

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING Proposed Amendments to the Department of Fair Employment and Housing Procedural Regulations

INITIAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 1. Procedures of the Department of Fair Employment and Housing

Pursuant to Government Code section 12930, subdivision (e), the Department of Fair Employment and Housing (Department or DFEH) has authority to “adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties of the department.” This rulemaking action is intended to further implement, interpret, and/or make specific the Fair Employment and Housing Act (FEHA) – Government Code section 12900 et seq. In particular, Government Code sections 12960 through 12976 and 12980 through 12989.3 set forth the Department’s practice and procedure for receiving, investigating, and conciliating complaints of employment, housing and public accommodation discrimination and hate crimes.

The specific purpose of each proposed regulation and the reason it is necessary are described below. The problem that a particular proposed regulation addresses and the intended benefits are outlined under each subdivision, as applicable. Some changes are not explained below as they are non-substantive – correcting grammatical or stylistic mistakes, renumbering and/or relettering, or simply rewording complicated concepts in simpler terms.

Chapter 1. Procedures of the Department of Fair Employment and Housing

§ 10000, Statement of Purpose

The purpose of this section is to outline the objectives and scope of the Department’s procedural regulations.

§ 10000, Reasonable Accommodation

The Department proposes to add that it “will reasonably accommodate persons with disabilities in the filing, investigation, and conciliation of complaints.” This is necessary to reiterate DFEH’s commitment to serving those with disabilities and eliminating discrimination based on disability. It is also necessary to emphasize that the rules outlined in subsequent sections may be modified if a reasonable accommodation is needed to file, investigate, or conciliate a claim and ultimately effectuate the FEHA.

§ 10001, Definitions

The purpose of this section is to define terms used throughout the “Procedures of the Department of Fair Employment and Housing” chapter of the regulations.

§ 10001, subd. (a) “Authorized Signature”

The Department proposes to move the definition of “authorized signature” to section 10005,

subd. (d)(8)(A). This is necessary because the term only appears in section 10005 of the regulations and it is misleading to define it in the section that otherwise defines global definitions used throughout the regulations. It is also misleading because, as discussed below, a “wet” signature is rarely needed and having “authorized signature” as the first definition might lead readers to believe otherwise.

§ 10001, subd. (h) “Dispute Resolution Division”

The Department proposes to add the definition of “Dispute Resolution Division.” This is necessary to use the more accurate term that the Department already uses in practice and renders the definition of “Mediation Division” obsolete. Also, the definition clarifies that the division handles more than just one type of dispute resolution and that some are mandatory.

§ 10001, subd. (f) “Filed or to File”

The Department proposes to delete the definition of “filed or to file.” This is necessary because the definition is unnecessary – it exempts complaints that are filed online, which comprise a vast majority of the complaints that the Department receives, and mandates the use of antiquated time-stamping.

§ 10001, subd. (s) “Verified Complaint”

The Department proposes to amend the definition of verified complaint to remove the signature component. This is necessary because, as above, most complaints are submitted online. Also, it is not always feasible to “sign” a complaint and civil litigation, prompted by technological advances, permits alternative means of verifying complaints. Therefore, throughout these regulations, the Department proposes to replace “signed” or “signature” with “verified” or “verification” in over a dozen instances.

Subchapter 1. Employment, Unruh Civil Rights Act (CIV. Code, § 51 et seq.), Ralph Civil Rights Act (CIV. Code, § 51.7), and Disabled Persons Act (CIV. Code, § 54 et seq.) Complaints

§ 10005, Obtaining a Right-to-Sue Notice from the Department

The purpose of this section is to describe how to acquire a right-to-sue notice.

§ 10005, subd. (c) Immediate Right-to-Sue

The Department proposes to amend how to obtain a right-to-sue and eliminate the restriction on appearing “in person at any department office without the prior consent of the district or regional administrator” in order to obtain a right-to-sue. This is necessary to expand and simplify the methods by which one can obtain a right-to-sue notice from the Department.

§ 10007, Intake

The purpose of this section is to describe intake interviews’ purpose, processes, topics to be discussed, and limitations.

§ 10007, subd. (b) How to Submit a Pre-Complaint Inquiry

The Department proposes to delete this subdivision that describes the ways to submit a pre-complaint inquiry. This is necessary because this information is not directly relevant to intake interviews and is unnecessarily limiting since the Department broadly construes the FEHA to accept pre-complaint inquiries in many different forms. This deletion also enables the

Department to use new technologies as they emerge and become feasible.

§ 10007, subd. (e) Intake Interviews

The Department proposes to delete the requirement that intake interviews be conducted via “telephone or other electric means” absent extenuating circumstances. This change is necessary to reflect the fact that the method for conducting an intake interview may vary based on Department capacity, operational efficiency, or complainant preference or need.

§ 10008, Priority Intake

The purpose of this section is to describe when a complainant may be given priority for expedited intake.

§ 10008, subd. (a) Who May be Given Priority for Intake

The Department proposes to delete allegations of Unruh Civil Rights Act violations as a basis for priority intake. This is necessary because Unruh Civil Rights Act violations are not uniformly more time-sensitive than other violations handled by the Department.

§ 10010, Written Statement or Correspondence as Complaint

The purpose of this section is to describe when and how a written statement or correspondence may be accepted as a complaint.

§ 10010, subd. (b) Handwritten or Typed and May Be Submitted Electronically or by Facsimile

The Department proposes to delete that a statement or correspondence “shall be handwritten or typed and may be submitted electronically or by facsimile transmission to the department.” This is necessary to expand the methods by which one can submit a written statement or correspondence and remove the arbitrary limitation on appearing in person.

§ 10015, Medical Information - Special Considerations

The purpose of this section is to reaffirm the California Constitution and the Department’s commitment to keeping medical information confidential.

§ 10015, subd. (b) “Medical Records”

The Department proposes to add that if it obtains medical records, they should be maintained in a section of the case file clearly marked “‘Medical Records’ or otherwise designated as” “Confidential.” This is necessary to permit the Department to mark medical records as “medical records” specifically as a subset of the broader category of confidential records. Regardless of the naming convention, medical records will continue to remain confidential to the greatest extent permitted by law.

§ 10021, Service of Complaints

The purpose of this section is to describe how the Department serves complaints.

§ 10021, subd. (d) Designation of Confidentiality

The Department proposes to delete the provisions of the confidentiality subdivision that reference personal service and certified mail, while maintaining the core confidentiality. This is necessary to emphasize that the subdivision pertains to confidentiality, and not means of service. It is also necessary to delete references to envelopes and types of service in the event the Department uses different means of service in the future.

§ 10022, Amending Complaints

The purpose of this section is to describe when and how a complaint may be amended.

§ 10022, subd. (a) Curing Complaints

The Department proposes to add that it may amend an open complaint of discrimination to “cure technical defects or omissions, including correcting a case number, address, or name of a party”. This is necessary to conform DFEH regulations to its federal counterpart for employment matters – the Equal Employment Opportunity Commission – in 29 CFR 1601.12(b) and enable the Department to swiftly correct mistakes in the complaints that it drafts.

§ 10022, subd. (g) “Correcting” Complaints

The Department proposes to delete this subdivision regarding “correcting” nonsubstantive issues. This is necessary because the subdivision is redundant in light of subdivision (a) of this section.

§ 10025, DFEH Dispute Resolution Division Services

The purpose of this section is to outline the responsibilities and operation of the Department’s Dispute Resolution Division.

§ 10025, subd. (b) Pre-Investigation Mediation

The Department proposes to move the text from former subdivision (g) to subdivision (b). This is necessary for clarity and to underscore the importance of pre-investigation mediation as a voluntary process.

§ 10025, subd. (d) Pre-Civil Action Mandatory Dispute Resolution

The Department proposes to amend subdivision (d) (previously subdivision (c)), to eliminate a now obsolete process of offering post-investigation voluntary mediation, which the Department has replaced with pre-civil action mandatory dispute resolution. This amendment is necessary to comply with Government Code section 12965, subdivision (a), which was amended effective January 1, 2013, to require parties to participate in mandatory dispute resolution before the Department files a civil action.

§ 10025, subd. (e) Post-Civil Action Mediation Conference

The Department proposes to amend subdivision (e) (previously subdivision (d)) to eliminate unnecessary text regarding designation of DFEH staff counsel. This amendment is necessary to clarify that there is no restriction on the assignment of staff counsel to prosecute cases, whether or not they participate in mediation.

§ 10025, subd. (e) Department’s Obligation under Government Code Section 12963.7

The Department proposes to strike former subdivision (e) because its text has been moved to subdivision (d) for clarity and to underscore its importance.

§ 10025, subd. (g) Assigning a Mediator Only When Both Parties Agree to Mediate

The Department proposes to strike former subdivision (g) because its text has been moved to subdivision (b) for clarity and to underscore its importance.

§ 10025, subd. (g) Matters the Legal Division Refers For Mandatory Dispute Resolution Shall Be Assigned to a DFEH Attorney Mediator

The Department proposes to amend subdivision (g) (formerly subdivision (h)) to clarify that matters the Legal Division refers for mandatory dispute resolution, in compliance with Government Code section 12965, subdivision (a), as amended effective January 1, 2013, will be assigned to a DFEH attorney mediator. This clarification is necessary because the DFEH also employs, and uses the services of volunteers, who are mediators, but not attorneys.

§ 10025, subd. (h) Mediation Confidentiality

The Department proposes to amend subdivision (h) (formerly subdivision (i)) to state that mediated settlement agreements shall be made public unless the parties request nondisclosure and the director determines that disclosure is not required to further the purposes of the laws the Department enforces. The amendment is necessary to reaffirm the public nature of the Department's prosecutions and resolutions as opposed to the confidential mediation process itself.

§ 10025, subd. (j) Affirmative Relief

The Department proposes to formalize the requirement that all mediated settlement agreements contain affirmative relief provisions, whose purpose it is to strengthen compliance with the law and prevent future discrimination from occurring. This regulation is necessary to implement the Department's obligations under existing law and work share agreements with federal partners. It is also necessary to clarify that affirmative relief requirements apply to all settlement agreements entered into through the Department, not just to agreements facilitated in the Enforcement or Legal Divisions.

§ 10026, Complaint Investigation

The purpose of this section is to describe how the Department investigates complaints.

§ 10026, subd. (e) Obtaining the Complete Personnel File

The Department proposes to remove the requirement that it obtain complainants' complete personnel files from respondents for all workplace discrimination complaints. This is necessary to correct a logical flaw since a complainant may not have a personnel file in certain instances, including failure to hire cases. It is also sometimes impossible to obtain personnel files in certain instances, such as when a respondent is out of business or lost the files. The Department would still be permitted to seek personnel files, just not required to do so.

§ 10031, Civil Actions

The purpose of this section is to describe (1) that the Department may file a civil action after an investigation determines there is merit, (2) that the Department must first seek to settle claims through dispute resolution before filing a civil action, and (3) when the Department has discretion not to file a civil action.

§ 10031, subd. (b) Civil Actions & Mandatory Dispute Resolution

The Department proposes to make clear that it must offer dispute resolution before filing a civil action. This is necessary to effectuate section 45 of SB 1038 (Senate Budget and Fiscal Review Committee, Chapter 46, Statutes of 2012), which specifies in Government Code section 12965 that "[p]rior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation." The current regulation impermissibly gives the Department discretion to circumvent the requirement for mandatory dispute resolution; the proposed regulation recognizes the statutory language while also

recognizing that the Department cannot force parties to participate in dispute resolution, but the Department must at least offer it.

§ 10033, Departmental Appeal

The purpose of this section is to detail the Department's appeals process regarding a decision to reject a complaint or close a case.

§ 10033, subds. (a)-(n) Appeals Process

The Department proposes to conform its regulatory appeals process in large part to the statutory scheme used by the Division of Labor Standards Enforcement of the Department of Industrial Relations in Labor Code section 98.7(e). This is necessary to eliminate a four-level appeals process that is cumbersome, duplicative, and guarantees in most cases that the final review of a case closure occurs outside of the Department's statutory window for taking action.

Subchapter 2. Housing Discrimination Complaints

§ 10038, Intake

The purpose of this section is to describe intake interviews' purpose, processes, topics to be discussed, and limitations.

§ 10038, subd. (b) How to Submit a Pre-Complaint Inquiry

The Department proposes to delete this subdivision that describes the ways to submit a pre-complaint inquiry. This is necessary because this information is not directly relevant to intake interviews and is unnecessarily limiting since the Department broadly construes the FEHA to accept pre-complaint inquiries in many different forms. This deletion also enables the Department to use new technologies as they emerge and become feasible.

§ 10038, subd. (e) Intake Interviews

The Department proposes to delete the requirement that intake interviews be conducted via "telephone or other electric means" absent extenuating circumstances. This change is necessary to reflect the fact that the method for conducting an intake interview may vary based on Department capacity, operational efficiency, or complainant preference or need.

§ 10042, Written Statement or Correspondence as Complaint

The purpose of this section is to describe when and how a written statement or correspondence may be accepted as a complaint.

§ 10042, subd. (b) Handwritten or Typed and May Be Submitted Electronically or by Facsimile

The Department proposes to delete that a statement or correspondence "shall be handwritten or typed and may be submitted electronically or by facsimile transmission to the department." This is necessary to expand the methods by which one can submit a written statement or correspondence and remove the arbitrary limitation on appearing in person.

§ 10043, Multiple Complainants

The purpose of this section is to describe the procedure for handling situations involving multiple complainants.

§ 10043, subds. (a) and (b) Multiple Adult and Minor Complainants

The Department proposes to delete this entire section, which requires (1) separate complaints for adults unless they are both married and have the same last name and the allegations and fact situations are identical and (2) that minor children are only listed on one complaint. This is necessary to avoid duplicative investigative work and needless paperwork in processing otherwise identical or very similar complaints, and to preserve flexibility in drafting complaints that are responsive to the individual facts of each case. The deletion also eliminates potential issues of gender, marital status, and sexual orientation discrimination that may stem from the arbitrary requirements of being married and having the same last name.

§ 10050, Medical Information - Special Considerations

The purpose of this section is to reaffirm the California Constitution and the Department's commitment to keeping medical information confidential.

§ 10050, subd. (b) "Medical Records"

The Department proposes to add that if it obtains medical records, they should be maintained in a section of the case file clearly marked "Medical Records or otherwise designated as" "Confidential." This is necessary to permit the Department to mark medical records as "medical records" specifically as a subset of the broader category of confidential records. Regardless of the naming convention, medical records will continue to remain confidential to the greatest extent permitted by law.

§ 10053, Service of Complaints

The purpose of this section is to describe how the Department serves complaints.

§ 10053, subd. (c) Designation of Confidentiality

The Department proposes to delete the provisions of the confidentiality subdivision that reference personal service and certified mail, while maintaining the core confidentiality. This is necessary to emphasize that the subdivision pertains to confidentiality, and not means of service. It is also necessary to delete references to envelopes and types of service in the event the Department uses different means of service in the future.

§ 10054, Amending Complaints

The purpose of this section is to describe when and how a complaint may be amended.

§ 10054, subd. (a) Curing Complaints

The Department proposes to add that it may amend an open complaint of discrimination to "cure technical defects or omissions, including correcting a case number, address, or name of a party". This is necessary to conform DFEH employment and housing procedural regulations and enable the Department to swiftly correct mistakes in the complaints that it drafts.

§ 10054, subd. (d) "Correcting" Complaints

The Department proposes to delete this subdivision regarding "correcting" nonsubstantive issues. This is necessary because the subdivision is redundant in light of subdivision (a) of this section.

§ 10057, DFEH Dispute Resolution Division Services

The purpose of this section is to outline the responsibilities and operation of the Department's Dispute Resolution Division.

§ 10057, subd. (b) Pre-Investigation Mediation

The Department proposes to move the text from former subdivision (g) to subdivision (b). This is necessary for clarity and to underscore the importance of pre-investigation mediation as a voluntary process.

§ 10057, subd. (d) Pre-Civil Action Mandatory Dispute Resolution

The Department proposes to amend subdivision (d) (previously subdivision (c)), to eliminate a now obsolete process of offering post-investigation voluntary mediation, which the Department has replaced with pre-civil action mandatory dispute resolution. This amendment is necessary to comply with Government Code section 12965, subdivision (a), which was amended effective January 1, 2013, to require parties to participate in mandatory dispute resolution before the Department files a civil action.

§ 10057, subd. (e) Post-Civil Action Mediation Conference

The Department proposes to amend subdivision (e) (previously subdivision (d)) to eliminate unnecessary text regarding designation of DFEH staff counsel. This amendment is necessary to clarify that there is no restriction on the assignment of staff counsel to prosecute cases, whether or not they participate in mediation.

§ 10057, subd. (e) Department's Obligation under Government Code Section 12963.7

The Department proposes to strike former subdivision (e) because its text has been moved to subdivision (d) for clarity and to underscore its importance.

§ 10057, subd. (g) Assigning a Mediator Only When Both Parties Agree to Mediate

The Department proposes to strike former subdivision (g) because its text has been moved to subdivision (b) for clarity and to underscore its importance.

§ 10057, subd. (g) Matters the Legal Division Refers For Mandatory Dispute Resolution Shall Be Assigned to a DFEH Attorney Mediator

The Department proposes to amend subdivision (g) (formerly subdivision (h)) to clarify that matters the Legal Division refers for mandatory dispute resolution, in compliance with Government Code section 12965, subdivision (a), as amended effective January 1, 2013, will be assigned to a DFEH attorney mediator. This clarification is necessary because the DFEH also employs, and uses the services of volunteers, who are mediators, but not attorneys.

§ 10057, subd. (h) Mediation Confidentiality

The Department proposes to amend subdivision (h) (formerly subdivision (i)) to state that mediated settlement agreements shall be made public unless the parties request nondisclosure and the director determines that disclosure is not required to further the purposes of the laws the Department enforces. The amendment is necessary to conform the Department's policy and practice to that of our federal counterpart, the Department of Housing and Urban Development (HUD), as detailed in 24 CFR 103.33(o) and reaffirm the public nature of the Department's prosecutions and resolutions as opposed to the confidential mediation process itself.

§ 10057, subd. (j) Affirmative Relief

The Department proposes to formalize the requirement that all mediated settlement agreements contain affirmative relief provisions, whose purpose it is to strengthen compliance with the law and prevent future discrimination from occurring. This regulation is necessary to implement the Department's obligations under existing law and work share agreements with federal partners. It

is also necessary to clarify that affirmative relief requirements apply to all settlement agreements entered into through the Department, not just to agreements facilitated in the Enforcement or Legal Divisions.

§ 10063, Civil Actions

The purpose of this section is to detail (1) that the Department must file a civil action after an investigation determines there is merit in a housing case and there is no successful dispute resolution, (2) that the Department must first seek to settle claims through dispute resolution before filing a civil action, and (3) factors the department consider in determining merit.

§ 10063, subd. (a) No Discretion to File Civil Actions upon a Finding of Merit

The Department proposes to make clear that it must file a civil action if a housing investigation finds merit and the violation is not remedied through dispute resolution. This is necessary to comport with Government Code section 12981(a) which reads in relevant part “[i]n the case of failure to eliminate a violation of Section 12955, 12955.1, or 12955.7 [the housing discrimination provisions] that has occurred...the director shall bring a civil action in the name of the department on behalf of the aggrieved person as a real party in interest.” Because the statute does not grant the Department discretion in bringing civil actions, the regulation should not grant that discretion either.

§ 10063, subd. (b) Civil Actions & Mandatory Dispute Resolution

The Department proposes to make clear that it must offer dispute resolution before filing a civil action. This is necessary to effectuate section 56 of SB 1038 (Senate Budget and Fiscal Review Committee, Chapter 46, Statutes of 2012), which specifies in Government Code section 12981 that “[p]rior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department’s internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation.” The current regulation impermissibly gives the Department discretion to circumvent the requirement for mandatory dispute resolution; the proposed regulation recognizes the statutory language while also recognizing that the Department cannot force parties to participate in dispute resolution, but the Department must at least offer it.

§ 10063, subd. (c) Merit Determinations

The Department proposes to outline factors the Department considers in determining merit. This is necessary to clarify and reiterate that the Department does not have discretion in filing housing cases and to elaborate upon what constitutes merit. This conforms the regulations to those of HUD’s regulations in 24 CFR 103.400(a)(2).

§ 10065, Departmental Appeal

The purpose of this section is to detail the Department’s appeals process regarding a decision to reject a complaint or close a case.

§ 10065, subds. (a)-(n) Appeals Process

The Department proposes to overhaul its appeals process and largely use the scheme successfully used by the Labor Commissioner in Labor Code section 98.7(e). The Department proposes to conform its regulatory appeals process in large part to the statutory scheme used by the Division of Labor Standards Enforcement of the Department of Industrial Relations in Labor Code section 98.7(e). This is necessary to eliminate a four-level appeals process that is cumbersome, duplicative, and guarantees in most cases that the final review of a case closure occurs outside of

the Department's statutory window for taking action.

TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Department did not rely upon any technical, theoretical or empirical studies, reports, or documents in proposing these regulations.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department has determined that no reasonable alternative it considered, or that was otherwise brought to its attention, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The Department invites comments from the public regarding suggested alternatives, where greater clarity or guidance is needed.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

The proposed amendments, which clarify existing law without imposing any new burdens, will not adversely affect small businesses.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments clarify and supplement existing law without imposing any new burdens. Their adoption is anticipated to benefit California businesses, workers, tenants, housing providers, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for all to understand their rights and obligations, and reducing litigation costs.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT

Based on the analysis above regarding evidence supporting finding of NO significant statewide adverse economic impact directly affecting business:

The Department anticipates that the adoption of the regulations will not impact the creation or elimination of jobs or housing within the state; the creation of new businesses or housing or the elimination of existing businesses or housing within the state; the expansion of businesses or housing currently doing business within the state; or worker safety and the environment. To the contrary, adoption of the proposed amendments is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the state's judiciary by clarifying and streamlining the operation of the law, making it easier for all to understand their rights and obligations, and reducing litigation costs.