



# Alert

Labor and Employment Client Service Group

To: Our Clients and Friends

February 15, 2013

## New Administrative Procedures For California Fair Employment & Housing Act Complaints (SB 1038)

Recent changes to California law alter the administrative procedures applicable to Fair Employment and Housing Act ("FEHA") complaints filed with California's Department of Fair Employment & Housing. Although these new procedures do not affect the FEHA's definition of employment discrimination, employers should expect a number of significant changes in the way the Department handles pending and future employee complaints after January 1, 2013.

### **Eliminating Administrative Adjudication of Complaints**

California's Department of Fair Employment & Housing investigates employee complaints of discrimination and attempts to eliminate perceived discrimination through alternative dispute resolution. Depending on the results of its investigation and ADR efforts, in most cases the Department was previously permitted either to issue a right-to-sue notice to the complainant or to issue a written accusation against the employer. A right-to-sue notice permitted the complainant to bring a civil suit in court. Except in certain circumstances, a written accusation would be resolved by an administrative hearing before the Department's sister agency, the Fair Employment & Housing Commission. Complainants could receive various relief following a hearing, but emotional distress damages and administrative fines were capped at \$150,000.

SB 1038 keeps intact the Department's investigation, resolution, and right-to-sue functions, but eliminates the administrative hearing procedure beginning January 1, 2013. Instead, the new law permits the Department to prosecute civil actions in court on the complainant's behalf. Every case selected for Department prosecution must first undergo free mandatory dispute resolution in the Department's Dispute Resolution Division. Aside from this requirement, a civil action instituted by the Department proceeds as an ordinary civil case with full discovery and motion practice. The complainant is entitled to participate in the suit and to obtain separate counsel. Unlike the previous Commission hearings, there are no caps on the damages that may be recovered in these civil actions. Additionally, the new law permits the Department to recover attorneys' fees and litigation costs (including expert witness fees) if successful.

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The new law applies both to new complaints and written accusations that were issued before January 1, 2013 but are not yet resolved. If a pending accusation seeks emotional distress damages or an administrative fine (or is amended to seek them), with the employer's consent, the Department may withdraw the accusation and file a civil action in superior court. Pending accusations that cannot be removed to court will be adjudicated by the Office of Administrative Hearings under the California Administrative Procedure Act.

## Introducing the Fair Employment and Housing Council

SB 1038 eliminates the Fair Employment & Housing Commission previously responsible for administrative hearings and FEHA rulemaking, and replaces it with the Fair Employment and Housing Council. The Council's primary role will be FEHA rulemaking and holding public hearings on FEHA-related issues. Employers should anticipate that the Council will implement a number of regulatory changes apart from the procedural issues discussed above. According to the Department of Fair Employment & Housing, these changes may include promulgation of new regulations interpreting the FEHA (for example, interpretations of the California Family Rights Act amendments) as well as rescission of existing Commission regulations.

Bryan Cave LLP has substantial experience advising employers regarding compliance with California employment laws. For information about this Labor and Employment Bulletin, please contact the following attorneys or your regular Bryan Cave LLP [Labor and Employment Client Service Group](#) contact.

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