Enforcing Civil Rights: Does a Regulator's Profit Motive Benefit the Public Interest?

By Steve McCarthy

Note: On July 1, 2022, California's Department of Fair Employment and Housing (DFEH) was renamed the California Civil Rights Department (CRD). The two names refer to the same department and are used interchangeably in this report, referring to the point in time in which the specific name applied.

Executive Summary

From its inception at the height of the Civil Rights Movement, the department known today as the California Civil Rights Department (CRD) was intended as the state's bulwark against discrimination, investigating and resolving bias claims. As its mission has grown over decades, CRD appears to have lost touch with some of its founding principles. Less an objective factfinder or a mediator of disputes, CRD has become an increasingly aggressive and litigious regulator, butting heads with federal counterparts, civil rights attorneys, and even the victims of harassment and discrimination it was founded to protect.

This evolution has had repercussions both for workers and businesses in California and bodes poorly for the future of civil rights enforcement. In a state where the outmigration of jobs and population to other states is only accelerating, CRD's campaigns of corporate brand assassination correlate with the departure of thousands of California jobs. Its proclivity toward protracted litigation has delayed both compensation for victims and policies to prevent discriminatory practices.

If California hopes to reverse the current exodus of jobs from the state and avoid a glut of civil rights litigation in the courts, a change in regulatory culture at entities such as CRD is in order. This paper recommends the modification or repeal of recent changes to state law that run counter to the department's historic mandate to advance the cause of civil rights through conciliation, mediation, and settlement. Specifically, the Legislature should repeal recently added provisions that created a profit motive for the department to pursue expensive and lengthy litigation. Doing so will encourage quicker, more efficient resolution of cases, more immediate elimination of discriminatory practices, and get compensation to victims faster while improving California's business climate.

Introduction

In April 2022, a media dustup between Governor Gavin Newsom and one of his appointees at the Department of Fair Employment and Housing (DFEH) generated some extraordinary charges against the governor. The firing of the department's Chief Counsel, Janette Wipper, instigated a public lashing of Newsom by a DFEH staffer who claimed the Administration had pressured Wipper on behalf of a company then in DFEH's legal crosshairs, Activision Blizzard.[1] Coincidentally, Microsoft Corporation was in the process of acquiring Activision for $68 billion and the DFEH case was viewed as a holdup to the merger.

Was Gavin Newsom, one of America's leading progressive governors, operating under the spell of corporate influence, as press reports implied? The *Activision* case had already generated some headache-worthy headlines for the Administration, including reports of a public turf battle between the department and its sister agency at the federal level, the Equal Employment Opportunity Commission (EEOC). Filings in that case revealed an agency "bigfooting" its way into high-profile cases developed and led by other counsel in an attempt to take them over. EEOC

[1] *Sacramento Bee*, "State lawyer quits citing interference in Activision lawsuit". April 17, 2022.

charged DFEH with unethical and occasionally extralegal behavior as well as conflicts of interest. A union representing public attorneys objected to the department's contract with a contingency law firm. An association of employment law attorneys openly accused DFEH of undermining the EEOC in search of big legal paydays instead of the public interest.

In May 2022, journalist Matt Taibbi released a series of reports chronicling the department's extraordinary, heavy-handed regulatory tactics, linking them to a little-known federal entity on the West Coast, and correlating those tactics with the departures of Palantir and Oracle to homebases in other states.

Today, CRD is developing its own similar record with similar results. While DFEH/CRD lawsuits were not likely the only cause of business departures – in a state known for business-killing regulation rarely is there just one cause – CRD appears to have joined the ranks of major litigation threats facing California employers.

The Civil Rights Movement and the Establishment of FEHA

Civil rights laws occupy a vital place in our modern life, ensuring that individuals have a fair shot at a job, promotion, a place to live, and can work free of harassment regardless of their race, sex, or other immutable characteristics or individual traits.

The push toward the creation of what is now known as the Fair Employment and Housing Act (FEHA) got its inspiration from the early days of World War II as Blacks fought against discrimination in defense industry jobs while Black soldiers went off to war. President Roosevelt issued a series of executive orders beginning in 1941 to prohibit discrimination against minorities in federal agencies, unions, and companies contracting with the federal government. New York followed with the first state-level Fair Employment Protection (FEP) law in 1945. New York's law importantly created an administrative enforcement agency of its own – something that Roosevelt's Fair Employment Practice Committee had lacked and was believed to have limited its effectiveness.[2] By 1955, 13 other states had followed suit.

Beginning in the mid-1940's and through most of the decade of the 1950's, the California Legislature rejected numerous attempts at a Fair Employment Protection (FEP) bill. Voters statewide also rejected an FEP initiative in 1946. Finally in 1959, Governor Pat Brown called for an FEP and later that year he signed the Fair Employment Protection Act (FEPA) into law.[3] The law established discrimination protections for workers and an investigative arm that was then known as the Fair Employment Protection Agency.

[2] *Yale Law Journal*. "The New York State Commission Against Discrimination: A New Technique for an Old Problem". May 1947.

[3] California Senate and Assembly Judiciary Committees. "Fair Employment and Housing 50 years after the FEHA: Where do we go from here?". February 23, 2010.

Over the decades, the Legislature added numerous new protections and classes to its fair employment law. Tenants and homebuyers were added in the 1960's via the Rumford Act[4]. In 1980, the Legislature combined the workplace protections of FEPA and the Rumford Act into a single statute known today as FEHA, with the newly constituted Department of Fair Employment and Housing (DFEH) assigned to investigate and enforce both the employment and housing aspects of FEHA.

In the following decades, DFEH-enforced discrimination protections were broadened to numerous additional protected classes of individuals and new venues, such as:

- The Ralph Civil Rights Act prohibiting "hate violence" or threats.
- The Unruh Civil Rights Act prohibiting discrimination in public accommodations.
- The Disabled Persons Act.
- The federal Age Discrimination in Employment Act.
- Victims of human trafficking.
- The California Family Rights Act (CFRA), guaranteeing protected terms of leave from work for employees to care for their own serious health condition or that of a family member.
- The Fair Chance Act, prohibiting employers from inquiring about an applicant's criminal history.
- The Pregnancy Disability Leave Act (PDLA), requiring disability leave for pregnancy, childbirth, or a related medical condition up to four months and the right to return to work[5].

Protected classes under FEHA now include race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition (including pregnancy, childbirth, or related medical condition), genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, and military and veteran status.

The growth in DFEH's scope and authority has only accelerated in the last few years. Among the more significant changes, the Legislature extended the statute of limitations on most new cases of harassment and discrimination from one year to three. Larger employers are now required to report employee pay data to the department, and the department will also begin collecting reports of hate incidents in public places.

[4] Though not without a historic legal tussle. After the Legislature's initial approval in 1963, the Rumford Act was rejected by voters in a 1964 referendum known as Proposition 14. In 1967, the U.S. Supreme Court ruled Proposition 14 unconstitutional (*Reitman v. Mulkey*), reinstating the Rumford Act.
[5] Department of Fair Employment and Housing, "2020 Annual Report", Pp. 19-20.

In 2022, lawmakers approved a name change for DFEH to the Civil Rights Department (CRD). According to CRD staff, the name change was based on "stakeholder feedback" and intended to more fully capture the range of services offered by the department.[6]

Bigfoot Sightings: A More Litigious DFEH Steps All Over Businesses and Victims

Paralleling this expansion of scope is the department's reputation for regulatory hostility toward employers. As one news report noted, "While the DFEH may not be nearly as famous as its federal analog, it's an agency that's becoming more and more aggressive."[7] As part of that aggressive posture, DFEH has also developed a reputation for "bigfooting" its way into major cases – figuratively stepping on and over plaintiffs and other regulators who developed those cases – to take control and potentially to reap the rewards, in a manner that has caught the attention of many, including EEOC. A few recent cases demonstrate the shift:

Riot Games

The *Riot Games* lawsuit may have marked the beginning of this pattern. In early 2020, private plaintiffs' attorneys representing a group of female employees were finalizing a substantial $10 million settlement with the video game producer on charges of sexual harassment and gender discrimination, when DFEH and the state's Division of Labor Standards Enforcement (DLSE) stepped in to block the settlement. The department alleged the plaintiffs' attorneys made procedural mistakes, failed to determine a proper dollar value for their clients, and made a headline-grabbing demand of $400 million – a number a Riot Games spokesperson described as "not grounded in any fact or reasonable analysis" and did not consider "key factors such as job title, duties, skills, experience, or education."[8] For a sense of scale, that amount was nearly 30 times larger than the total for all DFEH settlements in 2019 and exceeded the largest individual settlement reported in the department's 2020 Annual Report by a factor of 200.[9]

Naturally, attorneys for both plaintiffs and defendants rejected the allegations and filed rebuttals.[10] But by late 2021, Riot Games had agreed to a master settlement of $100 million. DFEH and DLSE will walk away with millions. The Master Settlement allotted between $5-$8.5 million for DFEH attorney fees and costs, of which DFEH has requested $7.1 million, while DLSE was awarded $3 million for a related Private Attorney General Act (PAGA) claim.[11]

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[6] Statement by Executive Director Adam Romero. Meeting of the Fair Employment and Housing Council, August 10, 2022. As cited by Culliton, Katie. "DFEH Renamed California Civil Rights Department". *CalChamber HR Watchdog*. August 30, 2022.

[7] Gardner, Eriq. "Video Game Industry's #MeToo Reckoning Erupts into Government Turf War". *The Hollywood Reporter*. October 11, 2021.

[8] Murray, Sean. "Riot Games is Furious over Potential $400 million Harassment Settlement." *The Gamer*. January 22, 2020.

[9] DFEH Annual Reports, 2019 and 2020.

[10] Dean, Sam. "Women suing Riot Games may deserve $400 million, not $10 million, state regulator says". *Los Angeles Times*. January 21, 2020.

[11] *DFEH v. Riot Games, Inc*. Consent Decree, pp. 18-19.

Activision Blizzard

Perhaps emboldened by *Riot Games*, DFEH sought to block another substantial settlement – this time led by the EEOC – against another video game manufacturer, Activision Blizzard. According to briefs filed in the case, after years of cooperative investigation between the two agencies and a month of settlement talks in which DFEH had been invited, the department unexpectedly filed a separate complaint against Activision. EEOC contends this was a breach of its agreement with DFEH to run parallel investigations on separate sets of charges – EEOC on sexual harassment and DFEH on discrimination.

What followed would later be described as "an all-out turf war"[12] between agencies that had co-existed relatively well for decades. In perhaps a moment of understatement the judge over the case referred to the kerfuffle as "a bit unseemly… I feel like I should send the two of you to a mediator…."[13]

The Communications Workers of America (CWA), which has campaigned for many years to organize the video game industry including both Activision and Riot Games, provided the department a useful ally.[14] DFEH lawsuits provide CWA another platform for their campaign. CWA and its intermediaries, along with DFEH, made multiple attempts to block the EEOC's settlement with Activision. CWA was an enthusiastic supporter of DFEH's ultimately doomed effort, calling the proposed settlement amount of $18,000,000 "woefully inadequate."[15]

If the efforts and messaging between the union and the department were well-aligned, it may have been in part because the law firm handling the department's attempted intervention and appeal in the *Activision* case has also represented CWA on multiple occasions. Outten & Golden's previous work on behalf of CWA includes recent lawsuits against Facebook and T-Mobile.

The department's interventions had substantial negative ramifications for defendants, just as the EEOC predicted. "DFEH argues that its intervention will not delay or prejudice the existing parties," the federal agency said in a brief. "This is belied by the extensive relief it seeks and the significant delays that would be imposed, beyond the months of delay which have already been imposed, by its continued involvement… which keeps injunctive relief from being implemented in their workplaces and monetary relief from being made available to eligible claimants."

[12] Gardner. "Video Game Industry's #MeToo Reckoning."
[13] Allsup, Maeve. "Activision Avoids California Bid to Intervene in Settlement". *Bloomberg Law*. December 13, 2021.
[14] Dean, Sam. "Major union launches campaign to organize video game and tech workers". *Los Angeles Times*. June 7, 2020.
[15] Undeterred, CWA continued its active pursuit of Activision in the press and in the regulatory sphere. CWA filed an objection to the proposed Microsoft/Activision merger at the Federal Trade Commission but later withdrew its opposition after Microsoft agreed to a "neutrality" agreement with CWA – a pact in which employers promise not to talk about drawbacks to union representation and often relinquish their right, and their employees' rights, to a secret ballot. CWA went as far as to take out a full-page ad in the *Washington Post* in support of the merger.

Indeed, DFEH's motions delayed settlement of the case and compensation to claimants for another year. And despite the eventual settlement of the case, the department continues to appeal that ruling fully a year after the court's approval of a consent decree. If successful, the DFEH appeal could create a legal path for the department to, in the words of the California Employment Law Council, "undermin[e] the purposes of Title VII [of the 1964 Civil Rights Act] by permitting state agencies to derail settlements for their own financial and political gain."[16]

Heading into 2022, the *Riot Games* case had "reset the bar" so to speak for gender equity cases as had the $18 million *Activision* settlement to which DFEH objected. Employment law attorneys noted an uptick in "copycat" pay equity cases with allegations "so broad that they encompass just about every type of discrimination, harassment claim out there…."[17]

Tesla

The early weeks of 2022 saw the filing of another major DFEH suit, this time against the electric automaker Tesla. To that point, Tesla had been investigated for years by EEOC, DFEH, and private attorneys. After the *Riot Games* master settlement announced on December 28, and before it had even concluded its investigations, DFEH filed the very next week against Tesla. On January 3, the department issued Tesla a notice of cause and ordered mandatory mediation within two weeks. When Tesla requested additional time, DFEH appeared to reveal its motives for the premature filing, conditioning any delay on an agreement that Tesla would not discuss or even "contemplate" settlement with EEOC. When mediation talks broke off in February after just 2 ½ hours, DFEH filed suit against Tesla the very next day.[18]

The DFEH complaint against Tesla is a thorough scalding of a company brand, beginning with its non-union status: "Tesla's Fremont factory is the only nonunion major American automotive plant in the country… Tesla's brand, purportedly highlighting a socially conscious future, masks the reality of a company that profits from an army of production workers… working under egregious conditions."[19] As evidence of "egregious conditions," DFEH notes that the plant had been inspected 17 times in twelve years, though Tesla's reply claims that DFEH never sought jurisdiction in any prior complaints.[20] DFEH accused the company of running a "racially segregated workplace" and cited its pending relocation to Austin, Texas, as "another move to avoid accountability."

However, the filing provides little in the way of specifics on evidence behind the charges to which the accused could respond. Tesla attorneys contend that neither the legal nor administrative filings from DFEH "name a single Tesla employee who purportedly experienced or engaged in racial harassment or retaliation. Neither complaint provides a date, location, or factual context for any alleged harassment or retaliation…" That, Tesla said, is an apparent violation of FEHA statutes, and makes it all but impossible for the company to respond or engage in good faith dispute

[16] California Employment Law Council, *EEOC, Activision Blizzard v. DFEH*, Amicus Curiae. November 7, 2022.
[17] Ottaway, Amanda. "$100M Riot Games Deal Hints at Uptick in Pay Bias Suits". *Law360*. January 10, 2022.
[18] *DFEH v. Tesla*. Memorandum of Points and Authorities in Support of the Motion to Stay. April 18, 2022.
[19] *DFEH v. Tesla*, Civil Rights Complaint for Injunctive and Monetary Relief and Damages. February 9, 2022, p. 2-3
[20] *DFEH v. Tesla*. Memorandum of Points and Authorities, p. 4.

resolution. "[DFEH] has cast aside any respect for statutory limits on its authority to initiate civil litigation, and instead has adopted a 'race to the courthouse' procedural standard that violates the APA and FEHA… DFEH comports itself as if the statutory and regulatory requirements it must satisfy before initiating civil litigation are of little import…."[21]

Tesla speculated that, consistent with pattern, DFEH's hurried timeline was the product of feared competition with EEOC's parallel investigation. "DFEH ignored its statutory obligations and rushed to file suit against Tesla, perhaps for a quick publicity grab, perhaps out of fear that the EEOC would be the first to settle with Tesla," the company's lawyers wrote.[22]

The *Tesla* case is ongoing as of March 2023. Interestingly however, less than two months after the initial filing, and the same day the Activision settlement was finalized, DFEH Chief Counsel Wipper was fired by Governor Newsom.

Turning Point: DFEH Becomes Bounty Hunter

A decade ago, DFEH was a maligned state agency criticized for its bureaucratic processes and overall lack of performance. A 1997 state audit, for instance, found administrative inefficiencies led to case backlogs and a failure to resolve many complaints within the one-year deadline.[23] The response to these issues would prove a crucial turning point in the department's enforcement approach.

In 2009, the RAND Institute undertook a thorough study of the performance issues at DFEH. The RAND study found a department struggling to keep up with increasing obligations while staff resources stagnated, and a wide disparity in outcomes between complainants who obtained their own attorneys and those who could not find representation and were therefore "stuck" in the DFEH system. At the time of the study, that accounted for around half of all claimants. Today that figure is roughly two-thirds.[24]

Study authors declared, "The FEHA in operation has evolved to become not one but two antidiscrimination systems, separate and unequal."[25] Among many findings, RAND authors saw a need to align DFEH resources with its obligations: either reduce DFEH's responsibilities or increase staff resources. RAND also came up with an Option C of sorts: a *limited* authority for the department to take cases directly to court. "In the alternative," the authors opined, "perhaps DFEH should be provided with an alternative to FEHC, and permit the DFEH to bring civil actions

[21] Petition of Tesla, Inc., for OAL Determination of Underground Rulemaking by Department of Fair Employment and Housing. June 7, 2022.
[22] Korte, Laura. "What we know about California's discrimination case against Activision." *Politico*. April 25, 2022.
[23] California Bureau of State Audits, January 1997. Department of Fair Employment and Housing: Its Complaint Processing Needs More Effective Management (ca.gov)
[24] CRD Annual Reports for 2018-2020.
[25] RAND, Center for Law & Public Policy, UCLA Law; "California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50". Blasi, Gary and Doherty, Joseph. Pp. 14, 62

directly in Superior Court *where claimants with meritorious claims have been unable to secure counsel on a contingency basis*."[26] [emphasis added]

A year after the RAND report, Jerry Brown replaced a termed-out Arnold Schwarzenegger in the Governor's Office. Toward the end of his first legislative session in 2012, Governor Brown signed Senate Bill 1038 granting DFEH authority to take discrimination complaints to court.[27] In a deviation from the RAND recommendation, that authority was not limited just to the underserved population – if dispute resolution failed, any case was eligible. The bill further abolished the Fair Employment and Housing Commission which had adjudicated DFEH cases.

SB 1038 also created a "special fund" connected directly to the Department, outside of the state's General Fund, into which court awards or settlements would be deposited for support of the Department's budget. Often referred to as a "bounty hunter" provision, this type of budgeting mechanism creates an incentive for agencies to pursue cases and strategies with higher rates of financial return rather than the public interest, in the hope of sharing some of the reward.

The new, minimally conditioned authority to litigate, along with financial incentives to do so, conflicted directly with FEHA's longstanding mandate that the department seek settlement of cases and avoid court where possible. Specifically, FEHA's founding statutes require the department to "immediately endeavor to eliminate the unlawful employment practice through conference, conciliation, and persuasion."[28] These requirements are also consistent with Title VII of the federal Civil Rights Act and longtime EEOC practices.[29] As courts have long noted, Congress and the Legislature were very intentional about their emphasis on mediation and settlement and with good reason:

1. **Faster elimination of unlawful practices and compensation for affected employees.** Conciliation and mediation can resolve a dispute within weeks or months, rather than a years-long court battle. Settlements include not just monetary compensation for claimants but also require policy changes or reforms by the defendant. Therefore, quicker resolution

[26] RAND, p. 64.

[27] Gov Code Sec. 12965 (h): "To bring civil actions pursuant to Section 12965 or 12981 of this code, or Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601 et seq.), and to prosecute those civil actions before state and federal trial courts." Conditions include a requirement that the department offer dispute resolution to the defendants prior to filing suit.

[28] GC Section 12963.7: (a) If the department determines after investigation that the complaint is valid, the department shall *immediately endeavor* to eliminate the unlawful employment practice complained of by *conference, conciliation, and persuasion*. The staff of the department shall not disclose what has transpired in the course of any endeavors to eliminate the unlawful employment practice through conference, conciliation, and persuasion." (Emphasis added)

[29] Section 706(b) of Title VII closely mirrors the language of FEHA, "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion*." (Emphasis added)

to discrimination cases even for just one or a few defendants stands to benefit all employees.[30]

2. **Certainty of outcome.** For cases that go to trial, the RAND study noted an even 50-50 split in outcomes between plaintiffs and defendants.[31] Settlements guarantee compensation and remediation, independent of the risks of trial.
3. **Balancing enforcement with a positive business climate.** As noted in a 1997 California Supreme Court case, "FEHA is a reasonable effort to protect both the individual's interest in discrimination-free employment and the broader public interest in vindicating that policy while maintaining a healthy business climate in California."[32]

By their nature, legal settlements require dispensation of all claims against a company and from any —private, state, and federal included. The reason is simple: defendants have no incentive to be forthcoming with information and negotiate settlement if they can be retried on those facts and stipulations in other venues. Thus, the desire of one entity to intervene in another's prosecution can have repercussions for *all* future settlement efforts.

A New Litigious Era at DFEH

The authorization for civil actions and the link between settlements and the department's budget appears to have fed this change in approach by DFEH regulators. The prosecutions of Tesla, Activision, and Riot Games show a strong preference for tactics that are inconsistent with the department's legal obligation to seek conciliation and settlement, at least in pursuing cases against deep-pocketed defendants where, coincidentally, unions are actively seeking to organize employees.

DFEH exhibited a pattern of litigation tactics such as short-circuiting the pre-litigation dispute resolution process, attempting to control other plaintiffs involved in cases and corral potential new ones, perhaps beyond legal bounds, as well as pressuring defendants by leaking accusations to the press.

- In opposing DFEH's attempt to block the *Activision* settlement, EEOC accused the department of acting in its own interests and not those of employees: "DFEH sent an email to employees of the Defendants, advising them that obtaining their own counsel would be 'misleading or confusing' and requesting that individuals contact DFEH if a lawyer sought to represent them individually. *This conduct is at odds with both state and federal law…* Rather than concern that individuals will be inadequately represented, DFEH expressed concern that counsel not controlled by DFEH might offer further representation to

[30] J. Rogers Brown. Dissent in *Stevenson v. Superior Court (Huntington Beach Memorial, 1997)* Commodore, supra, 32 Cal.3d at p.218, fn. Omitted) "Such a policy is consistent with 'the compliance structure of the FEHA[, which] encourages cooperation in the administrative process…. That helps deter strategies of 'holding out' for court damages in inappropriate cases…. *Administrative procedures also allow a compliant employer to rectify discriminatory practices without costly and protracted litigation, thus benefiting all employees*." (emphasis added)
[31] RAND, p. 60.
[32] *Stevenson*

claimants that could 'pull energy' away from their state court action."[33] Activision attorneys added, "*Ultimately, DFEH's true goal here is to force individuals to recover only through its lawsuit.*"[34]

- In *Riot Games*, DFEH sought to have one of the plaintiffs dismissed from the case – a move opposed by all plaintiffs who alleged it was part of a broader attempt to take over the case.[35] According to one press report, the department "demanded the company hand over the contact information of roughly 100 women who had settled confidentially with Riot over the years, which according to one lawyer would have been interpreted by management as an effort to re-litigate settled claims."[36]
- In the *Tesla* matter, DFEH reportedly warned the company not to discuss settlement either with EEOC or private attorneys pursuing a class action against Tesla, with the threat that DFEH would hold mandatory mediation "the next day" on charges for which Tesla was still seeking information.[37]

Further, in a DFEH suit ultimately settled with The Walt Disney Co. on behalf of twelve defendants allegedly harassed by a director of photography on the set of the television show *Criminal Minds*, the department initially sought a class definition that could have included every individual who had worked on the show during its 14-year run – over 10,000 people.[38]

DFEH allegations in ongoing cases also had a habit of finding their way into the press. The *Wall Street Journal*, for example, published a story on Tesla detailing DFEH accusations of a "racially segregated workplace" the day after DFEH filed its complaint and just two days after the first mediation conference.[39]

A Public Records Act suit brought by an Activision attorney appears to show the department engaging with news media on an open case, apparently contrary to departmental policy. The filing includes copies of other emails obtained earlier that show affirmative responses to case-specific interview requests, as well as a department official corresponding with evident familiarity with a journalist covering the Activision case. Other emails show at least an occasional willingness to engage with certain news outlets.[40]

Finally, there are the due process questions. In both *Tesla* and *Activision*, the department demonstrates a seeming intent to drive cases into court, short-circuiting the dispute resolution

[33] *EEOC v. Activision Blizzard*. Opposition to DFEH's Motion to Intervene. November 8, 2021, pp. 12-13.
[34] Gardner. "Video Game Industry's #MeToo Reckoning."
[35] Allsup, Maeve, "Women Suing Riot Games Criticize Agency Intervening in Bias Suit." *Bloomberg Law*. September 14, 2021.
[36] Taibbi, Matt. "The Lawyers Who Ate California, Part II". *TK News*. May 14, 2022.
[37] *DFEH v. Tesla*, Memorandum of Points and Authorities in Support of Motion to Stay. April 18, 2022, p. 7.
[38] Clough, Craig. "Disney Can't Get 'Criminal Minds' Sex Harassment Suit Tossed". *Law360.* March 17, 2020.
[39] Elliott, Rebecca. "Tesla Sued by California Agency for Alleged Racial Discrimination, Harassment". *Wall Street Journal*, February 10, 2022.
[40] *Skinnell v. California Civil Rights Department*. Verified Complaint and Petition for Writ of Mandate. County of Sacramento.

process. In each, the department offered only brief windows for responses to mediation offers. DFEH evidently had its complaint against Tesla already prepared prior to its first mediation session with the company, filing suit the very next day. In the *Activision* case, DFEH offered mediation on dates just eight days after its notice of cause and had filed suit in less than a month.

Conclusion: Civil Rights Enforcement and the California Exodus

A regulatory preference for courtroom battles over dispute resolution will have negative consequences both for civil rights enforcement and the business community. Pre-litigation settlements have long been the hallmark of civil rights enforcement, embedded in federal and state civil rights statutes, precisely because it benefits both employees and employers by addressing harmful practices more quickly and without costly lawsuits.

The focus on these high-dollar cases may also help explain a growing backlog of cases at CRD…

Litigious enforcement may also be hurting California employers and workers more broadly. As Taibbi noted in his series, "The Lawyers Who Ate California," the West Coast office of a federal agency known as the Office of Federal Contract Compliance Programs (OFCCP), where DFEH's former Chief Counsel Wipper had a previous stint, inaugurated many of the same tactics employed by DFEH/CRD: seeking out large employers for unprecedented judgments, blasting accusations into the press, granting unreasonable deadlines for response and pushing cases into the courts – with unfortunate results for California's economy. After a reputation-damaging $400 million suit ultimately was thrown out by an administrative law judge, software giant Oracle pulled up stakes and moved its corporate headquarters to Austin, Texas, where today it neighbors the Tesla HQ. Likewise, the Silicon Valley data analytics firm Palantir headed east to Denver soon after settling with the OFCCP for $1.7 million.[41]

Such lawsuits are contributing to California's longstanding and troublesome reputation for business-killing regulation, one built not only on compliance costs but risk. With their finances and their brand reputations at stake, businesses must navigate roughly 400,000 often complex and convoluted regulations generated and enforced by more than 500 agencies, boards, and commissions. They must defend against cottage industries of contingency law firms birthed by statutes such as the Private Attorney General Act (PAGA) and Proposition 65. Little surprise then that Stanford University's Hoover Institute recently found business flight from California for 2021, as measured by known departures of corporate headquarters, doubled the rate of the prior year. And many of those decisions were made pre-pandemic. In total, at least 352 companies have left the Golden State just since 2018.

These lawsuits also leave lasting damage in the tech sector at a time when California is in fierce competition with desirable locations like Austin, Denver, Nashville, and North Carolina's Research Triangle. In that competition, California has many historical advantages such as a skilled labor pool. But as companies flee California's CRD and other regulatory agencies, they take opportunity with them. Increasingly limited opportunities for workers just entering the marketplace will compel them to look farther afield for work, and many may end up in other states for good. All of this will leave a hole in California's labor pool – a gap that makes California less desirable for growing firms in an industry on which the state's economy and public finances have become utterly dependent.

[41] Taibbi, Matt. "The Lawyers Who Ate California, Part I." *TK News*. May 14, 2022.

Recommendations

More than anything, CRD and other state regulatory agencies are in need of a drastic culture change. Employment law attorneys report increasingly aggressive enforcement with labor agency entities across the board, not just CRD. Treating business as the enemy rather than a presumptively innocent party is regulatory chic in California – another reason the state consistently ranks at or near the bottom of business climate surveys.

Changing organizational culture in government bureaucracies is extremely challenging. In firing former Chief Counsel Janette Wipper, Gov. Gavin Newsom may have meant to spur a broader course correction at CRD. If so, it seems to have failed. Even after Wipper's departure, the department continues to focus on corporate deep pockets and potential legal paydays – requesting $7 million from the court in the *Riot Games* settlement, for example, and demanding reimbursement of state-salaried employee time with hourly billing charges befitting a high-priced contingency law firm. Likewise, CRD's ongoing appeal in the *Activision* case, if successful, would not only allow the department to take a second stab at the company but to continue bigfooting on other federal investigations and undermining EEOC settlement efforts. Similarly, the *Tesla* and other aforementioned cases deserve scrutiny as to whether the department is acting within the bounds of its statutory limits and following ordinary principles of due process. This lack of culture change at CRD suggests that scrutiny must extend beyond the former Chief Counsel and should include Kevin Kish, the agency's longtime director.

There are also simple and very practical legislative changes that can address these issues. One key is to remove the regulators' profit incentive to litigate. Shifting those incentives back toward the interests of justice and genuine factfinding rather than the department's bottom line will improve California's business climate and the timely and effective enforcement of civil rights.

To that end, the Legislature should consider the following revisions to the Fair Employment and Housing Act and SB 1038:

> **Repeal FEHA's "bounty hunter" provision.** Lawmakers should eliminate all financial considerations that might interfere with regulatory decision-making. There should be no link between the department's budget or staffing levels and the amount of money it amasses in penalties, judgements, or settlements. Any portions of judgments or settlements received by the department should be returned to the state's General Fund, rather than the Fair Employment and Housing Enforcement and Litigation Fund which supports the department directly.
>
> **Reestablish the adjudicatory function of the former Fair Employment and Housing Commission** under the new Civil Rights Council or another body. The Legislature should reconsider the RAND study's original recommendation to "reinvigorate" the administrative process that existed under the old Fair Employment and Housing Commission by supplying

a full complement of administrative law judges to handle cases, rather than dissolving it and leaning on litigation and California's overburdened court system.

Require CRD to pursue cases through administrative rather than civil action. Provide that cases that the department wishes to pursue and are not resolvable through mediation or dispute resolution are to be filed administratively. With an adequately staffed administrative process for claims as provided above, there should be no need for those cases to be filed as civil actions.

If the authority for civil actions is not eliminated or narrowed, at a minimum the law should **clarify that Director's complaints must still meet legal standards for civil actions.** FEHA's standards for Director's complaints (actions filed by the department on behalf of a class, group, or individual) were written well prior to SB 1038. To prevent abuses of process, it should be updated to clarify that Director's complaints should meet class-action standards and require administrative remedies be exhausted prior to filing in court.

Clarify and reinforce FEHA's due process standards:

- **Specify timelines for pre- and post-investigation dispute resolution** efforts to resolve cases before filing charges. The law already requires the department to "endeavor" to resolve complaints in their early stages. In support of its duty and as a matter of due process, the accused should be afforded time to review, respond, and engage in good faith settlement talks prior to formal accusations. Setting aside an appropriate amount of time for parties to prepare, schedule, and meet upon the receipt of complaint and filing of charges could improve those processes, encourage settlement, and avoid court action that risks the outcome for all parties.

- **Clarify existing requirements that complaints and causes of findings shall include evidence and facts** that lead to the department's finding of a violation or violations and shall be issued to the accused in advance of good faith settlement talks.

Increase transparency of state legal settlements. The Legislature is already required to approve a "claims bill" every year to pay off civil judgments against the state. There is far less transparency, however, when the state wins in civil court and how those funds are distributed. The Controller or individual agencies should report to the Legislature annually on judgments received (perhaps $50,000 or more) via litigation and what happens to those funds.

About the Author

Steve McCarthy served nearly five years as Policy Director for the California Assembly Republican Caucus and a decade as lead consultant for both Senate and later Assembly Republicans on natural resources issues. He is a native Californian and graduate of the University of California at Davis.

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