

APPLES and ORANGES

A Presentation of the Department of Fair Employment and Housing

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Fair Employment and Housing 50 years after the FEHA: Where do we go from here?

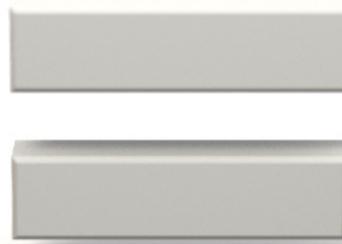
Joint Oversight Hearing of the Senate and Assembly Judiciary Committees
February 23, 2010, 1–3 pm, State Capitol, Room 4203, Sacramento, California

QUESTIONS

1. Does the system work?
2. Are different outcomes meaningful?
3. Are current resources enough?
4. Can the system be improved?
5. What are the priorities going forward?



PERSEPECTIVE



- Retrospective
- Separate and Unequal

- Prospective
- Different and Complementary

DOES THE SYSTEM WORK?

- ✓ Compensation.
- ✓ Correction.
- ✓ Prevention.

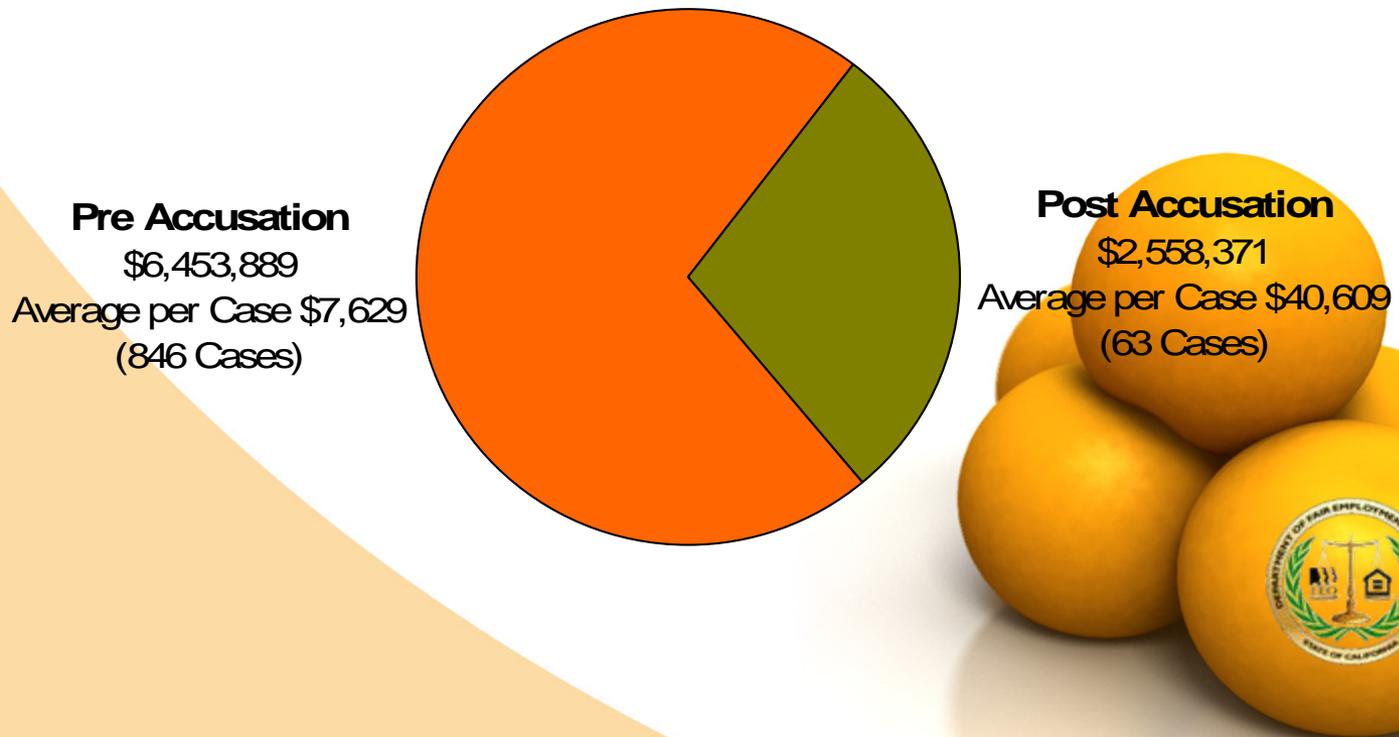


Compensation

California Department of Fair Employment and Housing

Fiscal Year: 2008 - 2009*

Closed Cases: by Settlement Amount (909 Cases - \$9,012,260)



Correction

- **Posting.**
- **Education and training.**
- **Policies and procedures.**
- **Notice of violation and remedies.**
- **Notice of completed training.**
- **Proof of compliance.**



Prevention

- **Statewide outreach.**
- **FEHA 50th anniversary collaborations.**
- **Technical assistance and training.**
- **Case Law Alerts.**
- **Mass Communications:**
 - **Videos: 50th Anniversary, Equal Rights 101, Fair Housing 101, Public Accommodations, and Hate Crimes.**
 - **YouTube, Facebook, Twitter.**



ARE DIFFERENT OUTCOMES MEANINGFUL?

- **Private Bar vs. DFEH.**
- **EEOC v. DFEH.**



WHY PARTIES OPT OUT

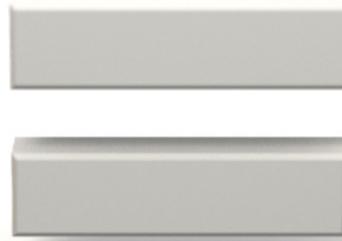


- Higher potential damages for plaintiffs.
- Chance of dismissal by summary judgment for defendants.
- Higher wage earners get relief.
- Less diversity reflects labor force that opts out.



- Greater affirmative relief and policy impact.
- Cap of \$150,000 for defendants.
- Lower wage earners get relief.
- Greater diversity among complainants reflects labor force before the DFEH.

COSTS vs. **BENEFITS** **for Litigants**



- Acceptance based on merit & monetary worth.
- Fee for services.
- Discounted damage awards.
- Limited affirmative relief.
- Unlimited discovery.
- Protracted litigation.
- Unlimited damages.
- Unlimited risks and exposure.
- No help for small cases.

- Acceptance based on merit only.
- Free services.
- Full damage awards.
- Routine affirmative relief.
- Limited discovery.
- 90 days unless otherwise stipulated..
- \$150,000 cap on damages.
- Fewer risks and exposure.
- Safety net for small cases.

COSTS vs. **BENEFITS**

for Taxpayers, Courts and Businesses



- Nearly \$4,000 per judge-day in court at taxpayer expense.
- Adds to court dockets and expenditure of resources.
- Increases cost of doing business.

- 81 cents/employee/year applied to efficient and effective alternative forum.
- Relieves court dockets and resources of thousands of cases.
- Reduces cost of doing business.

EEOC

vs.

DFEH



- **Narrower mission.**
- **Files all cases in civil court.**
- **100% of cases stay in court.**
- **Awards are not capped.**



- **Broader mission.**
- **Files all cases before the FEHC.**
- **50% of cases remain in the administrative setting.**
- **FEHC awards are capped.**

ARE THERE ENOUGH RESOURCES?

- **Greater efficiency and effectiveness yield resources.**
- **Greater productivity yields resources.**



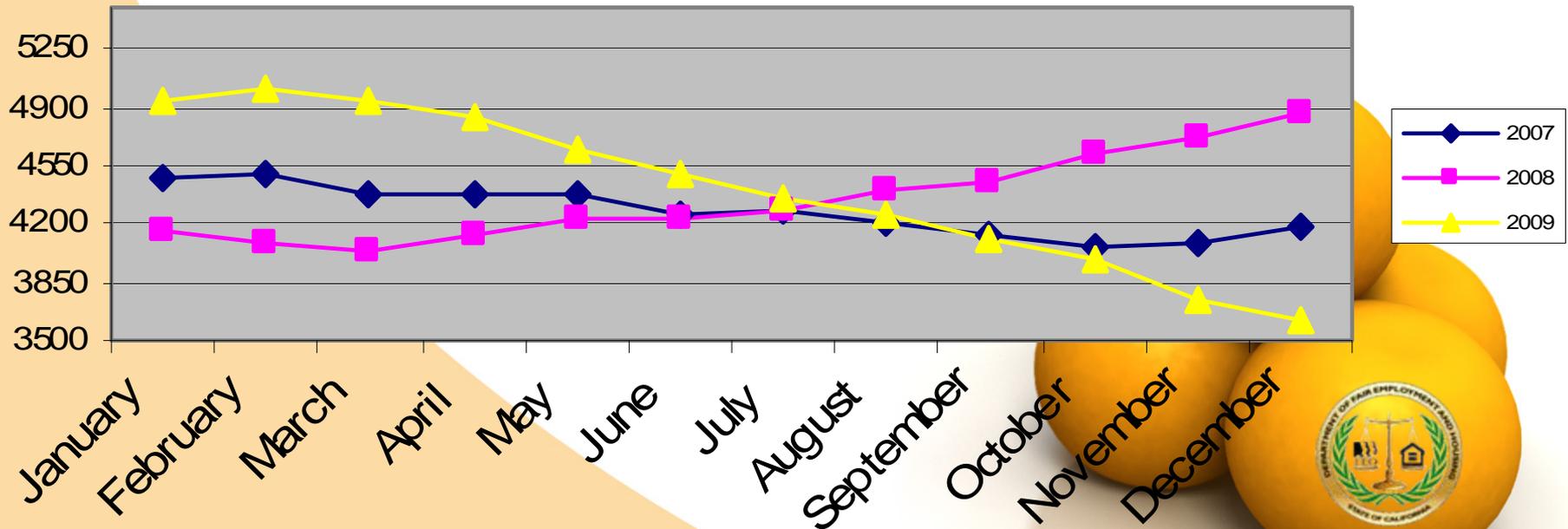
Greater Efficiency and Effectiveness

- **Automated Appointment System.**
- **Automated Right-to-Sue System.**
- **Telephone Intake.**
- **Case Grading System.**
- **Special Investigations Unit.**
- **Proposed Regulations to achieve greater transparency.**
- **Savings in Operations.**



Greater Productivity

Department of Fair Employment and Housing Employment Cases Open by Month Calendar Years: 2007 - 2009



HOW CAN THE SYSTEM BE IMPROVED?

- ✓ Increasing early, informal disposition of complaints in appropriate cases.
- ✓ Reinstating an effective mediation program.
- ✓ Upgrading consultant qualifications and training.
- ✓ Increasing resources devoted to quality assurance and supervision.
- ✓ Reducing use of “boilerplate” information and discovery requests to employers.
- ✓ Increasing educational efforts targeted at smaller employers.
- ✓ Improving the DFEH case management information system to make it more useful for both management and strategic planning.



Special Investigations Unit

- SIU: A specialized investigations unit within the enforcement division that operates under the direction of DFEH's Chief Counsel.
- Mission: Identify cases during investigation that represent ongoing patterns of discriminatory conduct by the same employer.
- Source of Cases: DFEH's existing 20,000 annual complaints from the public.



Identifying Potential SIU Cases

- **Team Approach:** Chief Counsel, District Administrators, individual consultants, and SIU Staff all reviewing DFEH complaints for potential SIU investigations.
- **Typical Characteristics:** Large employers that receive similar types of employment discrimination claims, and potentially unlawful employment practices that would impact a large number of California employees.



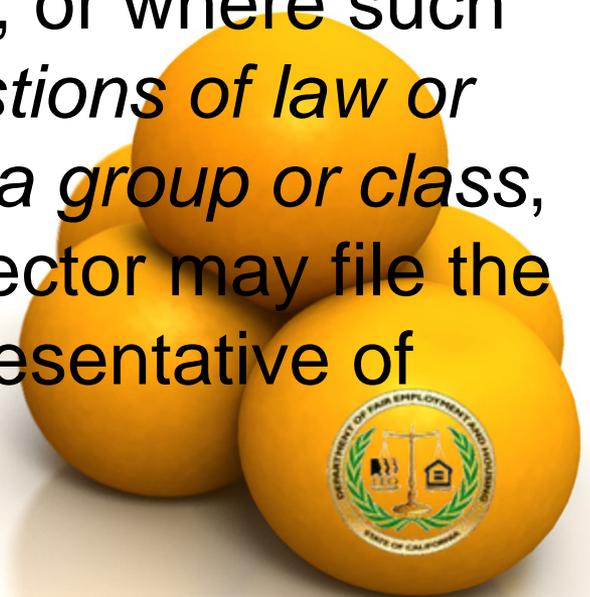
Potential SIU Case Identified – What Next?

- **SIU Staff Review:** Reviewed by SIU for recommendation.
- **SIU Staff Recommendation:** If case recommended for SIU investigation by SIU staff, then referred to Chief Counsel.
- **Decision by Chief Counsel:** Chief Counsel makes final decision in consultation with Director.



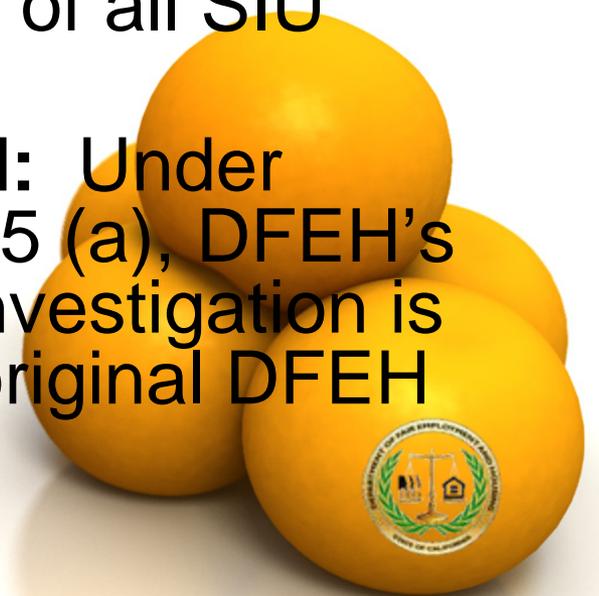
Legal Standard for SIU Investigation

- **Government Code § 12961:** Where an unlawful practice alleged in a verified complaint *adversely affects, in a similar manner, a group or class persons* of which the aggrieved person filing the complaint is a member, or where such an unlawful practice *raises questions of law or fact which are common to such a group or class*, the aggrieved person or the director may file the complaint on behalf and as representative of such a group or class.



What is Different with an SIU Investigation?

- **Priority Investigation for DFEH:** Investigation will be assigned to SIU investigator who specializes in large group/class complaints
- **Assigned Attorney:** Given the importance of these investigations to DFEH, a staff attorney is assigned to review the progress of all SIU investigations.
- **Two Year Investigation Period:** Under Government Code section 12965 (a), DFEH's time period for conducting the investigation is two years from the filing of the original DFEH complaint.



During Group/Class Investigation, What is SIU Looking For?

- Facts regarding the allegedly unlawful employment practice or policy.
- Facts regarding any applicable affirmative defense.
- Facts regarding the number and identity of employees allegedly harmed by practice or policy.
- Facts regarding possible economic or emotional distress damages of any harmed employee.



Recent SIU Group/Class Settlements

- **Three SIU Settlements in the Last Three Months.**
- **59 workers are receiving over \$712,000.**
- **DFEH Achieved Broad Injunctive Relief in all Three Settlements that will Protect Thousands of Workers.**
- **DFEH will Continue Additional SIU Investigations and Settlements within the Current Budget.**



Goals of the DFEH Case Grading System

- **Focus on Merit:** Implement an investigation process that identifies and fully investigates the most meritorious cases. End the previous “first in first out” system that did not consider the case’s relative merit.
- **Move Cases Faster:** Reduce consultant case loads by moving cases faster through the investigation process. Close non-merit cases sooner, and transfer merit cases to the Legal Division faster.
- **Closer Involvement by Legal Division:** Provide the litigating attorneys the ability to shape the cause cases prior to their transfer to the Legal Division.



Grading Cases at Intake

- **“Priority” Case:** The case appears likely to result in a merit finding. Decision made at intake with concurrence of District Administrator or Supervisor.
- **“Standard” Case:** The case does not appear to be meritorious.
- **Purpose for Grading at Intake:** (1) Bring case to attention of Legal Division at early stage, (2) encourage Enforcement Division to move merit cases quickly at early stage, and (3) case will be re-graded after DFEH receives the employer response.



Monthly Case Grading Meetings

- **Attorney Assignment:** Every employment District Office is assigned an attorney. The attorney meets with the District Office on a monthly basis.
- **Case Reviews:** All designated priority cases are reviewed. The attorney directs any further investigation that is required for a priority case and sets the goal for when the case can be transferred to the Legal Division. The attorney is also involved in any settlement discussions regarding a priority case.
- **Universal Participation:** Every consultant will also present his or her “two or three best cases,” even if they are standard cases. These reviews present excellent training for all the consultants. They can also result in a standard case being upgraded to a priority case.



Initial Success of Case Grading System

- Closing standard cases faster.
- Priority cases transferring to Legal Division sooner.
- Assigned attorneys know the cases better when they draft the accusations.
- More referrals to the SIU.
- Fewer case rejections by Chief Counsel
- Better team work between the Legal and Enforcement Divisions.



WHAT ARE THE PRIORITIES GOING FORWARD?

- **Legislative Fix.**
- **Procedural Regulations.**



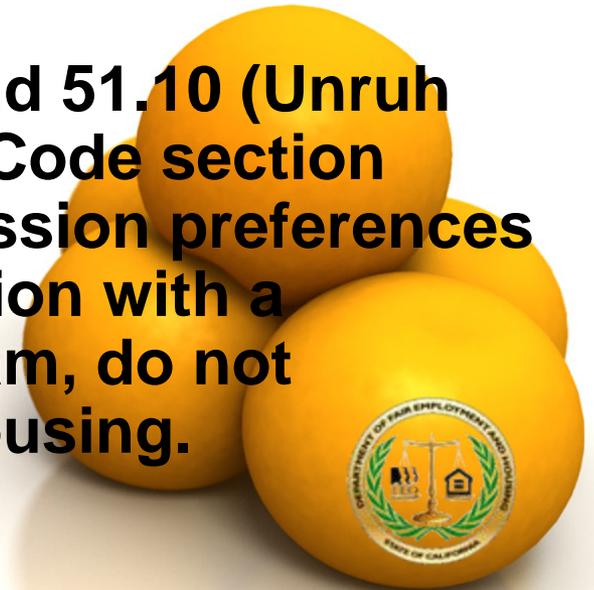
Problems Requiring Legislative Fix

- **Substantial Equivalency:** The FEHA must remain substantially equivalent to the federal Fair Housing Amendments Act (FHAA) for the DFEH to remain certified to receive complaint referrals, and funding, from HUD. Amendments to the FHAA have increased the cap on civil penalties available in housing discrimination cases litigated administratively under the FHAA. DFEH's HUD certification and funding could be in jeopardy if state law does not catch up with federal law.
- **Age Discrimination Exemption:** State law prohibits housing discrimination on the basis of age; federal law does not. A low-income housing provider that imposes admission preferences based on age (e.g., one household member must be age 62 or older), in compliance with a federally-approved housing program, violates state law prohibitions against age discrimination in housing.



Solution

- **Amend the FEHA to conform the civil penalty caps stated in Government Code section 12987 (\$10,000, \$25,000, \$50,000 for first, second, and third violations, respectively, committed with oppression, fraud, or malice) to those currently stated in the federal FHAA (\$16,000, \$37,500, \$65,000).**
- **Amend Civil Code sections 51.2 and 51.10 (Unruh Civil Rights Act) and Government Code section 12955 to expressly state that admission preferences based on age, imposed in connection with a federally-approved housing program, do not constitute age discrimination in housing.**



Proposed DFEH Procedural Regulations

- **When created by the Legislature in 1980, the DFEH was granted the statutory authority to adopt regulations to carry out its duties and functions. To date, the department has not adopted the regulations the Legislature contemplated.**
- **Instead, it developed procedures of general application (DFEH Directives), many of which fall outside any express exemption to the rulemaking requirements of the Administrative Procedure Act.**
- **The DFEH's proposed regulations provide duly noticed and vetted procedures of general application, currently utilized by the department, for participation in the DFEH administrative process.**



Public Hearings and Written Comment

- The text of the proposed regulations is available on the department's Web site at www.dfeh.ca.gov.
- Public Hearing: 10:00 a.m., April 6, 2010, 7th Floor Conference Room, Junipero Serra State Building, 320 West Fourth Street, Los Angeles, California.
- Public hearing: 10:00 a.m., May 26, 2010, Monterey Room, Hiram Johnson State Building, 455 Golden Gate Avenue, San Francisco, California.
- Written comments must be received by the department in DFEH headquarters by 5:00 p.m. on May 26, 2010.



For Further Information

www.dfeh.ca.gov

