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Annamarie Billotti is the Chief of Mediation at the Department of Fair Employment and Housing and also manages the Department's rulemaking, legislation and public affairs. She can be reached at annmarie.billotti@dfeh.ca.gov.



Rulemaking and Mediating at the Department of Fair Employment and Housing

By Annmarie Billotti

The California Department of Fair Employment and Housing (DFEH) is the state agency empowered to investigate and prosecute violations of California's civil rights laws, including the Fair Employment and Housing Act (FEHA).¹ On October 7, 2011, the DFEH's first-ever procedural regulations, which the Office of Administrative Law approved on September 7, 2011, took effect.² While the regulations themselves are new, the DFEH procedures they comprise are not.

California Gov't Code § 12930(e) authorizes the Department to adopt procedural regulations. The Legislature created the DFEH in 1980 with this rulemaking authority; however, it was not until February 2010 that the DFEH initiated the process of noticing and vetting authorized regulations to carry out its duties and functions.

SATISFYING THE ADMINISTRATIVE PROCEDURE ACT

Every California state agency must satisfy the basic procedural requirements established by the

Administrative Procedure Act (APA) for the adoption, amendment or repeal of an administrative regulation—unless the agency is expressly exempted by statute.³ To initiate an APA rulemaking action, an agency must issue a notice of its proposed rulemaking by having the notice published in the California Regulatory Notice Register, mailing the notice to stakeholders, and publishing the notice on its Web site.⁴ In order to provide a meaningful opportunity for public participation, the rulemaking agency also must make the text of the proposed regulations and a statement of reasons describing why the regulations are necessary available to the public for comment for at least 45 days.⁵ To satisfy these requirements, the DFEH issued notice of its rulemaking on February 19, 2010 and held two public hearings, one in Los Angeles and one in San Francisco, before closing the first public comment period on May 26, 2010.

A rulemaking agency must summarize and respond in one of two ways on the record to every timely comment directed at its rulemaking proposal: the agency must

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either explain how it amended a proposed regulation to accommodate the comment, or explain a reason for making no changes to a proposal.⁶ The purpose of the written summary and response to comments is to demonstrate that the agency understood and carefully considered all relevant material presented to it before adopting or amending a regulation. In its Final Statement of Reasons, available on its Web site, the DFEH carefully considered and responded to all timely comments directed at its rulemaking proposal.

In response to comments—and also to reflect organizational changes made after the Department published the original text of its proposed regulations in February 2010—the DFEH modified the text and made the modifications available to the public for further comment.

THE DFEH'S INAUGURAL PROCEDURAL REGULATIONS

In a succinct format, the DFEH's procedural regulations replace many of the Department's Directives adopted over 30 years, making the DFEH's procedures readily accessible to the public and easy to understand. The regulations formalize pre-existing procedural steps for participating in the Department's administrative process and, in most instances, supersede previously controlling DFEH Directives. A list of superseded Directives, which the Department rescinded effective October 7, 2011, is available on the DFEH's Web site at http://www.dfeh.ca.gov/Publications_DFEHPolicies.htm.

Found in title 2 of the California Code of Regulations at §§ 10000 through 10066, the regulations capture pre-existing DFEH procedures for accepting, investigating, conciliating and mediating complaints alleging employment, housing, and public accommodation discrimination and

incidents of hate violence. California Gov't Code § 12930(f)(1)-(2) grants the DFEH the power to receive, investigate, and conciliate complaints of discriminatory practices made unlawful by the FEHA, the Unruh Civil Rights Act,⁷ the Ralph Civil Rights Act,⁸ and the Disabled Persons Act.⁹ Chapter 6, Article 1, of the FEHA sets forth the general procedure for the DFEH's enforcement of the FEHA's prohibition against unlawful employment practices.¹⁰ (Article 1 also is applicable to Unruh Civil Rights Act, Ralph Civil Rights Act, and Disabled Person Act complaints filed with the DFEH.) Article 2 of Chapter 6 provides the general procedure for the Department's enforcement of the FEHA's prohibition against housing discrimination.¹¹ The DFEH's procedural regulations implement, interpret, and make specific these general procedures for processing complaints of discrimination filed with the Department.

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The DFEH's procedural regulations set forth a statement of purpose¹² and define key terms.¹³ They also include provisions governing the following DFEH procedures applicable to employment discrimination complaints: complaint filing;¹⁴ the liberal construction of complaints;¹⁵

categories of employment discrimination complaints accepted for filing;¹⁶ obtaining a right-to-sue notice from the Department;¹⁷ intake;¹⁸ priority intake;¹⁹ drafting complaints filed for investigation;²⁰ written statement or correspondence as complaint;²¹ complaints taken for filing purposes only;²² DFEH Director's complaints;²³ class or group complaints;²⁴ retaliation complaints;²⁵ special considerations regarding medical information the Department obtains during an investigation;²⁶ standards for accepting a complaint when the act of harm occurred outside California;²⁷ the effect of prior waiver agreements/release of all claims;²⁸ complaints taken after expiration of the one-year statute of limitations due to Department error;²⁹ complaints dual-filed with the Equal Employment Opportunity Commission (EEOC);³⁰ complaints transferred to the EEOC for processing;³¹ service of complaints;³² amending complaints;³³ responding to complaints;³⁴ conciliation;³⁵ DFEH Mediation Division Services;³⁶ complaint investigation;³⁷ investigative subpoenas;³⁸ investigative requests for production and inspection;³⁹ priority case processing/case grading system;⁴⁰ investigations not completed within the statutory time limit;⁴¹ accusation;⁴² notice of case closure;⁴³ Departmental appeal;⁴⁴ and EEOC substantial weight review.⁴⁵

Some practitioners have remarked in employment law journal and blog contributions that the regulations the DFEH adopted and the Office of Administrative Law approved make filing a DFEH complaint easier. In support, they cite procedures they perceive to be new, which are not. For example, relying on the Department's definition of “verified complaint,” which states that “[t]o be verified a complaint filed with the department need not be signed; verification need only confirm the truth of the allegations

submitted, including by submitting the allegations under penalty of perjury,⁴⁶ some practitioners claim that the DFEH established a new procedure of accepting unsigned complaints for filing. Yet, the DFEH has been filing unsigned verified complaints through its online right-to-sue system since 2008. Section 10002(a)(8) of the regulations makes clear that in order to file a complaint with the Department, the complaint must be signed—*unless the complaint is filed electronically*.⁴⁷ Similarly, the practice of accepting an unsigned complaint for filing in the limited circumstance when the statute of limitations will run before a complainant can sign it⁴⁸ has been in existence since this now-superseded (and very rarely invoked) DFEH Housing Directive was issued in 1995.

Likewise, some practitioners have raised concern over the purportedly newly broadened manner in which the Department defines “authorized signature,” which includes: “(1) the signature of an attorney whom the complainant has identified in writing as his or her legal representative, licensed to practice law in the State of California; (2) the signature of any person other than an attorney whom the complainant has identified in writing as a person authorized to sign a complaint on his or her behalf; (3) the signature of a parent or legal guardian who signs a complaint on behalf of his or her minor child; (4) the signature of a direct relative (parent, child, sibling, etc.) with an interest in the estate of a deceased complainant or the executor of the estate of a deceased complainant.”⁴⁹ Yet this procedure, in effect since now-superseded DFEH Directive 229 was issued in 2003, also pre-dates the Department’s procedural regulations.

A few practitioners have even raised concern over the Department’s purportedly new procedure governing the liberal construction of complaints.⁵⁰ However, this procedure, derived from a statute⁵¹ the

California Legislature enacted in 1980, also is not new.

DFEH MEDIATION DIVISION PROGRAMS

Procedures that are new, but have received little attention, are those of the DFEH’s Mediation Division, which the Department established in May 2010.⁵²

The DFEH Mediation Division is comprised of four programs: DFEH Housing Mediation Program, DFEH Volunteer (Employment) Mediator Program, DFEH-Loyola Law School Center for Conflict Resolution Mediation Program, and DFEH Staff Counsel-Mediator Program. The most successful program prior to the establishment of the DFEH’s Mediation Division was the Department’s Housing Mediation Program. The DFEH began offering free mediation to parties to newly-filed housing discrimination complaints when it received limited-term funding for that purpose from the U.S. Department of Housing and Urban Development (HUD). The program was so well-received and so successful that the DFEH continued to provide the service even after federal funding was no longer available.

Another pre-existing and successful program has been the DFEH’s Volunteer Mediation Program, now known as the DFEH Volunteer (Employment) Mediator Program. The Department changed the name because all DFEH mediations are voluntary,⁵³ and also to distinguish between the mediators who volunteer their time and expertise to mediate pre-investigation DFEH employment discrimination complaints from the attorney-mediators the DFEH now employs to mediate both pre- and post-investigation discrimination complaints.

Newly added in 2010 is the DFEH-Loyola Law School Center for Conflict Resolution Mediation Program. An offshoot of the Volunteer Mediator Program, the DFEH entered into a partnership with Loyola Law School to create a program that can accommodate numerous employment discrimination complaint mediations per month, so long as at least one party to the DFEH complaint is a resident of Los Angeles County.

“The DFEH has offered mediation on a limited basis for a number of years; however, not until May of 2010 did the Department launch its first-ever Mediation Division.”

The last addition to the Department’s Mediation Division—by far its most successful program and the one that precipitated the launching of this new DFEH division—is the Department’s Staff Counsel-Mediator Program. The DFEH currently employs five certified attorney-mediators—three half-time and two full-time—who work out of the Department’s Bay Area and Los Angeles Regional Offices. The Mediation Division’s attorney-mediators provide professional in-person, no-cost, pre- and post-investigation mediation services statewide to parties to complaints filed for investigation with the DFEH. Of the \$2.6 million in settlements the Mediation

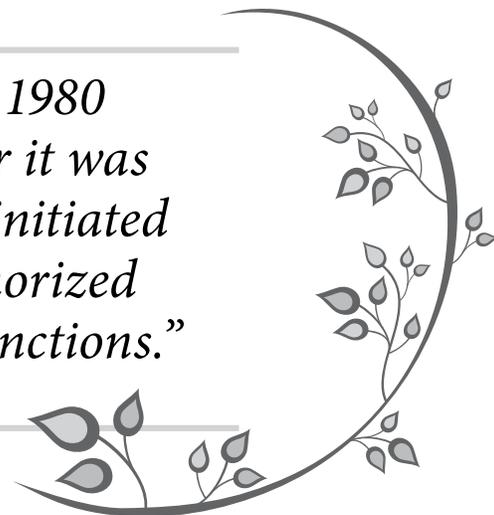
Division achieved in calendar year 2011, the DFEH's attorney-mediators achieved \$1.8 million, with a resolution rate in excess of eighty percent—far more favorable than the expected norm. These figures reflect the value to complainants; however, they do not reflect the cost savings to respondents who were able to exit the DFEH administrative process pre-litigation.

Although employed by the DFEH, the Mediation Division's attorney-mediators are true neutrals. They

To help facilitate early resolution, the Department temporarily suspends the requirement to provide a substantive complaint response while a DFEH complaint is with the Mediation Division pre-investigation.⁵⁷ If the parties decline mediation, or if mediation is unsuccessful, the Department's Enforcement Division must receive a response to the complaint no later than twenty-one days after the date the Regional or District Office notifies the respondent in writing

the DFEH has been able to offer cost-free mediation after the Enforcement Division completes an investigation and determines that a complaint has merit. Mediation that occurs after an investigation is complete—but before the Legal Division issues an accusation—takes the place of a formal conciliation conference.⁶³ A representative of the Department's Enforcement Division, who advocates on behalf of the DFEH process, participates in a post-investigation

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are not members of the Department's Legal or Enforcement Divisions, and their work is conducted in confidence behind a Mediation Division firewall. They report to the Chief of the Mediation Division and neither direct the investigation of, nor prosecute any cases for the DFEH.

PROCEDURES OF THE DFEH'S MEDIATION DIVISION

The Department may offer the parties the opportunity to mediate a complaint before investigation commences (“pre-investigation mediation”).⁵⁴ One or both parties to a complaint filed for investigation also may request pre-investigation mediation.⁵⁵ No representative of the Department's Enforcement or Legal Divisions attends or participates in a pre-investigation mediation conference.⁵⁶ Parties may have counsel if they like, but representation is not required at a DFEH mediation.

that a response is due.⁵⁸ This automatic, temporary suspension of the requirement to submit a response applies only to complaints referred to the DFEH's Mediation Division. Regardless of whether the Department refers a complaint to mediation before or after investigation has commenced, the Department ceases all investigative work while a complaint is with the Mediation Division.⁵⁹ If mediation is declined or is unsuccessful, the Department afterwards commences, resumes or completes the investigation, as necessary.⁶⁰ Whenever a mediated settlement is reached pre-investigation, the Mediation Division maintains the confidentiality of the settlement agreement and its terms.⁶¹

The Department also may offer the parties the opportunity to mediate a complaint after investigation (“post-investigation mediation”).⁶² Since the creation of the Staff Counsel-Mediator Program,

mediation conference conducted before an accusation issues.⁶⁴ The Enforcement Division representative may be the investigating office's assigned staff counsel—who participates on behalf of the DFEH's Enforcement Division, not on behalf of the Department's Legal Division.⁶⁵ To maintain the confidentiality of the mediation process, the investigating office's assigned staff counsel will report to the Chief of the Enforcement Division—not to the Chief Counsel of the Legal Division—for consultation and direction regarding the mediation. To further maintain mediation confidentiality, if the matter does not settle, the staff counsel who participated in the mediation on behalf of the Enforcement Division will not issue the accusation and/or prosecute the case on the Legal Division's behalf.⁶⁶ If a mediated settlement is reached post-investigation, pre-

accusation, the Mediation Division will keep confidential the settlement agreement and its terms.⁶⁷

As a practitioner, you will know whether the DFEH has recommended your client's complaint (or a complaint filed against your client) for post-investigation, pre-accusation mediation because the Regional or District Office that investigated the complaint will send a letter informing you of the Mediation Division referral. Soon after, expect to receive a call from the assigned DFEH attorney-mediator, who will contact the parties' counsel to determine whether the parties wish to mediate and, if both sides agree, will schedule the mediation.

Whenever a post-investigation mediation conference is conducted after the Legal Division issues an accusation ("post-accusation mediation"), the member of the Department's Legal Division who issued the accusation, or who subsequently took over the case, will participate.⁶⁸ If the matter does not settle at mediation, the same Legal Division attorney who participated in the mediation may prosecute the case.⁶⁹ When a mediated settlement is reached post-accusation, the participating Legal Division counsel will sign the settlement agreement, which—because of this signature—becomes a public document subject to disclosure under California's Public Records Act.⁷⁰

At the request of the respondent and the Department's Legal Division, the Mediation Division also provides no-cost mediation after the Legal Division issues an accusation or files a civil complaint.

CONCLUSION

The DFEH's procedural regulations, as published in the California Code of Regulations, are available on the Office of Administrative Law's Web site free of charge at <http://ccr.oal.ca.gov/>

[linked_slice/default.asp?SP=CCR-1000&Action=Welcome](http://www.dfeh.ca.gov/linked_slice/default.asp?SP=CCR-1000&Action=Welcome). To access the DFEH's procedural regulations from the above link, click on the following subsequent links: "List of CCR Titles;" "Title 2. Administration;" "Division 4.1. Department of Fair Employment and Housing." You may also access the DFEH's procedural regulations through the Department's Web site at http://www.dfeh.ca.gov/Procedural_Regulations.htm.

The DFEH's procedural regulations formalize existing procedures for the Department's entire administrative process from intake, through investigation and mediation, to conciliation and issuance of an accusation. They clarify the DFEH's procedures and make it easier for the public to understand and effectively participate in proceedings before the Department. The regulations benefit employees, employers, tenants, housing providers, and small and large businesses alike by creating procedural safeguards that encourage resolution at every step. ⁴²

ENDNOTES

1. Cal. Gov't Code §§ 12900-12996.
2. Cal. Code Regs. tit. 2, §§ 10000-10066.
3. Cal. Gov't Code § 11346.
4. *Id.* at § 11346.4.
5. *Id.*
6. Cal. Gov't Code § 11346.9(a)(3).
7. Cal. Civ. Code § 51.
8. *Id.* at § 51.7.
9. *Id.* at §§ 54-55.3.
10. Cal. Gov't Code §§ 12960-12976.
11. *Id.* at §§ 12980-12989.3.
12. Cal. Code Regs. tit. 2, § 10000.
13. *Id.* at § 10001.
14. *Id.* at § 10002.
15. *Id.* at § 10003.
16. *Id.* at § 10004.
17. *Id.* at § 10005.
18. *Id.* at § 10007.
19. *Id.* at § 10008.
20. *Id.* at § 10009.
21. *Id.* at § 10010.

22. *Id.* at § 10011.
23. *Id.* at § 10012.
24. *Id.* at § 10013.
25. *Id.* at § 10014.
26. *Id.* at § 10015.
27. *Id.* at § 10016.
28. *Id.* at § 10017.
29. *Id.* at § 10018.
30. *Id.* at § 10019.
31. *Id.* at § 10020.
32. *Id.* at § 10021.
33. *Id.* at § 10022.
34. *Id.* at § 10023.
35. *Id.* at § 10024.
36. *Id.* at § 10025.
37. *Id.* at § 10026.
38. *Id.* at § 10027.
39. *Id.* at § 10028.
40. *Id.* at § 10029.
41. *Id.* at § 10030.
42. *Id.* at § 10031.
43. *Id.* at § 10032.
44. *Id.* at § 10033.
45. *Id.* at § 10034.
46. *Id.* at §§ 10001(u).
47. Emphasis added.
48. Cal. Code Regs. tit. 2, § 10002(c).
49. *Id.* at § 10001(b).
50. *Id.* at § 10003.
51. Cal. Gov't Code § 12993(a).
52. Cal. Code Regs. tit. 2, §§ 10025, 10057.
53. *Id.* at § 10025(g).
54. *Id.* at § 10025(a).
55. *Id.*
56. *Id.*
57. *Id.* at § 10025(b).
58. *Id.*
59. *Id.* at § 10025(f).
60. *Id.*
61. *Id.* at § 10025(i).
62. *Id.* at § 10025(c).
63. *Id.* at § 10025(e).
64. *Id.* at § 10025(c).
65. *Id.*
66. *Id.*
67. *Id.* at § 10025(i).
68. *Id.* at § 10025(d).
69. *Id.*
70. *Id.*, Cal. Gov't Code §§ 6250-6270.