

## **Charge / Complaint Processing At the EEOC and the DFEH**

Since you believe you have been discriminated or retaliated against on the basis of a protected characteristic, you should become aware of the following differences in how the two government agencies will handle your discrimination / retaliation issues.

The Federal and State Agencies: The federal agency is known as the U.S. Equal Employment Opportunity Commission (EEOC). The California state agency is known as the Dept. of Fair Employment & Housing (DFEH). The two agencies function differently. The persons who “investigate” your charge of discrimination at the EEOC are called “Investigators.” They are considered law enforcement officials, and they carry federal credentials like an FBI badge. The persons who “evaluate” your complaint of discrimination at the DFEH are called “consultants.” These consultants do not carry credentials, nor are they considered law enforcement personnel, but merely “advisors” to both employers and employees.

Laws Enforced: The EEOC enforces the following laws: Title VII of the Civil Rights Act or “Title VII” (prohibits discrimination based on race, color, creed, national origin, or sex), the Age Discrimination in Employment Act or “ADEA” (prohibits discrimination based on age), the Americans with Disabilities Act or “ADA” (prohibits discrimination based on physical or mental disability), and the Equal Pay or “EPA” (prohibits paying one gender less than the other for work requiring skill, effort, and responsibility). In contrast, the DFEH enforces the Fair Employment & Housing Act (“FEHA”) which prohibits discrimination based on race, color, creed, national origin, ancestry, sex, age, disability, medical condition, genetics, sexual orientation, and gender identity. The DFEH does not enforce the California Equal Pay Act. All these laws are designed to protect employees and applicants from receiving adverse employment treatment “because of” a protected characteristic the worker has, and these are not the only laws the two agencies enforce.

Retaliation: All these laws also contain anti-retaliation language, so that you can also file a charge or a complaint of retaliation based on your having (a) filed or threatened to file a charge / complaint with the EEOC or DFEH, respectively, (b) complained about discrimination at work based on a protected characteristic, (c) participated in any type of investigation related to your, or someone else’s, charge / complaint, or (d) been associated with someone against whom the employer wants to discriminate because of that person’s protected characteristic.

Employers Covered: For the federal laws enforced by the EEOC, Title VII and the ADA cover employers having at least 15 employees, the ADEA covers employers having at least 20 employees, and the EPA covers employers with at least 2 employees. For the Fair Employment & Housing Act, all employers with at least 5 employees are covered with respect to acts of discrimination, and these same employers are covered as soon as they have 1 employee (or applicant) with respect to acts of unlawful harassment.

Difference Between Discrimination and Harassment: Both the federal laws and

California law (FEHA) distinguish between conduct that is termed “discrimination” and conduct termed “harassment.” Sometimes conduct is defined by the courts as both discrimination and harassment, so the distinction in the two definitions is not always easy to make. Under the federal laws (Title VII, ADEA, and ADA), the employer (called the “respondent”) against whom the charge of discrimination is brought is always the company, union, or government employer. Under the FEHA (California law), the employer can be the company, union, or government employer, and the employer may also be the individual who has harassed an employee. Therefore, in most cases, the person filing the discrimination and harassment charge at the EEOC will only file one charge against the employer entity, whereas the person filing the discrimination and harassment complaints at the DFEH will often file one complaint against the employer, and other complaints against the individual harassers.

If you filed your charge of discrimination against the company, union, or government with the EEOC, and you later realize you need to file a harassment complaint against an individual person, you can still remedy the situation by filing an individual harassment complaint against that person at the DFEH, separate from your original EEOC complaint against the employer. The EEOC will not help you with this individual harasser complaint, so you will need to contact the DFEH directly and file this harassment complaint yourself.

What the Complaint Is Called: The EEOC accepts “**charges**” of discrimination in California up to 300 days from the date of the discriminatory act. The DFEH accepts “**complaints**” of discrimination up to one year from the date of the discriminatory act. With the DFEH, if you discover the discrimination more than one year after it has occurred, you are allowed an additional three months (1 year 3 months total) to file your complaint of discrimination. At the EEOC, the person filing the charge is called the “charging party” (or “CP” for short), and at the DFEH, the person filing the complaint is called the “complainant.”

The Right-to-Sue Letter: Both the EEOC and the DFEH retain the right, or ability, to sue the employer after you have filed your charge / complaint of discrimination. However, the EEOC and DFEH give up their ability to sue the employer when they issue the “Right-to-Sue Letter” to you, so you can file the lawsuit if you wish to do so.

**When** the two agencies issue their Right-to-Sue Letters is markedly different. Because California’s law (FEHA) in many cases covers the same employers as are covered by one of the federal laws, you will often end up with two Right-to-Sue letters, one from the DFEH, the other from the EEOC. You should talk with an attorney about the situations where you might receive only one Right-to-Sue letter. The two agencies have agreed together (in what is called a “Work Sharing Agreement”) that only one agency will investigate your claims, despite the fact that you are entitled to investigations under both federal law and state law.

***If you file your charge of discrimination directly with the EEOC, the EEOC will normally mail the DFEH Right-to-Sue letter immediately to you, hidden within the original packet of materials mailed to you by the EEOC.*** Most EEOC charging parties never realize they have received the DFEH Right-to-Sue letter, because that letter is buried in the EEOC envelope. Then, after the EEOC has finished its own processing of your charge, the EEOC will issue its own federal Right-to-Sue letter to you.

On the other hand, if you file your complaint of discrimination directly with the DFEH, and that agency processes your complaint, it is not until the end of that processing (often when

the “investigation” is finished), that the DFEH will issue its own Right-to-Sue letter to you. Then the DFEH will notify the EEOC that the DFEH has finished investigating your complaint, and the EEOC will then issue its own federal Right-to-Sue letter to you several days later.

If you file your DFEH complaint of discrimination, and you immediately request your Right-to-Sue letter after informing the DFEH that you have an attorney, you are required to serve by certified mail a copy of that complaint of discrimination on the responding party whom you have accused. You accomplish this service within 60 days after receiving your Right-to-Sue letter. Because of these difficult service requirements, we advise that when you file your complaint with the DFEH, and you request your Right-to-Sue immediately, that you *not* indicate that you have an attorney representing you on the matter.

The Right-to-Sue Time Limits: The EEOC Right-to-Sue letter gives you 90 days *from your receipt of the Right-to-Sue letter* to file a lawsuit based on the allegations in your charge of discrimination. The DFEH Right-to-Sue letter gives you 1 year *from the date on the face of the Right-to-Sue letter* to file a lawsuit based on the allegations in your complaint of discrimination. If the EEOC has already sent the DFEH Right-to-Sue letter to you, and the EEOC is still processing your charge of discrimination when the DFEH 1 year Right-to-Sue period runs out, then the law gives you an extension for filing a lawsuit using your DFEH Right-to-Sue letter, that extension being until the period ends on the EEOC Right-to-Sue letter.

Here is an example of how the DFEH Right-to-Sue letter extension works. You file your charge with the EEOC. A few days later the EEOC issues the DFEH Right-to-Sue letter on March 1, 2009. The EEOC’s investigation continues for 17 months until August 1, 2010, when the EEOC issues the federal Right-to-Sue letter. When you receive that EEOC Right-to-Sue letter (around August 4, 2010), you will have 90 days from the date of your receipt to file a lawsuit using the EEOC Right-to-Sue letter, and you will also have the same 90 days from the date of receipt to file a lawsuit using your DFEH Right-to-Sue letter (even though the one year under the DFEH letter technically expired on March 1, 2010).

The Equal Pay Act: If you have a complaint under the federal or State Equal Pay Act, please note that the rules listed above for charge filing, Right-to-Sue Letters, etc. do not apply in many cases. You need to speak with an attorney to go over the same information described above to see how that same information applies to the EPA. In fact, you need to consult with an attorney about all the aspects of this DFEH, EEOC process, as the process can be hard to understand and follow. You also need to consult with an attorney to find out how the laws described in this paper apply to your situation, as well as what other laws may apply to your facts, laws such as the Family Medical Leave Act, California Family Rights Act, Employee Retirement Income Security Act, and various other labor laws and common laws.

Limits on the Investigative Processing: The EEOC investigators and the DFEH consultants have limits imposed on them by virtue of their work loads. As a result of those limits, the two agencies rarely find violations of the law in more than 5% of the charges / complaints investigated. Their attorneys rarely prosecute even 1% of the charges / complaints investigated. Investigators and consultants are often limited to spending 8-12 hours on each “investigation” because of the sheer volume of the cases in their file cabinets. Both agencies have high rates of turnover.

To help the agency process your charge / complaint, we recommend you assume that you must assist in the investigation, and that you do at least the following: (a) Supply a **chronology** of all important events, dates, and persons; (b) Prepare a **list of witnesses** who can verify the facts of your case, along with contact information and a list of questions to be asked of each witness; and (c) Prepare a complete **list of all the documents** the government should demand, including personnel files, disciplinary records, comparative records. Both agencies are vastly under funded, the investigators and consultants are severely under trained and over worked, and the attorneys are understaffed. These personnel need all the support they can get from you.

Limits on Law Enforcement: If the EEOC concludes your rights have been violated, it may issue a Letter of Determination that finds “reasonable cause” that the employer has violated one of the laws. If the DFEH concludes your rights have been violated, it may issue an Accusation that finds “reasonable cause” that the employer has violated one of the laws, but any Accusation must be issued within 1 year of the date of your complaint of discrimination. Both agencies then try to resolve your complaint informally with the employer, so that no lawsuit is required.

If informal resolution is not achieved, the EEOC must decide whether it will issue its Right-to-Sue letter to you, or whether the EEOC will retain the right-to-sue and file a lawsuit itself against the employer. Under Title VII, the EEOC is not permitted to sue divisions of government, such as City, County, or State entities. Under the ADEA and ADA, the EEOC may sue these government entities. In reality, the EEOC’s attorneys in California only file lawsuits in about one of every 400 cases processed by the EEOC.

If informal resolution is not achieved, the DFEH must decide whether it will issue its Right-to-Sue letter to you, or whether the DFEH will retain the right-to-sue and prosecute your matter before an Administrative Law Judge. Under the FEHA, the DFEH is required to allow the defendant to choose in what forum it will be prosecuted, either in a State court or before a State Administrative Law Judge. Again, the DFEH’s attorneys in California prosecute Accusations in court or before an Administrative Law Judge even less frequently than do the EEOC attorneys.

Neither the EEOC nor the DFEH can prosecute legal claims that you have against your employer that fall outside their laws. For example, neither the EEOC nor DFEH prosecutes wrongful termination claims. Neither prosecutes contract claims that allege your employer violated its own policies, procedures, handbook, or written agreement with you about how you would be treated on the job. Neither prosecutes personal injury (“tort”) claims which could include assault, battery, defamation, invasion of privacy, infliction of emotional distress, negligence, misrepresentation, and several other types of wrongful personal conduct.

Both the EEOC and DFEH have limits, in certain cases, as to how much they can recover in money damages for you. Those limits are determined within the laws enforced by the EEOC and DFEH, and the two agencies have no say as to the money limits imposed by the laws.

Editorial: The next time you consider voting for a candidate because that person promises “not to raise taxes,” consider whether your vote for that person may be a vote against proper funding of the government civil rights agencies, law enforcement agencies, and employment laws that protect workers in this country. The EEOC and DFEH can only do as much “investigating” as is funded by our taxpayer dollars.