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Driven to exhaustion

AVOIDING FEHA ADMINISTRATIVE POTHoles ON THE BUMPY ROAD TO LITIGATION

Administrative exhaustion under California's Fair Employment and Housing Act ("FEHA"), which appears at first glance to be routine and straightforward, can be a process fraught with traps for the unwary. From confusion regarding how the Department of Fair Employment and Housing ("DFEH") operates, to misplaced reliance on ambiguities in the law, to failure to remain vigilant about running of the statutes of limitations, there are potential pitfalls at every turn in the administrative exhaustion process that can open the door for defendants to fully exploit every mistake.

The purpose of this article is to highlight the traps to avoid when exhausting administrative remedies under FEHA. In light of these pitfalls, legislative, regulatory and/or practical changes need to be made to provide further clarity to the process and to effectuate the purposes of the FEHA; to make the administrative remedy process a tool – *not an impediment* – for aggrieved employees to vindicate their rights.

Overview of the administrative exhaustion requirement

The DFEH is tasked with receiving, investigating, and conciliating complaints of unlawful employment discrimination. (Gov. Code, §§ 12930, 12963 et seq.) Prior to filing any civil action for violations of the FEHA, an aggrieved person must first file with the DFEH a verified complaint that "set[s] forth the particulars" of the unlawful practices complained of – specifically, "a description of the alleged act or acts of discrimination, harassment or retaliation," "the date of the most recent alleged act" thereof, and "each protected basis upon which the alleged discrimination or harassment was based." (Gov. Code, § 12960(b).) With limited exceptions, this complaint must be filed within "one year from the date upon



which the alleged unlawful practice or refusal to cooperate occurred" (Gov. Code, § 12960(d).)

There are *two* kinds of "initial contact" with the DFEH. If the complainant wants to pursue civil litigation, he or she can obtain an immediate right-to-sue letter by simply filling out the form available on the DFEH website: www.dfeh.ca.gov. (2 Cal. Code Regs., tit. 2 ["2 CCR"], § 10005.) If, on the other hand, the complainant wants the DFEH to investigate before filing a lawsuit, he or she may submit an intake form, which is also available on the DFEH website. Regardless of whether an investigation is conducted or completed, or whether the complainant made any request for the letter, the DFEH *must* issue a right-to-sue letter to the complainant within one year of the filing of a verified DFEH complaint. (Gov. Code, § 12965(b); *Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 650.)

The complainant has one year from the date of the right-to-sue letter to commence a civil action under the FEHA. (Gov. Code, § 12965(b).) The plaintiff bears the burden of pleading and proving a timely filing of a sufficient DFEH complaint and obtaining a right-to-sue letter. (*Holland v. Union Pac. R.R. Co.* (2007) 154 Cal.App.4th 940, 945.) Failure to timely and sufficiently follow

these requirements is a jurisdictional defect and thus grounds for dismissal. (*Miller v. United Airlines, Inc.* (1985) 174 Cal.App.3d 878, 890.) However, the defendant's failure to raise administrative exhaustion as a defense waives its right to raise it on appeal. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1348.)

Overview of the DFEH investigative process

To initiate a DFEH investigation, the employee must first fill out and file an "intake form" (erroneously referred to in the DFEH regulations as a "*pre-complaint inquiry*"), which opens a "case" with the DFEH. (2 CCR, § 10002.) An investigator is then assigned, and an interview with the complainant is scheduled and conducted. (2 CCR, §§ 10007, 10008(a).) If the DFEH decides to proceed, it will draft a complaint for the complainant to verify and serve the verified complaint on the respondents. (Gov. Code, § 12960(b); 2 CCR, §§ 10007, 10009(a), 10023.) An ensuing investigation by the DFEH – which is akin to the "discovery" process in litigation and includes written interrogatories, investigative subpoenas, and requests for production of documents – must be promptly initiated. (2 CCR, §§ 100026-100028.) At any point during the DFEH investigation, the complainant may withdraw the complaint (to obtain a right-to-sue letter), or the DFEH may decline to proceed (in which case it must issue a right-to-sue letter). (2 CCR, § 10032.)

Trap #1: Complainant fails to timely file a DFEH complaint while pursuing the employer's internal remedies

Often, employers' complaint policies and procedures lead aggrieved employees to believe that they must exhaust all

See Browne & Lee, Next Page

internal remedies within the company prior to being able to turn to the DFEH. This is not true; employees need not go through the company's own internal grievance procedures, nor can they be forced to do so. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1080.) The employee may voluntarily opt to pursue the employer's internal remedy, however, it may support equitable tolling of the FEHA statute of limitations. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 101, 111.) In contrast, "[i]nformal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Elec. Co.* (2013) 217 Cal.App.4th 1402, 1416.) Further, equitable tolling does not apply if the employee is on notice that his or her rights under the FEHA have been violated and that any alternative remedy would be futile. (*Id.* at p. 1417.)

Trap #2: Complainant fails to name all potential defendants in the DFEH charge

As a prerequisite for filing a FEHA civil action against a particular employer, the employee must have named that same employer in the caption or body of the DFEH complaint. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 116.) Issues often arise when, in the midst of litigation, the plaintiff later ascertains the real employer (or additional employers) who was not originally named in the DFEH complaint. As a precautionary measure, the plaintiff's attorney should carefully research the employer entity prior to filing a DFEH complaint and consider naming any possible joint employers as well.

Trap #3: Complainant has multiple, discrete causes of action with different statutes of limitations

In order to create statute-of-limitations issues, defendants are becoming more aggressive in arguing that the limitations period for different causes of actions accrues at different times. For example, we have seen defendants argue that an employee's statute of limitations

on a failure to accommodate claim ran after the plaintiff was released without restrictions from disability leave, even though she had been placed on a job search leave and was actively pursuing other positions in the company to replace the one her employer filled while she was on leave. Such a narrow and rigid interpretation of the DFEH exhaustion rule, which would require an employee to exhaust her administrative remedies while she is still employed and actively seeking positions through an accommodation process, "would promote premature and potentially destructive claims." (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 494.) Nevertheless, there are courts willing to entertain such arguments.

Plaintiffs' attorneys should consider two equitable exceptions to the statute of limitations requirement when such arguments are made: 1) the relation-back doctrine, which cures an otherwise untimely amendment "if it rests on the same facts as the original complaint and refers to the same accident and same injuries as the original complaint" (*Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal.App.3d 1085, 1094); and 2) the continuing-violations doctrine, which extends the statute of limitations when there is "a temporally related and continuous course of conduct" (for example, in many disability accommodation, retaliation, and harassment claims) until the "alleged adverse employment action acquires some degree of permanence or finality." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1058-59.)

Trap #4: New claims accrue after administrative exhaustion on other claims

If new or entirely separate claims accrue against the same employer after administrative exhaustion on other claims, amend the DFEH complaint to add the new claims; otherwise, the plaintiff may not be able to bring the new claims that are not "like or reasonably related" to the allegations already in the DFEH complaint. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1617 [holding

that plaintiff's retaliation claim was barred where the retaliation occurred after plaintiff filed a DFEH complaint for discrimination and plaintiff failed to amend the DFEH complaint, because the additional retaliation claims were "neither like nor reasonably related to his DFEH claim and were not likely to be uncovered in the course of a DFEH investigation"]; see also *Wills v. Superior Court* (2011) 194 Cal.App.4th 143, 153, 159 [upholding summary judgment dismissing plaintiff's claims for "alleged incidents of discrimination [retaliation, harassment, and failure to accommodate] which were not specifically enumerated in [her] complaint before the DFEH" where the DFEH complaint only alleged discrimination based on denial of family/medical leave].)

The complainant should amend the DFEH complaint to add new claims, for example, where the complainant:

- is retaliated against by the employer for filing a DFEH complaint;
- continues to apply for positions with the employer after getting terminated and is subsequently not hired;
- alleges "failure to hire" in the original DFEH complaint, continues to apply for different positions, and is subsequently not hired; or
- files the original DFEH complaint while still employed and is subsequently terminated.

Trap #5: There is a delay in the DFEH investigation and the DFEH has not yet issued a right-to-sue letter

Given the surge in DFEH intake inquiries in recent years and diminution of resources, we have noticed that DFEH investigations have been increasingly going past the 150-day deadline, which in turn have led to delays in filing civil complaints, closing out a case, or issuing right-to-sue letters to complainants. (See Gov. Code, § 12965(b).) Fortunately, equitable relief is available in this situation: "Evidence that [plaintiff] filed a complaint with the DFEH and that the DFEH did not resolve her complaint within a year suffices to establish her exhaustion of administrative remedies

See *Browne & Lee, Next Page*

[even though the DFEH failed to issue a right-to-sue notice].” (*Grant, supra*, 109 Cal.App.4th at p. 650.)

Trap #6: Complainant timely submitted a sufficient but unverified intake form

Defendants have taken advantage of the misnamed “intake form” (erroneously referred to in the DFEH regulations as a “pre-complaint inquiry”), asking courts to throw out cases when the DFEH fails to formalize and obtain a *verified* complaint before the statute of limitations runs.

This contravenes the very purpose of the FEHA, which is to *protect the rights of the aggrieved employee*. (Gov. Code, § 12920; See 2 CCR, § 10003.) Surely, the administrative exhaustion process is meant to *aid, not hinder*, the aggrieved employee.

The confusion and error surrounding the FEHA exhaustion process has resulted in the involuntary dismissal of FEHA cases for failure to exhaust and led to conflicting appellate court rulings as to whether an intake form constitutes a sufficient “complaint” under FEHA. For example, compare *Holland, supra*, 154 Cal.App.4th at p. 947, fn. 8 (“[A]n intake questionnaire is *not* a complaint, and facts alleged in the intake questionnaire but not in the DFEH complaint cannot be the basis for employer liability.”) with *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 268 (finding triable issues of fact precluding summary judgment based on the contents of the plaintiff’s DFEH pre-complaint questionnaires). Employers who violate the FEHA should not be able to dispose of legitimate FEHA claims due to technicalities that arise from DFEH error or delay in its investigation.

Until there is a legislative or DFEH fix, plaintiffs’ attorneys must argue that the submission date of the intake form (which contains the information required to “set forth the particulars” of a FEHA claim pursuant to Government Code section 12960(b)) should be considered the *controlling date* for statute of limitations purposes. This is only fair because once the complainant fills out the questionnaire, she cedes to the DFEH control

over when and if a verified complaint will be filed. By filling out the questionnaire, the complainant already did everything in her power to “present” her claims as required by section 12960(b) prior to obtaining a right-to-sue letter. Indeed, the *only substantive difference* between the information a complainant is *required* to provide in an “intake” or “pre-complaint inquiry” form and a DFEH “right-to-sue” complaint is that the former does not require any verification. (2 CCR, §§ 10002(a), 10005(d).) In other words, the information in an intake form is sufficient under FEHA for the complainant to “present” her claims to the DFEH.

Any other interpretation would be inconsistent with the policies underlying FEHA. In describing the FEHA as a “comprehensive scheme” for combating employment discrimination, the California Supreme Court meant to “*expand, not restrict*, the plaintiff’s rights.” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 80.) Not only must the FEHA be liberally construed, but “[t]his liberal construction extends to interpretations of the FEHA’s statute of limitations: ‘In order to carry out the purpose of the FEHA to safeguard the employee’s right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits.’” (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 819, italics added (citing with approval to *Romano v. Rockwell Internat. Inc.* (1996) 14 Cal.4th 479, 493-494).)

Such liberal construction also applies to “what is submitted to the DFEH.” (*Nazir, supra*, 178 Cal.App.4th at p. 268; see also 2 CCR § 10003 [“The department shall liberally construe all complaints to effectuate the purpose of the laws the department enforces to safeguard the civil right of all persons to seek, obtain, and hold employment without discrimination.”].) *Nazir* relied on *Federal Express Corporation v. Holowecki* (2008) 552 U.S. 389, 404, which likewise held that the employee’s “Intake Questionnaire” was timely submitted even if her formal complaint was not. (*Id.* at p. 269.)

However, establishing that the intake form is a sufficient “complaint” is not enough. Plaintiffs’ attorneys must argue that the later verification of the formal complaint *relates back* to the intake form. Importantly, the DFEH did not intend the verification process to be an extra hurdle to the administrative exhaustion process; the instructions on its website (<https://www.dfeh.ca.gov/complaint-process>) for “Filing a Complaint” state: “If you feel you were the victim of discrimination, in most cases you need to contact DFEH within *one year* and file a form titled *intake form*.” (Italics added). Rather, the FEHA exhaustion process must balance three (sometimes competing) interests: (1) protecting the rights of plaintiffs by preserving the statute of limitations for those who timely present discrimination claims to the DFEH; (2) recognizing an employer’s interest in only having to respond to complaints that have been verified; and (3) providing the DFEH with sufficient opportunity to meet its service, investigatory, and filing deadlines under Government Code sections 12962(c) and 12965(b), which are triggered by the filing of the *verified* complaint. (See generally, *Procedures of the DFEH*, 2 CCR, § 10000 et seq.; cf. *Edelman v. Lynchburg College* (2002) 535 U.S. 106, 115.)

Fortunately, the DFEH regulations and caselaw support a belated verification relation-back cure. Indeed, numerous regulations already allow for verifications of the DFEH complaint *after the fact*. (See 2 CCR, §§ 10008(b), 10009(b) [“Where a complainant cannot verify a complaint for investigation before the applicable statute of limitations runs, the department shall file the unverified complaint and accept it as received before the statute of limitations runs.”]; see also *Edelman, supra*, 535 U.S. at p. 110 [holding that the plaintiff’s timely filed but *unverified* informal EEOC charge was cured by a later formal charge that related back to the initial filing date].) In *Edelman*, the complainant sent an unverified letter to the EEOC claiming he had been discriminated against by his employer; the EEOC then prepared a

See Browne & Lee, Next Page

formal complaint, which the complainant verified after the statute of limitations had run. (*Edelman, supra*, 535 U.S. at pp. 109-110.) The United States Supreme Court explained its rationale for permitting “relation back of the oath”:

“Construing § 706 [of Title VII] to permit the relation back of an oath omitted from an original filing *ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently.*” (*Id.* at p. 115, italics added.)

Moreover, the DFEH must promptly investigate “any employment discrimination complaint alleging facts sufficient to constitute a violation of FEHA,” *regardless* of whether the complaint is verified, in order to “safeguard the civil rights of all persons to seek, obtain and hold employment without discrimination.” (2 CCR, §§ 10003, 10026.) Given this explicit mandate, the focus should be on the instigation of a DFEH investigation, *not* whether or not the complainant signed the proper document on the proper line at the time the intake form was submitted.

Trap #7: DFEH error or reliance on the DFEH’s misrepresentations leads to issues in the DFEH process

Compounding the problems arising from Trap #6 above are delays and misleading representations from the DFEH that prevent the complainant from moving forward with his or her case. Plaintiffs’ attorneys should invoke equitable relief when the DFEH makes an error processing the complaint or the complainant is reasonably misled, through no fault of his or her own, as a result of inaccurate advice from the DFEH. (2 CCR, § 10018 [the one-year limit for filing a verified complaint may be tolled where the DFEH misleads the complainant during the process, makes errors in the processing of the complaint, or improperly discourages or prevents the complainant from filing a verified complaint at all]; see also *Holland, supra*, 154 Cal.App.4th at p. 947 [holding that the statute of limitations was equitably tolled where the plaintiff’s attorney timely initiated the DFEH process by

filling out a pre-complaint questionnaire, warned the DFEH of the impending statute of limitations deadline, was assured by the DFEH that the submission of the questionnaire was sufficient to make the DFEH complaint timely, and the DFEH complaint was filed after the statute of limitations had run].)

Factors that courts *may* consider include whether plaintiff: (1) diligently pursued his claim; (2) was misinformed or misled by the DFEH; (3) relied on those misrepresentations and failed to exhaust administrative remedies; and (4) was pro se at the time. (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 901-902 (citing *Denney v. Universal City Studios, Inc.* (1992) 10 Cal.App.4th 1226, overruled on other grounds by *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156).)

Note that equitable tolling is *not* limited to situations where the plaintiff is pro se (even though the defense side often argues otherwise). There is *nothing* in the language of the regulations that indicates that the involvement of an attorney precludes the application of equitable tolling. Indeed, in *Holland*, equitable tolling was appropriate even though the complainant was represented by counsel prior to and during the filing of his pre-intake questionnaire form with the DFEH. (*Holland, supra*, 154 Cal.App.4th at pp. 946-947.) Further, the Ninth Circuit in *Rodriguez*, a case oft-cited by defendants, noted that the four factors outlined in *Denney* were not a fixed “formula” (as there is none) but were “some factors meriting consideration.” (*Rodriguez, supra*, 265 F.3d at p. 901.)

Delay, error, or misrepresentation by the DFEH

Delay, error, or misrepresentation by the DFEH should not preclude a diligent complainant from being able to bring his or her claims. (See 2 CCR, § 10003.) The problem is that equitable relief is not a fail-proof way to preserve the plaintiff’s claims; while some trial courts do apply this principle, others have granted summary judgment for the employer and refused to equitably toll the statute of

limitations. Accordingly, if the DFEH fails to timely issue a right-to-sue notice, plaintiffs’ attorneys still need to remain vigilant about their clients’ statutes of limitations deadlines, *especially if a verified complaint has not yet been filed*. If the DFEH delays in filing a verified complaint, the complainant has two practical options under the current process: (1) *wait* for the DFEH to file a verified complaint, which will likely end up being a barebones “complaint for filing purposes only” (2 CCR, § 10011) instead of a detailed “complaint for investigation” (2 CCR, § 10009), and then have the DFEH issue a right-to-sue letter arising out of that complaint; or (2) *withdraw* the complaint by requesting the DFEH to close the matter *and start the process over again* by starting a *new* complaint (which generates a new, different case number) and requesting an immediate right-to-sue letter.

It is our position that the second option – i.e., placing the burden on the complainant to restart the process and essentially *re-complain to the DFEH* – is improper, unnecessarily onerous to the complainant, and in contravention of the investigation mandate in section 10032 of the California Code of Regulations. In reality, however, the DFEH (through the “Notice of Intake Closure”) has often (erroneously) represented to complainants and their attorneys that withdrawing the complaint and filing a new one is a prerequisite to obtaining a right-to-sue letter. Whereas the “Notice of Case Closure” doubles as a “right-to-sue notice” under section 10032, the “Notice of Intake Closure” directs the complainant to *file a right-to-sue complaint* even though the employee already timely complained to the DFEH. In some instances, it may not be worth fighting with the DFEH, especially if the one-year mark from the date of last harm has not yet lapsed and plaintiff would not suffer prejudice from a “verified complaint” being considered filed on the later date. Withdrawing the complaint and filing a new one to get a right-to-sue letter may be a speedier and more economic method of proceeding to a lawsuit.

See Browne & Lee, Next Page

If, however, the one-year mark *has* lapsed while the DFEH investigation was pending and a verified complaint has *not* yet been filed, a subsequent complaint will not revive expired claims. (*Acuna, supra*, 217 Cal.App.4th at p. 1417.)

Therefore, the plaintiff's attorney should argue that the complainant should be considered to have *already* timely "filed a DFEH complaint" *at the time of the filing of the intake form*. If your client's statute of limitations is about to run and she still has not received a formal complaint for verification from the DFEH, we suggest that you submit a signed, verified version of the intake form to the DFEH (before the statute of limitations runs) that complies with Government Code section 12960 and 2 CCR sections 10002(a), 10005(d)(7), (d)(8).

The verification should state that the information provided is "under penalty of perjury under the laws of the State of California" and "to the best of the complainant's knowledge all information stated is true and correct, except matters stated on information and belief, which the complainant believes to be true" and it should be signed by the complainant or on the complainant's behalf by an

authorized signatory such as the complainant's attorney. (*Ibid.*) The mere addition of the verification should render it a sufficient DFEH complaint.

Conclusion

In sum, the DFEH process is not an additional barrier to prevent the plaintiff from vindicating his or her rights. Yet, defendants are taking advantage of the traps in the DFEH complaint process, which have resulted in unintended and unfortunate consequences that are at odds with the policies behind FEHA. Until the systemic issues in Traps 6 and 7 are addressed, plaintiffs are vulnerable to failure to exhaust defenses if they cannot convince courts that their intake form was sufficient or that equitable tolling should apply. Accordingly, if your clients have filed an intake form for investigation, *timely follow through* to make sure that the DFEH will timely file a verified complaint on behalf of the complainant.



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