

# Kimball, Tirey & St. John LLP

## Legal Alert

### New Fair Employment & Housing Regulations Could Impact Your Business Operations

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**New Fair Employment & Housing Regulations:** The Fair Employment & Housing Council's new Fair Housing Regulations have been approved by the Office of Administrative Law and were filed with the Secretary of State on September 16, 2019. The effective date of the regulations is January 1, 2020. These are the implementing regulations for the Fair Employment & Housing Act and will be used by the Department of Fair Employment and Housing going forward to guide their investigation and prosecution of fair housing complaints.

The Regulations include some important changes that will affect how the California Department of Fair Employment and Housing investigate and prosecute fair housing complaints that landlords need to be aware of. A summary of these changes is outlined below. (The full final text of the Regulations can be accessed at: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2019/09/FinalText-FairHousingRegulations.pdf>.)

*Service Animals.* The Regulations contain a significant change to what information landlords can require from persons with service animals. Specifically, the Regulations state that "persons, including tenants, occupants, invitees, owners, and others, are permitted to have service animals as defined in section 12005(d)(1) in all dwellings (including common use and public use areas), residential real estate, and other buildings involved in residential real estate transactions, subject to the restrictions set forth in subsection (d) below. The only permissible questions that can be asked of an individual to determine if the animal is a service animal are: 1) "Are you an individual with a disability?" and 2) "What is the disability related task the animal has been trained to perform?" It is not permitted to ask the individual with a disability to demonstrate the task.

The Regulations define service animals as those that are trained to perform specific tasks to assist individuals with disabilities (including those with mental disabilities) such as guide dogs, signal dogs, service dogs, miniature horses and service animals in training. The Regulations state that the animals do not need to be professionally trained or certified but may be trained by the individual with a disability or another individual.

This change means that landlords will no longer be able to require verification of disability and disability-related need from an individual who claims his/her animal is a service animal. This change does not apply to emotional support animals and landlords will continue to be able to require verification of disability and disability-related need from persons who claim the animal is needed for emotional support (unless the disability and need are obvious).

*Criminal History/Criminal Acts on the Property.* While much of the language of the Regulations is consistent with the 2016 HUD Guidance on the use of criminal history, the regulations add further restrictions to a landlord's ability to use criminal history to deny tenancy or take other adverse actions against a person. Specifically, the relevant provisions of the Regulations state:

**“Discriminatory Statements Regarding Criminal History Information.**

(a) A person’s notice, advertisement, application, or other written or oral statement regarding criminal history information that violates Government Code section 12955(c) or its implementing regulations or which conflicts with the provisions in this article and Article 7 shall be a violation of the Act.

(b) Advertising a lawful screening policy or providing individuals a copy of a lawful screening policy pursuant to section 12266(d)(5) is not unlawful. Offering an individual an opportunity to present individualized, mitigating information pursuant to section 12266(d) and (e) is not unlawful.”

This provision could impose potential fair housing liability on landlords who include criminal background criteria in their application, rental screening standards, advertising or any other documents that are not narrowly tailored to meet the requirements of both the HUD Guidance and the new Regulations.

**“Specific Practices Related to Criminal History Information.**

(a) It is unlawful for a person to:

(1) Seek, consider, use, or take an adverse action based on criminal history information about any arrest that has not resulted in a criminal conviction, or based on information indicating that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, military, or prosecutorial agency;

(2) Seek, consider, use, or take an adverse action based on information about any referral to or participation in a pre-trial or post-trial diversion program or a deferred entry of judgment program; provided that if this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information;

(3) Seek, consider, use, or take an adverse action based on information about any infraction, or any criminal conviction that has been sealed, dismissed, vacated, expunged, voided, invalidated, pardoned, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4); or for which a certificate of rehabilitation has been granted pursuant to Penal Code section 4852.01 et seq.; provided that if this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information.” (Emphasis added.)

Under these provisions, the mere seeking of information is a violation. Landlords who use outside screening services to provide criminal history information could find themselves subjected to potential fair housing liability if the screening service pulls and provides information prohibited by the Regulations even if that information is not ultimately considered or used to take an adverse action against the person.

Additional specific practices that are prohibited by the Regulations to the extent they violate the Fair Employment & Housing Act or otherwise, restrict, deny or making housing available due to membership in a protected class or that have a discriminatory effect on any protected class (without a legally justifiable reason) will include actions to enact, modify, enforce or implement:

“(a) Practices requiring persons to take actions against individuals based upon broad definitions of nuisance activities (such as considering a phone call to, or receipt of a visit or service by, law enforcement or emergency services as a nuisance), or based upon broad definitions of unlawful conduct or criminal activity. For purposes of this section, practices requiring persons to take actions against individuals include mandating initiation of eviction procedures against tenants or occupants, prohibiting renewal of an existing tenancy, or requiring the initiation of adverse actions against one or more tenants, occupants or guests; or

(b) Practices that violate or mandate that other persons violate, Article 24, including practices requiring persons to use specified criminal history records in their business establishment in connection with housing opportunities, prohibiting persons from renting or engaging in transactions covered by this Act on the basis of specified criminal convictions, or mandating initiation of eviction proceedings against tenants and occupants arrested, suspected or convicted of crimes.”

These provisions could impose potential fair housing liability on landlords who initiate eviction proceedings against residents suspected of committing crimes on the property (or who have a guest who is suspected of committing a crime on the property) where there has been no conviction. It could also further limit the ability of landlords to use criminal background checks as a screening tool without being subjected to potential fair housing liability.

Reasonable accommodations in unlawful detainers. The right of a resident with a disability to make a reasonable accommodation request in an unlawful detainer action will now include, in certain circumstances, a request made after a lockout has been completed. The example given in the Regulations is:

“Chelsea is an individual with a physical disability. The owner filed a successful unlawful detainer action unrelated to her disability. Chelsea partially moved out the day after the trial, but was unable, without help, to move some larger items (e.g. her couch, bed and dresser) to her new apartment. Because of the disability, she could not lift or carry anything heavy. She requested some additional time as a reasonable accommodation to arrange for help to move her furniture. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179 (for example if the owner has the capacity to leave the items in the unit for a period of time or if the unit is not re-rented), and engaging in the interactive process under section 12177 as needed.”

Verification of a resident's disability. The Regulations indicate that verification of disability will include:

“A variety of self-certification methods, including documentation of receipt of disability benefits or a credible statement by the individual with a disability. A credible statement by the individual is one that a reasonable person would believe is true based on the available information; and

Verification by any reliable third party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation, including: (1) A medical professional; (2) A health care provider, including the office of a medical practice or a nursing registry; (3) A peer support group. Peer support groups are mutual support groups developed as alternatives to traditional medical or psychological treatments. They provide services such as education, peer mentoring, peer coaching, and peer recovery resource connections for groups of people with disabilities or people suffering from a wide range of trauma or illness; (4) A non-medical service agency or person, including In-Home Supportive Services or Supported Living Services providers; or (5) Any other reliable third party who is in a position to know about the individual's disability or disability-related need for the accommodation. This could include a relative caring for a child with a disability, a relative caring for an elderly family member with dementia, or others in a caregiving relationship with a person with a disability.

The determination of whether a third party is reliable must be determined on a case-by-case basis. A determination of reliability may take into account: (1) Information establishing how the third party is familiar with the individual's disability or the disability-related need for the accommodation; (2) Information that specifies the functional limitations that underlie the

request for an accommodation, but this information need not include specific medical information or terminology; or (3) Information providing a means to contact the third party to verify that the person identified did in fact provide the documentation and to answer any questions permitted by law.”

Assistance Animals – Direct Threat. The Regulations mirror those of HUD that a landlord can deny or require the removal of an assistance animal that is a direct threat provided that no reasonable accommodation will eliminate or sufficiently mitigate the threat. However, they further provide:

“(C) The assessment of whether the assistance animal as defined in section 12005(d) poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must consider:

(i) The nature, duration, and severity of the risk of a direct threat to the health or safety of others or of substantial physical damage to the property of others;

(ii) The likelihood that a direct threat to the health or safety of others or substantial physical damage to the property of others will actually occur; and

(iii) Whether there are any reasonable accommodations that will eliminate the direct threat to the health or safety of others or substantial physical damage to the property of others.

The reasonable accommodation provisions in Section 12176 through Section 12180 must be used to determine whether there is another or additional reasonable accommodation that would sufficiently mitigate or eliminate the problems creating the direct threat.

(D) Relevant evidence in determining whether an assistance animal as defined in section 12005(d) imposes a direct threat includes whether there is evidence that the animal in question is currently engaging in dangerous conduct or has a recent history of overt dangerous acts, as described under Food & Agric. Code section 31601 et seq. A dog that has been finally determined by a court of law to be “potentially dangerous dog” or “vicious dog” pursuant to Food & Agric. Code section 31601 et seq. shall presumptively be considered to pose a direct threat to the health or safety of others.”

The above language could result in potential fair housing liability if a landlord makes a decision to require removal of an assistance animal after an incident without going through the above assessment and considering alternative accommodations (such as a resident’s promise to muzzle an animal and/or enroll the animal in a training program). In addition, the relevant provisions of the Food & Agric. Code section referenced above define a potentially dangerous dog as (among other things) one that, when unprovoked, on two separate occasions with a 36-month period, engages in behavior that requires defensive action to prevent injury or on two separate occasions within a 36-month period has killed, seriously bitten, inflicted injury on another animal or the animal’s owner/keeper. This standard could be used to try and defeat a landlord’s claim that a particular dog was dangerous and warranted removal from the property after one incident.

The definition of adverse action will now include failing or refusing to add a household member to an existing lease. This change could result in potential fair housing liability in situations where a resident wants to add a spouse or other adult family member to a lease or an existing resident wants to add a disabled family member to the household as an accommodation for that family member’s disability.

Landlords are strongly advised to have their policies and procedures reviewed by a fair housing knowledgeable attorney to make sure they comply with the new Regulations.

Any questions regarding this alert can be directed to Lynn Dover at [lynn.dover@kts-law.com](mailto:lynn.dover@kts-law.com) or (800) 338-6039.

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