

## Calif.'s Canary In The Employment Mine Shaft

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California Department of Fair Employment and Housing (DFEH) Director Phyllis W. Cheng, speaking at the Jackson Lewis LLP-sponsored Association of Corporate Counsel (ACC) Labor and Employment Committee Meeting on Feb. 22, 2011, told the gathering of business lawyers that the agency would continue to pursue high-impact cases of “systemic discrimination” in the workplace as a means of leveraging its resources in a time of government austerity.

The DFEH, the largest state civil rights agency in the nation, investigates, conciliates, mediates and prosecutes discrimination complaints against employers, housing providers and businesses throughout California. It enforces mainly the Fair Employment and Housing Act (FEHA) and the California Family Rights Act (CFRA), the state laws that prohibit workplace discrimination.

Cheng observed that state employment law litigation is active and sophisticated, and she sees the DFEH as the canary in the mine shaft of employment law. The agency, she continued, is the “siren of today,” and, consistent with its civil rights mission, will continue to be a leader in advancing the development of the law and in shaping public policy.

According to Cheng, the DFEH has transformed itself under the state’s fiscal crisis measures to become more effective and efficient. Doing more with less, Cheng said the DFEH now targets “systemic discrimination” with case grading, special investigations, group and class actions, mediation, and education.

Yet, she emphasized, despite any fiscal austerity measures, the agency continues its vigorous enforcement of the law where violations are found.

Just last year, the DFEH settled a class action lawsuit with a large employer for the record amount of nearly \$6.9 million. The employer’s medical leave practices were allegedly in violation of the FEHA and CFRA. Cheng’s comments at the conference offered ACC attendees a unique opportunity to gain insights into the agency’s view of the case.

The agency’s class action began with an investigation that lasted more than two years by the DFEH’s Special Investigations Unit into the employer’s practices. When asked how the DFEH learned there might be widespread violations at the employer, Cheng said the violations became clear when the agency obtained copies of the employer’s employee handbook.

The handbook revealed a variety of employment policies and practices that were inconsistent with California employment law. For example, the handbook incorrectly said employees who missed work for a CFRA-qualifying event violated the employer’s attendance policy.

The DFEH then alerted its branches to direct complaints filed by the employer’s workers to the Special Investigations Unit. A class of approximately 1,500 employees was established. In response to the question of how a single complainant charge turned into a multimillion-dollar settlement, Cheng explained, “They had out-of-state counsel unfamiliar with California law.”

Therefore, in addition to providing in its handbook a roadmap for likely violations, the employer paid a heavy price, she said, for its misplaced reliance on outside counsel who were not versed in the intricacies of California law.

Cheng also shared the findings of a UCLA-RAND Center for Law and Public Policy study of the FEHA for 1997 to 2008. The study revealed a decrease of complaints in four areas: national origin discrimination by 40 percent; sex discrimination by 23 percent; race and color discrimination by 21 percent; and age discrimination by 4.9 percent.

On the other hand, complaints of disability discrimination increased by 75 percent over the same period.

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Cheng attributed this to the complexity of disability discrimination complaints, the overlap with other disability-related laws (e.g., Americans with Disability Act, Workers Compensation and Pregnancy Disability Leave), and increased advocacy by disability rights groups.

In addition, she said, because disability discrimination is a relatively new provision in the FEHA, the law's parameters are still being tested. In 2009, 17,617 employment-related cases were filed with the DFEH; nearly one-third of them were disability cases.

The study also revealed that an employment termination is the primary motivator for a disgruntled employee to file a charge with the DFEH.

Additionally, according to the study, midsize companies (employing 15 to 599 workers) are becoming the most popular targets for DFEH complaints. Nearly 60 percent of all charges filed with the DFEH since 1997 were against midsize companies.

Companies with 15 to 99 employees accounted for 33 percent of complaints, and those with 100 to 599 employees accounted for 27 percent of complaints. Cheng explained that midsize companies tend to be particularly vulnerable because their human resources practices are often inadequate, they usually retain inexperienced or no legal counsel, and they sometimes do not even have a basic knowledge of California's complex employment laws.

Cheng stressed the DFEH is taking a new direction to maximize effectiveness and efficiency to survive the current budget crisis. "The DFEH will continue to pursue high-impact group and class actions to more effectively enforce California's civil rights laws and to eliminate systemic discrimination," assured Cheng.

With high-impact or "A1" cases being directed to the Special Investigations Unit, Cheng advised employers that "if you haven't received an invitation to mediate and there is lots of discovery happening, pay close attention," perhaps implying that inattention can give the DFEH a chance at another record-breaking settlement.

Employers who operate in California face unique challenges. California continues to expand the rights of employees. Even well-intentioned employers, for lack of appropriate guidance, can find themselves at risk for violations of the law. The lessons are clear for employers: "Complying with workplace laws is good for business and productivity," said Cheng.

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