

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF FAIR  
EMPLOYMENT AND HOUSING

DECISION OF DISAPPROVAL  
OF REGULATORY ACTION  
(Gov. Code, sec. 11349.3)

REGULATORY ACTION:  
Title 2, California Code of  
Regulations

OAL File No. 2011-0215-01S

ADOPT SECTIONS 10000, 10001,  
10002, 10003, 10004, 10005, 10006,  
10007, 10008, 10009, 10010, 10011,  
10012, 10013, 10014, 10015, 10016,  
10017, 10018, 10019, 10020, 10021,  
10022, 10023, 10024, 10025, 10026,  
10027, 10028, 10029, 10030, 10031,  
10032, 10033, 10034, 10035, 10036,  
10037, 10038, 10039, 10040, 10041,  
10042, 10043, 10044, 10045, 10046,  
10047, 10048, 10049, 10050, 10051,  
10052, 10053, 10054, 10055, 10056,  
10057, 10058, 10059, 10060, 10061,  
10062, 10063, 10064, 10065, 10066

**SUMMARY OF REGULATORY ACTION**

The Department of Fair Employment and Housing (Department) proposed to adopt sections 10000 through 10066 of title 2 of the California Code of Regulations establishing the Department's practice and procedure for receiving, investigating, and conciliating complaints of employment and housing discrimination. On February 15, 2011, the Department submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On March 30, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

### DECISION

OAL disapproved the above-referenced regulatory action for failure to follow the required procedure, failure to comply with the necessity, clarity, and reference standards of Government Code section 11349.1, and the regulatory file did not contain all required documents and/or required documents included in the file were defective.

### DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

**1. THE REGULATION TEXT MADE AVAILABLE TO THE PUBLIC AND SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS CHANGES TO THE REGULATIONS THAT WERE NOT MADE AVAILABLE TO THE PUBLIC FOR COMMENT**

Subdivision (a) of Government Code section 11346.2 requires that an agency proposing to make changes to the California Code of Regulations make the proposed changes available to the public for comment:

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

...

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the

California Code of Regulations.

The text of the regulations submitted to OAL with the Form STD 400 for review and filing with the Secretary of State with this regulatory action contains changes to sections 10001, 10002, 10005, 10017, 10023, 10025, 10041, 10051, 10055, 10057, and 10063 from the versions of the regulation text made available to the public. Although these changes were largely made in response to comments received and some of the less significant of these changes might be considered changes without regulatory effect, many of the changes have substance.

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

The changes to the regulations made by the Department after the end of the last public availability period need to be made available to the public as required by Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

## **2. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS**

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An ‘expert’ within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The initial statement of reasons submitted with this regulatory action describes the purpose of the sixty-six new regulation sections (10000-10066) as follows::

The purpose of these proposed regulations is to provide duly noticed and vetted procedures of general application for participation in the DFEH administrative process. In most cases, the proposed regulations capture existing procedures currently utilized by the department. Where applicable, the proposed regulations will replace currently controlling DFEH Directives.

The initial statement of reasons submitted with this regulatory action then continues on for approximately thirty pages describing what the new regulation sections do without explaining the reasons for the particular regulation provisions adopted. This does not meet the necessity standard of Government Code section 11349 and section 10 of title 1 of the California Code of Regulations. In that the initial statement of reasons is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations and this document is required to be made available to the public with the 45 day notice, any addition to the statement of reasons now providing the necessity missing from the existing initial statement of reasons must be made available to the public for at least 15 days prior to resubmission to OAL pursuant to Government Code section 11347.1.

Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
  - (1) Persons who testified at the public hearing.
  - (2) Persons who submitted written comments at the public hearing.
  - (3) Persons whose comments were received by the agency during the public comment period.
  - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before

the proposed action is adopted by the agency.

### 3. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

a. New section 10002 provides in subdivision (a):

Any person claiming to be aggrieved by an employment practice made unlawful by the DFEH may file with the department a verified complaint, in writing, that shall describe the unlawful conduct alleged and include the following on a form prescribed by the department:

Subdivision (a) is then followed by ten subdivisions of which subdivision (a)(10) provides “any other information that may be required by the department.”

A person directly affected by this regulation would not easily understand from the regulation what this other information might be. Moreover, the Department could at any time impose new requirements for the filing of a verified complaint with the Department by simply adding those new requirements to the form without going through the public notice and comment process required by the Administrative Procedure Act.

A similar defect exists in new subdivisions 10007(e)(12), 10035(a)(12), 10038(c)(18), and 10041(a)(5) and, by extension, new subdivisions 10009(a), 10010(d), and 10042(d).

b. New section 10002 provides in subdivision (b):

No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice occurred, except that this period may be extended as set forth in Section 12960(d), of the Government Code, and Sections 10006 and 10018 of the department’s regulations.

A person directly affected by new regulation section 10002 would not easily understand how section 10006 extends the time period for filing a complaint with the Department. New regulation section 10006 provides that a person claiming to be aggrieved by an alleged violation of the Unruh Civil Rights Act, Ralph Civil Rights Act, or Disabled Persons Act may file a complaint for investigation with the Department and that, with certain exceptions, the procedures for processing employment discrimination complaints set forth in these regulations shall apply.

A similar problem exists in new subdivision 10035(b) which refers to section 10037.

c. New section 10005 in subdivision (c) provides in part:

An immediate right-to-sue may be obtained via the department's automated right-to-sue system accessible on the department's Web site at [www.dfeh.ca.gov](http://www.dfeh.ca.gov). An immediate right-to-sue also may be obtained by submitting a completed right-to-sue notice packet to a department district, satellite, or regional office via U.S. of electronic mail or facsimile....

A person directly affected by the regulation would not easily understand from the regulation what information is required to be submitted to the Department in order to obtain an immediate right-to-sue notice. Any changes made to the regulation clarifying the information required must be made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations prior to resubmission. Also, since the right-to-sue notice packet was not included in the rulemaking record, it should be made available to the public for comment for at least 15 days pursuant to Government Code section 11347.1 prior to resubmission.

d. New section 10058 in subdivision (c) provides in part:

...If a person or entity fails to comply with a subpoena ...the department shall file a petition with the superior court, in accordance with Section 12965.3 of the Government Code to compel compliance with its investigative discovery.

It would appear that the correct citation of Government Code section 12963.5 was intended.

**4. THE FISCAL IMPACT STATEMENT (STD. 399) SUBMITTED WITH THIS REGULATORY ACTION AS COMPLETED REQUIRES SIGNOFF FROM THE DEPARTMENT OF FINANCE**

Section 6615 of the State Administrative Manual (SAM), entitled "Estimates Which Require Department of Finance Action," provides in part:

A state agency is not required in all instances to obtain concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on government agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- A.1-Reimbursable Local Costs
- A.2-Non-Reimbursable Local Costs
- A.3-Local Savings
- A.6-Other
- B.1-State Costs

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B.2-State Savings

B.4-Other...

The Fiscal Impact Statement (STD. 399) submitted with this regulatory action has boxes A.6. "Other", and B.4, "Other," checked and is not approved by anyone from the Department of Finance as required by SAM section 6615.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that (1) the reference citation to Government Code sections "6250-6270" for new regulation sections 10015 and 10050 is overinclusive, (2) the reference citation to Civil Code section "53.4(2)" for new regulation section 10033 is erroneous; (3) the reference citation to 29 CFR 1607.77 for new regulation section 10034 is erroneous, and (4) the title to new section 10037 is missing the section numbers within the Civil Code cited for the Unruh Civil Rights Act and Disabled Persons Act. If you have any questions, please contact me at (916) 323-6808.

Date: April 5, 2011

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