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# **WHAT TO DO WHEN** **THE DFEH COMES KNOCKING**

## **Handling Discrimination Complaints**

### **Employment Law Workshop**

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The attached workshop material must not be considered legal advice. The sample forms and policies are for educational purposes only. We strongly recommend that you consult with legal counsel before adopting or implementing any of the attached sample forms and policies so as to avoid potential liability.

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I. At The Workplace

A. General Theory

1. Labor Code, Section 2922 presumes that employee is employed at will and can be terminated at any time, with or without notice, with or without cause.
2. Presumption can be eroded and then good cause may be necessary.
3. Basis as to why investigations into misconduct to establish “good cause” are necessary:
  - a. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93: California Supreme Court finds that a reasoned conclusion that good cause exists should be supported by “substantial evidence” gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.
  - b. Protections Against Harassment - discrimination laws require that the employer take immediate corrective action to address and remedy harassment. Investigation as to the extent of the alleged unlawful act and how to correct the situation cannot be accomplished without an investigation.
4. **Conduct a Thorough and Proper Investigation:** It is vitally important to conduct a thorough and proper investigation and give the accused employee the right to respond to charges against him before deciding what discipline should be imposed. When interviewing accused employees, it is always appropriate to ask their side of the story and ask for witnesses to the particular incident in question. The employer should always investigate the employee’s side of the case before making a final decision on discipline. Any investigation should be full and complete and properly documented.

B. Drug/Alcohol Use

1. The ADA specifically permits employers to ensure that the workplace is free from the illegal use of drugs and alcohol. The employer may also be required under federal or state law, or by contract to ensure a drug-free workplace.
2. At the same time, the ADA provides limited protection from discrimination for recovering drug addicts and alcoholics.
  - a. An individual who is **currently** engaging in the illegal use of drugs is not protected.

- b. An alcoholic may be disciplined, discharged, or denied employment when the employee's alcohol use impairs job performance or conduct to the extent they are not a qualified individual with a disability.
- 3. Reasonable Suspicion Testing - The decision to test must be based on a reasonable and articulated belief that the employee is using alcohol or a prohibited drug on the basis of specific contemporaneous observations concerning the appearance, behavior, speech, or body odors of the employee.
  - a. It is imperative that only those supervisors who have been trained in "reasonable suspicion" determinations make the decision to order a drug/alcohol test.
  - b. Testing policy should be set out in handbook or otherwise distributed to employees.
- C. Harassment/Discrimination
  - 1. Sources of Liability:
    - a. Agents and Supervisors
      - (1) The US Supreme Court has ruled that under Title VII, an employer is strictly liable for sexual harassment committed by supervisory personnel, *even if the employer did not know or have reason to know at the time that the harassment was occurring* and was not negligent in preventing its occurrence.
      - (2) Under California law, an employer is strictly liable for harassment perpetrated by an agent or supervisor. (Govt. Code §12940(j)(1).)
    - b. Employees and 3<sup>rd</sup> Parties
      - (1) An employer is liable if it knew or should have known of the harassment and failed to take prompt remedial action to stop it. (29 CFR §1604.11(d)–(e).)
      - (2) Remedial action must include immediate and corrective action calculated to (1) end the current harassment and (2) deter future harassment from the same offender or others.
    - c. Affirmative Defense to Harassment
      - (1) Under Title VII, an employer has an affirmative defense to harassment in instances when the employee has not suffered a tangible employment action.

- (2) An employer may avoid liability by proving both of the following:
    - (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and
    - (b) the victim unreasonably failed to take advantage of any preventative and corrective opportunities provided by the employer or to otherwise avoid harm.
  - (3) A tangible employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
  - (4) In California, strict liability is not absolute liability.
    - (a) The affirmative defenses available in Federal claims may be available to reduce the employer's liability in damages.
    - (b) Avoidable consequences doctrine
      - (i) Employer took reasonable steps to prevent and correct workplace harassment
      - (ii) Employee unreasonably failed to use the preventative and corrective measures that the employer provided, and
      - (iii) Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.
    - (c) No tangible employment action is required for employer liability.
- D. Violence/Threats: Under California Code of Civil Procedure, Section 527.8, an employer may have an obligation to act on behalf of an employee to obtain a Temporary Restraining Order (TRO) and a permanent injunction against **anyone**, including another current employee, who engaged in unlawful violence or made a credible threat of violence at the workplace.
- 1. Employer should have a zero tolerance policy outlining what is prohibited and what steps an employee and supervisor should take when an actual/potential situation occurs.

2. Obtaining a TRO/injunction requires the gathering of evidence, thus necessitating an investigation.
- E. Theft: An employer should not take action against an employee for theft unless it has a good faith belief that the employee engaged in the conduct.
1. An employer takes a risk in deducting from an employee's paycheck any amount allegedly stolen from the company.
  2. Employer's best response would be to have employee voluntarily return funds, and/or work with local law enforcement officials for a restitution order, and/or file a claim against the employee.
  3. Employer may face claims of defamation and/or unlawful deductions, if the company takes action without sufficient information.
- F. Solicitations/Unfair Competition: An employer has the right to protect its trade secrets as well as protect confidential information from unauthorized disclosure. The employer also has the ability to stop any unlawful interference of contractual relationships between the company and third parties.
1. Employees may not utilize or disclose trade secrets without prior authorization.
  2. Employees may not disclose confidential or proprietary information of a third party or co-worker.
  3. Employees have a duty of loyalty while working for the company.
  4. Employees should be apprised of the Company's policies and asked to sign non-disclosure agreements.

## **II. Outside Activities**

- A. Lawful Conduct: Employees cannot be disciplined for engaging in lawful off-duty conduct unless it creates a potential or actual conflict of interest.
1. Moonlighting policies
  2. Intra-office relationships
  3. Consumption on alcohol off-premises may lead to discipline if the lawful off-duty conduct affects the employee's performance.
- B. Unlawful Conduct
1. An employer may be able to discipline an employee for unlawful off-duty conduct if it:
    - a. Affects the reputation of the company;
    - b. Causes the employee to be absent; or

- c. Affects performance of the employee.
- 2. Arrest Records - An arrest, without conviction, can not form the basis of termination. Employer may discipline for absent employee or for conduct reasonably believed by the employer to have occurred.

### **III. How to Conduct and Document An Investigation**

- A. Reasons to Conduct Investigation - investigation should be conducted by employer anytime that it has reason to believe that conduct that could lead to discipline of an employee or impose liability on the employer has occurred.
- B. Interviews
  - 1. Complaining Employee: Define the employee's complaint by interviewing the employee who is complaining.
    - a. Such interview should include a description of the conduct in question and any similar conduct engaged in by the accused that previously occurred.
    - b. The complaining employee should be requested to provide the names of any witnesses who can support their claims. In all cases, obtain dates, times, places and persons present to any incidents.
    - c. Memorialize the employee's complaint in writing, if possible.
      - (1) This can either be accomplished by requesting that the employee prepare a complaint in writing or by preparing a statement for the employee which summarizes the points presented from an interview.
      - (2) If possible, obtain the complaining employee's signature on such statement.
      - (3) If the employee refuses to sign or subsequently withdraws complaint, do not simply abandon an investigation.
    - d. Ask the employee what action does he/she believe would be necessary to alleviate his/her concerns.
    - e. Do not guarantee confidentiality to any party involved.
  - 2. Witnesses: Interview all witnesses that have been identified by the complaining employee concerning the incident in question. All interviews should be conducted using the same procedure as set out in the "Complaining Employee" section above.
    - a. Each employee should be advised that if any retaliation occurs, they should notify management immediately.

- b. They should also be advised that the information that they provide and receive from the interview should be kept confidential, and that they should not discuss it with other employees.
    - c. Each employee should be requested to sign a statement which summarizes the results of the interview.
  3. Accused: Interview the accused employee concerning each and every incident that is alleged to have occurred.
    - a. Obtain dates, times, places and witnesses from the accused employee.
    - b. The accused employee should be requested to sign a statement which summarizes their side of the story and should be advised that any retaliation will result in discipline.
    - c. If a union setting, if the accused employee requests union representation at any stage of the interview, the interview should be suspended until a union representative is present.
    - d. Interview all witnesses the accused employee has identified unless the accused employee admits every allegation.
  4. Report: Prepare a confidential summary report which identifies each witness and the relevant facts elicited from each witness and the recommended disposition or discipline.
  5. Conclusion: Before deciding what discipline or remedy to take, request the complaining employee's input, and discuss any discipline or remedy with upper management or legal counsel.
  6. Corrective Action: Document any discipline in a separate discipline report which states the basic facts, the policies violated and the discipline imposed.
- C. Drug Testing
  1. Have a supervisor trained in "reasonable suspicion" testing make a determination whether the employee is impaired or unfit for duty.
  2. Use the least intrusive means of testing possible.
  3. Determine level of discipline and/or employee assistance.
  4. Maintain confidentiality of medical records and other personal health information.

D. Lie Detector Tests

1. State and federal laws prohibit private employers from requiring applicants or employees to take a polygraph examination as a condition of employment.
2. An employer may request that an employee take a lie detector test, but only if the employer first advises the employee of their right not to take the test.
  - a. If the employee ***voluntarily*** consents to take the tests and damaging information is obtained, the employer may discipline the employee.
  - b. Due to the ease of claiming duress and difficulty of establishing “voluntariness”, employers should be extremely cautious in requesting employee participation.
  - c. Federal law provides greater protection to employees:
    - (1) Test may only be administered in connection with an ongoing investigation involving economic loss or injury to business (i.e., theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage);
    - (2) Employee had access to property that is the subject of the investigation;
    - (3) The employer had a reasonable suspicion that the employee was involved in the incident;
    - (4) The employer has to provide a statement to the employee specifying the basis for testing the employee, including detailing information the employer has regarding sections 1-3 above.
      - (a) The statement must be signed by the employer and employee.
      - (b) The statement must be retained for at least 3 years.

E. Searches

1. Only conduct a search of property if the company has taken steps to reduce the employee’s expectation of privacy.
2. Only conduct a search of the property reasonably necessary to investigate.
3. Searches of employee’s property such as a purse or car must be done with care, if at all. Employer will pay the consequences through invasion of privacy or defamation claims if they are wrong!

4. Option - Ask the employee for consent and memorialize consent. However, claims of duress may always be raised by employees.

F. Surveillance/Electronic Monitoring

1. Labor Code, Section 435 prohibits audio or video recording of employee restrooms, locker rooms, changing room, or any other room designated by the employer for changing clothes.
2. Penal Code, Sections 631 and 632 prohibits intentional eavesdropping upon or recording of a confidential communication between parties without the consent of all parties to the communication.

G. *Weingarten* Rights

1. Union Setting: The rights of employees to have present a union representative during investigatory interviews were announced by the U.S. Supreme Court in *NLRB vs. Weingarten, Inc.* (1975) 420 U.S. 251, 88 LRRM 2689. These rights have become known as the Weingarten rights.
  - a. Employees have *Weingarten* rights only during investigatory interviews, including interviews conducted during an investigation into harassment. An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct.
  - b. The following is a list of possible subjects that can be considered "investigatory" interviews:
    - (1) Absenteeism
    - (2) Accidents
    - (3) Damage to company property
    - (4) Drinking
    - (5) Drugs
    - (6) Falsification of records
    - (7) Fighting
    - (8) Insubordination
    - (9) Lateness
    - (10) Poor attitude
    - (11) Sabotage
    - (12) Theft

- (13) Violation of safety rules
- (14) Work performance
- c. If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says during the investigatory interview, the employee has the right to request the presence of a coworker.
- d. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to know and request.
- e. Additionally, the rights only apply to investigatory interviews-not to disciplinary meetings or discharge conferences which do not have an investigatory component.
- f. No *Weingarten* rights exist where the purpose of the meeting is simply to inform the employee they are to be disciplined or discharged. Unless there is going to be some sort of investigation at the meeting, where the employee's responses to certain questions could affect the employer's decision, the employee does not have the right to have a coworker present.
- g. The employer only has to allow a coworker to be present, but does not have to allow an outsider such as a lawyer to attend the meeting.
- h. *Weingarten* rights are considered Section 7 rights under the NLRA which allow the right to engage in concerted activity. It is distinguished from a Section 9 right which includes the right to bargain. Thus, the coworker does not have the right to obstruct the process or bargain on behalf of his or her coworker.
- i. When the employee makes the request for a coworker to be present, management has three options:
  - (1) It can stop questioning until the coworker arrives,
  - (2) It can call off the interview, or,
  - (3) It can tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to the presence of a coworker (an option the employee could always refuse.) In such a case, the employee may be told that the investigation will go on without the interview of the employee.

- j. Employers will often assert that the only role of a coworker in an investigatory interview is to observe the discussion. The Supreme Court, in *Weingarten* however, clearly acknowledges a right to assist and counsel workers during the interview.
  - k. The Supreme Court has also ruled that during an investigatory interview, management must inform the coworker of the subject of the interrogation. The coworker must also be allowed to speak privately with the employee before the interview, unless the scheduling of the interview was such that the employee had opportunity to obtain consultation prior to the interview. During the questioning, the coworker can interrupt to clarify a question or make an objection to perceived confusing or intimidating tactics.
  - l. While the interview is in progress the coworker can not tell the employee what to say but he may advise them on how to answer a question. Each answer must come from the employee. At the end of the interview the coworker can add information to support the employee's case.
2. Non-union Setting
- a. Pre-IBM: On July 10, 2000, the National Labor Relations Board extended to nonunion employees the right, already held by union employees, to bring along a coworker to a disciplinary meeting with an employer.
  - b. In *Epilepsy Foundation of Northeast Ohio and Arnis Borgs and Ashrafal Hasan* (331 NLRB No. 92), the NLRB made *Weingarten* rights available to nonunion employees. The NLRB decided that the rights were based on a section of employment law that says employees have the right to "mutual aid or protection" and that the rationale is "equally applicable where employees are not represented by a union," the decision states.
  - c. Post-IBM: In this new case, three non-union employees of IBM Corp. (IBM) alleged they requested and were denied co-worker representation during investigatory interviews concerning workplace harassment. Following their termination, the employees filed unfair labor practice charges against IBM.
    - (1) The NLRB's decision relies on an employer's need to conduct confidential and discreet investigations in the workplace. The NLRB also commented on the difference between non-union and union workforces, where the presence of a union representative at an investigatory interview is essential to the protection of the interests of the bargaining unit.

- (2) The Board concluded that non-union employees have the right to request the presence of a co-worker at an investigatory interview, and cannot be disciplined for making such a request. However, employers have no obligation to grant the request in the non-unionized setting. *IBM Corp.*, 341 NLRB No. 148 (June 15, 2004).

3. Document and Follow Up

- a. All steps of the investigation should be documented.
- b. Employees' acknowledgments of company policies relating to any investigation should be obtained and filed in a personnel file.
- c. Employee counseling should be in writing and acknowledged by employee. If employee refuses to sign, have supervisor and/or witness indicate that employee received copy but refused to sign.
- d. If discipline or counseling indicates that employer will review or take steps in the future, such as review, probation, training, make sure that it is accomplished.

**PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

**DISCRIMINATION ALLEGATION/EVENT REPORTING FORM**

**TO:** Alfred J. Landegger, Esq. Michael S. Lavenant, Esq.

**FAX NO.** (818) 986-5147 (805) 987-7148

**COMPANY:** LANDEGGER, BARON & LAVENANT

**FROM:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

**CC:** \_\_\_\_\_

This form must be completed by the Branch Manager, Supervisor or by the corporate Human Resource Department no later than the next business day after any allegation of harassment or discrimination in the workplace.

**1 Please complete the attached First Report of Event or Circumstance. When interviewing the employee, do not feel compelled to ask the questions in the same order. Feel free to ask additional questions. Always be a good listener and take accurate notes. Never label the behavior, statement or allegation as “sexual harassment” or “discrimination”. Document the words used by employee. No further investigation is to take place until instructed to do so by \_\_\_\_\_ and Landegger, Baron & Lavenant;**

**2 Attach a copy of the personnel file of the employee making the allegation of harassment or discrimination; and**

**3 Attach the personnel file of the employee(s) against whom the allegation of harassment or discrimination has been made.**

If you have any questions concerning this Discrimination Allegation/Event Reporting Form, or the attached First Report of Event or Circumstance, please contact Alfred J. Landegger, Esq. at (818) 986-7561 or Michael S. Lavenant, Esq. at (805) 987-7128.

## **FIRST REPORT OF EVENT OR CIRCUMSTANCE**

**Date:** \_\_\_\_\_

1. Name of Employee Being Interviewed: \_\_\_\_\_
2. Name of Interviewer: \_\_\_\_\_
3. Name Facility or Location: \_\_\_\_\_
4. Tell Me What Happened: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
5. Who was involved? \_\_\_\_\_
6. When did the incident(s) happen? \_\_\_\_\_
7. Where did the incident(s) happen? \_\_\_\_\_
8. Were there any other incident(s)? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
9. How did this incident make you feel? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
10. Was your work affected? \_\_\_\_\_
11. Was this the first time this had happened? \_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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12. Were there any previous incidents of inappropriate behavior? \_\_\_\_\_

13. Have you kept any records, such as written notes, tape recordings or anything else?

(If so, please attach.)

14. Do you know of any other employee(s) who had similar experiences? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

15. Have you discussed this with anyone at work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

16. Have you discussed this with anyone outside of work? \_\_\_\_\_

Who: \_\_\_\_\_

When: \_\_\_\_\_

17. Did you participate in the incident? \_\_\_\_\_

**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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18. If yes, tell me how you participated: \_\_\_\_\_

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19. How would you describe your relationship with the employee about whom you are complaining? \_\_\_\_\_

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20. Are there any other issues we should discuss? \_\_\_\_\_

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21. Were any other facts or other information that you think I should know? \_\_\_\_\_

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22. Who do you think I should talk to? \_\_\_\_\_

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**FIRST REPORT OF EVENT OR CIRCUMSTANCE**

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23. Do you have any suggestions as to how best to resolve the situation? \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Type/Print Name of Person  
Conducting Interview

\_\_\_\_\_  
Signature of Person Conducting Interview

Date: \_\_\_\_\_

# Guide for Complainants and Respondents

The Department of Fair Employment and Housing (DFEH) enforces the California *Fair Employment and Housing Act* (FEHA), *Unruh Civil Rights Act*, and *Ralph Civil Rights Act*. The following information is designed to assist persons who believe that they have been discriminated against in violation of California law, and persons or organizations charged with discrimination under California law, in understanding their rights and responsibilities.

## THE LAW

DFEH proceedings are administrative or civil, not criminal. There are four areas in which DFEH accepts complaints of discrimination:

### Employment

The FEHA prohibits harassment and discrimination in **employment** because of race, color, religion, sex (gender), sexual orientation, marital status, national origin (including language use restrictions), ancestry, disability (mental and physical, including HIV and AIDS), medical condition (cancer/genetic characteristics), age (40 and above), pregnancy, denial of medical and family care leave, or pregnancy disability leave (Government Code sections 12940, 12945, 12945.2).

### Housing

The FEHA also prohibits discrimination in the sale, rental or financing of **housing** accommodations because of race, color,

Notice of Right to Sue. The complainant may request a Notice of Right to Sue at any time during the investigation. If not requested earlier, a Notice of Right to Sue will be automatically issued when the complaint is closed or **one year** from the date the complaint was filed.

In **housing** cases, a complainant has the right to file a lawsuit on his/her own behalf in a California court within **two years** of the alleged discriminatory act. It is not necessary to file a complaint with DFEH prior to the filing of a lawsuit. The time during which a complaint is pending with DFEH will not count when computing the two-year period within which a lawsuit must be filed.

Complainants who wish to file a lawsuit for housing under the Ralph Act (hate violence) or Unruh Act (business establishments) are not required to file with DFEH and do not need a Notice of Right to Sue.

For more information, contact DFEH toll free at (800) 884-1684

TTY number at (800) 700-2320  
or visit our web site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov)

*In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.*



State of California  
Department of Fair Employment & Housing

DFEH-159 (04/04)

religion, sex (gender), sexual orientation, marital status, national origin (including language limitations), ancestry, familial status (households with children under age 18), source of income, disability (mental and physical, including HIV and AIDS), medical condition (cancer/genetic characteristics), and age (Government Code section 12955).

### **Business Establishments**

Under the *Unruh Civil Rights Act*, all persons are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all **business establishments**, including both private and public entities. The *Unruh Civil Rights Act* protects all persons against arbitrary and unreasonable discrimination by a business establishment (Civil Code section 51).

### **Hate Violence**

The *Ralph Civil Rights Act* prohibits violence or threats of violence based on an individual's race, color, religion, ancestry, age, disability, sex, sexual orientation, political affiliation, or position in a labor dispute (Civil Code section 51.7).

## **THE PROCESS**

### **Filing a Complaint**

DFEH accepts complaints from persons who believe that they have experienced discrimination in violation of these laws. Complaints must be filed within **one year** of the alleged act of discrimination. However, in cases alleging *hate violence*, complaints must be filed within **one year** of the day the victim becomes aware of the perpetrator's identity, but not more than **three years** from the date of injury.

The person filing the complaint is the **complainant**. The employer, landlord, business, or individual filed against is the **respondent**. The

complaint is the written document that states what happened and why the complainant believes the action or incident was illegal. An individual seeking to file a complaint should contact DFEH through its Communication Center at (800) 884-1684 for Employment, Unruh, and Ralph act violations and (800) 233-3212 for Housing violations. An intake interview is conducted with the complaining party.

A complaint is accepted for investigation after a careful screening process. The complaint must contain allegations that, if proven, constitute a violation of the law. Acceptance of the complaint by DFEH does not represent any determination that the law has been violated. Filing the complaint initiates the investigative process through which the Department will determine if there is sufficient evidence to support prosecution. During an investigation, DFEH is a neutral fact-finder. DFEH represents the State of California, not the complainant.

### **Service and Response**

After a complaint is filed for investigation, a copy is served on the respondent. The complaint may also be referred to another state or federal agency. A respondent has the right to answer the complaint and should provide a response that answers each allegation in the complaint in detail and includes supporting documentary evidence.

### **Settlement**

A case may be settled at any time after the complaint is filed, and settlements may occur in several ways. If the respondent approaches a complainant directly, the complainant may contact DFEH for assistance. Settlements may also result from negotiations initiated by DFEH.

Efforts to resolve the complaint may include the negotiation of a no-fault settlement. This provides an opportunity to resolve the complaint voluntarily without a determination as to its merits. This process allows the parties to avoid the administrative and financial burden of a complete investigation.

DFEH will discuss all settlement offers with the complainant and the complainant is free to accept or reject them. However, DFEH may take no further action on a complaint if the complainant rejects a settlement offer that DFEH believes is reasonable. A settlement signed by the complainant, respondent, and DFEH is enforceable in a court of law. DFEH will determine appropriate settlement terms for any agreement it signs.

### ***Investigation***

If the complaint is not resolved during the preliminary stages, it will be fully investigated by DFEH. The complainant will also be advised of his/her right to file a lawsuit. Throughout the process, both complainants and respondents are given the opportunity to ask questions, provide information, and suggest witnesses.

As the investigation proceeds, DFEH may need to

- Interview the respondent, as well as any other relevant witnesses;
- Access pertinent records and documents for review;
- Make an on-site inspection of facilities and operations; and/or
- Initiate formal discovery, which may include the issuance of subpoenas, interrogatories, or the depositions of witnesses.

### ***Complainant's Responsibilities During the Investigation***

- The complainant must cooperate fully with DFEH by providing accurate information, such as names, addresses, telephone numbers, dates, and places.
- The complainant will be asked to identify witnesses and supply documents to support the charges listed in the complaint.
- Complainants must notify DFEH in writing if they decide to withdraw their complaint, decide to file a lawsuit on their own behalf, and/or change their address, telephone number, or contact information.

If a complainant does not respond to DFEH contacts or otherwise fails to cooperate, the complainant's case may be closed.

In an employment case, complainants who allege that they have been illegally fired must continue to look for work and keep records of each contact with a potential employer, including the employer's name and address, the position sought and date of application, and the name of the company representative.

### ***Respondent's Responsibilities During the Investigation***

- The law prohibits retaliation against a complainant or any person who provides information to DFEH.
- Respondents must retain any written materials relevant to the complaint until a determination has been reached and all appeals and proceedings have been terminated.
- Respondents must provide DFEH with requested data and any additional relevant information regarding the complaint. DFEH can subpoena records and witnesses if necessary but prefers to work cooperatively with respondents.
- Respondents must file their current address with DFEH and notify DFEH of any change of address that occurs while the complaint is pending.

*Employment cases:* The law requires employers to maintain all applications, personnel, membership, or employment referral records for a minimum of **two years**. After a complaint is filed, all such records shall be retained until a determination has been reached.

### ***Confidentiality***

Offers and counteroffers made in an effort to settle a case, as well as any information disclosed during formal conciliation efforts by DFEH, will be held confidential. All other information gathered in the course

of an investigation is subject to disclosure unless otherwise protected by the individual's right to privacy (e.g., medical records).

### **Conciliation**

If the complaint is substantiated, a formal conciliation conference to settle the complaint may be scheduled with DFEH. Settlement terms may require:

- The previously denied employment, housing, or service be made available
- Compensation for any out-of-pocket losses incurred by complainant because of the discrimination
- Compensation for the complainant's emotional distress
- Correction of other harm(s) resulting from the violation(s)
- Modification of practices that adversely affect persons protected under the law
- Other actions to eliminate the effects of discrimination

The terms of any settlement will be formalized in a written agreement.

### **Prosecution**

If DFEH determines that the law has been violated and is unable to resolve the complaint through conciliation, the director of DFEH may issue an accusation of discrimination. The accusation must be issued within **one year** of the date a complaint is filed (**two years** if hate violence is alleged). In employment complaints, the respondent may elect to have the matter heard by the Fair Employment and Housing Commission, or transfer the matter to court if DFEH is seeking emotional distress damages or administrative fines. In housing complaints, either the respondent or the complainant can also elect to have the matter transferred to court.

In **housing** cases, the accusation should be issued within 100 days of the filing of the complaint, unless it is impracticable to do so. However, the

accusation must be issued within **one year** of the date the complaint is filed. After an accusation is issued, the respondent and complainant have 20 days to choose either to have the matter heard by the Fair Employment and Housing Commission or to transfer the matter to court.

### • **Fair Employment and Housing Commission**

If the respondent elects to have the matter heard by the Commission, the Commission will hear testimony under oath, take evidence, render a decision, and issue a legally enforceable order. If the Commission finds there has been illegal discrimination, the order may award to the complainant out-of-pocket losses, hiring or reinstatement (employment cases), offer of previously denied housing (housing cases), changes in a respondent's policies or practices, additional damages for emotional distress, administrative fines paid to the state (employment cases), and civil penalties paid to the complainant (housing cases). In employment discrimination cases, the Commission is limited to awarding a maximum of \$150,000 for emotional distress damages and administrative fines combined.

In cases in which hate violence occurs in violation of the *Ralph Civil Rights Act*, the Commission may order remedies for out-of-pocket and emotional distress damages as well as a civil penalty, which is awarded to the complainant. The Commission's order may be appealed to or enforced by a Superior Court.

### • **Court**

If a complaint is transferred to court, DFEH may file a lawsuit on the complainant's behalf and represent complainant's interests during the trial. Damages are unlimited in court.

### **Right to Sue**

Complainants who file private **employment** lawsuits on their own behalf under the FEHA must obtain a Notice of Right to Sue from DFEH. The lawsuit must be filed within **one year** from the date of the



## WELCOME TO THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

[Home](#) > [Complaints](#)

[Employment Complaint Flow Chart](#)

### 1. Intake

Complainants are first interviewed to collect facts about possible discrimination. Every person wishing to file a complaint will be given a date, time and place where the interview will be held. Prior to the interview, a Pre-Complaint Questionnaire, (DFEH-600-03) English or (DFEH-600-03S) Spanish, should be obtained and filled out. You can obtain a copy of this questionnaire by [contacting DFEH](#) or by viewing the [Publications](#) page. This form should be brought to your scheduled interview.

### 2. Filing

1. The interviewing Consultant drafts a formal complaint on the DFEH's standard form. It is signed and served on the Respondent.
2. If accepted for investigation, the complaint is also filed with the United States Equal Employment Opportunity Commission (EEOC) if the matter falls within the jurisdiction of that agency. As a substantially equivalent agency, DFEH's findings are usually accepted by EEOC.
3. The Respondent is required to answer the complaint and is given the opportunity to voluntarily resolve it. A no-fault resolution can be negotiated at any time during the complaint process.
4. Complaints can be filed by individuals, the Director of DFEH, or a community organization.

### 3. Investigation

1. DFEH investigates every case in a standard, timely manner.
2. DFEH has the authority to issue subpoenas and interrogatories and to take depositions. The California courts enforce DFEH's discovery efforts.
3. If the investigation does not show a violation of the law, DFEH will close the case.

### 4. Conciliation

1. Formal conciliation conferences are scheduled by the District Administrator when the investigative findings show a violation of the law.
2. During the conciliation conference, the Department presents information supporting its belief that there has been a violation and explores options to resolve the complaint.
3. If formal conciliation fails, the District Administrator may recommend litigation.

### 5. Litigation

After DFEH issues an accusation, DFEH legal staff may litigate the case in a public hearing before the Fair Employment and Housing Commission (FEHC). If emotional distress damages or administrative fines are sought, the Respondent may elect to have the case moved to a civil court. If the case is moved to court, the DFEH prosecutes, but the Complainant is the Real Party in Interest.

### 6. Remedies

The FEHC may award or order reinstatement, back pay, out-of-pocket losses, affirmative relief, training, policy changes and emotional distress damages and administrative fines. Emotional distress damages and administrative fines are limited to a total of \$150,000 per Respondent. However, an additional award of up to \$25,000 may be ordered for violations of Civil Code section 51.7 (Hate Violence). In the event the matter is removed to Superior Court, remedies are identical, with three exceptions:

- There is no limit on emotional distress damages.
- Instead of administrative fines, unlimited punitive damages may be awarded.
- The prevailing party may recover their reasonable attorney's fees, expert witness fees and costs.



WELCOME TO THE CALIFORNIA DEPARTMENT OF  
FAIR EMPLOYMENT AND HOUSING

[Home](#) → [Complaints](#) → Employment Flow Chart

## Employment Complaint Flow Chart

Initial inquiry to DFEH  
Communication Center

Intake interview

After interview, complainant  
decides not to pursue

Complaint filed, registered, and  
served\*

Non-jurisdictional cases and those  
not supporting further inquiry are  
closed

Pre-determination resolution  
explored

If resolved, case closed

Investigation

If no provable violation, case  
closed

If investigation shows a provable  
violation, resolution attempted

If settled, case closed

Formal conciliation if resolution  
effort unsuccessful

If conciliation successful, case  
closed

Accusation issued and  
Administrative Hearing or Lawsuit\*\*

Either party can elect to have the  
Department litigate in court in lieu of  
an administrative hearing

\* Where there is concurrent jurisdiction with the EEOC, the complaint is dual filed and referred. The complaint will be investigated by DFEH.

\*\* If emotional distress damages or administrative fines are sought in a DFEH accusation, the Respondent may elect to have the case litigated in civil court.

Interview Date:	Processing Time: :HR :MIN
Approval:	Action Taken:
Interviewer:	Computer Entry:

## PRE-COMPLAINT QUESTIONNAIRE - EMPLOYMENT

The information requested on this form will assist the Department in helping you. There is no guarantee that the information submitted will result in an investigation. Please check or answer only those questions that apply.

PLEASE PRINT

DATE

NAME \_\_\_\_\_  
First Middle Last

ADDRESS \_\_\_\_\_  
Street Apt. Number City County ZIP Code

TELEPHONE NUMBER: WORK ( ) HOME ( )  
Area Code Area Code

I prefer to be contacted by telephone at work/home: Days: Time:

Person to contact if you cannot be reached or if you move:

Name TELEPHONE ( )  
Area Code

I WISH TO COMPLAIN AGAINST: (Name and address of company, government entity [city, county, state], employment agency, union, etc.)

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_  
Street City County ZIP Code

TELEPHONE NUMBER: WORK ( ) NUMBER OF EMPLOYEES (Estimate, if necessary)  
Area Code Job Site Company-Wide

I WISH TO COMPLAIN AGAINST: (Other named individuals who were involved in this particular complaint.)

NAME \_\_\_\_\_

TITLE TELEPHONE ( )  
Area Code

ADDRESS \_\_\_\_\_  
(if known) Street City County ZIP Code

EMPLOYER LISTED ON W-2 FORM:

NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_  
(if known) Street City County ZIP Code

(CONTINUE ON BACK IF NECESSARY)

1. I believe I was discriminated against because of my (please circle):

- |   |   |  |   |   |
|---|---|--|---|---|
| <input type="checkbox"/> Race                               | <input type="checkbox"/> Sex                | <input type="checkbox"/> Cancer  | <input type="checkbox"/> Pregnancy      | <input type="checkbox"/> Age (40 and over)                            |
| <input type="checkbox"/> Color                              | <input type="checkbox"/> Sexual Orientation | <input type="checkbox"/> Genetic   | <input type="checkbox"/> Marital Status | <input type="checkbox"/> Denial of Family Care Leave                  |
| <input type="checkbox"/> Religion _____<br>(Please specify) |   | <input type="checkbox"/> Disability (including AIDS) _____<br>(Please specify) |   | <input type="checkbox"/> National Origin/Ancestry<br>(Please specify) |

2. Circle the discriminatory treatment and indicate the date occurred:

Terminated/Laid Off _____	Not Hired _____	Denied Promotion _____	Harassed _____
Denied Leave (Pregnancy/Family Care Leave) _____	Denied Accommodation _____	Denied Equal Pay _____	
Denied Accommodation for Pregnancy _____	Impermissible Non-Job-Related Inquiry _____		
Retaliation _____	Other _____		

3. Why do you believe the unfair treatment was discrimination? (If others were treated better than you, give names, addresses and examples.) \_\_\_\_\_
4. List the names, addresses, job titles and telephone numbers (if possible) of witnesses, co-workers, or others you feel could provide evidence. Explain what you think each witness will be able to tell us.

Name and Address

Title/Relationship

Telephone Numbers  
Home Work

Can provide information regarding: \_\_\_\_\_

Name and Address

Title/Relationship

Telephone Numbers

Home

Work

Can provide information regarding: \_\_\_\_\_

**(Use extra sheets of paper for additional witnesses, if necessary.)**

5. EMPLOYMENT DATA: (Complete as many items as you can.)

- A. Date hired or applied for job: \_\_\_\_\_
- B. Job title/salary at time of discrimination: \_\_\_\_\_
- C. Name and title of immediate supervisor or interviewer: \_\_\_\_\_
- D. If you? your employment was terminated, who replaced: \_\_\_\_\_
- E. If your employment was terminated or if you were refused a job, have you since been employed? Yes \_\_\_\_\_ No \_\_\_\_\_  
Date of hire: \_\_\_\_\_ Salary: \_\_\_\_\_ Job Title: \_\_\_\_\_
- F. If not hired:
- < How did you know about the job and/or salary? \_\_\_\_\_
  - < Did you apply by written application or verbally? \_\_\_\_\_
  - < To whom did you submit the application? \_\_\_\_\_ Date \_\_\_\_\_
  - < How did you find out you had been refused? \_\_\_\_\_ Date \_\_\_\_\_
  - < Who got the job, salary, etc. (if known)? \_\_\_\_\_

6. Have you filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) before coming to DFEH? Yes \_\_\_\_\_ No \_\_\_\_\_ Date \_\_\_\_\_

7. Have you talked to an attorney concerning this problem? Yes \_\_\_\_\_ No \_\_\_\_\_

NAME \_\_\_\_\_ TELEPHONE ( ) \_\_\_\_\_

Area Code

ADDRESS \_\_\_\_\_

8. PERSONAL DATA:

RACE/ETHNICITY (Check box that best describes)

Native American

Asian/Pacific Islander (specify) \_\_\_\_\_

PRIMARY LANGUAGE

African-American

African – Other

Caucasian (non-Hispanic)

Hispanic (specify)

SOCIAL SECURITY NUMBER: \_\_\_\_\_

(The Federal Privacy Act of 1974 prohibits a state government agency from requiring disclosure of an individual's Social Security Number. Disclosure of your Social Security Number is voluntary.)

DATE OF BIRTH

\_\_\_\_ / \_\_\_\_ / \_\_\_\_

SEX:

Male

Female

DO NOT WRITE IN THIS AREA  
INTERVIEWER'S NOTES

---

Complainant's assertions:

What does Complainant say the employer's position will be?

Comparative data/relevant information:

What does Complainant want as a remedy?

Complaint taken for investigation: Yes \_\_\_\_ No \_\_\_\_  
If taken for filing purposes only, explain why:

If **NO**, was "b" offered? Yes \_\_\_\_ No \_\_\_\_

If not taken, rationale:

Complainant advised of Pilot Mediation Program? Yes \_\_\_\_ No \_\_\_\_  
Complainant advised of statute of limitations? Yes \_\_\_\_ No \_\_\_\_  
Complainant advised of other agencies? Yes \_\_\_\_ No \_\_\_\_


Date statute runs: \_\_\_\_\_

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FOR OFFICIAL USE ONLY

DFEH CODE: LAW \_\_\_\_ BASIS \_\_\_\_ ACT \_\_\_\_ REJECT \_\_\_\_ PUBLIC \_\_\_\_

DFEH-600-031 (06/03)

	<p>DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING</p> <p><b><i>ENFORCEMENT DIVISION</i></b></p> <p><b><i>DIRECTIVE</i></b></p>	<p>DIRECTIVE NUMBER <b>202</b></p> <p>DISTRIBUTION DATE October 1, 1998</p>
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1. **SUBJECT: PRIORITY PROCESSING**

2. **PURPOSE:** To set forth the procedures for the priority processing of certain Employment, Unruh Civil Rights Act, and Ralph Civil Rights Act complaints.

3. **BACKGROUND:** Generally it takes at least two years for a discrimination complaint filed with the Department of Fair Employment and Housing (DFEH) to be processed from the point of an investigation to an accusation, a public hearing, and a decision by the Fair Employment and Housing Commission (FEHC). The timeframe is longer for cases that go through the civil litigation process. DFEH policy requires that complaints be processed in the order in which they are received/filed or on a first in, first out basis with the exception of those identified as having priority status.

4. **PROCEDURES:**

Cases which have been designated as "**priority**" will be completed, including investigative reports or Progress Memos, within **120** days of filing. Formal discovery will be commenced as soon as it appears appropriate. Cases will be designated as priority as follows:

A. **Cases Always Assigned Priority Status:**

The following cases will **always** be assigned priority status:

- 1) All Ralph Civil Rights Act cases;
- 2) Any employment case that is a **companion** to a Ralph Civil Rights Act case; and
- 3) Cases where the complainant has AIDS, or is HIV Positive.

B. **Cases Which May Be Assigned Priority Status:**

Under certain circumstances, the following cases **may** be assigned priority status:

1) Complaints in which the complainant has a terminal illness and BOTH of the following conditions exist:

- a) The complainant alleges, verbally, in writing, or in the complaint that he/she has a terminal illness; and
- b) The complainant alleges that there is a possibility that he/she might not survive until the completion of the administrative or civil process.

**NOTE:** Complaints assigned priority status because complainant has a terminal illness will be immediately reviewed to determine whether a temporary restraining order (TRO) is appropriate. (Refer to Directive 235, "Emergency Relief For Complainants in Employment Cases," for guidance.)

2) Employment cases in which the complainant alleges retaliation when BOTH of the following conditions exist:

- a) The complainant alleges that the retaliation occurred because he/she previously filed a complaint with DFEH or participated in a DFEH investigation, hearing, or court case; and
- b) The alleged retaliation occurred within 180 days of the filing of the previous formal complaint or within 180 days of complainant's participation in an investigation, hearing, or court process.

3) When a priority retaliation complaint is filed which evolves from a prior DFEH complaint and the initial complaint is still open, the original complaint will also be designated as priority. (Both cases will be assigned to the same Consultant.)

**C. Cases Which Will Not Be Assigned Priority Status:**

Where the complainant alleges retaliation for filing a charge with the U.S. Equal Employment Opportunity Commission (EEOC), priority status **will not** be assigned and the complaint will be handled as follows:

- 1) The complaint will be waived to EEOC for processing and immediately closed with Closing Category 11, "Processing Waived to Another Agency;" or
- 2) Where EEOC does not have jurisdiction because the 300-day statute of limitations for filing has passed, the complaint will be processed by DFEH on a non-priority basis.

**D. Exceptions:**

- 1) The District Administrator has the discretion to designate any case as a priority.
- 2) Cases so designated by the District Administrator must be justified. Some examples of justification are:
  - a) The complaint will be processed as a class action complaint;
  - b) The complaint concerns a personnel practice that discriminates against a large number of individuals;
  - c) The complaint is one of multiple complaints against one respondent; or
  - d) The complaint is a Director's Complaint.

**E. Responsibility for Identifying Priority Complaints:**

- 1) The assigned Consultant is responsible for identifying the need for priority processing.
- 2) When a complaint is identified as priority at intake, the intake Consultant should ensure that the complaint is drafted and signed within 24 hours if the interview was conducted in the office, and within 10 days if the interview was done by telephone and the complaint was mailed for signature.
- 3) The assigned Consultant is responsible for advising the support staff to:
  - Enter the case in the Case Management Information System (CMIS) as a priority;

- Add a "v" suffix to the case file label;
- Write "PRIORITY" (in red) on the case file next to the label.

**F. Priority Case Suffix:**

- 1) Priority cases will be identified by adding the suffix "v" as the last indicator after any other suffixes appropriate to the case. Refer to the Enforcement Division's Clerical Case Processing Manual for details on case numbering.
- 2) The assigned Consultant will enter a red "v" on his/her Case Log for any case designated as a priority.

**G. Removal of Priority Status:**

When there is no longer a reason for a case to be identified as a priority (e.g., the prognosis of an illness is no longer fatal), the assigned Consultant, with the concurrence of the District Administrator, will:

- 1) Indicate the status change on the Case Diary;
- 2) Complete an EDP Update/Closure Report (DFEH-800-02) to remove the "v" suffix in the computer;
- 3) Line out the "PRIORITY" entry on the case folder;
- 4) Block out the "v" on both the Case Diary and the case file label (complaints will not be amended to remove the "v" suffix, therefore it will remain on the complaint); and
- 5) Process the case in accordance with its filing date sequence.

**5. APPROVAL:**

\_\_\_\_\_  
Nancy C. Gutierrez, Director

\_\_\_\_\_  
Date



**DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING  
ENFORCEMENT DIVISION  
DIRECTIVE**

**DIRECTIVE NUMBER  
205**

**DISTRIBUTION DATE  
August 8, 2007**

1. **SUBJECT: ACCEPTANCE OF COMPLAINTS AGAINST INDIVIDUALS**
2. **PURPOSE:** To set forth the procedures for identifying situations in which the Department of Fair Employment and Housing (DFEH) has jurisdiction over complaints against individuals.
3. **BACKGROUND:** Generally, the Fair Employment and Housing Act (FEHA) applies only to employers of at least five employees. Certain provisions of the FEHA, however, extend jurisdiction to individual persons. This Directive identifies those situations in which DFEH complaints may be accepted against such individuals.
4. **PROCEDURES:**

Certain provisions of the FEHA prohibit individual **persons** from discriminating against employees or applicants. Complaints naming individual persons as respondents may be accepted in any of the following circumstances:

**A. Respondent As A Harasser**

The person (respondent) **harasses** an employee or applicant because of any of the protected bases (Gov. Code, § 12940, subd. (j)(1)). This applies to harassment by supervisory as well as non-supervisory employees. It also applies to non-employee harassers.

**B. Respondent Retaliates**

The person (respondent) **retaliates** against another person for opposing practices forbidden by the FEHA, or for filing a DFEH complaint, or for participating or testifying in a DFEH proceeding (Gov. Code, § 12940, subd. (h)).

**C. Respondent Aids, Abets, Incites, Compels, or Coerces Discriminatory Acts**

The person (respondent) **aids, abets, incites, compels, or coerces** acts forbidden by the FEHA, or attempts to do so (Gov. Code, § 12940, subd. (i)).

D. **Employment Agency in Harassment, Retaliation or Aiding and Abetting Case**

The person (respondent) qualifies as an **employment agency** that receives compensation for procuring employees or opportunities for employment and either harasses, retaliates against, aids, abets, incites, compels or coerces acts forbidden by the FEHA or fails to eliminate harassment or retaliation in compliance with Government Code section 12940, subdivisions (j) or (g).

5. **APPROVAL:**

\_\_\_\_\_  
Wanda J. Kirby, Acting Director

\_\_\_\_\_  
Date



DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING  
***ENFORCEMENT DIVISION***  
***DIRECTIVE***

DIRECTIVE NUMBER  
**213**

DISTRIBUTION DATE  
February 7, 2003

1. **SUBJECT: COMPLAINTS AGAINST RELIGIOUS, NON-PROFIT ORGANIZATIONS**
2. **PURPOSE:** To set forth the procedures for processing complaints or prospective complaints where there is a question of jurisdiction because the respondent may be, or claims to be, a religious, non-profit institution under the Fair Employment and Housing Act (FEHA).
3. **BACKGROUND:** The FEHA, at Government Code sections 12926, subdivision (d), and 12940, subdivision (j)(4)(B), provides that "employer" does not include a religious association or corporation not organized for private profit. However, the following exceptions apply:

A religious corporation or association that is a religiously affiliated health care facility is an employer under the FEHA and may not discriminate with respect to persons employed to perform duties that are not "religious duties" (defined at Gov. Code § 12926.2 (b)). However, it may restrict employment to adherents of a particular religion in any position constituting an executive or pastoral-care position.

A non-profit benefit corporation formed by or affiliated with a particular religion that operates an educational institution as its sole or primary activity may restrict employment to individuals of a particular religion. However, such corporations may not discriminate based upon other FEHA protected bases such as race, sex, national origin, etc.

It is important to note, neither the FEHA nor regulations of the Fair Employment and Housing Commission exempt non-profit religious organizations from the provisions of the California Family Rights Act (Gov. Code § 12945.2).

Title VII of the Civil Rights Act of 1964 (Title VII) does not have the same exemptions regarding religious organizations as those contained in the FEHA.

The language of Title VII differs from the FEHA in that it contains only a limited exemption for religious corporations. Section 702 of Title VII allows religious corporations, associations, educational institutions or societies to employ individuals of a particular religion to perform work connected with carrying on the organization's activities. Section 703(e)(2) specifically permits schools, colleges, universities, or other educational institutions

"...to hire and employ employees of a particular religion if the institution is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of such an institution is directed toward the propagation of a particular religion."

Although religious corporations or organizations under Title VII may base relevant hiring decisions on religious preferences, they may not make such decisions based on other protected bases such as race, sex, or national origin.

#### 4. **PROCEDURES:**

##### A. **Intake:**

Where there is doubt at the intake stage whether an institution is religious in nature and, therefore, exempt from coverage as an employer, the case should be accepted. The issue of jurisdiction should be analyzed as a part of the investigation of the case.

##### B. **Investigation:**

The investigation should initially focus on obtaining the documentation necessary to analyze jurisdiction from the respondent. Sample interrogatories for this purpose are available in the Pre-Accusation Discovery Manual. If the respondent refuses to respond to the interrogatories, the case should be referred to Legal for enforcement.

##### C. **Determination of Religious Status:**

- 1) When the relevant information has been collected, it should be summarized in a memorandum to be attached to a "Legal Transmittal" (DFEH-600-26). (Refer to Directive 311, "Referral of Case Files to Legal.") The case should then be forwarded to the Legal Division for a determination as to the organization's status as a religious non-profit institution. The determination will be made on a case-by-case basis based on the facts of

each individual complaint. Even in those instances where the District Administrator feels the information available is clear that the respondent is exempt, the case should be forwarded to the Legal Division. As respondents are identified as "exempt," this information will be circulated to District Office staff.

- 2) When the Legal Division determines that the organization is not exempt, the processing of the complaint will proceed as usual. Where an organization is determined to be exempt from the applicable provisions of the FEHA, the legal opinion will be forwarded to the District Administrator with copies to the Deputy Directors of Enforcement and the Regional Administrators.

**D. Complaints Where Religious Exemption Is Identified:**

- 1) When an organization's exemption as a religious institution is identified at intake, including those organizations previously identified by the Legal Division for that particular office, where there is Title VII jurisdiction as described above, a complaint will be accepted, registered, and waived to EEOC. The complainant will be mailed a copy of DFEH-200-22.
- 2) Where the complaint is not jurisdictional with EEOC, the complaint should be accepted for "filing purposes only" following the procedures in Directive 228, "Complaints Where One or More of the Allegations or Parties are Rejected for Investigation."
- 3) When an organization's religious exemption is verified after a complaint is accepted, the complaint will be closed with Closing Category 01, "No Jurisdiction." If the case is dual filed with EEOC, it will be closed with Closing Category 11, "Processing Waived to Another Agency," and deferral will be made to EEOC. If the matter is not jurisdictional with EEOC, such other referrals, as are appropriate, will be made.

**5. APPROVAL:**

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Dennis W. Hayashi, Director

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Date

	<p><b>DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING</b></p> <p><b><i>ENFORCEMENT DIVISION</i></b></p> <p><b><i>DIRECTIVE</i></b></p>	<p><b>DIRECTIVE NUMBER</b></p> <p style="text-align: center;"><b>302</b></p> <p><b>DISTRIBUTION DATE</b></p> <p style="text-align: center;">October 1, 1998</p>
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1. **SUBJECT: RECEIPT OF CONFIDENTIAL INFORMATION**
  
2. **PURPOSE:** To set forth the procedures for the receipt and use of information accepted under a promise of confidentiality.
  
3. **BACKGROUND:** The Fair Employment and Housing Act (FEHA), Government Code section 12932, subdivision (b), states, in part, that "...the department shall hold confidential any information acquired in the regular performance of its duties *upon the understanding that it would be so held.*" (emphasis added). California Evidence Code section 1040 also outlines provisions for the receipt of confidential information by public employees in the course of their duties.

Because of the limits placed on the use of confidential information, it is necessary to ensure that confidential information will be accepted by the Department of Fair Employment and Housing (DFEH) only in rare instances. It is also necessary to ensure that when such information is accepted by the Department, it is not inadvertently released or used in an otherwise public document, such as an investigative report.

4. **PROCEDURES:**
  - A. **"Confidential Information" Defined:**
    - 1) "Confidential information" as used in this Directive refers *specifically* to information obtained from an individual only after the Department *agrees that it will not be released to anyone but DFEH personnel.*
  
    - 2) Where a promise of confidentiality has been made regarding information communicated orally, the Consultant's notes of such communications are to be handled in the same manner as written material accepted as "confidential."

- 3) Information received by the Department that has been marked confidential by the provider is not confidential information as defined above unless there has been prior agreement that the information will not be released.

**B. When to Accept Confidential Information:**

Confidential information is to be accepted only where:

- 1) there is no other way to obtain the information; and
- 2) the information is expected to lead to other information which need not be kept confidential; and
- 3) the District Administrator agrees that the information will be kept confidential.

**C. Release of Confidential Information:**

- 1) Information accepted by a Department representative under a promise of confidentiality may not be released for any purpose. This means, for example, it cannot be used to obtain information from third parties, substantiate a progress report, substantiate a closure, in settlement discussions or to prove a case at hearing, etc.
- 2) If confidential information as defined above is subpoenaed, the case should be immediately referred to the Legal Division for handling.

**D. Guidelines For Accepting Confidential Material:**

Confidential information should be accepted as follows:

- 1) The decision to accept confidential information will be the responsibility of the District Administrator. The authority to make such decisions, however, may be delegated as appropriate.
- 2) Once such information is accepted, it shall be marked "confidential" and retained in a separate envelope in the case file. The envelope shall be clearly marked with the case number and the words:

**"CONFIDENTIAL INFORMATION ACCEPTED PURSUANT  
TO GOVERNMENT CODE SECTION 12932,**

SUBDIVISION (b), AND EVIDENCE CODE SECTION 1040.  
NOT TO BE RELEASED TO ANYONE BUT DFEH  
PERSONNEL."

5. APPROVAL:

\_\_\_\_\_  
Nancy C. Gutierrez, Director

\_\_\_\_\_  
Date



**DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING  
ENFORCEMENT DIVISION  
DIRECTIVE**

**DIRECTIVE  
NUMBER  
304**

**DISTRIBUTION  
DATE  
October 1, 1998**

1. **SUBJECT: INVESTIGATIVE WORK PLANS**
2. **PURPOSE:** To set forth the procedures regarding the use of investigative work plans.
3. **BACKGROUND:** Case analysis is a crucial part of all Department of Fair Employment and Housing (DFEH) investigations. It is the process by which a Consultant analyzes and evaluates the information in the case file, determines what additional information is needed, and identifies the source of the information. The investigative work plan (IWP) is the tool that facilitates case analysis and enables a Consultant to properly plan an investigation.
4. **PROCEDURES:**
  - A. **Guidelines for the Use of the Investigative Work Plan:**

The following guidelines are to be used when completing an Investigative work plan:

    - 1) An Investigative work plan will be prepared on every case that requires an investigation. The Investigative Worksheet (DFEH-400-08) or an approved alternative format may be used for this purpose.
    - 2) An IWP is to be completed as soon as possible after receipt of the response, but no later than three (3) months after the complaint filing date.
    - 3) The IWP will be filed under the "Confidential" tab in the case file where it will be retained after the case is closed.
    - 4) During case reviews, District Administrators will review the IWPs for all cases that are open more than 90 days. District

Administrators will initial the IWPs to indicate that they have completed their review of the investigative plan.

**B. Format for Investigative Work Plans:**

While the DFEH Investigative Worksheet (DFEH-400-08) is available, Consultants may use their own format as long as they:

- 1) Address every issue raised in the complaint.
- 2) Follow the "relevant question" analytical outlines contained in the Case Analysis Manual.
- 3) Summarize the information obtained from the respondent and complainant under the appropriate case analysis relevant questions. Such information should be obtained from the Pre-Complaint Questionnaire (PCQ), intake notes, documentation submitted by the complainant, the respondent's response and supporting documentation, and any witness interviews or witness statements contained in the file.
- 4) Identify the additional information that needs to be gathered and the source of the information.

**NOTE:** For a sample Investigative Worksheet that meets all of the above criteria, refer to Attachment 1.

**5. APPROVAL:**

\_\_\_\_\_  
Nancy C. Gutierrez, Director

\_\_\_\_\_  
Date

## INVESTIGATIVE WORKSHEET

Case Name: HUNT/Smitty's Coffee Shop and Henry Woo

Case Number: E-9798-R-3282-00-se

Filing Date: 01/01/98 Consultant: J. Jones

I. **Jurisdiction:**

Not disputed.

II. **Discrimination:** Termination

**Issue Question(s):** Was Complainant terminated due to her age, 59?

**Relevant Question:** Did adverse action occur?

**Evidence for Complainant**

Complainant states she was terminated.  
Did not provide copy of termination/lay off notice.

Need copy of lay off notice,  
unemployment information from  
Complainant.

**Evidence for Respondent**

Respondent states in response  
Complainant laid off due to slow  
down in business and  
Complainant's ill health.  
Respondent states unable to locate  
any lay off notices.

**Relevant Question:** Is Respondent's reason factually accurate?

**Evidence for Complainant**

**Evidence for Respondent**

Complainant states younger waitresses hired after she was terminated. No work slow down. Complainant denies she was in ill health.

Need to contact new waitresses hired.  
Need to contact Complainant's witnesses.

Respondent states business slow down and ill health of Complainant. Respondent does not provide any business records nor medical evidence to support.

Respondent has also provided a witness statement (Lawrence Tail) indicating wage was not a factor in termination.

Need business records for previous three months. Need copy of any medical documents. Respondent provided telephone numbers for waitresses laid off.  
Respondent has knowledge of others who can confirm Complainant's ill health.

**Relevant Question:** Does Respondent's treatment of similarly situated employees indicate termination due to age?

**Evidence for Complainant**

Complainant provided names of other waitresses laid off at approximately the same time who she states are all over forty (Adeline Keen, Jackie Kuffel, Jackie Weyant, and Connie). Respondent in response provided a list of all waitresses laid off at the approximate time as Complainant, all were over the age of fifty.

Need to contact other witnesses laid off.

**Relevant Question:** Does application of Respondent's lay off policy indicate age bias?

**Evidence for Respondent**

Respondent has not provided any information to indicate that any other waitresses besides those over fifty were laid off.

Respondent indicates that he currently employs six employees over the age of forty but does not indicate in what capacity.

Need confirmation from Respondent of employees over the age of forty, what capacity they are employed in and date of hire.

**Evidence for Complainant**

Complainant not aware of how decision was made.

**Evidence for Respondent**

Respondent has stated no lay off policy.

Need from Respondent criteria for lay off.

Need from Respondent persons retained, age, and reason for retaining.

**Relevant Question:** Does the manner in which Complainant was replaced indicate termination due to age?

**Evidence for Complainant**

Respondent in response provided the names of three waitresses hired after Complainant was laid off, all of whom were under the age of forty. One, Trina Hoagy, 33, was hired the day after Complainant was laid off.

**Evidence for Respondent**

Need copy of application/ confirmation of hire date, date of birth from Respondent. Need to contact new employees.

**Relevant Question:** Does the relevant statistical pattern indicate that Complainant's age was a factor in her termination?

**Evidence for Complainant**

Ask Complainant for any information regarding statistical pattern of other waitresses laid off.

**Evidence for Respondent**

Need number of waitresses laid off and age of each. Need number and ages of waitresses retained.

III. **Affirmative Defenses:** None

IV. **Remedy:**

Complainant seeks lost wages for the period of time during which she was unemployed from 10/15/97 until employment. She states she is currently making \$300.00 per month. She indicates her previous wages were \$600.00 per month. Complainant is unsure of reinstatement. The complainant is also seeking compensatory damages because ...