

Health Care Practice Tip – July 2020

Filing Administrative Complaints for Race-based Discrimination in Health Care

The information on the DFEH complaint process was previously provided in our [April 2019 Health Tip](#).

The COVID-19 pandemic has drawn renewed attention to racial health disparities. While these disparities are often explained by upstream problems such as inadequate food, housing, and lack of safe environments to live, work, and play, we also know that people of color disproportionately experience lower quality health care and discrimination in health care settings.¹

At the same time, the federal Health & Human Services agency's Office of Civil Rights has shifted much of its focus from protecting Americans from discrimination in health care settings to protecting providers' ability to discriminate based on their own religious freedom. This might leave advocates wondering what they can do if a client has knowingly experienced racial discrimination in a health care setting. Despite any federal erosion of civil rights protections, California law maintains its own non-discrimination provisions that can be applied broadly to health care settings.

1. Examples of Discrimination in a Health Care Setting

In California, it is unlawful to discriminate on the basis of race, color, religion, ancestry, national origin, and ethnic group identification in state-funded programs (Government Code § 11135) and all businesses (Civil Code § 51 *et seq.*). This includes most, if not all, health care settings.

The following is a list of examples of how race-based discrimination may occur in health care settings.² This is neither an exhaustive list of examples of discrimination nor claims that would necessarily prevail under California's non-discrimination statutes.

- A health plan utilizes an algorithm that results in a different and better set of services targeted to White members as compared to non-White members.
- A Medi-Cal health plan provides more non-emergency medical transportation in neighborhoods with predominantly White residents as compared to neighborhoods with predominantly Black and Latinx residents.
- COVID-19 testing sites are not accessible to certain racial or ethnic groups, such as the lack of walk-in testing sites in urban areas or lack of home visitation testing in rural areas where transportation is a challenge for certain racial or ethnic groups.
- A hospital selects an advisory board at the exclusion of non-White individuals.
- A patient reports being belittled or disbelieved by medical staff and asked things that stereotype her, such as whether she knows who is the father of her child, a question not typically asked to patients of other races.
- State policy allows nursing homes to certify fewer Medi-Cal beds, resulting in less access for Black, Latinx, and Asian residents to high-quality nursing homes.

¹ See e.g. *Bad Medicine: The Harm That Comes From Racism* <https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html>; *Black Children Are More Likely to Die After Surgery Than White Peers, Study Shows* <https://www.nytimes.com/2020/07/20/health/black-children-surgery-deaths.html>; *Pregnancy can be life-threatening for black women. SB 464 can change the equation* <https://www.sacbee.com/opinion/california-forum/article227252189.html>

² Some of the examples are adapted from Title VI guidance released by the Office for Civil Rights at the U.S. Department of Health and Human Services on July 20, 2020: <https://www.hhs.gov/sites/default/files/title-vi-bulletin.pdf>.

- The Medi-Cal program sets medical necessity criteria for a certain service such that Latinx beneficiaries have a more difficult time accessing that service as compared to other racial groups.

2. Department of Fair Employment and Housing (DFEH) Complaints

In 2016, [SB 1442 \(Liu\)](#) reorganized how discrimination complaints would be handled by state agencies. Among other things, it consolidated the regulatory authority under DFEH for [Government Code § 11135](#), the antidiscrimination statute for recipients of state funding, and the Unruh Civil Rights Act ([Civil Code § 51 et seq.](#)), California's broad antidiscrimination statute affecting all businesses, including health facilities.

In addition to moving the authority to promulgate regulations under these two statutes, DFEH, which has now rebranded itself as "California's Civil Rights Agency," has authority to investigate complaints brought under these statutes, similar to how it handles employment discrimination complaints. In other words, when a consumer faces discrimination at a health care facility, the consumer can elect to seek an investigation of their complaint through an administrative process.

DFEH's complaint process is a bit different than an administrative fair hearing conducted by the Department of Social Services. A complaint must be filed **within one year** of the alleged discrimination. At that point, if DFEH accepts the case for investigation, it prepares a complaint to serve on the respondent. Once the respondent replies, parties are encouraged to use DFEH's free dispute resolution processes. If no resolution can be found, DFEH will investigate to determine if California law has been violated. If DFEH finds that no law was violated, they will end the investigation. If DFEH finds a probable violation of the law, the parties must go to mediation. If the parties cannot reach an agreement at mediation, DFEH may file a lawsuit on behalf of the claimant.

DFEH has a full description of the process, including a handy flowchart, on its website [here](#).

While California consumers still retain their rights to file lawsuits enforcing California law in the face of discrimination at a health care facility, both consumers and their legal services advocates sometimes lack the resources to fully address a violation on their own. The DFEH complaint process is designed to be a simplified process to address these concerns, with an emphasis on early resolution.

3. Other Places to File

Consumers can also file complaints, including discrimination complaints, with the **Department of Public Health's Licensing and Certification** division if the discriminatory conduct occurred in a licensed health care facility. Even concerned advocates, relatives, friends, and members of the public can file a complaint with the Department of Public Health. Information on filing a complaint, including where to route the complaint based on which district it resides can be found on their website [here](#).

Similarly, consumers can file a complaint about a doctor with the [Medical Board of California](#), with the [Department of Health Care Services](#) if the provider is a Medi-Cal provider, or with the **plan regulator** (such as the [Department of Managed Health Care](#) of the [Department of Insurance](#)) if it is a plan that is discriminating. While reporting to the regulator can be effective, consumers should also understand the limits of these complaints. In some cases, the regulator can mandate that a denied service be provided or assess a penalty on the plan or provider. However, regulators cannot attempt to make a consumer whole for the harm suffered as a result of the discrimination.

The Health Consumer Alliance has a consumer-facing publication, [How Consumers Can Address Quality of Care Concerns](#), with the contact information of these entities.

For questions or to share your experience in filing a DFEH complaint for discrimination at a health care facility, contact Jen Flory at jflory@wclp.org or Helen Tran at htran@wclp.org.