

**HOW TO FILE A**  
**DISCRIMINATION**  
**COMPLAINT**

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# INTRODUCTION

This booklet has been produced by SEIU Local 1000 to assist stewards in the investigation and filing procedures of discrimination complaints.

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## **WHAT IS UNLAWFUL EMPLOYMENT DISCRIMINATION ?**

Unlawful employment discrimination occurs when an employee is intentionally treated differently than others **because of the employee's:**

- race, color, religion, national origin, sex, disability, age, marital status, ancestry or sexual orientation,
- or because the employee opposed the employer's discriminatory practices
- or participated in a discrimination proceeding.

## **WHAT ARE THE 7 FEDERAL & 3 MORE STATE PROTECTED CLASSES?**

Federal discrimination laws protect employees based on their status in the following classes:

**Race**

**Color**

**National Origin**

**Religion**

**Sex (Including gender and pregnancy)**

**Age (over 40 yrs. of age)**

**Disability (Mental or Physical)**

State discrimination laws cover the 7 Federal classes as well the following 3 additional classes:

**Medical Condition-**

(Cancer or Genetic Characteristic)

**Marital Status**

**Sexual Orientation**

## **TYPES OF DISCRIMINATION:**

### **1. Disparate Treatment**

It is disparate treatment when your employer makes a negative employment decision, for example, denies you a position or opportunity because you are a member of a "Protected Class." You must show that you are qualified to do the job, and that the position or opportunity was given to a less qualified person.

### **2. Pattern and Practice**

It is a pattern or practice case when an employer's hiring practices or workplace policies have the result or impact of discriminating against workers in one or more "Protected Classes." Intent to discriminate is not required.

### **3. Hostile Work Environment**

It is a hostile environment case when an employer who makes a negative employment decision against you because you refused sexual favors (quid pro quo harassment) or because you refused to tolerate a sexually hostile work environment. Also, if you can prove that your workplace is hostile in regards to race, disability, or some other "Protected Class," you may be able to file a claim.

## **TYPES OF NEGATIVE EMPLOYMENT ACTIONS.**

These are job-related decisions that negatively affect the employee. Such as:

- **Failure to hire or promote**
- **Termination**
- **Undesirable reassignment**
- **Denial of leave or benefits**
- **Denial of training or work assignments**
- **Denial of reasonable accommodation**
- **Denial of salary increases**

## **HOW TO FILE A CHARGE OF DISCRIMINATION.**

### **STEP 1 – GET THE FACTS**

- Facts are the building blocks of any discrimination charge.
- You should be able to answer the questions known as: **The "5 W's"**
  - 1) **Who?**
  - 2) **What?**
  - 3) **Why?**
  - 4) **Where?**
  - 5) **When?**

**WHO:** How many people are involved in the action? A Supervisor? A Manager? Another co-worker? The Department Director?

**WHAT:** What happened that has a negative effect on your job? Is it similar to what has happened before or different? Is the action taken this time different? Have others been treated differently or better under similar circumstances? Did a supervisor make a specific statement? What was actually said?

**WHY:** Can the employee think of any reason why the action was taken? Is it because of past poor performance? Or, does the supervisor have a grudge or bias toward the employee?

**WHERE:** Where did the action occur? At work? At the employee's regular work station? Did it occur in front of other people who might be witnesses?

**WHEN:** What was the date and time of the action? Has the supervisor ever done this before? When?

- Review documents you may have which might contain dates or refer to the events.
- Look for an honest opinion as to why the action took place.
- Answer the 5 Ws completely and cover every conceivable question that might arise regarding the action which you believe constitutes discrimination.
- If the answers lead you to conclude that the negative action was **because** the employee was a member of a "Protected Class," then you should continue to Step 2.

### **STEP 2 – DEFINING THE PROBLEM**

Now that you have the facts, you need to determine if you will file a grievance or a charge. Keep in mind that the same facts may also be grounds to file both actions.

- If the action involves discipline, you may appeal it to the State Personnel Board.
- If it also involves a contract violation you may file a grievance.
- If it doesn't involve the contract or a

discipline charge, you may file with DFEH or EEOC.

SEIU Local 1000 contract provides in Section 5.7(A) that no State employee shall be discriminated against in State employment in violation of state or federal law.

In Section 5.7 (B), the contract provides that employee can choose to file a grievance of discrimination or failure to provide reasonable accommodation. It may be raised to the third level of the grievance procedure.

Alternatively, an employee may appeal the issue to the State Personnel Board or use their departmental Equal Opportunity complaint process. Finally, an employee may choose to file a charge with the **(DFEH)**, and/or the **(EEOC)**.

Section 5.7(C) of the Contract protects employees to retaliation or threats of retaliation, interference or coercion related to these protected rights. Such claims may be grieved and taken to arbitration.

Of course, if the negative employment action is caused by some reason other than the employee's status in the protected class, unlawful discrimination may not have occurred. **Examples:** 1) Personality conflict between Employee and Supervisor. 2) Employee's Union Activity. In these examples, a grievance or other action should be considered.

### **STEP 3 – FILING THE CHARGE**

- Contact either California Department of Fair Employment and Housing (DFEH) or U.S. Equal Employment Opportunity Commission (EEOC) and set up an appointment to discuss your complaint.
- Before any discrimination lawsuit can be filed, the employee must first file a charge of discrimination with either the **(EEOC)** or the **(DFEH)**. This step is mandatory!
- The agent will want to know the facts that you believe constitute discrimination.

The work you did in Steps 1 & 2 will be beneficial during this interview.

- The EEOC and DFEH have a “joint filing Procedure”. A complaint filed with one agency, can be filed automatically with the other (by checking the appropriate box on the Agencies complaint form). **MAKE SURE TO COMPLETE THIS STEP**
- Go to the agency that enforces the law that provides the greater protections or remedies. Regardless of where you go, you should ordinarily be able to *dually file*.
- State Law is usually (but not always) more advantageous.

a copy of the “Pre-Complaint Questionnaire” that you may be asked to complete is available at this website: <http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-600-03.pdf>

#### **STEP 4 – PROCESSING THE CHARGE**

- The agency will notify the employer that the charge has been filed.
- The agency will ask the employer for a response to the events cited in the charge.
- If the case appears strong, it may be assigned for “priority investigation”.
- When investigating a charge, the agency may make written requests for information, interview people, review documents, and make on-site visits.
- Some Charges are selected for *Mediation/ Conciliation Programs*, with the consent of both parties. These processes are confidential, and if unsuccessful, the matter may be returned to investigation.
- The agencies may dismiss a charge at any point if the charge or the investigation does not produce adequate evidence to support the claim of discrimination.

- When a charge is dismissed, a notice and right to sue letter are issued that gives the charging party a certain period of time in which to file a lawsuit. This is normally:
  - *90 Days from the receipt of a Federal “Right To Sue Letter”.*
  - **1 year from the date of the State or DFEH “Right To Sue Letter”.**

#### **STEP 5 - GET THE “RIGHT TO SUE” LETTER**

- After at least a preliminary investigation, the DFEH or EEOC will issue a “*Right To Sue Letter*”.
- This right to sue letter is a necessary prerequisite to filing a lawsuit. Without this letter, the lawsuit is likely to be dismissed.
- In addition, either agency (and possibly the Department of Justice) has the ability to litigate the case on behalf of affected individuals.

#### **STEP 6 - ANTICIPATE THE EMPLOYER DEFENSES**

- An employer will attempt to show that there was a legitimate, nondiscriminatory reason for taking the employment action considered to be discriminatory.
- They may cite that the employee that received the benefit, promotion, or job was an equal or better performer than the employee(s) who was rejected.
- It is up to the employee to **prove** that discriminatory motive, and not the employer’s offered justification, was the real reason for the negative employment action.

#### **MORE ABOUT DISCRIMINATION RIGHTS**

##### Proving Discriminatory Motive or Intent

An employee may believe or feel they are being discriminated, but proving that they were can be legally difficult. Many cases are about a negative thing that happened to one person - you - as compared

to more beneficial treatment of others. The challenge is proving that motive for the employer's action was illegal discrimination.

The ultimate burden of proof is with the employee - you. The employee has to establish a "prima facie" case of discrimination. This involves establishing by a preponderance of the evidence the following three elements:

1. He/she is a member of a protected class,
2. The complainant experienced a negative employment action, and
3. The complainant was treated differently than similarly situated individuals not in his/her protected class under similar circumstances.

Once these are established the burden shifts to the Respondent to show that a non-discriminatory reason existed for their decision. The burden then goes back to the employee to prove that the employer's reason is merely pretextual.

- This is the most difficult part of the case because there is rarely a "smoking gun" to demonstrate a discriminatory motive.
- By contrast, it may be relatively simple for the employer to prove a legitimate, nondiscriminatory reason for the negative action.

**Example:** The employer may have a documented history of poor performance that might justify the decision not to promote an individual.

### TIME LINES FOR FILING A CHARGE OF DISCRIMINATION.

- Claims under Federal law - the charge must be filed with the *EEOC within 300 Days* of the discriminatory act.
- Claims under State law - the charge must be filed with the *DFEH within 1 year* of the discriminatory act.
- It is important to contact the EEOC or DFEH promptly when discrimination is suspected.

When charges or complaints are filed beyond these time frames, you may not be able to obtain any remedy.

### REMEDIES FOR DISCRIMINATION

The "Remedies" available in an employment discrimination lawsuit may include:

- Back Pay
- Hiring
- Promotion
- Reinstatement
- Out-Of-Pocket Expenses
- Front Pay
- Policy Changes
- Training
- Reasonable Accommodation
- Actual Damages (e.g. Emotional Distress)
- Attorney's Fees and Court Costs

### OTHER TYPES OF COMPLAINTS THAT TO CHALLENGE DISCRIMINATION.

#### State Personnel Board (SPB) Discrimination Complaint:

- The **SPB** has a procedure for state employees to file complaints of discrimination against the state employer.
- The **State Civil Service Laws** prohibit discrimination in civil service employment based on:  
Race, Color, Sex, Age, Creed, Religion, National Origin, Ancestry, Disability, Marital Status, Sexual Harassment, Sexual Orientation, Retaliation, or Political Affiliation.
- If an employee believes he/she has been discriminated against, *he/she MUST file an internal EEO complaint with his/her department by filing a written complaint with the EEO Manager within 365 Days of The Discriminatory Action.*
- The Department must investigate, issue a report on its findings, and render a **final**

**decision within 180 Days of the filing of the complaint.**

- If the Employee is not satisfied with the Department's finding, the employee may appeal the decision to the SPB within 30 Days.
- In certain limited cases an employee may file a discrimination complaint directly with the (SPB). **Example:** Charges of retaliation for using the Internal (EEO) process, when the complaint is against the Department Director or Executive Staff, *or if the Department has not issued a decision within 180 Days.*

Labor Commission Complaint

The Labor Commission of the Division of Labor Standards Enforcement has a complaint procedure for claims that an employer discriminated against an applicant or employee for:

- Engaging in political activities or political affiliations.
- Engaging in lawful conduct occurring during non-working hours away from the employers premises.
- Filing a claim with or testifying before the Labor Commissioner or disclosing to, a governmental entity, information that the employee reasonably believes is a violation of the law.
- ***A Labor Commission charge must be filed within 6 Months of the occurrence of the violation.***

Equal Pay Act (EPA) Charge

The Federal Equal Pay Act (EPA) prohibits wage discrimination on the basis of sex.

- Men and women who work in the same classification, performing substantially the same work, must be paid equally, unless other legitimate, nondiscriminatory factors justify a different pay.
- Individuals are not required to file an EPA charge with the EEOC before filing a private lawsuit. Charges may, however, be file with EEOC.
- Some cases of wage discrimination may also be violations of Federal Discrimination Law (Title VII).
- If an EPA charge is filed with EEOC, the procedure for filing is the same as for charges brought for discrimination under Title VII, However, the time limits for filing in court are different under the EPA.
- It is advisable to file a charge as soon as you become aware the EPA may have been violated.

**"DISCRIMINATION" CHECK-LIST:**

NOTES:

\_\_\_ Check the time limits

- When did the Incident occur?
- When is the deadline to file a discrimination complaint, contract grievance and other Charges or complaints?

\_\_\_ Assembled and Analyzed the facts.

**The 5 Questions? (Who, What, Why, Where, When?)**

\_\_\_ Investigated and documented.

\_\_\_ Distinguished between facts, opinion, allegations, and assumptions?

\_\_\_ Checked the facts on BOTH SIDES?

\_\_\_ Gathered all relevant documents?

\_\_\_ Remaining Objective with the Issues?

\_\_\_ Clarified any doubtful, ambiguous points?

\_\_\_ Checked Relevant past practices?

\_\_\_ Checked previous settlements, if any for precedents and guidance?

\_\_\_ Located and Interviewed witnesses?

\_\_\_ Checked the experience of others in similar cases?

\_\_\_ Determined the Appropriate Remedy?

\_\_\_ Filed Charge with (EEOC) / (DFEH) or other appropriate agency depending on type of charge?

\_\_\_ Filed Grievance under (SEIU Local 1000) contract?

\_\_\_ Filed a Departmental Complaint?