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Nicole Meyers
THE LAW OFFICE OF NICOLE MEYERS, APC

Oshea Orchid
PUBLIC EMPLOYEES, LLP

Claims against public-sector employers can be calculated to expand your practice

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS REQUIRED AT BOTH THE FEDERAL AND THE STATE/LOCAL LEVELS, AND THOSE REMEDIES ARE FASTER AND OFTEN MORE EFFECTIVE THAN LITIGATION

Many attorneys who practice plaintiff's employment law shy away from representing public employees. Attorneys are often deterred because they lack knowledge about the various rules, differing statutes of limitations, and procedural hurdles that distinguish private-sector employees, and which appear more complex.

The first priority for counsel sounds simple: It is imperative that your intake process includes a thorough assessment of the rules and procedures for public-sector employees. This often eludes attorneys, but issues of law like administrative prerequisites and exhaustion of remedies must be accounted for and satisfied before commencing a lawsuit. This includes knowing what statutes of limitations apply, and whether the employee is subject to a Memorandum of Understanding (MOU), Personnel Rules, Civil Service Rules, or other agency-specific rules. Once you identify any applicable internal processes that need to be followed, counsel can calculate and calendar the deadlines.

Don't hesitate to ask a lot of questions of your client, the agency representatives or even opposing counsel to determine what procedures need to be utilized. The agency by which plaintiff is or was employed has an obligation to furnish the rules detailing their administrative procedures – upon request. Remember, your client is not the first employee going through this labyrinth. The agency representatives also have an interest in assisting in this process to proceed as smoothly as possible.

Bringing discrimination claims against federal agencies

Many federal employment laws that protect the rights of private-sector employees also cover federal employees, but there are specific regulations and statutes that protect federal employees. Here we will discuss federal civil service employees, which includes individuals other than military personnel who are employed in the executive, judicial, and legislative branches of the United States government. The civil service is subdivided into the competitive service, excepted service, and the Senior Executive Service.

Federal employees who believe they have been discriminated against must contact an agency EEO counselor before filing a formal complaint. The employee must initiate contact with an EEO counselor within 45 days of the matter alleged to be discriminatory. (29 C.F.R. § 1614.105(a)(1).) This time limit shall be extended where the individual shows that they did not and reasonably should not have known that the discriminatory matter occurred; despite due diligence they were prevented by circumstances beyond their control from contacting the counselor within the time limits. (29 C.F.R. § 1614.105(a)(2).)

The EEO Counselor provides information to the aggrieved individual, including how the EEO process works, and attempts to informally resolve the matter. In most cases, the EEO Counselor will give the individual the option of participating in either EEO counseling or in an alternative dispute resolution (ADR) program, such as mediation. If the matter fails to resolve through counseling or ADR, the aggrieved may file a formal discrimination complaint against the agency with the agency's EEO Office. The formal complaint must be filed within 15 days from the day the individual receives notice from the EEO Counselor about how to file.

After the formal complaint is filed, the agency reviews the complaint and determines whether the complaint should be dismissed for a procedural reason (i.e., the claim was filed too late, complainant already elected to pursue the matter through a negotiated grievance procedure or in an appeal to the Merit Systems Protection Board). If the complaint is not dismissed, the agency has 180 days from the date of filing to conduct an investigation. When the investigation is finished, the agency will issue a notice giving the individual two choices: (1) request a hearing before an EEOC Administrative Judge (AJ), *or* (2) ask the agency to issue a decision as to whether the discrimination occurred.

If the complainant asks the agency to issue a decision and they determine there was no discrimination, or if the individual disagrees with part of the decision, they may appeal to EEOC, or file a lawsuit in federal district court.

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In the alternative, the complainant may seek a hearing. They must make their request in writing or via the EEOC Public Portal within 30 days after receipt of their hearing rights from the agency. Within 15 days after receipt of the request for hearing, the agency must submit a copy of the complaint file to EEOC. The EEOC will then assign an Administrative Judge to conduct the hearing.

Parties may conduct discovery before the hearing. Unless the AJ requires the agency to bear the costs of discovery, each party bears its own costs.

An EEOC hearing is considered part of the investigative process, so it is closed to the public. The hearing is recorded and the agency is responsible for the costs of transcripts. Rules of evidence are not strictly enforced during the hearing. If the AJ determines that some or all facts are not in genuine dispute, they may limit the scope of the hearing or issue a decision without a hearing.

The AJ must conduct the hearing and/or issue a decision within 180 days of their receipt of the complaint file from the agency. Once the agency receives the AJ's decision, the agency must issue a final order with 40 days of receipt. The final order will notify the complainant whether the agency will fully implement the AJ's decision, and will contain a notice of the complainant's right to appeal to EEOC or file a civil action. If the agency does not fully implement the decision of the AJ in its final order, the agency must simultaneously file its appeal with the EEOC.

A complainant has the right to appeal an agency's final order (including a final order dismissing their complaint) to EEOC's Office of Federal Operations (OFO). The appeal must be filed within 30 days after receipt of the final order.

Once received by the OFO, EEOC appellate attorneys will review the entire file, including the agency's investigation, the AJ's decision, the transcripts of any hearing and any statements characterizing the appeal by the parties.

Review on appeal from an agency's final order is de novo, except that factual findings in the AJ's decision are reviewed for substantial evidence. (29 C.F.R. § 1614.405(a).)

A party may request reconsideration of the EEOC's decision on appeal within 30 days of receipt of the OFO's decision. A request for reconsideration will only be granted if the requesting party can show that the decision involved a clearly erroneous interpretation of material fact or law; or when the decision will have a substantial impact on the policies, practices, or operations of the agency. (29 C.F.R. § 1614.405(b).)

Filing a lawsuit against a federal agency

An aggrieved federal employee must go through the administrative complaint process before they can file a lawsuit in federal district court. There are several different points, however, where a complainant may be deemed to have exhausted their administrative remedies to authorize the commencement of a lawsuit in federal district court:

- After 180 days from the day the complaint was filed, and the agency has not issued a decision and no appeal is pending;
- Within 90 days of receipt of the agency's decision on their complaint and no appeal is pending;
- After180 days from the day the complainant has filed their appeal and the EEOC has not issued a decision; or
- Within 90 days of receipt of the EEOC's decision on their appeal.

Bringing discrimination claims against California state and local agencies

State, County and City employees are generally not required to exhaust an internal administrative process for discrimination complaints. However, most agencies do have an Equal Opportunity process that can be utilized. Current employees filing a complaint for discrimination and harassment internally have the advantage of triggering a documented investigation, and in some cases, the opportunity to mediate or otherwise resolve the outstanding issues to their satisfaction.

This is more likely the pathway in larger agencies where independent investigators (think, "internal affairs") may actually conduct a fair and impartial investigation because they have no relationship to the bad actors. As the agency gets smaller, the employee may find utilizing internal procedures to be less effective, particularly if those responsible for the underlying conduct have any role in investigating or directing an investigation.

Employees, and particularly, former employees can bypass agency review entirely by obtaining a right-to-sue letter from the Department of Fair Employment and Housing (or EEOC for cases in federal court). The right-to-sue letter authorizes their commencing a discrimination complaint in state Superior Court or the United States District Court, regardless of utilizing the agency's internal administrative procedures. Former employees and current employees with reservations about resolving anything through their agency may choose litigation as the most efficient means of gaining closure.

Administrative procedures

Employment litigation against public entities generally requires exhaustion of the employee's administrative remedies before filing a lawsuit.

The general rule is that plaintiff exhausts their administrative remedies if they file a DFEH complaint within one-year of the allegedly unlawful act. (Gov. Code, § 12960.) A disparate impact claim must be independently exhausted.

Moreover, if the employee has claims outside of the rubric of the FEHA, such as whistleblower claims, the employee will be required to separately exhaust any internal administrative procedures available and file a government claim. This will avoid the always-anticipated defense of failing to exhaust administrative remedies that would effectively work as a forfeiture against your client.

Internal procedures are usually triggered by a termination or serious

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disciplinary or employment action. This includes public-sector employees who generally have due process rights. Details of governing procedures have some variability from agency to agency. However, all agencies are required to furnish employees with notice of any proposed or intended discipline, and a meaningful opportunity to respond to the charges before disciplinary action can be taken. For federal employees, this is often referred to as a proposal, and for California public-sector employees it is called a "*Skelly* hearing," after the California Supreme Court's seminal decision in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. It should be underscored that due process requires the offending employer agency to provide everything the proposed employment action is based on.

Counsel would do well to remember to examine all documents provided with the intended action or proposal with an eye for omitted or withheld evidence. Some common examples suffice including an investigation referencing interviews without transcripts, redacted investigation reports, or references to other documents or complaints that were not provided to the complainant-employee.

Procedures for appealing discipline

Federal employees

The Merit Systems Protection Board (MSPB) is an independent, quasi-judicial agency in the Executive Branch that serves as a guardian of federal merit systems. The MSPB essentially operates as a civil service system for federal employees appealing discipline and other prohibited personnel practices. It is authorized by the Civil Service Reform Act of 1978 (CSRA) to hear appeals of some, but not all, agency actions.

The majority of personnel actions before the MSPB are adverse agency actions. They include:

- Reductions in pay or grade, also known as demotions
- Furloughs of 30 days or less
- Removals, or termination of employment
- Suspensions of more than 14 days

Other actions that may be appealed to the MSPB include performance-based reductions in grade or removals, denials of within-grade salary increases, reduction in force actions, terminations of probationary employees, denials of restoration or employment rights. This also includes employment actions administered by the Office of Personnel Management (OPM) that examine and evaluate the qualifications of an individual for appointment to the competitive service. Some personnel actions that are not appealable to the MSPB may be appealable to the OPM, or may be covered under the agency's grievance procedures. While most discrimination complaints should be filed with the EEO, the MSPB will adjudicate discrimination complaints that are connected to personnel actions that are administratively appealed.

State employees

State employees must appeal any disciplinary actions to the State Personnel Board. The State Personnel Board Hearing Manual can be viewed online, and will detail the procedures and applicable rules. Any and all retaliatory conduct leading to employment action must be appealed to the State Personnel Board.

County employees

Counties have a civil service system in place for appealing discipline. Counsel should set out locating the County's civil service rules, any Memorandums of Understanding which apply to the client, and any other applicable County policies, such as personnel- or department-specific policies.

Recently, in *Terris v. County of Santa Barbara* (2018) 20 Cal.App.5th 551, the Second District Court of Appeal held that a County employee failed to exhaust administrative procedures prior to filing discrimination and whistleblower claims in superior court. In *Terris*, the County had repeatedly offered to add the employee's claims of unfair treatment to the issues before the civil service hearing officer, and the plaintiff's attorney refused to add them, choosing instead to take those claims to superior court. Because the law on internal exhaustion is frequently changing and can be very confusing, accepting any administrative process that is offered may be the safest option.

City employees

Many larger municipalities will have a civil service system like a county. However, other due-process procedures for appealing discipline may be a hearing before the City Manager, City Council, a Personnel or Human Resources Commission, or a designated hearing officer. Counsel can navigate this easily by locating any applicable Memoranda of Understanding, the municipality's Personnel Rules, Civil Service Rules, and the Municipal Code. Familiarity with the local rules can provide counsel an advantage. Many times, officials tasked with implementing these municipal procedures may not have brushed up on the local rules in years and they are subject to change.

Most procedures to be followed by employees are available for viewing and downloading online. However, some smaller agencies may not have these resources, or you may have a difficult time locating them. If you cannot immediately find the documents you need online, write and ask the agency's counsel, or whomever you are dealing with in the human resources department, to provide copies of their rules. Any agency with due process or complaint procedures is required to provide the procedures to their employees and representatives.

Government claims

Finally, and again, unless you are certain all your client's claims fit within the rubric of FEHA, a government claim should be filed within six months of the alleged illegal or wrongful conduct. This is in addition to, and not in lieu of, following due-process procedures. The timeline for filing is not tolled by an appeal, a termination or other discipline.

Most agencies have a complaint form online that you can download and

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save. If you cannot find the form, you can write your own. Best practices include incorporating all the requirements set forth in Government Code section 910 in a separately an attached form, signed by counsel. Section 910 provides,

> A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following:
>
> (a) The name and post office address of the claimant.
>
> (b) The post office address to which the person presenting the claim desires notices to be sent.
>
> (c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.
>
> (d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.
>
> (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.
>
> (f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case.

Public employees' union rights

Most government employees in California come under the jurisdiction of the Public Employment Relations Board (PERB). PERB is a quasi-judicial agency which oversees public-sector collective bargaining, and adjudicates disputes between employers and unions or employees including cases of retaliation for protected union activity. Some of the main statutes administered by PERB are:

- The Educational Employment Relations Act (EERA) applies to California's public schools (K-12) and community colleges
- The Dills Act applies to state employees
- The Higher Education Employer-Employee Relations Act (HEERA) applies to the California State University System, the University of California System and Hastings College of Law
- The Meyers-Milias-Brown Act (MMBA) applies to California's municipal, county, and local special district employers (PERB's jurisdiction over the MMBA excludes peace officers, management employees and the City and County of Los Angeles)
- The Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) applies to supervisory employees of the transit agency
- The following are some examples of unlawful employer conduct which would come under PERB's jurisdiction:
  - coercive questioning of employees regarding their union activity;
  - threatening employees or discriminating against employees because they participated in union activities;
  - promising benefits to employees if they refuse to participate in union activity;
  - failure to engage in good faith bargaining;
  - interference with union activities; and
  - retaliation for participation in union activity.

Conclusion

Many lawyers come into contact with public-sector employees who have experienced illegal employment action, and with some basic research and form-building for calendar management, lawyers who were reticent about the burdens of administrative procedures can see the forest and the trees, cut through thickets and distinguish their practices from other labor lawyers – which might be the greatest benefit of all.

Oshea Orchid is a partner at Public Employees, LLP, *a Los Angeles based firm focused on representing public-sector employees in all aspects of their employment. She can be reached at oshea@publicemployees.legal.*

Nicole Meyers is an employment and civil rights attorney practicing in Los Angeles, with a focus on representing employees before administrative agencies and in litigation. She is a graduate of UCLA and Southwestern Law School and is also licensed in New York. Nicole is the founder and principal at The Law Office of Nicole Meyers, APC *and can be reached at nicole@nicolemeyers.law.*