Per California Code of Regulations, title 2, section 548.5, the following information will be posted to CalHR's Career Executive Assignment Action Proposals website for 30 calendar days when departments propose new CEA concepts or major revisions to existing CEA concepts. Presence of the department-submitted CEA Action Proposal information on CalHR's website does not indicate CalHR support for the proposal.

A. GENERAL INFORMATION

1. Date
3/10/2022

2. Department
Department of Fair Employment & Housing (DFEH)

3. Organizational Placement (Division/Branch/Office Name)
Legal Division

4. CEA Position Title
Deputy Chief Counsel

5. Summary of proposed position description and how it relates to the program's mission or purpose.
(2-3 sentences)
Under the general direction and supervision of the Chief Counsel of the Department of Fair Employment and Housing (DFEH), the Deputy Chief Counsel (DCC) supports the Chief Counsel in direction, oversight, and administration and sets policies and procedures of the Legal Division. The DCC serves as a civil rights expert and legal advisor to the Chief Counsel; assists in supervising the work of Assistant Chief Counsels; provides guidance as needed to supervisors, attorneys, investigators, and support staff; creates and supports a work environment consistent with the Department's core values and civil rights mission; and performs other duties as directed by the Chief Counsel. This position has an enterprise-wide impact and an increased level of responsibility as the department continues to grow in the number of positions and locations.

6. Reports to: (Class Title/Level)
Chief Counsel / Appointed

7. Relationship with Department Director (Select one)

☑ Member of department's Executive Management Team, and has frequent contact with director on a wide range of department-wide issues.

☐ Not a member of department's Executive Management Team but has frequent contact with the Executive Management Team on policy issues.

(Explain): Reports to Chief Counsel (appointed), and provides expert advice on all legal matters apart from external systemic and confidential litigation work activities to Executive Management Team, Agency and the Governor's Office.

8. Organizational Level (Select one)

☐ 1st  ☐ 2nd  ☑ 3rd  ☐ 4th  ☐ 5th (mega departments only - 17,001+ allocated positions)
9. What are the duties and responsibilities of the CEA position? Be specific and provide examples.

The Department of Fair Employment and Housing’s Deputy Chief Counsel (DCC) supports the Chief Counsel in direction, oversight, and administration and sets policies and procedures of the Legal Division. The DCC serves as a civil rights expert and legal advisor to the Chief Counsel; assists in supervising the work of Assistant Chief Counsels; provides guidance as needed to supervisors, attorneys, investigators, and support staff; creates and supports a work environment consistent with the Department’s core values and civil rights mission; and performs other duties as directed by the Chief Counsel.

The Deputy Chief Counsel’s duties include, but are not limited to:

Assist the Chief Counsel in planning, organizing, and directing the work of Assistant Chief Counsels in affirmative litigation under the civil rights statutes enforced by the Department. Monitor the overall quality and efficiency of the Division’s work consistent with civil rights laws, state government laws and policies, DFEH’s mission, and professional and ethical standards of conduct. Set, implement and evaluate policies and procedures for the Legal Division. Under the direction of the Chief Counsel, provide management and guidance to Division staff, evaluate the performance of staff, and take or recommend appropriate action.

Assist the Chief Counsel in overseeing the work of the Legal Division related to general counsel duties, including oversight of the administrative and operational functions of the Division. Maintain decision-making authority in case grading with DFEH investigators, help to identify issues and analyze cases and compel investigative discovery, and defend DFEH against third-party claims, internal claims and represent DFEH personnel when subpoenaed to testify at deposition or trial.

Assist the Chief Counsel in setting the strategic direction and goals for the Division. Identify and oversee the implementation of specific projects and activities to meet strategic goals and priorities. Assist the Chief Counsel in setting and administering budget and contracts, staffing resources, and management priorities and processes, and manage divisional hiring, onboarding, training and mentoring, as well as facilities and purchasing issues.

Under the direction of the Chief Counsel, provide analysis, advice, and management of complex and sensitive issues relating to all aspects of divisional operations with control agencies as well as the public, legislators, EEOC, HUD, other state and federal civil rights agencies, and other external stakeholders, including the State Compensation Insurance Fund, State Personnel Board, California Department of Human Resources, Fair Political Practices Commission and the Employment Development Department. Represent the Department, Legal Division, and Chief Counsel in public functions, on committees and task forces, and with stakeholders.
10. How critical is the program's mission or purpose to the department's mission as a whole? Include a description of the degree to which the program is critical to the department's mission.

☑ Program is directly related to department's primary mission and is critical to achieving the department's goals.

☐ Program is indirectly related to department's primary mission.

☐ Program plays a supporting role in achieving department's mission (i.e., budget, personnel, other admin functions).

Description: DFEH receives, investigates, conciliates, mediates, and prosecutes complaints of alleged violations of the Fair Employment and Housing Act (FEHA), the Equal Pay Act, the Unruh Civil Rights Act, the Ralph Civil Rights Act, Civil Code section 51.9, the Disabled Persons Act, the California Trafficking Victims Protection Act, and Government Code section 11135 et seq (prohibiting discrimination in all State-funded activities and programs). DFEH affirmatively investigates discriminatory practices within the State in accordance with its statutory mandate “to eliminate discrimination in California.” A critical component of meeting DFEH’s mission is the department’s efforts to provide employers, housing providers, businesses, state-funded programs and activities, and the public clear, accurate, and easily accessible information related to their rights and responsibilities under the laws that DFEH enforces. DFEH also collects and analyzes pay and demographic data from large employers pursuant to Government Code section 12999.

At the core of the department’s mission is the mandate to provide thorough, timely, and fair investigations of discrimination complaints received from the public. When the department finds a complaint has merit, the FEHA requires that DFEH file a civil complaint within 365 days from the date the complaint was filed. The DFEH Legal Division is charged with investigating and, where necessary, prosecuting employers, housing providers and businesses providing public accommodations who violate the state’s anti-discrimination laws. Since 2012, the Legal Division has been authorized to recover reasonable attorney fees as the prevailing party in litigation or as part of settlements.

Since 2018, DFEH has increasingly focused its efforts on systemic complaints, meaning cases involving a pattern or practice of discrimination, a discriminatory policy, and/or class or group claims. These investigations and litigation are designed to make the biggest impact on the regulated community and allow DFEH to obtain broad injunctive relief to prevent future violations of the law and provide monetary and affirmative relief for hundreds or thousands of individuals impacted by systemic discrimination.
11. Describe what has changed that makes this request necessary. Explain how the change justifies the current request. Be specific and provide examples.

The creation of this existing Deputy Chief Counsel (DCC) CEA position is being requested due to the increasing size of the department and a need to separate the strategic external complex systemic and confidential litigation cases from more internally-focused work, including legislation, regulations, policies, procedures, internal claims, case reviews and investigative discovery, among other issues.

Increased workloads, new state laws, new programs and increased complexity of complaints being received necessitate the creation of this DCC position. Because the DCC will supervise Assistant Chief Counsel positions with maximum monthly salaries of $15,600, the CEA Level C with a maximum monthly salary of $13,063 does not represent a suitable alternative. Because the DCC must be a licensed attorney in order to oversee internal legal issues, DFEH requests to create a CEA in the Restricted Zone salary range.

Each year the number of complaints submitted and accepted by the Department goes up; in 2018 DFEH received 27,840 complaints with 5,395 investigations opened and in 2019 DFEH received 28,739 complaints with 6,600 investigations opened; in 2020, DFEH received 28,897 complaints, with 7,235 open investigative cases. The growth of the program is attributed to heightened media focus on high profile sexual harassment allegations as the #MeToo Movement has increased awareness and new laws passed by the California Legislature increasing civil rights protections such as the Fair Chance Act (AB 1008), the CROWN Act (SB 188), and the SHARE Act (AB 9) which extended the statute of limitations to file an employment discrimination complaint from 1 to 3 years. At this time, the Department plays a more critical role in civil rights enforcement than ever. This transformative moment leaves the Department as one of the only options available for strategic enforcement actions. Targeting resources to areas in which the federal government and the private bar are less capable of prosecuting, such as systemic litigation and strategic enforcement, is the current priority of many state and local government enforcement agencies. Without that shift, Californians will be more vulnerable to civil rights violations.

DFEH’s strategic vision is a California free of discrimination. As the volume of complaints trends up, efforts to prevent discrimination must be strategic, targeted, and forward looking. The Legal Division and the department have grown to meet this challenge. DFEH added 36.7 positions in FY 2020-21 and an additional 32 positions in FY 2021-22. Over these two fiscal years, the Legal Division added 20 additional positions for a 51% growth rate alone in order to support its workloads, and to support additional complaints generated by new laws. These include Senate Bill (SB) 329, which prohibits landlords from asking tenants about their "source of income" to prevent housing discrimination, SB 973, which required DFEH to create an additional online portal and allow employers of 100 or more employees to submit pay data to the department annually in order to identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws, SB 1383 and AB 1033, which expanded the California Family Rights (CFRA) Act and a small employer family leave mediation pilot program, and the creation of fair housing testing programs during the COVID pandemic.

DFEH has also received approval for new offices and leases in areas which the department experiences the highest numbers of complaint submissions, including Oakland and Riverside, which will require mediation expertise to staff.

Due to these ever-increasing staffing levels, new state laws, additional programs, and geographic locations, and because the DCC position must be a licensed attorney, DFEH requests approval for a new CEA designation with the restricted zone level CEA at $18,850 monthly, and a corresponding increase in the department’s spending cap.
12. Provide 3-5 specific examples of policy areas over which the CEA position will be the principle policy maker. Each example should cite a policy that would have an identifiable impact. Include a description of the statewide impact of the assigned program.

1) Fair Employment and Housing Act (FEHA)/California Family Rights Act (CFRA) Enforcement
California Government Codes 12900-12996 encompass the FEHA as the principal California statewide statute prohibiting employment discrimination covering employers, labor organizations, employment agencies, apprenticeship programs and any person or entity who aids, abets, incites, compels, or coerces the doing of a discriminatory act. It prohibits employment discrimination based on race or color; religion; national origin or ancestry; physical disability; mental disability or medical condition; marital status; sex or sexual orientation; age, with respect to persons over the age of 40; and pregnancy, childbirth, or related medical conditions. The FEHA also prohibits retaliation against for opposing any practice forbidden by the Act or for filing a complaint, testifying, or assisting in proceedings under the FEHA. Government Codes 12954.2 and 19702.3 define CFRA and Government Code 12945 defines Pregnancy Disability Leave (PDL). The DCC will act as the principal policy maker and civil rights expert to enforce all 3 of these laws, among many others, supervising the work of Assistant Chief Counsels, providing guidance as needed to supervisors, attorneys, investigators, and support staff; creates and supporting a work environment consistent with the Department's core values and civil rights mission.

2) Department of Justice Outside Counsel Contracts/Conflicts of Interest
In 2013, Chapter 46, Statutes of 2012 (SB 1038) transformed DFEH into a statewide prosecutorial agency, eliminated a specified cap of actual damages and empowered the department to bring actions to court by civil action. Generally, Government Code section 11040(c) requires state agencies to obtain the consent from the California Department of Justice/Office of the Attorney General to hire or contact with in-house or outside counsel, and Government Code section 11042(a) applies this requirement to judicial and administrative adjudicatory proceedings in which the agency is interested or a party. If DF EH prosecutes another state entity for workplace violations and DOJ/OAG agrees to defend that entity, a conflict of interest arises. In this case, Government Code 11045 requires DF EH to request and receive the consent of the DOJ/OAG in order to secure the services of outside counsel to represent the department's interests. Additionally, Government Code section 11041 specifically exempts from these requirements numerous state entities, including DLSE, DFPI, and "any state agency which, by law enacted after Chapter 213 of the Statutes of 1933, is authorized to employ legal counsel." DF EH falls within this catch-all category of exempt agencies because DF EH is statutorily authorized to, and does, appoint attorneys to represent the department in its civil actions and for other purposes. (See Gov. Code § 12930(c). The DCC will be the principal policy maker in working with DOJ/OAG to determine whether a conflict of interest applies, or which circumstances apply to cases pending litigation, and in following up to ensure that all procedures are properly followed with DGS, state, federal and appellate courts, as well as informing designated representatives of bargaining units.

3) Case Review/Investigative Discovery
The DCC will act as the principal policy maker in involving active cases and related to workers' compensation hearings and settlement offers through the State Compensation Insurance Fund, (SCIF); bargaining unit grievances, merit issue complaints and administrative and adverse actions through the State Personnel Board (SPB) and the California Department of Human Resources (CalHR); conflict of interest positions and Form 700 reporting with the Fair Political Practices Commission (FPPC); and unemployment insurance claims and disputes with the Employment Development Department (EDD). The DCC will maintain principal policy authority in case grading with investigators and staff counsel, helping to identify issues and analyze cases and compel investigative discovery, and in defending DF EH against third-party claims, internal claims and represent DF EH personnel when subpoenaed to testify at deposition or trial.
13. What is the CEA position's scope and nature of decision-making authority?
The primary function of this position is to create, advise on and execute policy-making decisions and to assist with ensuring proper oversight and administration of the DFEH Legal Division. The DCC will have decision-making authority for setting and administering budget and management priorities and processes, and will manage all divisional training, hiring, onboarding, and mentoring, as well as contracts, facilities and purchasing issues.

The DCC will serve as the department's premier internal general counsel expert and conduit for all internally-focused work, and maintain decision-making authority in consultation with the Chief Counsel, Director and Chief Deputy Director over all aspects of their program.

The DCC will also have decision-making authority involving active cases and related to workers' compensation hearings and settlement offers through the State Compensation Insurance Fund, (SCIF); bargaining unit grievances, merit issue complaints and administrative and adverse actions through the State Personnel Board (SPB) and the California Department of Human Resources (CalHR); conflict of interest positions and Form 700 reporting with the Fair Political Practices Commission (FPPC); and unemployment insurance claims and disputes with the Employment Development Department (EDD).

In addition, the DCC will maintain decision-making authority in case grading with DFEH investigators, help to identify issues and analyze cases and compel investigative discovery, and defend DFEH against third-party claims, internal claims and represent DFEH personnel when subpoenaed to testify at deposition or trial.

14. Will the CEA position be developing and implementing new policy, or interpreting and implementing existing policy? How?
Yes, the CEA position will be developing and implementing new policy, and interpreting and implementing existing policy. The incumbent must gain an understanding of existing policies and business procedures that impact the DFEH Legal program and all of the regulations that relate to the case types that their team will be responsible for. They must also be aware of new laws that have been passed and that are being proposed by the California Legislature. They would work with the Department's Executive Team, their peers and staff in other Divisions (Dispute Resolution, Executive Programs, Enforcement, Information Technology and Administration), and their team members (staff and subordinate supervisors) to establish the best policies for the department. The incumbent must also be forward looking and be aware of what's on the horizon to ensure they are creating policies and procedures that are easily updated.