California's New Procedure for Investigating and Litigating Employment Discrimination Claims

Best Practices to Defend Discrimination Complaints and Avoid Liability

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Today’s faculty features:

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California’s New Procedure For Investigating and Litigating Employment Discrimination Claims

Presented by
Teresa R. Tracy, Esq.
Principal

March 12, 2013
Avoiding California Discrimination Litigation

The first step to avoiding litigation involving California’s discrimination laws is to be aware of the key differences between the FEHA and federal laws.
FMLA vs. CFRA

- Availability for pregnancy disability
- Availability for certain military service-related reasons
- Certification form and information
- Recertification
- Minimum leave
- Use of paid time off
- Ability to recover premiums paid during leave
- When both parents work for the same employer
- Investigations, enforcement, and remedies
Title VII, FMLA, Pregnancy Disability

- Title VII: Cannot discriminate
- FMLA: Pregnancy disability is FMLA-covered
- CFRA: Pregnancy disability generally not CFRA-covered
- CA: Separate pregnancy disability leave and benefits
Disability Discrimination

California:

- Expansive definition of “disability”
- Affirmative duty for interactive process
Religious Discrimination

California:

- Prohibits religious dress and religious grooming discrimination and requires reasonable accommodation
- An accommodation that requires segregation is unreasonable
Gender-Related Discrimination

California:
- Sex stereotype
- Sexual preference/orientation
- Gender expression
- Gender identity
Marital Status Discrimination

California:

- Specifically prohibited
- Affects no-nepotism policies
Harassment

California:

- Coverage
- Individual liability
Remedies Available

California:

- No cap on compensatory damages
- Punitive damages available
Additional Advice

1. Proactively communicate with DFEH
2. Do not underestimate (or overestimate) the DFEH
3. Anticipate litigation and consider publicity
4. Avoid retaliation
5. Take advantage of mediation services
6. Do not conclude that delay by DFEH means no merit; be prompt in responses and do not assume that a DFEH request for information means you are losing
Additional Advice

7. Do not lie to the DFEH
8. If you discover a problem, start remediation
9. Proactively monitor DFEH compliance
10. It is not a layoff unless it is really a layoff
11. Just because the DFEH litigates does not mean you are wrong
12. Be careful of potential systemic issues
Teresa R. Tracy, Esq.

Teresa R. Tracy is chair of Gladstone Michel Weisberg Willner & Sloane, ALC’s Labor & Employment Group. She has practiced exclusively in labor and employment law for over 30 years and has extensive experience representing employers in wrongful termination, discrimination, harassment, wage and hour matters, class actions and traditional labor law. She also advises clients on compliance with the myriad of state and federal regulations governing employers. Ms. Tracy is the author of numerous articles, and has been selected nine times by her peers as a Southern California Super Lawyer in the area of Labor and Employment. She was also named one of the “Top 75 Women Litigators” by the Los Angeles/San Francisco Daily Journal.

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TRANSFORMATIVE CHANGES 
to DFEH Enforcement

Phyllis W. Cheng | Director
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OVERVIEW

- Introduction.
- Overview of Senate Bill 1038.
- FEHA provisions repealed, amended and added.
- Elimination of Fair Employment & Housing Commission (Commission).
- New Authority for Department of Fair Employment & Housing (DFEH).
- Creation of new Fair Employment & Housing Council (Council).
- Impact on FEHA regulation, litigation and dispute resolution.
- Practice pointers.
INTRODUCTION

- The DFEH’s civil rights mission.

Statutes enforced:

- Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).
- Unruh Civil Rights Act (Civ. Code, § 51 et seq.).
- Ralph Civil Rights Act (Civ. Code, § 51.7).
- Disabled Persons Act (Civil Code, § 54 et seq.).

Jurisdiction.
DFEH EMPLOYMENT FLOWCHART

Department of Fair Employment and Housing
EMPLOYMENT FLOWCHART

DFEH Complaint

Immediate Right-to-Sue

Investigation

Dispute Resolution

Merit Finding

Settlement

no

yes

Dismissed with Right-to-Sue

Dispute Resolution

Settlement

Prosecution

Settlement

Judgment by Court
2011 DFEH COMPLAINTS FILED BY BASES

California Department of Fair Employment and Housing
Calendar Year: 2011
Cases Filed: by Bases (18,012 Employment Cases)
Amended

- Disability - Mental and Physical: 9,379
- Association - Must be Used with Another Basis: 530
- Age - 40 or Over: 3,872
- Sex - Pregnancy: 937
- Sex - Other Allegations: 2,350
- Sex - Orientation: 727
- Sex - Harassment: 3,713
- Religion: 492
- Race/Color: 3,427
- Marital Status: 363
- National Origin/Ances: 2,021
- Other: 576
- Family Care: 709
- Retaliation: 7,728

Total: 18,012
2011 DFEH ACCUSATIONS ISSUED

California Department of Fair Employment and Housing
Calendar Year: 2011
Accusations Issued by Legal: Count by Bases* (65 Accusations Issued)
EXAMPLES OF DFEH PROSECUTIONS

- In 2008, a $618,000 familial status discrimination class action settlement against an Orange County apartment complex, on behalf of the Fair Housing Council of Orange County and 9 families;
- In 2009, a $260,000 settlement of an employment disability discrimination case against Loma Linda University Medical Center on behalf of a class of 10 job applicants denied selection.
- In 2010, a $467,000 settlement against Verizon on behalf of 8 current and former employees denied accommodation for disability, as well as a $445,000 settlement against Verizon on behalf of 42 current and former female employees who suffered pregnancy discrimination;
- In 2011, a $846,300 judgment against Acme Electric Corporation on behalf of a cancer survivor sales manager.
- In 2012, a $450,000 settlement against Penske Trucking company on behalf of 13 newspaper delivery drivers the company refused to hire due to real or perceived disabilities;
- In 2012, a $6,011,190 class action settlement against Verizon on behalf of over 600 call center employees denied California Family Rights Act leave.
- The Department is currently prosecuting a class action disability discrimination lawsuit pending against the Law School Admission Council in federal court, which will affect the rights of thousands of Law School Admission test takers with a disability in California and nationwide.
DFEH INNOVATIONS AND EFFICIENCIES

- **Automation**: implemented appointment and Right-to-Sue systems; deploying new cloud-based Case Management System.
- **Intake reform**: implement telephone intake; cease in-person intake.
- **Office consolidations**: 50% overhead reductions.
- **Staff development**: monthly training; no layoffs; 50% promotions.
- **Triage investigations**: developed case grading system to triage cases.
- **Target systemic discrimination**: re-establish Special Investigations Unit.
- **Maximize statutory authority**: file Director’s, group/class complaints.
- **Dispute resolution**: develop new Dispute Resolution Division.
- **Regulatory reform**: issue procedural regulations and rescind underground regulations.
- **New partnerships**: DFEH-UC|CSU|Community College clinical programs; training future civil rights lawyers & investigators; Civil Rights Graduate Fellowship pipeline program.
- **Outreach**: in-person, webinars and social media outreach.
- **Contract compliance**: revitalizing Office of Compliance Programs.
Effects of Case Grading, SIU and Mediation Innovations

California Department of Fair Employment and Housing
Calendar Years: 2007 - 2011
Closed Cases: by Settlement Amount

- SIU
- Mediation Division
- Legal Division
- Enforcement Division
California Department of Fair Employment and Housing
Open Cases by Month 2007-2011

Effects of Case Grading
SB 1038 FEHA AMENDMENTS


- Transfers the Commission’s regulatory function to the Department. (Ibid.)

- Ends administrative adjudication of FEHA claims. (Ibid.)

- Authorizes the DFEH to file cases directly in court. (Ibid.)

- Authorizes the DFEH to collect attorney fees and costs when it is the prevailing party in FEHA litigation. (Ibid.)
SENATE BILL 1038


- Results in net General Fund savings of $391,000 in 2012-13 and $784,000 in 2013-14 and ongoing.

- Makes sweeping changes to the Fair Employment and Housing Act (FEHA), effective Jan. 1, 2013.

- Changes significantly the role of the Department of Fair Employment and Housing (DFEH) in civil rights enforcement in California.
SB 1038: ALL FEHA PROVISIONS AMENDED, REPEALED & ADDED

- Amended: Government Code sections 12901, 12903, 12904, 12905, 12906, 12925, 12930, 12935, 12944, 12946, 12947.5, 12950, 12950.1, 12961, 12963.5, 12964, 12965, 12966, 12973, 12974, 12975, 12980, 12981, 12981.1, 12983, 12985, 12988, 12989.1, 12989.2, 12990.

- Repealed: Government Code sections 12967, 12968, 12969, 12970, 12972, 12987, 12987.7, 12989.


CREATION OF FAIR EMPLOYMENT AND HOUSING COUNCIL

- Seven-member Council within the DFEH. (Gov. Code, § 12903, effective June 27, 2012, operative Jan. 1, 2013.)

- Council Chairperson and members appointed by the Governor and confirmed by the Senate. DFEH Director serves as nonvoting ex officio council member. (Gov. Code, § 12903, effective June 27, 2012, operative Jan. 1, 2013.)

- Primary role is rulemaking and holding public hearings on FEHA-related issues. (Gov. Code, § 12935, subds. (a) & (c), effective June 27, 2012, operative Jan. 1, 2013.)

- Council can meet at any place within the state and function in any office of the Department. (Gov. Code, § 12935, subd. (a)(3), effective June 27, 2012, operative Jan. 1, 2013.)

- Council members receive $100 per diem plus travel expenses. (Gov. Code, § 12905, effective June 27, 2012, operative Jan. 1, 2013.)

- The DFEH staffs the Council and absorbs costs.
APPLICATIONS FOR APPOINTMENT TO FAIR EMPLOYMENT & HOUSING COUNCIL NOW OPEN

- Persons interested in gubernatorial appointment to the Council can apply by:
  - Submitting application online or by mail using form on the Governor’s Web site (http://gov.ca.gov/s_appointmentsapplication.php). Reference Fair Employment & Housing Council in the narrative.
PRACTICE POINTER 1: ANTICIPATE REGULATORY CHANGES

- Rescission of some existing Commission regulations and DFEH procedural regulations.
- Promulgation of some new DFEH procedural regulations to reflect statutory changes.
- Hearings by new Council on FEHA regulations and civil rights issues.
- Promulgation of new future Council regulations interpreting the FEHA (i.e., California Family Rights Act amendments; new housing regulations, and others).
- Subscribe to the DFEH civil rights alerts for all regulatory and other notices (http://www.dfeh.ca.gov/CaseLawAlerts.htm).
AUTHORIZATION TO COLLECT ATTORNEY FEES AND COSTS

- In civil actions alleging employment discrimination, the court, in its discretion, may award to the prevailing party, including the DFEH, reasonable attorney’s fees and costs, including expert witness fees. (Gov. Code, § 12965, subd. (b), effective June 27, 2012, operative Jan. 1, 2013.)

- In a civil action alleging housing discrimination, the court may, at its discretion, award the prevailing party, including the DFEH, reasonable attorney’s fees and costs, including expert witness fees, against any party other than the state. (Gov. Code, § 12989.2, effective June 27, 2012, operative Jan. 1, 2013.)

- The DFEH uses the Attorney General’s $170/hour rate as its fee basis.
AUTHORIZATION TO PROSECUTE CIVIL COMPLAINTS IN COURT

- In the case of failure to eliminate an unlawful employment practice through conference, conciliation, mediation, or persuasion, the DFEH may bring a civil action in the name of the Department on behalf of the person claiming to be aggrieved. (Gov. Code, § 12965, subd. (a), emphasis added, effective June 27, 2012, operative Jan. 1, 2013.)

- In the case of failure to eliminate an unlawful housing practice through conference, conciliation, mediation, or persuasion the DFEH shall bring a civil action in the name of the Department on behalf of the person claiming to be aggrieved. (Gov. Code, § 12981, subd. (a), emphasis added, effective June 27, 2012, operative Jan. 1, 2013.)
DFEH LITIGATION FUND

SB 1038 also establishes the Fair Employment and Housing Enforcement and Litigation Fund in the State Treasury, which the DFEH will administer. (Gov. Code, § 12907, subd. (a), effective June 27, 2012, operative Jan. 1, 2013.)

The fund will consist of attorney’s fees and costs courts award to the DFEH when it is the prevailing party in FEHA litigation. (Gov. Code, § 12907, subd. (b), effective June 27, 2012, operative Jan. 1, 2013.)

The Legislature may appropriate money in the fund in the annual budget act to offset the DFEH’s costs. (Gov. Code, § 12907, subd. (c), effective June 27, 2012, operative Jan. 1, 2013.)
**PRACTICE POINTER 2: DFEH PROSECUTIONS**

- Calculate costs and benefits of litigation against, intervening in, or co-counseling with the DFEH on the Department’s cases in court:
  - Attorneys’ fees (pegged at the California Attorney General’s rate of $170/hour).
  - Expert witness fees.
  - Costs.
  - No caps on damages.
  - Full panoply of litigation rules, law and motion, trials and appeals will apply.
MANDATORY DISPUTE RESOLUTION

- Prior to filing a civil action, the Department shall require all parties to participate in mandatory dispute resolution in the DFEH’s internal Dispute Resolution Division, free of charge to the parties. (Gov. Code, §§ 12965, subd. (a), 12981, subd. (a), effective June 27, 2012, operative Jan. 1, 2013.)

- Dispute resolution is now mandatory for all cause cases for which the DFEH will file a civil action.

- Mandatory dispute resolution is conducted behind a firewall by the DFEH’s attorney mediators.

- The DFEH continues to offer voluntary pre-investigation mediation and conciliation services.
**PRACTICE POINTER 3: MANDATORY DISPUTE RESOLUTION**

- Save your client time and money through dispute resolution.

- Take advantage of mandatory dispute resolution services of the DFEH Dispute Resolution Division, which is behind a firewall and free to the parties. Successful settlement rate is over 80 percent.

- Engage in free DFEH dispute resolution early and often.
PENDING ACCUSATIONS: REMOVAL TO COURT OPTION

- Applies to any accusation pending before the former Commission on or after January 1, 2013. (Gov. Code, § 12930, subd. (m), effective June 27, 2012, operative Jan. 1, 2013.)

- With respondent’s consent, the DFEH may withdraw an accusation issued under former Government Code section 12965 that includes a prayer for emotional distress damages or an administrative fine, and bring a civil action in superior court. (Gov. Code, § 12930, subd. (m)(1), effective June 27, 2012, operative Jan. 1, 2013.)

- With respondent’s or complainant’s consent, the DFEH may withdraw an accusation issued under former Government Code section 12981 and bring a civil action in superior court. (Gov. Code, § 12930, subd. (m)(2), effective June 27, 2012, operative Jan. 1, 2013.)
Where removal to court is not feasible, the DFEH has retained the services of the Office of Administrative Hearings to adjudicate the few, if any, remaining administrative actions. (Gov. Code, § 12930, subd. (m)(3), effective June 27, 2012, operative Jan. 1, 2013.)

The DFEH will consult with the Attorney General regarding the defense of any writ petition challenging a decision of the former Commission that is pending on or after January 1, 2013. (Gov. Code, § 12930, subd. (n), effective June 27, 2012, operative Jan. 1, 2013.)
PRACTICE POINTER 4: REVIEW PENDING CASES

- Review when the statute of limitations will run on your case in view of SB 1038’s January 1, 2013 effective date.

- Determine whether your case should remain in the administrative process or opt out to civil court. For employment cases, a $150,000 cap on emotional distress damages and administrative fines apply in administrative adjudication; no caps apply in court, and new attorneys’ fees/costs can be awarded to the DFEH as of January 1, 2013.

- Determine whether any writ of administrative action challenging a Commission decision is pending by January 1, 2013.

- Make your election based on the statutory time frames, client needs, litigation tactics, costs and benefits, and other factors impacting your case.

- Use the DFEH’s free dispute resolution services early and often.
THANK YOU

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