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## California's new procedural regulations will facilitate administrative claims

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In early 2010, California's Department of Fair Employment and Housing (DFEH) proposed a series of new procedural regulations to govern the intake, investigation, conciliation mediation, and prosecution of administrative complaints under the Fair Employment and Housing Act (FEHA), Unruh Civil Rights Act, Disabled Persons Act, and Ralph Civil Rights Act. Following a series of public hearings and a public comment period, the final regulations went into effect on Oct. 7, and are codified at Title 2, California Code of Regulations, Sections 10000 through 10066.

These new regulations are designed to "capture and replace" most of the department's former directives on the handling of administrative complaints. While the regulations streamline the cumbersome directives of the past, the department asserts that they do not alter existing complaint processing or the administrative process. According to the department, these new regulations support the state's continuing efforts to move toward "e-government," which focuses on modernizing procedures, making government transparent and user-friendly, and saving taxpayer dollars.

Nonetheless, some are concerned that these new regulations will increase the volume of cases passing through the administrative process and into the court system. Based on the department's statistics, how-

ever, it believes the regulations have not increased, and are unlikely to increase, the current or future volume of civil rights litigation.

Pursuant to California Government Code Section 12960, a person claiming a violation of the FEHA first must submit a complaint to the DFEH and exhaust his or her administrative remedies before filing a lawsuit in court. Once the complainant has exhausted his or her administrative remedies, the DFEH issues a "right-to-sue" letter permitting the complainant to proceed with a lawsuit.

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

Each of these four statutory requirements is covered by the DFEH's new procedural regulations. From the perspective of employers, there is concern that the new regulations make it so easy to meet these substantive statutory requirements that, in effect, they will lose their meaning. The department disagrees, viewing these regulations as simply a natural extension of its online system, which has been in use since 2008.

Either way, the administrative process is not what it used to be:

**Verification:** The statute requires that a complaint be "verified" but does not state how the verification is to occur. Since the DFEH instituted its 2008 online right-to-sue system and codified online verification under the new regulations,

it has not required those complainants filing electronically to sign the complaint. Pursuant to the Uniform Electronic Transactions Act, "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law." California Civil Code Section 1633.7. Indeed, Los Angeles County Superior Court's online small claims filing process likewise accepts electronic verification without signatures.

Under the new regulations, the DFEH has taken this a step further by permitting a complaint to be verified electronically or otherwise by the complainant's attorney or any other person whom the complainant has designated to sign on his or her behalf. California Code of Regulations Title 2 Section 10001(b). In order to "verify" the complaint, the complainant need only submit an "oath or affidavit" confirming the truth of the allegations. California Code of Regulations Title 2 Section 10001(u).

The oath or affidavit is the same as that provided on hard copies of the DFEH complaint form: "By submitting this complaint I am declaring under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge

except as to matters stated on my information and belief, and as to those matters I believe it to be true." As a result, it appears that an oral oath or affidavit will be deemed to have been made by the filing of the complaint, even if someone other than the complainant verifies the complaint.

**Unsigned complaints:** The DFEH now will accept an unsigned complaint when neither the complainant nor an authorized representative is able to sign it before the statute of limitations expires. California Code of Regulations Title 2 Section 10002(c). In response to objections raised by the Fair Employment and Housing Commission regarding the validity of unsigned complaints, the DFEH countered 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 May, 26, 2010, Comment. C2d. The DFEH's view prevailed, as the Office of Administrative Law approved the regulations proposed by the department.

**Liberal construction:** In enacting FEHA, the Legislature provided that the "provisions of this part shall be construed liberally for the accomplishment of the purposes of this part." California Government Code Section 12993(a). The DFEH's new regulations interpret this concept of "liberal construction" to

provide for exhaustion of all claims that are or could have been asserted based on the facts alleged in the complaint. California Code of Regulations Title 2 Section 10002(c). Thus, where the facts are alleged in support of 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 complainant did not assert a retaliation claim.

As a result, employers may have more difficulty than before in obtaining dismissal of civil claims not expressly asserted in the administrative complaint. See *Okoli v. Lockheed Technical Operations Co.*, 36 Cal. App. 4th 1607 (1995) (where administrative complaint only asserted discrimination claim; claim for retaliation properly dis-

missed for failure to exhaust administrative remedies).

**Timeliness:** Pursuant to the statute, “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. California Code of Regulations Title 2 Section 10007(i)(2). Consequently, fewer complaints may be rejected as untimely during the filing stage because the issue of timeliness will be deferred to the investigator. According to the department, this procedure has been in place for many years under its former directives with no change in the percentage of cases rejected for untimely filing.

Given current economic conditions, some are concerned about the effect these new regulations may have on the volume and substance of FEHA litigation. The department, however, is confident that the new rules can only improve efficiency and effectiveness by resolving disputes early. The department states that its statistics show that, under the procedures put in place four years ago, total annual complaints filed grew to 20,073 in 2008 during the height of the recession, but has since decreased to 19,437 in 2010. In that time, the department notes that it has nearly doubled settlement values and reduced the number of administrative and civil complaints filed.

While the practical impact of these new regulations remains to be seen, there can be no doubt that all stakeholders will be affected.

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