

- Speaker 1: Welcome to the performance review, Greenburg charts, California labor and employment law podcast, where we discuss a review for the trends and topics for California employers as host Ryan Bykerk and Phillip person.
- Speaker 2: Welcome back to another episode of the performance review. My name is Ryan Bykerk and, as always I'm joined by my co-host Phillip person. And today we are honored to be meeting and talking with Brandon Coen, who is counsel at the fair employment and housing [00:00:30] offices over there. He's a mediator. He's in fact, I'll tell you what, why don't I stop talking about what Brandon is and let Brandon describe a little bit more about his practice and his role there at the department of fair employment and housing and the sort of work you do. Brandon, welcome to the podcast.
- Speaker 3: Thanks for having me. So I'm one of the mediators at the department of fair employment and housing. I am one of the in-house mediators. We also have a volunteer panel that does some of our mediations, my job is to essentially mediate [00:01:00] some of the cases that they designate for mediation and see if we can get some sort of resolution. Of course. So just general mediation, like everyone else has done.
- Speaker 4: Brandon, let's start at kind of the beginning. Can you tell us the DFEH intake process? Give us just a brief overview and how cases get started in and at the DFEH.
- Speaker 3: Yeah, so most of our cases get started with what's called just the intake form. This is something [00:01:30] that is typically filled out online. Now, whether you can come into the office or you can mail it in, we get a lot of intake forms per year, and those don't necessarily translate to DFEH investigations. So for example, in 2019, we received over 22,000 intake forms and over 66% of those were immediate rights to Sue. So we had 6,600 investigations in 2019, [00:02:00] and then, you know, obviously much less than that get picked up for filing or get picked up for mediation. So if it does get picked up for mediation and we settle it, great, the case is done. We close it. If it doesn't get settled, then we send it back to the enforcement division to conclude the investigation. And they will either find merit in it or issue a right to Sue at which time the plaintiff can go ahead and file [00:02:30] in court.
- Speaker 4: Just so I'm clear, the mediation process occurs before the investigation process is completed, correct?
- Speaker 3: It does. So it occurs right in the middle of the investigation process. And, um, during that time, if a response, uh, is due, um, that response is typically told and, uh, if we're not successful in the mediation, um, once we send it back, there'll be a one day letter [00:03:00] issued and the responsible be do 21 days from when we send the case back.
- Speaker 4: Got it. I think I understand. So before we go to investigation and that entire process, we get to see somebody like you who's at the DFEH and so nice and kind, and it will help us settle this case,

Speaker 3: Correct? Yeah, exactly. Phillip, although not all of them come to mediation, but you can always ask for mediation and we, you know, do our best to accommodate the parties if they're willing to mediate. [00:03:30] So

Speaker 4: What are some of the interesting cases you've seen?

Speaker 3: Um, well, we get, you know, a DFEH we get a lot of sexual harassment complaints and those are always interesting and, you know, just the general failure to accommodate some of those can be quite technical and pretty interesting, but it really runs the gamut. A lot of times the employee will have multiple issues, some of which are not in the jurisdiction of the DFEH, but we'll [00:04:00] still mediate those. So for example, we have a lot of wage and hour crossover complaints that we go ahead and take care of. So there'll be, there'll be signing a general release if we settle it. So they want to include everything. So those are always fun when we get to go out of our area or interesting. So a lot of people don't know that they think we'll just go ahead and meet the fee Hawk. We were part of the complaint, but we'll do everything. So our mediators are generally pretty knowledgeable in wage and hour and all the other employment [00:04:30] areas.

Speaker 2: Oh, that makes a lot of sense. I mean, you're there, you got to cover it all. One of the things I think Phillip and I have talked about a ton, uh, on this podcast is how life has changed due to COVID it's affected the workplace. It's affected our jobs, our lives, everything we do. I'm certain, it's had some kind of effect over at the DFEH. Uh, how, how has that impacted the processes there? Employees?

Speaker 3: The DFEH has been great. You know, when, when this thing hit, when COVID hit, we all immediately transitioned to [00:05:00] work from home. And it was really pretty seamless. Our services never stopped. We never stopped conducting intake interviews and taking new cases. We never stopped mediating cases. We never stopped litigating cases. So it was pretty seamless. And for the dispute resolution division in general, we were sort of already set up to work from home. Obviously the big thing that's changed is w you know, we don't do in-person mediations and we haven't for over a year now. [00:05:30] So we've had to adjust and, you know, like everyone, we, we had to pivot over to zoom or other platforms, which I'm sure you're all familiar with, but by and large, it's, it's the same, you know, uh, when I mediate, I don't generally do joint sessions. So, uh, if we were in person, I would have, you know, the different parties in different rooms and I would go back and forth. Now we have different parties in virtual rooms and I go back and forth, right. [00:06:00] The differences I don't get out of my chair. So I think that's the one thing that's changed is I'm not walking back and forth across, uh, the 10th floor of our building anymore. So I think it's important. You have to, you know, stand up as, you know, because you can sit all day. So make sure stand and walk around and take breaks as needed. Yeah.

Speaker 2: I think we're all getting a lot less exercise because none of us are moving around as much as we, as we used to. So, right. I was going to ask though your opinion [00:06:30] on this, like, did you, you know, to fill up and I both have done, uh, both in-person and now of course, quite a few of these virtual mediations, do you find that they are equally effective, more effective, less effective, or do you think it has no impact? So

Speaker 3: They are equally effective. DFEH keeps statistics of everything and we've looked at the statistics and they are just as effective as the in-person mediations. Obviously in [00:07:00] the beginning, there was a lot of pushback, although there was nothing we can do. People were not mediating last March and April. We saw a lot of people pushing, cause we didn't know when this thing was going to end, but then once everybody started mediating it's, you know, pretty much the same. So I haven't really noticed a difference. It allows for us to start earlier, which I sorta like, you know, sometimes we get done earlier. So it's by and large the same,

Speaker 4: Another question I want to [00:07:30] make sure we asked for our listeners here is can you give us a rundown on the difference between the DFEH and the ELC? Now I know the DFEH cuts your check. So you may be a little bit biased there, but give us a rundown. Obviously

Speaker 3: DFEH enforces the state laws. Well, EOC enforces the federal laws, right? Title seven. All those, these laws are very much the same though. So a lot of people don't know who to go to, or they may have heard of the EOC [00:08:00] and not the DFEH, but typically when they file a case with one, it gets filed with the other. So it's not uncommon for me to see a DFEH case that also has an E O C case number. And we have a contract with the EOC. And when we mediate a dual filed case, uh, we settle in close both cases. I know they have a mediation program as well. I'm not obviously as familiar with it as I am [00:08:30] with the DFEH program, but I hear good things. Um, and yeah, that's the main difference is just federal law versus state law. It,

Speaker 2: Okay. See, that was fair and balanced. I mean, but I still think, look DFEH is better than EOC, right? Is that what you're saying?

Speaker 3: If I wasn't clear, we were waiting for you to say on that.

Speaker 2: We're trying to start an inter-agency fight. Can you tell

Speaker 3: It's interesting. Um, there, there has been some inter-agency [00:09:00] fights, but nothing, nothing major, just some, some con competitive spirits here.

Speaker 2: Brandon, I think you're, it's like, you're teasing us for the next step.

Speaker 5: All right. We're gonna have they come up with a whole new, we're gonna have to have you back on to hear more about that. You're inviting us to dig further.

Speaker 3: Yeah. Maybe have me back on with someone from the EFC and we can do like a debate style.

Speaker 2: Oh, that would be perfect. All right. That's what we'll have to do. One of the things Brandon, I hate to keep coming back to the pandemic, but one of the, as I said, life's changed. Can [00:09:30] you give us maybe a quick overview of any trends that you've noticed that the DFEH, that, that perhaps have been caused by, or at least occurred during the pandemic?

Speaker 3: I think the biggest one is discrimination based on COVID right. So somebody tests positive and what are the rules surrounding that if this is, you know, uh, like the virus, this is a novel area of the law, right? So we've seen an uptick in, in COVID [00:10:00] related cases, whether it's, you know, I was laid off and I believe it was because the employer thought I had COVID and the employer may be saying, well, we laid everyone off. We still have seen an uptick in COVID related cases. So my understanding is we're sort of putting those to the front of the line and mediating those because it's, you know, the agency's goal, one of the agency's goals to keep people working or get people back to work if we can. [00:10:30] Um, so it's my understanding. We are putting those to the front of the line to try and accomplish that.

Speaker 2: Anticipate there being any trends as we come back out of this. I mean, we've, we've been speculating a little bit about, you know, what's this going to be like when people do eventually go back to the workplace, are there going to be claims that maybe just claims generally will, will tick back up or yeah, I guess where do you see the future going in this space?

Speaker 3: I think definitely once people get back into the office, I think we're going to see an increase [00:11:00] in claims in general. You know, people are pretty happy working from home and once they go to the office, you know, they, they may not necessarily want to go back. So we may see an uptick in requests for accommodation, which may include working from home and that sort of thing. And then of course, you know, we're, we're going to have to deal with the vaccine and what that looks like, and if that can be required and that sort of thing.

Speaker 2: [00:11:30] Got it. I suppose I fill up, I sort of stole a question that I know you were going to ask about, about trends, but maybe we can skip ahead.

Speaker 4: I talked to you before the podcast or what I want to ask Brandy.

Speaker 5: Exactly. Um, so anyway, I stole

Speaker 2: Phillip's question about trends. Are there any areas that you can see the DFEH from an enforcement perspective really focusing on? I mean, I know you've mentioned COVID sort of to the front of the line, but, and any other trends or areas in particular, you see the DFEH focusing [00:12:00] on, on a go-forward basis? Well,

Speaker 3: The legislature has sort of guided us on, on what to focus on with SB 9 73, which is that pay data reporting requirement. So we're now, you know, private employers with over a hundred employees and at least one in California have to report, pay data to the DFEH now, and then we'll be analyzing that data for pay equity. So that's one of the things that is sort of ramping up another, which we've seen [00:12:30] quite a bit of, or a fair chance act claims. So like the criminal history and employment decision claims, I think that laws over a year old now, so we're getting quite a bit of those and those are interesting claims. They're very technical. They require a lot of the employer. The employer has to do a lot of very specific things to be in compliance if they choose not to hire someone based on their criminal history. So we have been seeing a lot of those.

- Speaker 4: [00:13:00] Well, let me ask you a question that I didn't already tell Ryan
- Speaker 5: That I was going to ask. Cause I'll steal it. If you tell me, you sure will
- Speaker 4: You share, it will shifting to the mediation side. Why would a company mediate with the DFEH? Well,
- Speaker 3: If they think, you know, there's a chance that the person is going to file a complaint or that the DFEH may find merit in the complaint and file a complaint themselves, then why wouldn't they mediate? You know, uh, [00:13:30] so many of these cases are going to be mediated privately. Anyway, this is a free service that the state of California offers. We're all very experienced mediators. If I do say so myself and we have a very high percentage of, of settlement. So we do settle the vast majority of the claims and it's it's free. So why not mediate? Why not take advantage of it?
- Speaker 2: Well, and I understand too, I mean, there's, there are new rules about mediation. Can you maybe tell us a little bit about those [00:14:00] rules?
- Speaker 3: Yeah. So AB 1867 was enacted based on this new sea FRA expansion. So the new CIFOR expansion is, is now applicable to smaller employers with five or more employees. And there was sort of an uproar about that and the increased costs of litigation for these smaller employers. So the legislature [00:14:30] wrote a bill that provided for this mediation pilot program, so that if we get a complaint regarding C for a, for an employer who has between five and 19 employees, they can request mediation and we will mediate those cases, even if the other side elected to obtain an immediate right to Sue, they can request mediation and we will meet those, even though it's not an open investigation.
- Speaker 2: [00:15:00] Have you seen a lot of employers taking advantage of that?
- Speaker 3: We've seen quite a few personally. I've seen a couple and we've had very good results with this program, but it is a pretty brand new program. So, you know, it's sort of getting ramped up now and we expect to see more, certainly
- Speaker 4: See the advantage if you're a smaller employer maybe to take advantage of the free mediation service that's
- Speaker 3: Right. Absolutely. It's much cheaper than going [00:15:30] to litigation as you well know, I'd
- Speaker 4: Like to pull back the curtains a bit further, so you can tell us everything that goes on at the DFEH. First thing I want to know is how many cases get filed with the DFEH per
- Speaker 3: Year? Well, so you can see that on our annual report, that's, that's public information, but it's a little misleading. So in 2019, according to the annual report, we filed and litigated four cases, [00:16:00] but those were just cases that were pulled out of investigation. Those don't include the directors complaints and the other types of

complaints that we have, um, mechanisms for, uh, to enforce the law. So I guess you could say it's, it's rare that we pick up a case, but it's, it's not that rare. And we do pick up cases. We see merit in and we will prosecute those cases. Of course, I don't do that because I'm [00:16:30] a neutral. So that is our legal division that does that. And cause you're a nice guy.

Speaker 5: Uh, well

Speaker 4: Then let me ask you this. How many gets into meetings?

Speaker 3: I think last year we mediated around seven or 800 of them. Um, we have a pretty small, um, mediation group. So we do as much as we can. And like I said earlier, we try and accommodate all the mediation requests. So yeah, I [00:17:00] believe it was seven to 800 last year is what went to mediation,

Speaker 2: Brandon for you? How, how many, how many is that for you on a weekly monthly basis? It really depends.

Speaker 3: I try and settle a lot of them before a formal mediation. So I will call both sides and, you know, just ask what they're looking for, what they want to do with this one. And I would say probably a good 40 to 50% of them settled that way [00:17:30] before we even have to schedule a zoom mediation, it's better for the employer. Uh, they don't have to, you know, pay their attorney to write a brief or pay their attorney to sit all day in mediation. And, you know, we can sort of put that money towards settlement before, you know, an unrepresented it's a lot less daunting, you know, if we don't have an actual set up date and I'm just calling them or going back and forth informally. So I try [00:18:00] and do a lot of those, which may sort of skew how many I get to do. Um, but I would say we settle, you know, anywhere from four to 10 cases a week, another chance

Speaker 4: For you to sell the DFEH is mediation want to know just in, in your own thoughts, why mediation is important.

Speaker 3: One of the main things is it's sort of an access to justice issue for complainants or individual plaintiffs. [00:18:30] If we do an investigation and we find some merit, but not enough to file litigation, uh, we'll issue a right to Sue and they may do nothing with that right. To Sue letter. Whereas if we can get them into mediation, then we may be able to settle a case that otherwise would go nowhere. So I look at it as an access to justice issue for one and for two, it's just, like I said before, it's so much cheaper [00:19:00] than litigation and this is a free service. So I mean, it's, it's cheaper to mediate normally with a private mediator, but with DFEH it's free. So might as well take advantage of that free service.

Speaker 2: Now as a couple of guys who write mediation briefs from time to time and I mean, like all the time, uh, I'm, I'm really curious Brandon to hear from your perspective, what's a, uh, what's a, [00:19:30] what's a helpful strategy for if, really, for either side. I mean, we, we obviously mostly represent employment side or management side, um, clients,

but I'm just curious to hear from you, what's, what's helpful for the mediator and for the process for someone to put into their mediation brief.

Speaker 3: So generally everyone does a very good job of including what needs to be included, but I think some people include too much. [00:20:00] Uh, as far as the law goes, what I always tell people is, listen, I'm more interested in the facts than the law. Like we know the law, this is what we do every day. I don't need you to recite it to me unless there's some obscure case that you want to bring to my attention. I don't, I don't need a big, you know, analysis section. I just want to know what happened. So I'd rather you take a deep dive into facts so that I can better prepare for the mediation than spending time, you know, researching [00:20:30] the law and letting me know what the law is. That's my personal preference.

Speaker 2: Got it. No, I think I think that's, uh, that's why it's, that's good to know. So shifting gears again, I mean, as things start to reopen, we've hit on some of this a little bit, but as things start to reopen, as I mentioned, you know, Phillip and I mostly, uh, management side, what, what should employers need to be aware of and what kind of things should they avoid to, you know, find them to avoid getting in the cross hairs of the DFEH or just their employees [00:21:00] generally?

Speaker 3: Well, I think the big thing as we reopen is going to be the vaccination or the vaccines and, you know, whether or not they can be required, DFEH actually released guidance on this last week. And so the guidance that DFEH released is that you can't require a non FDA approved vaccine. [00:21:30] And this is interesting because the vaccines we have now are authorized for emergency use. They're not FDA approved yet. And there was one case that was filed in New Mexico, challenging the requirement that you, you know, an employee get an emergency authorized vaccine. So that's what we're recommending at this point, obviously that's, you know, in addition to the religious exception or [00:22:00] the reasonable commutation based on disability exception and that sort of thing. So it's going to be interesting. Luckily it seems like most people are getting the vaccine and hopefully this'll be a limited issue, but I would expect it moving forward when as we reopened and as we're going back to work,

Speaker 4: Do you think there'll be any age related claims? You know, there may be more vulnerable categories here, but do you think that may be something that DFEH [00:22:30] may be saying?

Speaker 3: I'm sure we will. I'm sure we will. I just don't know to what scale, you know, it, it may be a few complaints. It may be quite a few complaints. I'm not sure it's not something we've seen yet that I'm aware of. Well,

Speaker 2: So for, I just want to go on record and say it, I was going to ask that question and Phillips stole that one from me. So now I think we're even so,

Speaker 5: So what we learned

Speaker 4: Is we're not going to talk to each other before the podcast. Exactly.

Speaker 2: Yeah. Um, so look, [00:23:00] Brandon, thank you so much. This is fantastic. It's great to hear a little bit more about this program, about, uh, the, the mediation program at the, at the department of fair employment and housing. And as you've mentioned, a couple of times, it's free seems to make a lot of sense to at least kick the tires on these cases. And it sounds like you've got a good, a good track record of getting a resolution for people. So, uh, thanks for coming on Sharon, uh, about that. And of course about, you know, what, what we're maybe going to see as the world starts reopening again. So [00:23:30] very much appreciate you being on the podcast with us today. And, and we definitely will have to have you back when we have that fight between you and the EEOC guy. I like your, I like the chances. So what we'll get, we'll get that lined up. Yeah. And we're not just saying that because you're on the podcast,

Speaker 5: Right. That's right. But before you leave,

Speaker 4: We have to ask you for a crazy employment story.

Speaker 3: Well, there are a lot, but uh, one comes to mind. It was, you know, just a wrongful termination based on a protected [00:24:00] class. I don't even remember what the protected class was. I received mediation briefs from both sides. Both sides were represented. We went ahead and started the mediation about three hours into the mediation progress is slowing down. And at that point, the employer decides to tell me that the employee, after they were terminated, came back to the office, used their unique code to get into the office. We're we're on camera [00:24:30] coming into the office. And this was about midnight, mind you. And they proceeded to steal everything that wasn't bolted down. We're talking lobby, waiting room chairs. There was truckloads. And I don't understand why this wasn't in the brief. This is a perfect example of why I want facts. I want those. So I don't know why it took them three hours to let me know that stuff, but it certainly [00:25:00] helped in, uh, you know, getting a resolution and getting the case resolved. But that that's the most memorable one I can think of. One would hope one

Speaker 4: Would hope I would actually put that right front and center in my brief,

Speaker 5: Let you know about it. Yeah.

Speaker 4: Here's some after required evidence. Yeah,

Speaker 2: Exactly. Here's some pictures. Here's the video reel. Yeah. Wow. It'd be show and tell man.

Speaker 3: Yeah, it was, it was a good one. Well, Brandon,

Speaker 4: Thanks again for joining us on this episode. [00:25:30] Thank you both. Thank you so much, Brandon,

Speaker 3: Of course, and for

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Speaker 4: Our listeners out there, if you have any craziest stories you want to share with us, you can reach us at theperformancereview@gtlaw.com. And other than that, we'll catch you next time.

Speaker 1: [inaudible] [00:26:00] this content is for informational purposes only and does not contain legal or other advice and or opinions for more information, please visit B I T dot L Y slash GT law disclosure.