



Labor and Employment Law Update

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SB 1038 – ELIMINATION OF THE FAIR EMPLOYMENT AND HOUSING COMMISSION (FEHC)

On June 28, 2012, Governor Brown signed Senate Bill 1038 which, among other things, eliminated the Fair Employment & Housing Commission (FEHC) and transferred its duties, effective January 1, 2013, to the Department of Fair Employment & Housing (DFEH). Currently, the FEHC serves as an adjudicative body for claims of discrimination in employment and housing with power to subpoena witnesses, publish opinions and mediate claims at the request of the DFEH. This bill replaces the FEHC with a Fair Employment & Housing Council within the DFEH which is authorized to promulgate regulations interpreting the Fair Employment & Housing Act (FEHA) and hold informational hearings on FEHA-related topics.

Currently under FEHA, the FEHC can assess up to \$150,000 in actual damages upon the finding of an unlawful employment practice. SB 1038 removes this damages cap and permits the DFEH to prosecute discrimination claims directly through the filing of a civil action in superior court. DFEH may also investigate, conciliate and civilly prosecute discrimination claims on behalf of a group or class. Prior to the filing of a civil action, DFEH is required to provide free dispute resolution, such as mediation, through its in-house Dispute Resolution Division. Party participation will be mandated.¹ DFEH may, however, end mediation at any time and, where DFEH concludes after a preliminary investigation that prompt judicial intervention is required, can immediately file a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint (thus bypassing any conciliation effort).

SB 1038 also authorizes DFEH to recover reasonable attorney fees (currently set at \$170/hour) and costs, including expert witness fees, if it is deemed the prevailing party in the civil action. The bill establishes the Fair Employment & Housing Enforcement & Litigation Fund within the State Treasury to be administered by DFEH, subject to appropriation, for the deposit of attorneys' fees and costs

¹ Keep in mind that mediation is a voluntary process notwithstanding a mandate that a party appear and participate. The outcome of the dispute is controlled by the parties, not the mediator. An effective, impartial mediator will facilitate communication between the parties in an effort to reach a mutually agreeable resolution.

awarded to DFEH in civil actions. These funds will be used by DFEH to offset the costs of civil rights enforcement.

Prior to SB 1038, the FEHC litigated on average only 7.4 cases per year. With a large number of complainants opting out of the administrative process, and DFEH prosecuting nearly half of its cases in court, SB 1038 attempts to streamline civil rights enforcement with this current trend. It will be interesting to see the operative effect of SB 1038. With the free mediation program, and DFEH's claim to an 80% settlement rate, employers may find mandatory mediation to be a viable and cost-effective alternative to litigation and the uncertainty of jury verdicts.

Should you have any questions concerning SB 1038, please contact our office.

— Kelly A. Lazerson

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