can't pick up my
19 family and take them and go. Those jobs are off the
20 table. I need to work here at home. This is home for
21 me. Oakland is home. I chose San Francisco as a
22 transitional place with Walden House because it was the
23 best program in the state, and I had that dialed in for
24 being a substance abuse mentor. I have the SASCA
25 funding.

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1 And then I went, and after the program I went
2 to Treasure Island and then I met my wife. And I said,
3 "Well, where do we want to live?" We've decided to stay
4 in Oakland. I love Oakland. I know a gang of people
5 out here in the community. And the more I get involved,
6 this is a great city. And I want to help make it
7 greater, but I got to have a job.
8 And for somebody to look me in the face and go
9 "nope" just based on that is the same thing as looking
10 to say, "I'm not hiring you because you're black," "I'm
11 not hiring you because you're Mexican," "I'm not hiring
12 you because you're a woman," "I'm not hiring you because
13 you're gay," "I'm not hiring you because you're
14 whatever."
15 Discrimination is discrimination. Whatever
16 level you label it, you want to throw on, and some of us
17 fall under more than one. And the truth is we live in a
18 messed up world, but what are we going to? And that's
19 what we're here to figure out. Because what you put on
20 paper today is what's going to apply.
21 What which we adjust it and have 15 days more,
22 what's the bottom line? I hate to draw a metaphor and
23 go with this, but pollution. How many companies are
24 still dropping pollution because they can pay the fine?
25 They're pouring in our rivers; they're pouring our lakes

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1 because they can pay the fine. So what's the cost of
2 business? \$50 dollars for one guy not to work for me?
3 Truth is, if I really felt that way I wouldn't hire him.
4 But I'm a person of second chances.
5 My goal is to open my own seat company and
6 utilize people coming out of prison, lifers, and use
7 them as mentors for at risk youth and put them to work
8 out here while they're going to college. That's my
9 goal; my goal is to build that. I have a life coach for
10 that, and she works for the system. She works for the
11 sheriff's department in San Francisco. She just moved
12 over from Health & Welfare, and she really, really
13 influences me to do these good things and my wife
14 influences me to get community involved. All that's
15 great.
16 I got debt. I got to get a car. We drive a
17 \$900 dollar Ram that we paid for. And piece by piece,
18 it's falling apart. And I've got to figure out how to
19 get us a new one. Life's hard out here. And I'm the
20 face -- and this is hard for me to come down here to --
21 because when I was convicted, I sat in front of a judge,
22 the family cried, and I went away. I never had to face
23 them.
24 I'm facing you, I'm facing my victims because
25 I'm taking accountability for what I did in my

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1 community. I'm a full advocate of what they call
2 "restorative justice." I want open a dialogue to the
3 victims and offenders and I want to be on the forefront
4 of this part. But I got to pay my rent. I got to feed
5 my kids, you know? At the end of the day, that's what
6 it comes down to.
7 This is a great city, and I love what she said
8 because she hit it on the head, you know? The
9 regulations got to be clear. Because if not, I don't
10 know how familiar you guys are with CDC. On the inside,
11 they ask them to call RVR-115. It's a rules violation
12 report. And when a correctional officer says I did
13 something wrong, he writes it out. As a convict, my job
14 is to find a loophole and file a 602 and get out of it
15 so I don't lose 90 days or go do a year in the hole or
16 whatever it is.
17 You give an employer the opportunity to find a
18 loophole, he's going to do it. And I'm not saying
19 they're all like that, but we're talking about
20 integrity. And integrity is hard to find; that's just
21 the truth. It's hard. People live in communities and
22 don't care about them. They don't care. I wish it
23 wasn't like that, but it's the way that it is.
24 It's why we have the drug problems, we have
25 the gang problems. People don't want to call the cops

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1 when, "What's going on on the corner?" "That's them.
2 My door's shut, my kids are safe. Don't call out,
3 I want nothing to do with it." Because they don't want
4 the problems in the neighborhood they live in. We live
5 in a messed up world.
6 Coming back out of prison, I don't need a
7 handout. That's not what I need. I just need a fair
8 shot and something in place so that if that person has
9 it in their heart, "No, I'm not going hire a felon,"
10 there's a penalty for that. Because if I'm not going to
11 hire a woman, there's a penalty for that. There's
12 always. It needs to be the same. And that reason is
13 because discrimination is discrimination; I don't care
14 what it is. I don't care.
15 My wife is African. Her children are African.
16 My son, my 25-year-old son, he's mixed. Discrimination
17 is discrimination, period. You see my point with that?
18 It doesn't matter. You can pick -- you know how many
19 times we've walked into a restaurant and I've watched
20 the reaction because we're a mixed couple? Yeah, it's
21 discrimination.
22 But I can't sue Olive Garden because of that.
23 You know, I can't. I can just not go spend my money
24 there anymore. But it's different when they have the
25 power and I need the money in order to pay my rent.

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1 It's different. I'm all for spending to your committee.
2 So I've kind of been a little bit all over and
3 I've just been trying to speak from my heart. The -- I
4 keep hearing "relevant factors" and "nature of the job."
5 Bottom line is I will hire any of you that can do the
6 job. If I get my business -- I hope to be a business
7 owner -- and you can do the job, and you have changed
8 your life, and you can let me know, say, "I just did
9 20 years in prison," and you can tell me who you were
10 then and how you are now and you're not doing that
11 anymore, I'm going to hire you.
12 Not just because I'm an ex-con, but because I
13 believe in hope and change and everyone gets that second
14 chance. And it's really, really important that we don't
15 leave anybody behind when we write this regulation.
16 I agree with the whole separation of the criminal factor
17 things. It's there. Sex offenders -- I don't want to
18 get into that. That's a separate thing.
19 But I want to close with this: Community
20 receptiveness, that's what's going to determine. I was
21 welcomed with open arms and I'm thriving. I'm thriving.
22 Even on a broken leg, I'm thriving. I still give back.
23 But if I come back and my first run-in is I can't get a
24 job and I'm told, "It's because you got a felony," well,
25 I got that felony no matter where I go. If I pick up

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1 and move to Pittsburg, I still got that felony. If I
2 move to Vallejo or San Francisco, I still got that
3 felony and I'm told I can't get a job for that.
4 But my homeboys that I grew up with are still
5 doing the same thing. "We got you." Where am I going
6 to go? Because I got to pay my rent and I got to feed
7 my kids. Armies move on, bullets, beads, and Band-Aids.
8 Families are the same way. Got to pay the rent, go to
9 feed the kids.
10 If you guys have any questions, I'm open to
11 it. I'm an open book.
12 CHAIRPERSON MANDELBAUM: Well, thank you.
13 I really appreciate your testimony.
14 COUNCILMEMBER PEREZ: I actually do have one
15 question. First of all, thank you very much. Very,
16 very compelling. You do have loads of charisma for
17 sure.
18 I'm curious. From going back and talking
19 with, let's say, to employers, clearly there's an
20 acknowledgement that there are some who get out of jail
21 and do go back to the life. You chose not to, and I
22 commend you so much for that.
23 What sets you apart and what would you say, as
24 an employer, what are the types of questions or what are
25 the bullet points or types of information that employers

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1 should look for to know in addition to just meeting you
2 in person and hearing your story, that differentiates
3 you? So that an employer can say, "Yeah, I can see that
4 this person is a real person who is really going to
5 contribute to my workplace as opposed to someone else."
6 MR. BURRIS: For me, it's a little different
7 for me. I think that anybody else, everybody -- the
8 polarization of who I used to be and who I am now. The
9 truth is I was not a good person; I was a horrible
10 person. Even when I was in prison, I'd love to tell you
11 that I went to prison and got it together. It took
12 me 10 to 12 years to get it together. In those 10 to 12
13 years, I was involved in a lot of horrible, negative
14 things. The entire spectrum. But to answer your
15 question is just, for me, I just tell you the truth.
16 And some people aren't fair to that. Some
17 people, they, "Hey, I got a felony for this." They
18 still haven't accepted responsibility for their crime.
19 "Hey, I did my time and I'm out." And I wish it wasn't
20 like this. There's a lot of lifers like that. "Hey,
21 I did my time and I'm out. I don't even want to talk
22 about that no more." They want to move past it and
23 gloss over it.
24 And that goes back to what we were talking
25 about with opening the dialogue in restorative justice

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1 and finding accountability. Because all victims need to
2 be heard. All victims' families need to be heard. The
3 community needs to be heard for the crime. And some
4 people just don't get to that work. I'm fortunate I got
5 to that work. I understand what I did to a community.
6 Where I committed my act of violence, there
7 have not been a major act of violence out there lately.
8 I terrified that community in one night and I understood
9 that. And then I got to the point it started out as
10 regret and it grew into remorse and I apologized. And
11 it became heartfelt.
12 It wasn't I said it enough to become a mantra
13 and I could sell it, throw some tears. I really
14 understood what I did and came to terms with it. But if
15 that dialogue never takes place between employer because
16 I got a felony, two now. Two now. It's that easy. We
17 lived in a messed up world.
18 And I'm not telling you that you have to make
19 provisions or excuses to pave the road and make it easy.
20 Just level the playing field. And if a guy has really
21 made the changes in his life that he needs to and he's
22 really did the work on himself emotionally and he's
23 matured, I did not become a man -- and I'm kind of
24 ashamed to say this -- until I was 33 years old in
25 prison.

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1 Until then, I was a boy playing boys' games
2 saying I was a man. And I fathered a child, but I
3 thought I was a man until I was 33 years old and woke up
4 and went, "Wait a minute, you're playing the wrong game.
5 Something's wrong in your head. Now you set out and you
6 get right." And I spent the rest of my time getting it
7 right. But it will show up.
8 If they haven't done the work and they're not
9 ready, I hope they don't go back to prison. I hope they
10 don't do nothing crazy. I hope they make it. But the
11 truth is that not everybody coming out of prison has a
12 life. The lifers don't re-offend a lot. It's the other
13 75 to 83 percent that re-offend. And it's because when
14 they come back, the receptiveness of the community.
15 They don't feel -- I hate to use this
16 metaphor, it's Vietnam. They're coming back from
17 Vietnam. I could paint a world for you in there that is
18 completely backwards and the only way you can survive is
19 to be able to think backwards, and what you think makes
20 sense, doesn't.
21 Everything that I needed to do in prison when
22 I got there to get out of prison and re-enter society
23 productively would get me killed. And it's sad. But a
24 lot of these guys are coming back from war zones in
25 their head. They come from these worlds where three

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1 blocks over, everybody wants to kill you.
2 And it's all about drug trade, and the other
3 guys control it and they got you thinking it's all about
4 representing this gang and respect. It's not about
5 that; it's about money. It's about drugs. It's about
6 power. But for umpteen years, you believe that it's
7 about respect and pride and identity.
8 And they don't have an identity; so they
9 become Lil' Such-and-Such from Such-and-Such Street and
10 he has this reputation as killer or a gunner or a
11 hoarder. He's always got the money or the cars or the
12 girls. Whatever it is, that's his reputation and he
13 builds it. And it's sad.
14 COUNCILMEMBER PEREZ: Thank you.
15 COUNCILMEMBER FRANKLIN MINOR: I wanted to say
16 a very heartfelt thank you for coming and speaking
17 today.
18 I think that it's very important -- I say this
19 whenever someone tells a personal story, but it's very
20 important for us to hear just these personal
21 perspectives and I understand it takes a lot of courage
22 to talk to complete strangers and tell them very
23 personal details about your life. But it is so
24 important and I encourage you to continuously do that
25 because that is how we make a change.

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1 That is how -- it's the personal narratives
2 that make policymakers or people who are looking at
3 these laws who get -- we get very caught up in legalese
4 and we need to be caught up in personal situations. And
5 so I completely commend you and appreciate your
6 testimony today for that. I am absolutely a proponent
7 of banning the box and doing as much as we can to make
8 it so that people re-enter society and they actually
9 have a chance and an opportunity.
10 Because if you don't have a job, just like you
11 said, you can't feed your family. And if we are truly
12 afraid of people recommitting crimes, then we have to
13 eliminate barriers to real employment. Because
14 otherwise, that's only option. If you don't have
15 welfare or if you don't have a job that is able to pay
16 your bills, what is going happen if the skill set -- if
17 you have these other pressures?
18 So I take it as absurd that we have as many
19 barriers that we do. We are limited as far as the
20 Council and how much we can do towards that effort. But
21 as far as what we can do, I am definitely a proponent of
22 making it as open a process for people to not be
23 discriminated against based on their past histories.
24 Just as a principle, your worst mistake should
25 not dictate the rest of your life. And we need to work

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1 hard to make sure that that is not the situation; not
2 just in California, but in the rest of this country.
3 So thank you so much for your testimony today.
4 COUNCILMEMBER IGLESIAS: I wanted to thank you
5 also very much for your testimony and for your
6 forthrightness. I'm sure it took a lot for you to do
7 that.
8 I just had a couple of quick comments.
9 Number one, to respond to your concern about the
10 penalties, I can assure you that under the regulation
11 law that we're talking about, if an employer was found
12 guilty of violating the law, it would be much more than
13 \$50 dollars; it would be a very, very significant
14 penalty for them.
15 CHAIRPERSON MANDELBAUM: And that's because
16 this is the state law. I think you're referring to the
17 San Francisco or local ordinance.
18 COUNCILMEMBER IGLESIAS: Yes. I just wanted
19 to reassure you about that.
20 Secondly, I thought the sort of whistleblower
21 aspect you brought up was interesting. I don't know if
22 that's something that is within our realm or maybe it
23 already exists. But I do think the idea of a
24 whistleblower statute or regulation would be interesting
25 to consider.

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1 And then the third thing is actually I have a
2 question which is we're also considering writing a
3 regulation that would consider in what ways can housing
4 providers use criminal history to determine whether or
5 not to accept somebody as a tenant. So I'm curious
6 about your communities of ex-offenders' experience,
7 if you have any particular information about your
8 experience in terms of having a criminal history used
9 against you as far as a housing decision.
10 MR. BURRIS: It hasn't been used against me.
11 I actually passed the Oakland Housing Authority's
12 background check. Parole got involved and made sure
13 that I would pass, because my felony is 22 years old.
14 But at first it looked like I wasn't going to. Then
15 parole was like, "Hey, let's talk about this," and then
16 they got with the Oakland Housing Authority. It was
17 awesome.
18 To comment on that -- and I don't want to
19 forget one thing really quick. I want to talk about the
20 licensing thing; just one comment because you hit it.
21 San Jose recently had a thing where if I live
22 in a neighborhood and I have a party and I bring people
23 to my house and there is a felony committed there by
24 someone that has a history, that I could actually get
25 evicted. And we went down there, and like I said, I'm a

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1 founding member of All Of Us Or None.
2 We went down there and talked about that, and
3 that's where that goes, that same type of thing.
4 I haven't been directly discriminated against.
5 Actually, mine is the exact reverse. I got to move to
6 Oakland, so my experience is good. Everyone's probably
7 isn't; especially if you have fraud or drug sales.
8 Because the last thing you want in housing,
9 because housing areas under authority, people need that
10 help with that rent and it's already the neighborhoods
11 they get rough, we don't want people with their drug
12 history down selling out of apartments or doing
13 whatever.
14 We're trying to turn that around. We're
15 trying to turn those communities around. Those are
16 pockets of people that need help; not people that need
17 oppression from within. And we're trying turn that
18 around, so I understand.
19 The idea is that everyone should have a shot
20 at a house -- housing free. Don't have to live in a
21 neighborhood. And I only heard of two guys having
22 problems with living in certain neighborhoods, but those
23 were specific criterias. The guy committed his offense
24 in that area and they didn't want him back in that
25 neighborhood. And the other one is a guy still on the

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1 inside that's trying to come back and the City is like,
2 "We don't want you back."
3 COUNCILMEMBER IGLESIAS: Thank you very much.
4 MR. BURRIS: Yeah.
5 If I may on licensing?
6 COUNCILMEMBER FRANKLIN MINOR: Yes, please.
7 MR. BURRIS: It's a cross-pollination issue
8 that may or may not come up.
9 For instance, medical marijuana, where it's
10 headed, the restrictions of licensing with people with
11 marijuana convictions.
12 Well, I get it. But let's just say, for
13 example, my whole life. I mean, I'm in the streets.
14 I understand how to sell drugs and I have a felony. Now
15 I'm out here, I'm trying to go legit. Wait a minute,
16 this is what I know. This is where my experience is.
17 Same thing if I've been building houses my
18 whole life. If I'm restricted from going there because
19 of a felony conviction for marijuana.
20 But now it's legal. So what was illegal in
21 the past from my mistake is now legal, but I'm banned
22 because back then it's illegal. It's kind of a
23 catch-22. I'm just throwing that out that because what
24 Ms. Schur said about that.
25 We've got to look at -- my mistake can't be

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1 held against me. It can, and I'm accountable for it,
2 but it shouldn't be. I should have a fair shot.
3 Right now I sat in front of the Board of
4 Prison Terms with two of the hardest commissioners that
5 give out refusals and I sat in there for five hours,
6 heart to heart, and they felt me. And they gave me a
7 shot. I don't want someone out here to take that shot
8 away. That's all.
9 COUNCILMEMBER SCHUR: And I just want to say I
10 certainly heard your point that what we can do with
11 licensing may not be as broad as you would hope. But I
12 think it's a very important point that some prior
13 criminal conduct is no longer illegal and that maybe is
14 something we want to consider. So thank you.
15 MR. BURRIS: Thank you.
16 DIRECTOR KISH: Just weighing in on the
17 comment about licensing. It turns out that the
18 Department of Fair Employment and Housing actually does
19 have some jurisdiction over licensing in the state of
20 California, which I have learned. This is a major
21 priority, as I understand it, of the government.
22 In fact, there's a letter from, I believe,
23 1976 during the Governor Brown's first term as governor
24 talking about the use of criminal background history and
25 licensing and restrictions on licensing. And this is

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1 reemerging as an area of concern for the government.
2 So I can tell you that we are working with our sister
3 agency, the Bureau of Consumer Affairs -- Department of
4 Consumer Affairs which licenses many occupations and
5 professions in California to look -- take a look at
6 whether the licensing requirements are good, whether
7 they're reasonable, whether they exclude people from
8 employment they should not be excluded.
9 So thank you very much for your testimony
10 today.
11 MR. BURRIS: To close, if nobody has nothing
12 else, first I'd like to publicly apologize for my crime.
13 I know it didn't happen in Oakland, I apologize to my
14 community. And I'm not the same person I was, and I
15 appreciate the support that's been given to me.
16 CHAIRPERSON MANDELBAUM: Thank you. Thank you
17 for being here today.
18 Are there additional people wishing to make
19 public comments?
20 PUBLIC COMMENT BY KAREN SHAIN
21 MS. SHAIN: I know it's getting to be lunch
22 time. Trying to be fast.
23 Hi, my name is Karen Shain. That's K-A-R-E-N.
24 My last name is Shain, S-H-A-I-N. I'm the reentry
25 policy planner for San Francisco Adult Probation.

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1 My job is to staff the San Francisco reentry council,
2 which on March 24th did unanimously vote to support --
3 and I believe you've gotten a letter -- I've gotten an
4 e-mail back from you -- that the council which is made
5 up of, just so you know, it's the mayor, it's five
6 co-chairs of the mayor, public defender, sheriff,
7 district attorney, and Chief of Adult Probation.
8 They are the five cochairs, and then there are
9 23 members of the council including the Department of
10 Public Health, Work Force Development, and seven
11 formerly-incarcerated people, plus obviously some more.
12 And so I also in my private life, I'm the
13 Chairman of the Board of the Essie Justice Group, which
14 is a group of women with incarcerated loved one. And so
15 when I was hearing the testimony, particularly the most
16 recent testimony -- first of all, I'd like to say
17 welcome home. Because you have every right to be here.
18 And when we get to housing, which I'm not
19 going be able to stay today, but I'd like to talk to you
20 about housing because I think that it is a critical
21 piece of this puzzle. But I really wanted to talk a
22 little bit about what it means to be on the forefront of
23 a culture change, which is where you're sitting. And
24 I think it's very exciting; it's exciting to hear such
25 thoughtful comments and questions and concerns.

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1 And I think that, you know, it is only
2 through -- all of this is going to be a combination of
3 both the culture change from employers and employees
4 recognizing, "Wait, we're going to get some of the best
5 employees we possibly can," and the state regulators and
6 the regulations in general saying, "You have to get the
7 best employees you can."
8 So on behalf of the reentry council, I really
9 want to applaud you. I do want to say that in terms of
10 the fair chance ordinance in San Francisco which the
11 reentry council was very involved in passing, what you
12 saw happen in terms of having that employment
13 application tossed out was illegal and I'd be happy to
14 talk to you about what can be done about that.
15 The other thing, just because it's come up
16 several times, I want to talk a little bit about the
17 question of sex offenders because this is probably the
18 final frontier. And it's the place where, you know,
19 people have put all of their fears and all of their
20 concerns and all of their anger and everything else on a
21 grouping of people that are 95 percent are not the
22 people that you're talking about.
23 And I think it's very important to recognize
24 that -- actually, in 1972 I was arrested for being naked
25 on the beach in the city of San Francisco, which if I

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1 had been found guilty which for some reason I wasn't --
2 that's a long story -- I would be a registered sex
3 offender to this day how many years later, 46 years
4 later. And this is what we're talking about when we're
5 talking about sex offenses; so I think we should be very
6 careful about what the term means, what the fear is, and
7 in fact, in terms of the childcare example that was
8 used, I have children.
9 I think we obviously all want to keep our
10 children safe. I would say if you have a childcare
11 center in your place of employment, you better have some
12 protections for those children no matter where they are.
13 The Hall of Justice where I work in San Francisco has a
14 childcare center. There are all kinds of people that
15 come in and out of there; some of them are guilty, some
16 of them aren't.
17 But there are plenty of people in that
18 building, and somehow they manage to keep their children
19 safe. And I think that that's the important point of
20 having a place where there are children and not coming
21 up with some kind of regulation that blankets everyone
22 and turns it into something that really becomes its
23 opposite. So I just wanted to mention that because here
24 we are.
25 COUNCILMEMBER PEREZ: If I could just

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1 interrupt you for a second because I came up with that
2 example off the cuff.
3 MS. SHAIN: I'm not saying -- it's not a
4 personal thing.
5 COUNCILMEMBER PEREZ: In fact, as we were
6 talking I want to make it clear that I thought of ten
7 other examples that have nothing to do with sex
8 offenders; one that I was just sharing earlier just so
9 that it's not misunderstood that that was what I was
10 focusing on, because it wasn't at all.
11 First of all, to the extent I was focusing on
12 that, it would have been of a crime that was reasonably
13 related, not being naked on a beach. Because really,
14 that's a crime? When?
15 MS. SHAIN: That's what I said.
16 COUNCILMEMBER PEREZ: I live in San Diego. We
17 have Black's Beach.
18 But just as an example -- and I don't want to
19 open up another Pandora's box, but just so that it's
20 clear that I was not focusing in any way, shape, or form
21 on issues related to children and sex offenders, I was
22 thinking of another example where a workplace had just
23 undergone something very traumatic like a workplace
24 violence incident, and the person who was applying
25 perhaps would trigger something related to that

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1 incident.
2 My question really was very broad. Using an
3 example, the question being, "Would it be fair, in your
4 opinion as an commentator, for the employer to use that
5 as a factor?" And again, I thought of fifteen other
6 ones, but I just wanted to make it clear that the sex
7 offender issue was not meant to be anything to imply
8 that I wanted it included in the regulations.
9 MS. SHAIN: So let me just say I think that in
10 any example, including -- I mean, I know that you're the
11 person who raised it and I recognize that there are a
12 lot of opinions and there are a lot of issues in both of
13 the things that you're talking about.
14 And I would just say that the thing that we're
15 trying to parse out or trying to understand here is what
16 is it that triggers someone's fears? That is a
17 reasonable thing that we want to be able to control in a
18 work environment and one of the things that we really
19 need to work with each other to overcome.
20 And it may be -- you know, it's interesting.
21 Because I work in probation, we had a meeting with some
22 of the people from the San Bernardino probation
23 department, which was -- they were not in the middle of
24 the shooting that happened in San Bernardino, but many
25 of them were in the building. And so it became part of

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1 that entire scene with many of the first responders.
2 And they were talking about how everything is
3 triggering everything, and that this is a department
4 that has become kind of decimated. Obviously, the
5 Department of Public Health in San Bernardino has as
6 well.
7 And then you have to begin to figure out,
8 "Well, how do you heal from these things?" And that's,
9 I think, where we're coming with what we want to be part
10 of and what I'm so excited about you making the attempt
11 to be part of from your own perspective, is how do we
12 create a healing environment where people who had
13 nothing to do with the damage that other people are
14 feeling are able to go to work there? You know, whether
15 or not they have a criminal record.
16 Because I'm of a somewhat older generation, I
17 worked at a temporary agency for a while. In the
18 reception, there were two piles of questions; everybody
19 got tested when they walked in. And I was told my first
20 day of work, "If any black person comes in, give them
21 these questionnaires." You know, and then everybody
22 else got these questionnaires.
23 I don't know what was in those exams. I don't
24 know what was in them, but I can guarantee you it wasn't
25 so that everybody would have a fair chance of getting

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1 employment. And those are the kinds of things that are
2 in the past. You know, that is a culture shift that has
3 happened. And all of us are now looking at a new and
4 really critical one today.
5 COUNCILMEMBER PEREZ: Thank you.
6 CHAIRPERSON MANDELBAUM: Thank you.
7 Are there others wishing to provide public
8 comment?
9 A familiar face.
10 PUBLIC COMMENT BY NOAH LEBOWITZ
11 MR. LEBOWITZ: Good morning, everyone.
12 COUNCILMEMBER IGLESIAS: Good morning.
13 MR. LEBOWITZ: My name is Noah Lebowitz.
14 That's N-O-A-H, L-E-B-O-W-I-T-Z.
15 I'll try to keep my comments short today. I
16 don't want to repeat anything; I just want to highlight
17 a few things.
18 So I'm here. I'm a partner at the law firm of
19 Duckworth, Peters, Lebowitz & Olivier in San Francisco
20 and I'm here today in my role as the chairman or chair
21 of the Fair Employment and Housing Regulation and
22 Commission Council.
23 Let's start over. The Fair Employment and
24 Housing Council Regulations Committee of the California
25 Employment Lawyers Association. CELA as we all know is

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1 a statewide organization made up of, I believe now we're
2 1,200 attorneys primarily representing employees in
3 their practice. And we have been involved, as you all
4 know, in the regulatory process and anything related to
5 the employment side of FEHA for several years now.
6 And our goal, just to restate, is always that
7 regulations should be made clear, should be made
8 comprehensive, and should be written with the idea of
9 clear rules that help avoid litigation.
10 We may be lawyers we may make our livings as
11 lawyers in litigation, but we do honestly believe
12 that -- and our main priority especially in the
13 rulemaking process is that clear rules help prevention
14 and compliance. And our goal is to assist in voluntary
15 compliance around the state and not to increase
16 litigation.
17 With that in mind, there's only a few things
18 I want to highlight today. Our written comments will be
19 submitted by the end of the day -- we're not quite
20 finished yet, so you'll get those this afternoon -- but
21 also informed by the comments today, because I think
22 it's been a very helpful discussion.
23 And I will take two minutes to go outside the
24 scope here and thank Director Kish for all of his work
25 on obtaining the new budget line for the online system

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1 that's going to be created. It is a prime example of
2 good government that the director came to the community,
3 asked the community what it was that was wrong with the
4 system, took all of our feedback from both sides of the
5 equation and implemented it and fortunately advocated on
6 behalf of making a system -- that is, creating a system
7 that will be accessible and useable by all. And so
8 thank you on behalf of all our organization. It is
9 truly good government.
10 So to start on our comments, technically I
11 think -- and I don't know if I'm reading this wrong or
12 if our community's been reading this wrong or if it is a
13 drafting error, but I believe there is a drafting error
14 in the section -- the revision in the very first
15 paragraph. So in 11017(a), in the proposed striking of
16 the cross-reference to section 11010 which has been more
17 general, which is not part of the rulemaking but is part
18 of the general regulations title of the affirmative
19 defenses to employment discrimination.
20 The way we read the subsection -- this is
21 going to get a little complicated. So in section
22 017(a), it cross-references section 010, just to use
23 shorthand. It used to be subsection (c) in relation to
24 the definition of job-relatedness. If you go back to
25 job-relatedness in 010, it cross-references -- it

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1 doesn't actually provide a definition itself, it
2 cross-references back to 017(e).
3 And if you go to the original language of
4 017(e), the proposed adopted regulations that are before
5 us purport to strike the language that I believe 010 was
6 trying to reference back to. So it appears we have a
7 circular cross-referencing back to nothing. And so I
8 would suggest that the Council take a look to make sure
9 that our interpretation of that is accurate and to
10 correct if that's the case.
11 COUNCILMEMBER SCHUR: And that's a problem
12 because?
13 MR. LEBOWITZ: So just a technical glitch.
14 And just a couple of points I just wanted to
15 endorse, especially from both the NELP and
16 Professor Zatz's comments which are comprehensive and
17 thorough and taken together really do paint a very
18 comprehensive picture what our comments will be. We
19 will be largely adopting substantively what they have
20 said already.
21 But to highlight a couple of items, the
22 importance -- trying to be as specific as possible -- of
23 NELP's comments in regards to the individualized
24 assessment and the idea of providing notice and an
25 opportunity to cure, so to speak. Those concepts are

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1 familiar in employment law, especially in the context of
2 a just cause contract employment that can only be
3 terminated for just cause. Typically those clauses come
4 with just that, an opportunity for a notice and a right
5 to cure.
6 So folks in the employment law field are
7 familiar with those concepts and those terms and I think
8 they apply quite well in the situation where you've got
9 a -- someone who has been screened out because of a rule
10 or bright-line rule or not-so-bright-line rule based on
11 a criminal history.
12 So we would endorse those concepts and ask
13 that the Council consider inserting some language within
14 the regulation that entitles the applicant or the
15 employee who has subsequently been screened out and
16 somehow adversely affected in the workplace either by
17 promote, transfer, or even terminated because of
18 discovery of a criminal history -- a record of criminal
19 history that they be given notice and an opportunity to
20 cure, explain, what have you and all the various
21 factors.
22 The other major issue is -- and I think this
23 is highlighted by the gentleman who testified earlier a
24 few moments ago. And that is in regards to the
25 statistics that everyone's been talking about for some

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<p>1 time and how to deal with statistics in this situation. 2 I think we can bring the litigator's point of 3 view that some of the Councilmembers were querying about 4 earlier. Because this is where -- when things do break 5 down and we do end up in litigation and we do have to 6 figure out how these how's these things play out in a 7 courtroom. 8 And the ability to use statistics and what 9 statistics are available is really a matter of -- really 10 has a significant impact on how available a lawsuit 11 really is to an individual. Because of the 12 cost-prohibitive nature of proving statistics in an 13 individual case of litigation, if you're talking 14 about -- because most of -- the regulations are not 15 really focused on -- they certainly can be applied in a 16 class-wide basis. But they're also -- they're not 17 exclusive to that. They are -- taking into account 18 individual cases of disparate impact, how a disparate 19 impact would impact and effect an individual. 20 And if you're talking about an individual 21 bringing a lawsuit saying they were unlawfully screened 22 out of a job because of their criminal history. And 23 part of the prime fascia case is that they have to prove 24 -- have a burden of proof that there is a statistical 25 adverse impact on the category or group of people to</p> <p style="text-align: right;">Page 94</p>	<p>1 it's just a \$50 dollar fine and they'll take the \$50 2 dollar fine as explained before. 3 If they know that there is no real penalty, 4 there's no real litigation coming out of this and 5 there's no potential real litigation or legal liability 6 to come from it, it's a negative incentive. No one is 7 going think that these are enforceable or real. So we 8 would encourage a strong look at that as prima fascia 9 case. 10 And as Councilmember Perez noted, you were 11 trying to suss out where this would play out in the 12 litigation with the burden of proof and the shifting 13 burdens of proof. Now, remember that these are 14 disparate impact cases. They aren't just for treatment 15 cases, so there's no pretext analysis. 16 If it shifts back, this would be -- as these 17 would play out in litigation, the statistical element 18 would be an element of the plaintiff's prima fascia 19 after which the defense could come back. The burden 20 would shift to the defense to come back and show through 21 the end that they made the individualized assessment and 22 all the factors that came into play in the 23 individualized assessment and it meant the standard of 24 being job-related and justified by business assessment. 25 After which the burden as set forth in the</p> <p style="text-align: right;">Page 96</p>
<p>1 which they belong. 2 To prove that without having some guidance in 3 these regulations or some clear statement about both 4 what statistics can be looked at or should be looked at, 5 and even we would endorse Professor Zatz's proposal that 6 there be a rebuttal of presumption established within 7 the regulations of the statewide statistics. 8 That means an individual has to spend 9 conservatively \$10,000 to \$15,000 dollars on an 10 individual case just for the cost of the expert who 11 they're going have to retain, who is going to have to 12 come in and testify, both give an expert report, do the 13 research, show the research, do an expert report, have 14 their deposition taken, and then come in and testify at 15 trial just to prove one element of a prima fascia case. 16 That is prohibited. And that will preclude anybody from 17 being able to enforce the laws and the regulations that 18 are being contemplated here as a whole. 19 So it will be -- if there's not a clear 20 statement about the statistics, it is our position that 21 it will be a significant barrier to true enforcement of 22 these regulations in a litigation standpoint. And 23 without that prospect being out there of the litigation, 24 then that will be a negative incentive and that folks 25 will not come into a situation where they think maybe</p> <p style="text-align: right;">Page 95</p>	<p>1 regulation would shift back again to the plaintiff not 2 to prove pretext, but to prove that there was a more 3 narrow alternative means or however the language is. 4 So that would play out. So it's not an intent scenario 5 that requires a showing of pretext, and that's how it 6 would play out. 7 COUNCILMEMBER PEREZ: And are you saying then 8 that absent being allowed to use statistics in the first 9 instance for the prima fascia case, the case won't be 10 able to go past that stage? 11 MR. LEBOWITZ: I think that the point is that 12 statistics will always be able to be used. The 13 plaintiff can use whatever they want to show that; 14 right? The point is about how practically speaking does 15 an individual plaintiff go about obtaining the necessary 16 evidence to prove -- to establish their prima fascia 17 case. 18 And if it's just left unstated or ambiguous, 19 it will be interpreted that the plaintiff has to go and 20 prove in each instance the proper scope of statistics 21 and what those statistics are. And to do that, the only 22 way to do that is through expert testimony. The only 23 way to go get admissible evidence on that would be 24 through expert testimony and the cost would be 25 prohibitive.</p> <p style="text-align: right;">Page 97</p>

1 CHAIRPERSON MANDELBAUM: What would you
2 thoughts be on -- because this is something I examined a
3 lot initially with Councilmember Schneiderman before,
4 and the problem is we can envision scenarios where
5 that's not true. And so it was -- it's hard to craft
6 that universe. Certainly it's true in the aggregate,
7 I mean, if you look at a job open in California and you
8 look at California's statistics. But it's not always
9 the case. I mean, what if you're talking about a rocket
10 scientist position?
11 So is there some subset where you think that
12 the declaration of presumption can be more affirmative?
13 I mean, ultimately it's still litigation and plaintiff's
14 right to prove. I don't want these regulations to do
15 more than they're intended to do as regulations.
16 But it seems like maybe that was one way to go
17 was to carve -- it was just hard to figure out a way to
18 carve out a universe because there are a myriad of
19 different ones that I haven't seen any empirical
20 evidence to indicate that rocket scientists from certain
21 protected categories are more likely to have a criminal
22 conviction.
23 So I mean, there are scenarios and that's just
24 an example.
25 COUNCILMEMBER BRODSKY: You don't remember the

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1 astronaut who drove from Houston to Florida with a dead
2 body?
3 CHAIRPERSON MANDELBAUM: I do remember that.
4 Although, I don't remember which protected category.
5 But the point is there's a bunch of ones when you start
6 slicing and dicing where that's just not the case where
7 an affirmative proof would be required by the plaintiff.
8 So it's -- I think we need to ruminate on it further.
9 But how to do that in a way that's responsible as a
10 regulation and not just as a guide to enforcement is
11 trickier; easier said than done.
12 MR. LEBOWITZ: No, I don't disagree that your
13 job is difficult. But I would fall back on the EEOC
14 guidance in that instance. And the EEOC is seemingly
15 comfortable with making the pronouncements as hard as
16 what the statistics meant on a national level. So I
17 would simply fall back on that.
18 CHAIRPERSON MANDELBAUM: And they made sort of
19 a mini-burden shifting within the first prompt, which is
20 once the statistics are there, the employer then can
21 still demonstrate that in that specific context that's
22 applicable. So they sort of created a mini-burden
23 shifting all within the first step of the analysis.
24 MR. LEBOWITZ: That may be an answer to it.
25 There may be another way to do it.

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1 DIRECTOR KISH: I'm not as deep in this as you
2 are, Chairman.
3 Isn't it just establishing a prima fascia case
4 in saying, "This is a prima fascia case"? And then the
5 regular sort of burden-shifting process goes on. It's
6 just saying if you use these statistics and they show
7 what you say they do, then that's your prima fascia
8 case.
9 CHAIRPERSON MANDELBAUM: Well, so what the
10 EEOC did is essentially that, except all within that
11 first establishing a disparate impact, they said, "Okay,
12 we'll allow plaintiffs at least before the commission to
13 say -- given this national statistics for disparate
14 impact."
15 But employers still have the opportunity
16 within that first disparate impact prompt to say, "Well,
17 that's not the case in this job because our job is --
18 the job I'm applying for is 'X' and there's just no
19 reason to believe that that" -- back to the rocket
20 scientist, that in this context there's a disparate
21 impact.
22 So they basically created like a multi-step
23 prong just on that first step.
24 COUNCILMEMBER IGLESIAS: So I would think that
25 -- I would be in favor of going along with that as

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1 you're describing. Because just as I have known in the
2 housing context, the similar sort of barrier to any
3 realistic enforcement occurs because of the cost of
4 hiring an expert to come up with the right statistics.
5 So I think it would be helpful, really, for
6 both parties to have there not be a lot of litigation
7 throughout the scope. If you wanted to do something
8 different, we could do something like the presumption
9 would be not that state statistics are always in
10 everywhere sufficient, but if the majority of the
11 qualified employee pool -- majority of the qualified
12 applicant pool is from California, then the statistics
13 -- you know, something like that. It could be narrowed
14 a little.
15 CHAIRPERSON MANDELBAUM: Yeah, I think that's
16 a good way to go. I mean, the geographic bounds are
17 less problematic and I think your point is well-taken
18 about reconsidering prominence of that. I think it's
19 more in the context of specific positions, particularly
20 positions that have specialized training or higher
21 levels of education where those statistics veer out.
22 Now, Professor Zatz did point out that under
23 at least some college education under that category, the
24 statistics are even more pronounced. But I don't know
25 that that would be true and certainly haven't seen any

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1 empirical evidence that that's true about Ph.D.'s, for
2 example or something. So that's where I think it gets a
3 little messy, but maybe the EEOC's got its --
4 COUNCILMEMBER SCHUR: There's also some
5 precedent out there in the context of insurance
6 redlining. You know, there's certain underlying
7 statistics that if you just did them in the abstract,
8 might produce their corollaries. But we decide as a
9 policy basis, they're not ones we want to use; right?
10 You can't underwrite loans, for example, based on
11 certain things that we know are closely tied to racial
12 discrimination.
13 So I don't think we're totally stepping out of
14 the box to say there's a set of statistics here that
15 we're comfortable relying on. You always have a chance
16 to show that they're different in a particular context.
17 But in general, we know that this is what happens and
18 that evidence is indisputable. And we can make that
19 presumption, and I don't think there are sort of
20 parallels in other places where the law has said, "We're
21 not going allow certain categories because we know off
22 the top of our head that they're either not
23 professionally-related or they always have a disparate
24 impact."
25 COUNCILMEMBER BRODSKY: And my concern is that

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1 we get too specific as to the particular job category
2 that we're going to do what you're saying we shouldn't
3 do, which is to make this litigation so expensive that
4 we're going to deter folks from invoking their rights.
5 So I think we have to avoid that risk of falling into
6 saying that you've got to prove adverse impact as a
7 rocket scientist, for example.
8 COUNCILMEMBER PEREZ: So I've got -- first of
9 all, thank you for giving a litigator's perspective.
10 I guess the question I still have, and this is
11 just because I'm alone in these cases is in addition to
12 the issue on statistics, is there a another way that
13 this prime fascia case can be established? I guess I
14 just keep hearing about that. Is that the only way?
15 MR. LEBOWITZ: Well, I don't -- to us,
16 we're -- and as we've gone back and gone through the
17 regulations, part of what will be in our written
18 comments will be -- and my thoughts aren't completely
19 clear on it right this second, so I don't want to go
20 into all the details. But because this is a disparate
21 impact analysis as opposed to a disparate treatment
22 analysis, and that the regulations don't really deal
23 with disparate treatment and whether or not they should
24 is a question that we ponder whether or not they should
25 more explicitly. Whether they are could be argued they

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1 are by implication and covered by other parts of the
2 regulations or whether they should be specifically set
3 out in other subsection in these regulation would be
4 part of our written comments.
5 But to your question, is there a disparate
6 impact case that can be made without statistical --
7 COUNCILMEMBER PEREZ: At its initial state.
8 MR. LEBOWITZ: Yes, at the prima fascia.
9 I don't know. I don't think so. We don't do enough of
10 the disparate impact litigation; at least I don't have
11 that experience to be able to say one way or the other.
12 COUNCILMEMBER PEREZ: And my follow-up
13 question, just as I'm looking now at the way we've
14 organized these and I'm just curious if your written
15 comments are going to address this, but would you --
16 reading them now, and it's really made up of one section
17 which of course speaks my language because it's what you
18 do at the workplace level to avoid this from occurring
19 in the first place.
20 What we don't have in the regulations, and I
21 certainly see in a lot of other sections that we have,
22 is how the you prove the case as a separate section of
23 the regulation? Is that something that you think we
24 might clarify?
25 MR. LEBOWITZ: I don't know. This is unique

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1 situation, so I don't know that that would -- I'll go
2 back and ponder to see if we can organize them and see
3 if that makes sense, but I haven't thought about it
4 along those lines. I know what you're saying.
5 COUNCILMEMBER PEREZ: Every section it says --
6 MR. LEBOWITZ: -- establishing discrimination.
7 We haven't really had it. This is kind of a mix of all
8 of that, and I think it probably is too intertwined to
9 be able to separate out. It's just my initial thought.
10 But I'll go back and think about it. Can see if there's
11 something that makes, we'll put it in our comments.
12 The only other comment I had is for
13 Councilmember Schur. The issue of licensing is
14 something that we had never really thought about until
15 this process. And we have come to realize that, first
16 of all, we agreed with Director Kish that the Department
17 and the Council has jurisdiction over this under
18 Government Code 12944.
19 But also, in response to Business and
20 Professions Code 480 which I never looked at until an
21 hour ago, I would take the EEOC's position in that it's
22 preempted to the extent that it is a -- that a
23 government agency or a licensing board would rely on
24 compliance with the state law that would have a
25 disparate impact on a protected category, that it

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1 violates title 7 and is preempted.
2 COUNCILMEMBER SCHUR: I appreciate that. It's
3 probably an argument that I'll make as well that whether
4 this Council can overwrite a statute is in our
5 regulations.
6 MR. LEBOWITZ: But I think you have two
7 conflicted theoretical --
8 COUNCILMEMBER SCHUR: We do have conflicting
9 statutes, so we can interpret. Yes.
10 DIRECTOR KISH: One is the effect of 012944
11 which says, "Shall be unlawful for a licensing board to
12 require a qualification that has an adverse impact on
13 any class."
14 COUNCILMEMBER SCHUR: Right.
15 DIRECTOR KISH: And then it lists them. I
16 mean, that's just out there.
17 COUNCILMEMBER SCHUR: You know, I agree. And
18 I just think we have to figure out what our
19 interpretation is and how we want to proceed. And I can
20 tell you that coming at this from a different
21 perspective, licensing boards are a huge issue on a
22 variety of fronts. They create real problems in the
23 disability arena because they often set up rules that
24 make it difficult for certain people with disabilities
25 to provide reasonable accommodations and they haven't.

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1 And they are notorious for not having their
2 own processes and abilities and consciousness that they
3 can or have to make accommodations to their own
4 licensing requirements. So it is -- I think there's a
5 very generalized issue here around licensing in a
6 variety of contexts: housing and employment and other
7 things.
8 And I said this came up for me in a completely
9 different context where I realized that the state
10 agency's relying on this statute. And so I agree; it's
11 something we should definitely take a look at. We have
12 more authority than I thought and that's perfect.
13 MR. LEBOWITZ: And I think frankly, to be
14 completely honest, we had never -- I had never even read
15 12944; maybe three weeks ago. And to me it seems right
16 for a full set of rulemaking in not just part of this
17 rulemaking, but I would suggest that the Council
18 undertake a full set of rulemaking -- since you don't
19 have enough to do -- on that particular issue.
20 I think that could be -- that would prove a
21 fruitful discussion. And if the governor is truly of
22 the mind that these things are a priority, I would
23 suspect that having a fruitful full-blown rulemaking
24 discussion about it would be welcome.
25 COUNCILMEMBER SCHUR: And I think, like I

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1 said, it is not just an employment issue. It is
2 significantly a housing and services issue as well.
3 COUNCILMEMBER PEREZ: Back to the statistics.
4 Sorry. So because I'm just trying to wrap my brain
5 around this, and again, thank you so much for giving a
6 litigator's perspective.
7 So if statistics are the primary and exclusive
8 way of showing this, does that mean that a
9 non-African-American or non-Latino applicant who was
10 denied employment perhaps solely or primarily on the
11 basis of criminal background has no case?
12 MR. LEBOWITZ: On a disparate impact claim,
13 I don't know if they have a case or not. On a disparate
14 treatment claim, perhaps. Depending on how the
15 individual -- how that rule is applied to the person who
16 is not within the categories of statistical knowledge of
17 what's statistically accepted as far as having a
18 negative impact.
19 It certainly have a disparate treatment claim
20 based on the fact that, say, they're -- make up a data
21 category. Whatever it is, that's not within the known
22 statistics or the acknowledged statistics on that
23 adverse impact.
24 It would certainly potentially have a
25 disparate treatment claim based on fact that their

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1 category -- whatever they happen to be a member of,
2 their category -- or the folks who are not in their
3 category have been allowed to have employment or even
4 screen-out.
5 CHAIRPERSON MANDELBAUM: Well, I think
6 Professor Zatz's comments address the zone of interest
7 standard for standing under these civil rights statutes.
8 And they cite very compelling supreme court precedent on
9 this about if you're impacted by -- no.
10 If it has a disparate impact that's
11 discriminatory in the first instance and you may not be
12 a part of that group but you're impacted because of that
13 illegal implementation, and under certain circumstances
14 you do have a -- you're within the zone of interest and
15 negatively impacted.
16 So there is some authority to cover some of
17 those instances, and Professor Zatz touched on that and
18 got me thinking.
19 COUNCILMEMBER PEREZ: And then other side of
20 the question is, let's assume an employer actually goes
21 for a good faith effort; goes through the process, the
22 analysis is thoughtful, and writes a letter saying the
23 legitimate reasons for which this person was not hired.
24 I guess it seems to me -- I'm just trying to
25 wrap brain around the statistical issue that even having

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1 done all of that, if the person impacted falls within --
2 and I'm not going to use the zone of interest -- just
3 falls within those racial/ethnic categories that --
4 I guess I just don't want it to negate automatically the
5 thoughtfulness that I'm assuming in their hypothetical.
6 MR. LEBOWITZ: Well, their thoughtfulness
7 comes in in their response. This is just a prima fascia
8 case we're talking about; right. You have to presume
9 that there's a law suit. I mean, it's up to the
10 individual to, in their own mind, believe whether or not
11 the employer's been actively --
12 COUNCILMEMBER PEREZ: I guess in my ideal
13 world it might be great to be able to give an incentive
14 to an employer to say he do the right thing; if you go
15 through the process and you do the analysis, I mean.
16 MR. LEBOWITZ: I think there is in the
17 defense -- in the individualized assessment language is
18 that incentive. Because when you do it just like you
19 mentioned earlier, the interactive process and kind of
20 best practices and certainly the disability field, we
21 see the best practices is when the employer puts their,
22 in good faith, their efforts in writing and sends it
23 back contemporaneously to the employee who's requesting
24 accommodation or is in need of accommodation and details
25 their efforts.

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1 And then, you know, there is an incentive to
2 that because if they end up in litigation -- because
3 it's not under their control, it's under the individual
4 employee or applicant's control whether or not to bring
5 litigation regardless of what's put in front of them --
6 that the incentive is they have a defense and that they
7 have the contemporaneous writings and not have to do it
8 retrospectively.
9 So I think that same incentive exists within
10 the context of how these regulations are drawn up.
11 COUNCILMEMBER PEREZ: Yeah. But the only
12 reason that I'm making the distinction is that because
13 we're relying so heavily or discussing so much the issue
14 of statistics which apply relatively narrowly. And then
15 not taking the zone of interest issue into account on a
16 specific group, it's almost an inclusion or exclusion
17 within that group.
18 So I understand it much better now that
19 you've --
20 MR. LEBOWITZ: I think my only point is
21 that -- just to reemphasize, it's just the prima fascia
22 case.
23 COUNCILMEMBER PEREZ: Sure.
24 MR. LEBOWITZ: And again, in the disability
25 field, when we had to litigate for a decade over whether

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1 or not someone had a disability; you know, the initial
2 question, was someone a qualified individual with a
3 disability, and that was just a prima fascia case.
4 And it was finally clarified both on the state and
5 federal level. It's just a prima fascia case; that
6 should not be the focus of the litigation. I think the
7 same kind of concept should --
8 COUNCILMEMBER PEREZ: Translate.
9 MR. LEBOWITZ: Yeah, I think that has a lot.
10 COUNCILMEMBER PEREZ: Okay. Thank you.
11 COUNCILMEMBER SCHUR: Let me just say -- it's
12 not directly around here, but there are some
13 circumstances in the disability context where disparate
14 impact is a different analysis than the statistical
15 analysis we're talking here.
16 Somebody asked the question about whether it's
17 always this analysis, but it plays out a little
18 different in the disability field. I don't think the
19 impact's this ragged; I just wanted to say that. Sorry.
20 COUNCILMEMBER IGLESIAS: And just to so sort
21 of comment on the zone of interest analysis too. As I
22 understand, part of our authority includes also the
23 Unruh Act, and the Unruh Act talks about arbitrariness.
24 So there could be a linkage there, I think, between the
25 hypo that was raised about a person -- if you're not

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1 being hired for your criminal record, but that basically
2 arbitrary in your situation, then you can seek a
3 connection.
4 COUNCILMEMBER BRODSKY: But Unruh isn't
5 supposed to apply in employment.
6 COUNCILMEMBER IGLESIAS: So I'm thinking more
7 broadly.
8 COUNCILMEMBER BRODSKY: Just analogously.
9 MR. LEBOWITZ: Thank you very much.
10 CHAIRPERSON MANDELBAUM: Thank you.
11 So it's 1 o'clock. Well, a couple of things
12 I'd like to say.
13 One, if people can sign the sign-in sheet,
14 that will help us know who was here provide notice and
15 subsequent rulemakings. So if you haven't done so,
16 please remember to do so.
17 It's about 1 o'clock. Are there additional
18 people that want to provide public comment? Because we
19 can maybe verify whether this is something we can close
20 out before lunch or whether we will need to resume in
21 the afternoon session.
22 Are there other people who want to provide
23 public comment? I don't see any -- on specifically on
24 this issue, on the public comment hearing that we're
25 holding.

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1 All right. Well, seeing no additional public
2 comment, thank you for taking the time to provide public
3 comments regarding issuance of the proposed amendments
4 to the FEHA regulations concerning the use of criminal
5 history in employment decisions.

6 We'll accept written comments on the proposed
7 regulations until 5:00 PM today.

8 With that, the hearing portion of this meeting
9 is adjourned. And with that, the morning session of
10 this meeting is adjourned.

11 (Ending time: 12:57 PM.)
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1 REPORTER'S CERTIFICATE
2
3

4 I, MAXIMILLIAN A. CONTRERAS, CSR No. 13876,
5 Certified Shorthand Reporter, certify:

6 That the foregoing proceedings were
7 stenographically reported by me at the time and place
8 therein set forth and were thereafter transcribed;

9 That the foregoing is a true and correct
10 transcript of my shorthand notes so taken.

11 I further certify that I am not a relative or
12 employee of any attorney or any of the parties nor
13 financially interested in the action.

14 I declare under penalty of perjury under the
15 laws of California that the foregoing is true and
16 correct.

17 Dated this 19th day of April, 2016.
18
19

20 
21 
22 MAXIMILLIAN A. CONTRERAS
23 CSR NO. 13876
24
25

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