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BUSINESS INSIGHTS FOR THE LEGAL PROFESSIONAL

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PHYLLIS W. CHENG, DIRECTOR OF THE CALIFORNIA  
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING (DFEH)

PHYLLIS W.  
CHENG ON  
ADVANCING  
CIVIL RIGHTS

state of  
evolution



# State of evolution

## California Department of Fair Employment and Housing (DFEH) Director Phyllis W. Cheng on advancing civil rights

**W**HILE A LOVE OF policy and a balanced legal background help make any good labor and employment lawyer better, California Department of Fair Employment and Housing (DFEH) Director Phyllis W. Cheng's perseverance and dedication to justice for all have much deeper roots than that.

By her own account, Cheng was born on a midwife's kitchen table in Hong Kong during a typhoon that just so happened to take place on the Fourth of July. "You can say I was meant to be a Yankee Doodle Dandy," Cheng quips.

Following the auspicious timing of her entry into the world, 10 years later, Cheng left Hong Kong with her mother, who had fled from Communist rule in China. The two immigrated to the United States during the Kennedy administration.

"This country was really different in those days, and even though there were some civil rights laws, they were really just formulating. We encountered pretty much every type of discrimination typical of that time in employment, housing and education," Cheng explains. "I think I was the only Asian in my class and maybe one of two in the entire elementary school."

After gaining experience working for a research organization, as a school administrator, and as an activist for women's rights, her life experi-

ence helped Cheng to take responsibility for the passage of California's law prohibiting gender discrimination in education. After receiving her B.A. and M.Ed. degrees, she pursued a Ph.D. and then a J.D. With prior experience in civil rights advocacy, Cheng's entry into labor and employment law was a natural progression.

"While I was in law school I entered a writing competition for the state bar on labor and employment law, and the winning piece was published. The executive secretary of the former Fair Employment and Housing Commission read my article and encouraged me to apply for a gubernatorial appointment to that body."

Shortly after taking the bar exam, Cheng received a call from then-Governor Pete Wilson's office and was appointed to the Fair Employment and Housing Commission, one of her first forays into labor and employment law. She served two terms on the commission and had stints at plaintiff-side Hadsell Stormer LLP, the California Office of the Attorney



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General, and defense-side Littler Mendelson LLP. In 2008, Cheng was appointed by then-Governor Arnold Schwarzenegger and unanimously confirmed by the California Senate to become director of the DFEH. Governor Jerry Brown then retained Cheng in his administration.

"I'm the second longest serving director in the history of the department, and I hope to be the longest serving. It's a wonderful job and a great place to make changes and bring a civil rights agency into the 21st century," Cheng says.

### The legacy of the DFEH

The DFEH's official capacity is the protector and facilitator of California's civil rights laws. Not surprisingly, the primary law it protects is the California Fair Employment and Housing Act, but it also handles complaints related to the Unruh Civil Rights Act, the Disabled Persons Act and the Ralph Civil Rights Act.

"We're like the EEOC (U.S. Equal Employment Opportunity Commission), HUD (U.S. Department of Housing and Urban Development) and OFCCP (U.S. Office of Federal Contract Compliance Programs) all in one," Cheng says.

Although the agency focuses on both housing and employment, Cheng says that of the over 20,000 complaints her department receives annually, roughly 19,000 are employment complaints. To put it in perspective, in 2013, the EEOC

handled 93,000 complaints nationwide, which underscores the staggering volume that Cheng's team deals with on an annual basis.

The volume and diversity of complaints might mean plenty of work for the DFEH, but its role as the largest state civil rights agency in the United States also offers an opportunity to champion laws and regulations that protect more of its citizens.

"California is a bellwether state for the nation. Our state has been in the forefront of providing protections for bases not covered under federal or other state laws well in advance of their enactment elsewhere," Cheng says. For example, "California covered sexual harassment before it was included under Title VII of the Civil Rights Act, disability rights before the ADA was enacted, LGBT rights before it was added as a protected basis under federal law, and genetic characteristics well before GINA became law."

And California is still leading the way in expanding civil rights. The DFEH recently settled a significant class action for more than \$6 million for over 600 Verizon Service Corp. employees denied family leave.

But, the biggest case in the hands of DFEH right now involves the Law School Admission Council's (LSAC) alleged discrimination of disabled test takers on the Law School Admission Test (LSAT.) The settlement of this case, pending in U.S. District Court in San Francisco, is expected to have wide-ranging implications not only for case law surrounding the identification of those with disabilities, but also for the advancement of the disabled in the legal profession.

"Because the LSAT is the only test used for law school admission, denying disabled test takers a level playing field shuts off their opportunity to become lawyers, which is a disservice to them and to our society," Cheng explains.

That type of forward thinking is the hallmark of the DFEH's approach to civil rights, and Cheng says, "When the LSAC case finally settles in the next month, it will be historic."

### **Achieving a golden state**

For employers, stringent and progressive labor and employment laws can often

sound more like a thorny challenge than a tangible benefit, but Cheng says that compliance with California civil rights law offers companies a higher standard at which to aim.

"Many national employers rely on federal law, so they mistakenly believe that if they comply with the ADA or FMLA they would be fine in California. Federal law is the floor rather than the ceiling. If national employers follow California law, they would be in compliance with both federal and state law," Cheng adds.

Aside from that advice, Cheng says that companies should never discount the help that California counsel can provide when issues arise.

As for the companies most vulnerable to action by the DFEH, "large employers are proportionally less prone to being sued because they usually have the regular advice of counsel, strong HR shops, and regular training. Likewise, very small employers tend to be family operations, and personal relationships tend to hold litigation at bay. However, mid-sized employers with fewer than 500 employees are most vulnerable to litigation, because they do not have the regular advice of counsel and limited HR offices. Two-thirds of the time, mid-sized employers are most often sued in California," Cheng says.

### **Doing more with less**

Although California undoubtedly ranks high on its civil rights efforts, until Governor Brown closed the budget deficit following a voter-supported sales tax increase in 2013, the state was plagued by tens of billions of dollars in budget shortfalls that meant painful furloughs for government agencies over the last few years. Despite such fiscal challenges, Cheng managed to improve a number of operations in her tenure with the DFEH, and in the process, set yet another standard for agency operation. Automation of complaint filing and reliance on new technologies have modernized the department and allowed it to slash operating costs even in lean times.

"The DFEH had used a paper and pencil system. In the middle of 2012, we put in place a cloud-based, electronic case management system, so our department is totally paperless," Cheng says. Allowing us-

ers to make requests online, or even print frequently requested documents, has gone a long way to saving time and money.

"We have saved the state of California hundreds of thousands of dollars by automating and ensuring that the system is transparent, efficient and effective," adds Cheng.

Intake reform, which allows the submission of complaints via telephone versus in person, was another change that Cheng championed, along with triaging cases, investigating systemic discrimination, mediation, automation and web portal submissions. These changes allowed the DFEH to consolidate its physical locations, further eschewing costs typically associated with running the department. At the same time, egregious and systemic violations were triaged and developed as director's, group and class actions. With those changes, settlements and judgments grew from about \$7 million in 2009 to more than \$16 million in 2013.

"Rent, phones and everything else needed to run an office are so expensive. All we had to work with was rent and personnel costs," she says. "I was committed to not lay off any of our employees. Even during the deepest seasons of our recession we had no layoffs and were still able to eliminate 50 percent of our overhead, and even promote half of our staff."

But the consolidation of locations did not translate to reduction of resources. The DFEH maintained faculty presence at numerous law schools, universities and colleges throughout the Golden State, offering clinics on pressing civil rights issues and giving students the opportunity to work on real cases in advance of their matriculation.

Under Cheng's leadership, a department that may have otherwise been crushed by constricting funds and operation costs in a time of budget shortfall incorporated technologies and smart business planning to do more with less.

"The economic downturn was like a tsunami," Cheng says. "You could stand still and be destroyed by that terrible force or ride its tidal wave to a new shore. The challenging years became a time of innovation. That crisis is over now and we are in a better place." ●