

CIVIL RIGHTS DEPARTMENT
FIRST MODIFICATIONS TO INITIAL TEXT OF PROPOSED REGULATIONS REGARDING
CONCILIATION PROCEDURES OF THE CIVIL RIGHTS DEPARTMENT

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Civil Rights Department

Chapter 1. Procedures of the Civil Rights Department

TEXT

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§ 10000. Statement of Purpose.

~~These regulations interpret, implement, and supplement the procedures of the Department of Fair Employment and Housing (department) set forth in Article 1 of Chapter 7 (Gov. Code, § 12960 et seq.) (applicable to employment discrimination, Unruh Civil Rights Act (Civ. Code, § 51 et seq.), Ralph Civil Rights Act (Civ. Code, § 51.7), and Disabled Persons Act (Civ. Code, § 54 et seq.) complaints filed with the department) and Article 2 of Chapter 7 (Gov. Code, § 12980 et seq.) (applicable to housing discrimination complaints filed with the department) of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). These regulations and provisions of the FEHA shall govern the department's practice and procedure with respect to the filing, investigation and conciliation of complaints alleging practices made unlawful by any law the department enforces. The department will reasonably accommodate persons with disabilities in the filing, investigation, and conciliation of complaints.~~

This Chapter contains procedures that the Civil Rights Department has established for initiating, investigating, conciliating, mediating, and prosecuting complaints alleging violations of the laws that the department enforces. These laws include the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), Government Code sections 11135 to 11139 et seq., the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51 et seq.), Civil Code section 51.5, the Ralph Civil Rights Act (Civ. Code, § 51.7), Civil Code section 51.9, the California Trafficking Victims Protection Act (Civ. Code, § 52.5), the Disabled Persons Act (Civ. Code, §§ 54-55.32 et seq.), the Equal Pay Act (Labor Code, § 1197.5), and related federal civil rights laws. In implementing these regulations, the department shall reasonably accommodate persons with disabilities.

Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(f), 12948, 12960-12976 and 12980-12989.3, Government Code.

§ 10001. Definitions.

(a) "Civil Action" means the type of proceeding brought by the department pursuant to sections 12965 and 12981 of the Government Code.

(b) "Complainant" means a "person," as that term is defined by Government Code section 12925(d) or 12927(g), who files a complaint with the department alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces.

(c) "Complaint" means a complaint filed with the department alleging that a "person," as that term is defined by Government Code section 12925(d), or class or group of persons, has been aggrieved by a practice made unlawful by any law the department enforces. "Complaint" also means the charging document filed by the department pursuant to sections 12965 and 12981 of the Government Code.

(d) "Conciliation," means bringing two opposing sides together to reach a compromise in an effort to resolve a complaint filed with the department, which includes pre determination settlement negotiations and post investigation conciliation and/or settlement conferences conducted by the department's enforcement division refer generally to the department's efforts to resolve disputes by agreement, including efforts to resolve complaints through settlement.

(e) "Department" means the Civil Rights Department (CRD) Department of Fair Employment and Housing (DFEH) and includes any officer, employee, or other individual delegated any function, power, or duty of the department.

(f) "Departmental appeal" means a verbal or written appeal or request made to the department by a complainant or respondent seeking reconsideration of the department's determination regarding a complaint filed with the department.

(g) "Director" means the Director of the Civil Rights Department of Fair Employment and Housing and includes any officer, employee, or other individual delegated any function, power, or duty of the director.

(h) "Dispute Resolution Division" means the division of the department that employs trained neutrals to mediate complaints filed with the department ~~when the parties to a complaint agree to mediate ("voluntary mediation"), or when the department requires parties to a complaint to mediate before the department files a civil action ("mandatory dispute resolution")~~. The dispute resolution division is separate from the department's enforcement and legal divisions. It may utilize volunteers as well as dispute resolution division staff to facilitate communication between parties to assist them in attempting to reach a mutually

acceptable settlement agreement.

(i) “District Administrator” means any employee, officer, or other individual delegated the authority to supervise the staff and day-to-day operations of a department district, satellite, or regional office.

(j) “EEOC” means the United States Equal Employment Opportunity Commission.

(k) “Enforcement Division” means the division of the department responsible for filing, investigating, and conciliating complaints alleging a practice made unlawful by any law the department enforces.

(l) “HUD” means the United States Department of Housing and Urban Development.

(m) “Legal Division” means the division of the department responsible for, among other responsibilities, providing legal advice to all divisions of the department, including conducting and supporting investigations, issuing and prosecuting civil complaints alleging a practice made unlawful by any law the department enforces, and providing legal representation to the department.

(n) “Mediation,” “mediate,” and “mediating” refer to the department’s efforts to resolve disputes through a confidential process facilitated by neutrals in the dispute resolution division. Mediation includes “mandatory post-determination mediation” and “voluntary pre-determination mediation.” Mediation is one form of conciliation.

(o) “Mandatory post-determination mediation” means mediation conducted when the department requires parties to a complaint to mediate after the department has determined that there is reasonable cause to believe a law it enforces has been violated.

(p) “Pre-complaint inquiry” means the initial request to have the department investigate allegations that a “person,” as that term is defined by Government Code section 12925(d) of these regulations, or class or group of persons, may have been aggrieved by a practice made unlawful by any law the department enforces.

(q) “Pre determination” means the department has not yet determined whether a complaint has merit under the relevant legal standard.

(r) “Protected basis” means any basis or characteristic upon which discrimination is prohibited by the FEHA (Gov. Code, § 12900 et seq.), Government Code sections 11135 to 11139, the Unruh Civil Rights Act (Civ. Code, § 51), the Ralph Civil Rights Act (Civ. Code, § 51.7), the Disabled Persons Act (Civ. Code, §§ 54-55.32), the Equal Pay Act (Labor Code, § 1197.5), or any other law the department enforces.

(er) "Regional Administrator" means any employee, officer, or other individual delegated the authority to supervise the staff and operations of a department regional office or multiple district or satellite offices.

(rs) "Respondent" means an entity or person alleged to have committed a practice made unlawful by a law the department enforces and against whom a complaint has been filed with the department or civil action has been filed.

(st) "Verified complaint" means a complaint submitted to the department with the complainant's oath or affidavit stating that to the best of the complainant's knowledge, all information contained in the complaint is true and correct, except matters stated on information and belief, which the complainant believes to be true. A complaint must be verified prior to investigation by the department.

(u) "Voluntary pre-determination mediation" means mediation agreed to by the parties and conducted when the department determines that it is appropriate to mediate a complaint before the department has determined whether there is reasonable cause to believe that a law it enforces has been violated.

Note: Authority cited: Section 12930(e), Government Code. Reference: Section 446, Code of Civil Procedure; Sections 12901-12903, 12925, 12927, 12930-12932, 12940, 12950, 12955-12956, 12960, 12961, 12963.1(a), 12963.7, 12964, 12965, 12971, 12980-12981, 12984-12989.3 and 12995, Government Code.

Subchapter 1. Employment, Unruh Civil Rights Act (Civ. Code, § 51 et seq.), Ralph Civil Rights Act (Civ. Code, § 51.7), and Disabled Persons Act (Civ. Code, § 54 et seq.) Complaints

§ 10024. Conciliation.

~~(a) Conciliation efforts undertaken by the department's enforcement division may include post-investigation conciliation and/or settlement conferences as well as pre-determination settlement negotiations. Whenever a complainant or respondent is represented by an attorney or advocacy organization, enforcement staff shall communicate with the party's attorney or advocate regarding settlement.~~

~~(b) Pre determination settlement (PDS) negotiations are confidential; however, any settlement agreement entered into as a result of PDS negotiations that is signed by the department, as well as the terms of settlement, are not confidential.~~

~~(c) If the department determines after investigation that a preponderance of evidence exists to prove a complaint's allegations, both the complainant and respondent, as well as their respective attorneys or advocates, if any, shall be invited to participate in a conciliation or mediation conference on equal terms.~~

~~(d) Everything that transpires at a post investigation conciliation conference shall be kept confidential, except as follows:~~

- ~~(1) issues established as fact during the investigation;~~
- ~~(2) any settlement agreement signed by the department, and the final terms of settlement; and/or~~
- ~~(3) new facts presented by the respondent at the conciliation conference that cause the department to re-evaluate the case and determine not to file a civil action. A respondent providing such information at a conciliation conference shall authorize the department to use the information to close the case.~~

~~NOTE: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(f) and 12963.7, Government Code.~~

~~§ 10025. DFEH Dispute Resolution Division Services.~~

- ~~(a) The department may offer the parties to a complaint filed for investigation the opportunity to mediate the complaint before investigation commences ("pre investigation mediation"). One or both parties to a complaint filed for investigation also may request pre investigation mediation. Pre investigation mediation conferences are not attended by any representative of the department's enforcement or legal divisions.~~
- ~~(b) Pre investigation mediation is voluntary. Therefore, the department shall not assign a pre investigation complaint to a mediator to mediate unless both the complainant and respondent (or their respective attorneys or advocacy organizations, if any) have agreed to mediate.~~
- ~~(c) While a pre investigation complaint is with the dispute resolution division, the requirement to submit a response to the complaint is temporarily suspended. However, if mediation is declined or is unsuccessful, a response shall be provided to the department no later than twenty one (21) days after the date the department notifies the respondent that a response is due because mediation was declined or was unsuccessful. After the complaint is returned for investigation, the enforcement division shall in writing notify the respondent or, if the respondent is represented, the respondent's attorney, of the exact date the response is due.~~
- ~~(d) After an investigation finds merit under the relevant legal standard and prior to filing a civil action, the department shall require the parties to participate in mandatory dispute resolution in an effort to resolve the dispute without litigation.~~
- ~~(e) Post investigation mediation conferences conducted after a civil action is filed ("post civil action") shall be attended by the member of the department's legal division who filed the civil action or who has subsequently been assigned the case. If settlement is reached, the legal division representative shall sign the settlement agreement.~~

~~(f) Regardless of whether the department refers a complaint to the dispute resolution division before or after investigation has commenced, the department shall suspend investigation while the complaint is with the dispute resolution division. After mediation is declined or is unsuccessful, the department shall commence, resume, or complete the investigation as necessary.~~

~~(g) When both sides agree to mediate a complaint pre investigation, the department may assign the complaint to a trained mediator employed by the department's dispute resolution division or a trained volunteer mediator, based on mediator availability and the department's discretion. Whenever a complainant or respondent is represented by an attorney or advocacy organization, the assigned mediator shall communicate with the party's attorney or advocate regarding scheduling and settlement. Matters the legal division refers for mandatory dispute resolution shall be assigned to a DFEH attorney mediator.~~

~~(h) Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. However, settlement agreements reached in mandatory dispute resolution shall be public records available in accordance with the department's Public Records Act policy, including the provisions regarding redaction, unless the parties request nondisclosure and the director, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department.~~

~~(i) Any written settlement agreement reached through a DFEH dispute resolution division conference may be used as evidence to enforce the terms of the settlement agreement if the conditions of Evidence Code section 1123 are satisfied and the agreement contains language showing the intent of the parties to be bound by the agreement's terms.~~

~~(j) All DFEH mediated settlement agreements shall include "affirmative relief" as defined in Government Code section 12926(a), including the development of policies or practices to prevent future workplace discrimination or harassment. DFEH mediators assist parties to select the affirmative relief that is best suited to the complaint at issue.~~

~~(k) A copy of any settlement agreement executed in connection with a DFEH dispute resolution division conference shall be provided to the department's dispute resolution division.~~

~~(l) DFEH complaints resolved through mediation shall be closed by the department.~~

~~Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 1119, 1120 and 1123, Evidence Code; and Sections 12930(f) and 12963.7, Government Code.~~

§ 10031. Civil Actions.

(a) If, after investigation, it is determined by the department that a complaint has merit under the relevant legal standard, the director, in his or her discretion, may file a civil action in the

name of the department. The discretion to file a civil action may be delegated to the department's chief counsel or designated associate or assistant chief counsel.

(b) A civil action may be filed, if at all, only after the department has required mandatory ~~dispute resolution post-determination mediation, except as provided for by section 10281 of these regulations.~~

(c) The department has discretion not to file a civil action when circumstances warrant. Factors considered by the department when determining whether to proceed with a civil action include, but are not limited to: (1) the strength and sufficiency of the evidence of unlawful conduct; (2) the likelihood of prevailing on the merits at hearing or trial; (3) the availability and allocation of department resources; (4) whether the alleged violation addresses an important legal issue in an area where the department seeks to establish case law; (5) whether filing the civil action and subsequent litigation thereof are likely to impact civil rights in a manner consistent with the department's mission; and/or (6) whether the respondent has offered the complainant an equitable remedy the complainant has refused.

Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(h) and 12965(a), Government Code.

Subchapter 2. Housing Discrimination Complaints

§ 10056. Conciliation.

~~(a) Conciliation efforts undertaken by the department's enforcement division may include post-investigation conciliation and/or settlement conferences as well as pre-determination settlement negotiations. Whenever a complainant or respondent is represented by an attorney or advocacy organization, enforcement staff shall communicate with the party's attorney or advocate regarding settlement.~~

~~(b) Pre-determination settlement (PDS) negotiations are confidential; however, any settlement agreement entered into as a result of PDS negotiations that is signed by the department, as well as the terms of settlement, are not confidential.~~

~~(c) If the department determines after investigation that a preponderance of evidence exists to prove a complaint's allegations, both the complainant and respondent, as well as their respective attorney or advocate, if any, shall be invited to participate in a conciliation or mediation conference on equal terms.~~

~~(d) Everything that transpires at a post-investigation conciliation conference shall be kept confidential, except as follows:~~

~~(1) issues established as fact during the investigation;~~

(2) any settlement agreement signed by the department; and/or

(3) new facts presented by the respondent at the conciliation conference that cause the department to re-evaluate the case and determine not to file a civil action. A respondent providing such information at a conciliation conference shall authorize the department to use the information to close the case.

(e) For cases that are dual filed with HUD, conciliation and settlement agreements shall meet all requirements specified by HUD.

Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(f)(1), 12980(i) and 12984, Government Code.

§ 10057. DFEH Dispute Resolution Division Services.

(a) The department may offer the parties to a complaint filed for investigation the opportunity to mediate the complaint before investigation commences ("pre-investigation mediation"). One or both parties to a complaint filed for investigation also may request pre-investigation mediation. Pre-investigation mediation conferences are not attended by any representative of the department's enforcement or legal divisions.

(b) Pre-investigation mediation is voluntary. Therefore, the department shall not assign a pre-investigation complaint to a mediator to mediate unless both the complainant and respondent (or their respective attorneys or advocacy organizations, if any) have agreed to mediate.

(c) While a pre-investigation complaint is with the dispute resolution division, the requirement to submit a response to the complaint is temporarily suspended. However, if mediation is declined or is unsuccessful, a response shall be provided to the department no later than twenty-one (21) days after the date the department notifies the respondent that a response is due because mediation was declined or was unsuccessful. After the complaint is returned for investigation, the enforcement division shall in writing notify the respondent or, if the respondent is represented, the respondent's attorney, of the exact date the response is due.

(d) After an investigation finds reason to believe that discrimination has occurred or is about to occur, and prior to filing a civil action, the department shall require the parties to participate in mandatory dispute resolution in an effort to resolve the dispute without litigation.

(e) Post-investigation mediation conferences conducted after a civil action is filed ("post-civil action") shall be attended by the member of the department's legal division who filed the civil action or who has subsequently been assigned the case. If settlement is reached, the legal division representative shall sign the settlement agreement.

(f) Regardless of whether the department refers a complaint to the dispute resolution division before or after investigation has commenced, the department shall suspend investigation while

~~the complaint is with the dispute resolution division. After mediation is declined or is unsuccessful, the department shall commence, resume, or complete the investigation as necessary.~~

~~(g) When both sides agree to mediate a complaint pre investigation, the department may assign the complaint to a trained mediator employed by the department's dispute resolution division or a trained volunteer mediator, based on mediator availability and the department's discretion. Whenever a complainant or respondent is represented by an attorney or advocacy organization, the assigned mediator shall communicate with the party's attorney or advocate regarding scheduling and settlement. Matters the legal division refers for mandatory dispute resolution shall be assigned to a DFEH attorney mediator.~~

~~(h)(1) Except as otherwise required by law, nothing that is said or done in the course of the mediation process may be made public. However, settlement agreements shall be public records available in accordance with the department's Public Records Act policy, including the provisions regarding redaction, unless:~~

~~(A) In pre-investigation mediation, the parties request nondisclosure and the chief of dispute resolution, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department.~~

~~(B) In mandatory dispute resolution, the parties request nondisclosure and the director, or a designated representative, determines that disclosure is not required to further the purposes of the laws enforced by the department.~~

~~(2) Circumstances that may result in partial or complete nondisclosure of a settlement agreement may include, but are not limited to:~~

~~(A) Claims involving allegations of sexual harassment;~~

~~(B) A complainant's physical or mental condition, or medical diagnoses; or~~

~~(C) Claims involving circumstances that, if disclosed, could create a safety risk, including the fact that a complainant is a resident in a domestic violence shelter or other protected residence.~~

~~(i) Any written settlement agreement reached through a DFEH dispute resolution division conference may be used as evidence to enforce the terms of the settlement agreement if the conditions of Evidence Code section 1123 are satisfied and the agreement contains language showing the intent of the parties to be bound by the agreement's terms.~~

~~(j) All DFEH mediated settlement agreements shall include "affirmative relief." Affirmative relief may include individual relief to make the complainant whole such as approving or restoring a housing opportunity, approval of a reasonable accommodation request, and relief in the public interest to prevent future discrimination or harassment such as training, the development of~~

~~policies or practices, and affirmative advertising. DFEH mediators assist parties to select the affirmative relief that is best suited to the housing complaint at issue. Agreements shall also include reporting and monitoring provisions to ensure compliance with settlement terms.~~

~~(k) A copy of any settlement agreement executed in connection with a DFEH dispute resolution division conference shall be provided to the department's dispute resolution division.~~

~~(l) DFEH complaints resolved through mediation shall be closed by the department.~~

~~Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 1119, 1120 and 1123, Evidence Code; and Sections 12930(f) and 12963.7, Government Code.~~

§ 10063. Civil Actions.

(a) If, after investigation, it is determined by the department that discrimination has occurred or is about to occur, and the alleged violation has not been remedied through conference, conciliation, mediation, or persuasion, or otherwise, the director shall file a civil action in the name of the department.

(b) An action may be filed, if at all, only after the department has required mandatory ~~dispute resolution post-determination mediation, except as provided for by section 10281 of these regulations.~~

(c) In making the determination whether discrimination has occurred or is about to occur, the department shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action. Factors considered by the department in making such a determination include, but are not limited to: (1) the strength and sufficiency of the evidence of unlawful conduct; and (2) the likelihood of prevailing on the merits at hearing or trial.

~~Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(h), 12965, 12981(a) and 12981.1, Government Code.~~

Subchapter 4. Conciliation

§ 10280. Conciliation.

~~(a) The department may attempt to resolve complaints through conciliation. Mediation, a form of conciliation, is addressed in section 10281 of these regulations. This section addresses other conciliation efforts that may include settlement discussions conducted by investigators, attorneys, or other CRD staff before or after the department has determined that there is reasonable cause to believe a law it enforces has been violated.~~

(b) The department shall inform respondents and complainants when it is initiating a conciliation.

(c) Communications during conciliations shall be kept confidential, except the following are not required to be kept confidential:

(1) issues established as fact during the investigation (but not facts communicated confidentially only as part of conciliation);

(2) settlement agreements reached during conciliations, with limited exceptions for partial confidentiality through redactions as permitted under section 10281 of these regulations and Code of Civil Procedure section 1001; and/or

(3) information or documents produced during a conciliation that the producing party has authorized the department to disclose.

(d) The confidentiality of conciliation communications shall not prevent participants in a conciliation from:

(1) sharing information about what transpired in the conciliation with their counsel or co-counsel who did not participate in the conciliation; or in the event of a settlement, with parties identified and agreed to in the written settlement agreement; or

(2) discussing at a continued or resumed conciliation the settlement offers and other statements parties made during an earlier conciliation of the same complaint.

(e) For cases that are dual filed with HUD or EEOC, conciliations and settlement agreements shall meet all requirements contractually required by HUD or EEOC.

(f) The department may require all parties to agree in writing to toll any applicable statutes of limitations for filing a civil action between the date a conciliation commences and the time the department notifies the parties in writing that the conciliation has been completed.

(g) All settlement agreements reached through conciliation shall comply with the requirements for settlement agreements reached through CRD mediations, as specified in section 10281 of these regulations.

Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 12930(f)(1), 12963.7, 12980(i), 12984, and 12985, Government Code.

§ 10281. Mediation.

(a) Voluntary Pre-Determination Mediation.

(1) The department may, but is not required to, offer the parties to a complaint the opportunity to participate in voluntary pre-determination mediation with the dispute resolution division.

(2) Parties to a complaint may request referral to the dispute resolution division for voluntary pre-determination mediation but the department is not required to make the referral. Factors considered by the department when determining whether to make a referral to voluntary pre-determination mediation include, but are not limited to: department resources, whether the complaint affects a group or class of individuals, mediator availability, and the department's interest in redressing and preventing civil rights violation in a public matter as a public prosecutor.

(3) Only the director, chief counsel, assistant chief counsel in the legal division, or their designee may approve any high priority complaint, as described in sections 10029(b) and 10061(b) of these regulations, or group or class complaint being referred to a voluntary pre-determination mediation.

(4) After a complaint is accepted by the dispute resolution division, the division may assign the complaint to a mediator employed by the department or a volunteer mediator, based on mediator availability and the dispute resolution division's discretion.

(5) All parties to a voluntary pre-determination mediation and their representatives, if any, as well as the CRD mediator or volunteer mediator, must agree in writing to the following sign the department's required Agreement to Mediate and Confidentiality Agreement as a condition of participation in mediation:

(A) The parties agree to the confidentiality provisions in subsection (c) of this section;

(B) The parties agree to mediate because they have a sincere desire to resolve the complaint;

(C) By participating in the mediation, no party is admitting guilt or wrongdoing;

(D) The mediator assigned by CRD may upon request by any party or a department representative allow other people to participate in the mediation if in the mediator's judgment it would be beneficial to the mediation process; and

(E) The parties and their representatives are prohibited from making audio, video, and photographic recordings throughout the mediation process.

(6) Whenever a complainant or respondent is represented by an attorney or advocate, the assigned mediator shall communicate with the party's attorney or advocate regarding scheduling and settlement. Parties may receive automated emails that they may disregard or forward to counsel.

(7) Regardless of whether the department refers a complaint to the dispute resolution division before or after investigation has commenced, the department will suspend pursuit of investigative discovery from the respondent(s) while the complaint is with the dispute resolution division. However nothing in this subdivision precludes the department and the respondent(s) from agreeing to the voluntary production of information while a case is pending with the dispute resolution division.

(8) A department representative outside of the dispute resolution division may elect to participate in a voluntary pre-determination mediation to ensure that relevant information obtained by the department in the investigation is presented, and that the department's interest in redressing and preventing civil rights violations is addressed. Any such department representative must agree in writing to the same terms set forth in subdivision (5) of subsection (a), will be required to sign the department's Agreement to Mediate and Confidentiality Agreement as a condition of participation in mediation.

(9) If mediation is declined or is unsuccessful, the department shall commence, resume, or complete the investigation as necessary.

(b) Mandatory post-determination mediation.

(1) If the department determines that there is reasonable cause to believe that a law it enforces has been violated, the department shall require the parties to participate in a mandatory post-determination mediation in an effort to resolve the dispute without litigation. The department will schedule the mandatory post-determination mediation prior to filing a civil action unless, in the department's discretion, circumstances warrant filing the civil action without scheduling a mandatory post-determination mediation.

(2) A legal division attorney shall participate in any post-determination mediation or settlement discussion conducted before or after a civil action is filed. A legal division attorney must approve and sign any settlement agreed to in a post-determination mediation or settlement discussion.

(3) All parties to a mandatory post-determination mediation and their representatives, if any, as well as the CRD mediator or volunteer mediator, must sign the department's required Agreement to Mediate and Confidentiality Agreement as a condition of participation in mediation, agree in writing to the following as a condition of participation in mandatory post-determination mediation:

(A) The parties agree to the confidentiality provisions in subsection (c) of this section;

(B) By participating in the mediation, no party is admitting guilt or wrongdoing;

(C) The mediator assigned by CRD may upon request by any party or a department representative allow other people to participate in the mediation if in the mediator's judgment it would be beneficial to the mediation process; and

(D) The parties and their representatives are prohibited from making audio, video, and photographic recordings throughout the mediation process.

(c) Confidentiality.

(1) Communications, notes, and records generated during the course of or for purposes of a mediation that are exchanged between a mediator and the parties to a mediation and that relate to the parties' settlement positions and negotiations are confidential, consistent with California Evidence Code sections 1115 through 1129.

(2) A mediator may disclose confidential information that a party shares during the course of a mediation in the following circumstances:

(A) With the authorization of the party or their representative;

(B) When operationally or ethically necessary, a mediator may discuss the mediation process with a co-mediator, the deputy director of dispute resolution or their designee, or dispute resolution division administrative staff, who will maintain the confidentiality of the mediation process.

(3) The following categories of information generated during the course of or for purposes of mediation are not confidential:

(A) Communications and records that only address scheduling and do not otherwise contain any substantive information about the parties' respective settlement positions;

(B) Communications and records relating only to the fact of a party's participation or non-participation in mediation;

(C) Whether a party agreed to mediate and the executed versions of any agreement to mediate and any confidentiality agreement, including any agreement completed pursuant to subsection (a)(5) or (b)(3) party signed an Agreement to Mediate and Confidentiality Agreement and the executed versions of these documents;

(D) Documentation of compliance with a settlement agreement provided by a party, except to the extent that the written settlement agreement provides for confidentiality of a party's name and/or the amount of monetary relief and such confidentiality is permitted by law;

(E) Any log maintained in the mediation case record showing dates of communications and the general subject of the communications between the mediator, dispute resolution division staff, and the parties and representatives, and.

(F) A threat of imminent physical harm or physical harm made by a party or their representative.

(4) Settlement agreements reached through the department's conciliation processes, including mediation in the dispute resolution division, are not confidential documents and are public records, except:

(A) An individual complainant may choose to keep their name confidential as part of a settlement agreement unless disclosure is required by law or contract between the department and EEOC or HUD. When an individual complainant chooses to keep their name confidential, the department will redact the complainant's name before publicly disclosing the settlement agreement or information about the settlement agreement under the Public Records Act, workshare agreement obligations, or for any other purpose, with the exception that the department shall disclose the complainant's name to HUD or EEOC if the case is dual-filed with HUD or EEOC.

(B) The parties to a voluntary pre-determination mediation may negotiate a term making the amount of any monetary recovery confidential unless disclosure is required by law or contract between the department and EEOC or HUD. If the amount of monetary recovery is made confidential, the department will redact the monetary term before publicly disclosing the settlement agreement or information about the settlement agreement under the Public Records Act, workshare agreement obligations, or for any other purpose, with the exception that the department shall disclose the amount of monetary recovery to HUD or EEOC if the case is dual-filed with HUD or EEOC.

(C) The deputy director of the dispute resolution division or their designee may approve a term designating as confidential a portion of a settlement agreement, but not the entire agreement. Such approval will be limited to exceptional and unusual circumstances such as, for example, where the department has concluded that public disclosure of a settlement term could endanger a party and where disclosure is not required to further the purpose of the laws the department enforces or otherwise required by law or contract between the department and the EEOC or HUD.

(D) If the parties agree to keep a party's name or amount of monetary recovery confidential under paragraph (A) or (B), CRD may disclose this information as compelled by law, as necessary to enforce the terms of the settlement agreement, or in the event that CRD needs to reopen the case.

(5) Subject to the other provisions of this subsection (c), communications, notes, and records generated during the course of or for purposes of a mediation and in the possession of the

dispute resolution division shall be maintained in such a way as to not be accessible by CRD staff in the legal division or enforcement division or who are otherwise engaged in enforcement actions of the department.

(d) Required Settlement Agreement Components.

(1) All CRD-mediated settlement agreements shall be reduced to writing, signed by all parties, and the department shall act as a signatory pursuant to Government Code section 12964. All CRD-mediated settlement agreements shall include affirmative relief and shall include the development of policies or practices to prevent future discrimination, harassment, retaliation, or other unlawful practices. The mediator may assist parties to select the affirmative relief that is best suited to the complaint at issue. The settlement agreement shall state clearly the terms of the agreement.

(2) A settlement agreement resulting from a voluntary pre-determination mediation must use the applicable dispute resolution division settlement agreement template.

(3) All settlement agreements shall meet the conditions of Evidence Code section 1123 for being admissible in evidence in any proceeding that the department brings to enforce the settlement agreements. Settlement agreements may include provisions for a court to retain jurisdiction to enforce the agreement.

(e) The department may close a complaint resolved through a CRD mediation while monitoring a respondent's compliance with a settlement agreement and, if necessary, reopen the complaint to enforce the settlement agreement through mediation or other legal action.

Note: Authority cited: Section 12930(e), Government Code. Reference: Sections 1119, 1120, and 1123, Evidence Code; and Sections 12930(f), 12963.7, 12964, 12965, and 12980(i), Government Code; and *Civil Rights Department v. Grimmway Enterprises, Inc. (2025) 768 F.Supp.3d 1099*.