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California DFEH's New Procedural Regulations Will Facilitate the Claims Process for Employees

By Margaret Gillespie

In early 2010, California's Department of Fair Employment and Housing (DFEH) proposed a series of new procedural regulations to govern the receipt, investigation, and conciliation of administrative complaints received by the department. Following a series of public hearings and a public comment period, the final regulations now have been approved by the Office of Administrative Law and filed with the Secretary of State. They will go into effect on October 7, 2011, and are codified at Title 2, California Code of Regulations, sections 10000 through 10066.

According to the DFEH, these new regulations were meant to "capture and replace" its directives on the handling of administrative complaints, so as to formally adopt its procedures. In fact, however, these new regulations will change the DFEH's administrative procedures in several significant respects. The new procedures are part of a broader effort by the current head of the DFEH, Phyllis Cheng, to redirect the department's limited resources away from individual complaints and towards "high impact" cases of systemic discrimination.

Statutory Requirements for Filing an Administrative Complaint with the DFEH

Pursuant to California Government Code section 12960, a person claiming a violation of California's Fair Employment and Housing Act (FEHA) first must submit a complaint to the DFEH and exhaust his or her administrative remedies before filing a lawsuit in court. Once the claimant has exhausted his or her administrative remedies, the DFEH issues a "right-to-sue" letter permitting the claimant to proceed with a lawsuit.

By statute, the administrative complaint filed with the DFEH must be: (1) verified; (2) in writing; (3) comprised of facts that would give rise to a violation of FEHA; and (4) filed within one year of the date of the alleged violation.

Each of these basic statutory requirements is affected by the DFEH's new procedural regulations. Although the DFEH has no authority to modify statutory requirements, its new procedural regulations make it much easier for claimants to satisfy them. As a result, employers should expect more claimants to exhaust the administrative process with little, if any, DFEH involvement.

DFEH's New Procedural Regulations Ease the Way for Claimants

The changes lower the bar on exhausting administrative remedies. The new procedural regulations will make it much easier for claimants to file a complaint to initiate a DFEH investigation. Additionally, once a complaint is accepted, the issuance of a right-to-sue letter is automatic upon request, thereby permitting individuals to, in effect, bypass the administrative process. Changes to the claim filing process and administrative procedures include:

- **Verification:** Despite the statutory requirement that a complaint be "verified," the DFEH will no longer require the claimant to sign the complaint. Instead, the complaint may be signed by the claimant's attorney or any other person whom the claimant has designated to sign on his or her behalf. In order to "verify" the complaint, the claimant need only submit an "oath or affidavit" confirming the truth of the allegations. It is unclear what form this oath or affidavit must take. But if the claimant is unable to sign the complaint, it raises the question of whether he or she would be able to sign a written oath or affidavit. As a result, it is possible that an oral oath or affidavit may be deemed sufficient.
- **Unsigned Complaints:** The DFEH now will accept an *unsigned* complaint when neither the claimant nor an authorized representative is able to sign it before the statute of limitations expires. Notably, California's Fair Employment and Housing Commission (FEHC), which conducts hearings and issues administrative decisions in cases brought before it by the DFEH, objected to this proposed regulation as being inconsistent with the statute's requirements. The FEHC argued that a complaint must be signed in order to qualify as being verified and in writing, but the DFEH disagreed, stating that "[n]owhere in the statute does it provide that the complaint must be signed in order to be filed." See Updated Final Statement of Reasons, Summary and Response to Comments Received During the Initial Notice Period of February 19, 2010 through May 26, 2010, Fair Employment and Housing Commission memo dated 5/26/10, Comment C2d.
- **Liberal Construction:** The DFEH now has codified its liberal construction of complaints to extend to all claims that are *or could have been* asserted based on the facts alleged. Thus, where the facts are alleged to support a discrimination claim but also could support a retaliation claim, the DFEH will construe the complaint to include both a discrimination claim and a retaliation claim – even though the claimant did not assert a retaliation claim. As a result, employers may have more difficulty in obtaining dismissal of civil claims not expressly asserted in the administrative complaint, which previously would have been dismissed for failure to exhaust administrative remedies. See *e.g.*, *Okoli v. Lockheed Technical Operations Co.*, 36 Cal. App. 4th 1607 (1995) (where administrative complaint only asserted discrimination claim, claim for retaliation properly dismissed for failure to exhaust administrative remedies).
- **Timeliness:** Despite the clear statutory language that "no complaint may be filed after the expiration of one year" following the alleged violation, the new DFEH regulations provide that "where there is doubt about whether the statute of limitations has run," the complaint will be accepted and timeliness "investigated and analyzed" during the investigation. As a result, it is likely that fewer complaints will be rejected as untimely; rather, they simply will be deferred to the investigator to determine timeliness.

With the number of DFEH complaints already on the rise as a result of current economic conditions, employers should expect these new procedural regulations to result in even more administrative complaints being accepted for filing. Moreover, the ability to receive an automatic right-to-sue letter once a complaint is accepted fast-tracks a dispute to litigation, further increasing costs.

In short, these new procedural regulations will make it much easier for an employee to essentially bypass the administrative process and yet still be found to have exhausted his or her administrative remedies. It remains to be seen how this will affect the volume and substance of FEHA litigation.

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