

DEPARTMENT OF LABOR
DIVISION OF INDUSTRIAL AFFAIRS

1310 The Office of Anti-Discrimination

Statutory Authority: 19 Delaware Code, Sections 712(a)(2) and 728
(19 Del.C. §712(a)(2) & §728)

PROPOSED

The Secretary of Labor in accordance with 19 Del.C. §712(a)(2) has proposed rules and regulations relating to the Delaware Department of Labor's Office of Anti-Discrimination ("Anti-Discrimination Office"). These proposals set forth the Anti-Discrimination Office's procedures for the handling of discrimination charges with coordinated instructions and procedures developed by the Anti-Discrimination Office Administrator and staff ("Rules and Regulations").

A public hearing will be held before the Director of Industrial Affairs and Anti-Discrimination Office Administrator (collectively the "Department") at 2:00 p.m. on September 24, 2008, in the Department of Labor Fox Valley Annex, 4425 N. Market Street, Wilmington, Delaware 19802 where members of the public can offer comments. Anyone wishing to receive a copy of the proposed Rules and Regulations may obtain a copy from Julie Klein Cutler, Administrator, Office of Anti-Discrimination, Division of Industrial Affairs, Department of Labor, 4425 N. Market Street, Wilmington, Delaware 19802. Persons wishing to submit written comments may forward these to Ms. Cutler at the above address. The final date to receive written comments will be at the public hearing.

The Department will consider making a recommendation to the Secretary following the public hearing.

1311 Office of Anti-Discrimination Rules and Regulations

1.0 General Provisions

1.1 Purpose and scope.

1.1.1 The regulations set forth in this part contain the procedures established by the Department of Labor for carrying out its responsibilities in the administration and enforcement of 19 Del.C. Ch 7, Subchapters II-III.

1.2 Address; office hours.

1.2.1 Questions may be addressed to "Anti-Discrimination Office Administrator" at 4425 N. Market Street, Wilmington, Delaware 19802. The office is open daily from 8:00 a.m. to 4:30 p.m. except Saturdays, Sundays, and Legal Holidays.

1.3 Definitions.

1.3.1 The terms **Charging Party, Conciliation, Delaware Right to Sue Notice, Mediation, No Cause Determination, Reasonable Cause Determination, and Respondent**, when used in this regulation, shall have the meanings set forth in 19 Delaware Code, Section 710.

1.3.2 The following words and terms, when used in this regulation, should have the following meaning:

"**Administrator**" means the Office of Anti-Discrimination Administrator or his designee.

"**Complainant**" means any individual claiming to have been harmed by an unlawful employment practice under the Discrimination in Employment Act (19 Del.C. §711) or the Handicapped Persons Employment Protections Act (19 Del.C. §724).

"**Day**" means calendar day unless otherwise specified.

"**Department**" means the Department of Labor.

"**Fact-finding conference**" means a conference convened by the administrator as an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the verified charge.

"**Mediation Director**" means the director of the Discrimination Mediation Unit or his designee.

“Party” means any complainant, charging party, respondent, or the Department of Labor.

“Verified charge” or “charge” means the charge of discrimination which sets forth a concise statement of facts, in writing, verified under oath and signed by the Charging Party.

1.4 Attorneys: form of appearance on behalf of parties.

1.4.1 An attorney may appear on behalf of a party by providing written notice of appearance. To constitute an appearance, a form, letter, or document shall contain the names of the parties, the department’s docket number if known, the name of the party which the attorney represents, and the attorney’s address, telephone number, facsimile number, and email address.

1.4.2 If a party appears through an attorney, all papers shall be served on the attorney with the same force and effect as though served on the client.

1.4.3 An attorney may withdraw his appearance by providing written notice of withdrawal to the department, certifying that a copy of the notice of withdrawal was mailed to all parties.

1.5 Parties’ obligation to keep department informed of change of address or status.

1.5.1 The parties shall promptly notify the department of any change in address, telephone number, contact information, or other material change in business status while the charge is pending.

1.6 Liberal construction of regulations.

1.6.1 These regulations shall be liberally construed by the administrator to permit the department to discharge its statutory duties under 19 Del.C. Ch. 7, Subchapters II and III.

1.7 Practice where regulations do not govern.

1.7.1 In any circumstance that arises not governed by these regulations, the administrator shall exercise his discretion in order to permit the department to discharge its statutory duties under 19 Del.C. Ch. 7, Subchapters II and III.

1.8 Validity of regulations if any portion declared invalid.

1.8.1 If any portion of these regulations is adjudged by a court of competent jurisdiction to be invalid, or if by legislative action any portion loses its force and effect, the ruling or action will not affect, impair or void the remainder of these regulations.

1.9 Amendment of regulations.

1.9.1 The administrator may rescind, amend or expand these regulations from time to time as necessary to comply with the Discrimination in Employment Act, 19 Del.C. Ch 7, Subchapter II or the Handicapped Persons Employment Protection Act, 19 Del.C. Ch 7, Subchapter III, and such new regulations shall be submitted to the Registrar’s office in accordance with the provisions of 29 Del. C. §10161(b).

2.0 Commencement of Actions

2.1 Manner of commencing actions.

2.1.1 An action shall be commenced by the filing of a verified charge with the department’s Office of Anti-Discrimination.

2.2 Who may file a verified charge.

2.2.1 A complainant may file a verified charge alleging a violation of the Discrimination in Employment Act or the Handicapped Persons Employment Protections Act.

2.3 Preparation and contents of verified charge.

2.3.1 A verified charge shall be filed on a printed form approved by the administrator.

2.3.2 The department shall assist the complainant in the completion of the verified charge where necessary.

2.3.3 The verified charge shall indicate that it is filed with the department, and shall set forth the following:

2.3.3.1 The complainant’s full name, address, and telephone number;

2.3.3.2 The respondent’s full name, address, and telephone number if known;

3.1.2 A Respondent, in lieu of filing an answer, may request mediation within 20 days of receipt, certifying that a copy of the request for mediation was mailed to the charging party or his attorney where appropriate at the address provided.

3.1.3 A request for extension of time shall be in writing and addressed to the administrator. The administrator within his discretion may authorize an extension.

3.2 Form and content of answer.

3.2.1 The answer to the charge shall fully and completely advise the charging party and the department as to the nature of the respondent's defenses to each claim asserted, and shall specifically admit or deny the allegations set forth in each paragraph of the charge. A respondent may admit in part and deny in part.

3.2.2 An affirmative defense to an allegation shall be set forth separately.

3.2.3 The following information may be redacted from the copy of the answer served on the charging party:

3.2.3.1 Employment records of individuals other than the charging party;

3.2.3.2 Medical records of individuals other than the charging party;

3.2.3.3 Confidential trade secrets; and

3.2.3.4 The identity of witnesses who respondent intends to produce.

4.0 Preliminary Findings and Recommendations

4.1 Timing of preliminary findings and recommendations.

4.1.1 The administrator shall issue preliminary findings and recommendations within 60 days from the date of service of the charge on the respondent as required by 19 Del.C. §712(c)(2).

4.2 Form and content of preliminary findings and recommendations.

4.2.1 The preliminary findings and recommendations shall set forth the following:

4.2.1.1 A brief statement of whether or not the respondent filed an answer;

4.2.1.2 A referral to mediation, investigation, or recommending dismissal.

4.3 Service of preliminary findings and recommendations.

4.3.1 Within one business day of issuing the preliminary findings and recommendations, the department shall cause a copy to be mailed to each party by U.S. mail.

4.4 Criteria for preliminary recommendation of dismissal.

4.4.1 In determining whether to issue a preliminary recommendation of dismissal, the administrator shall take the following factors into account based on a review of all information submitted by the parties that has been properly served as required by 19 Del.C. §712(c)(1):

4.4.1.1 The nature of the discrimination charged;

4.4.1.2 Probability of obtaining additional evidence that may impact the department's final determination after full investigation; and

4.4.1.3 Whether the public interest is best served by the continuation of the investigatory process.

4.4.2 Before dismissing a case under 19 Del.C. §712(c)(2) the administrator shall notify the charging party of the reason for the recommendation, and shall offer the charging party at least 14 days to present additional information which warrants further investigation.

4.4.2.1 The administrator in his sole discretion shall determine whether additional information provided warrants further investigation.

4.4.2.2 If the charging party does not present additional information which warrants further investigation within the stated time, the department may dismiss the case and issue a Delaware Right to Sue Notice.

5.0 Mediation

5.1 Confidentiality of Mediation Communications and Records.

5.1.1 All information exchanged during mediation proceedings are considered dispute resolution communications and shall be kept confidential. Records obtained in the course of mediation should remain confidential and not be used as evidence in any manner unless obtained independent of the mediation. Parties participating in the mediation process shall be required to sign and adhere to a confidentiality agreement in a form approved by the administrator.

5.1.2 Mediation settlement agreements are confidential and shall not be disclosed by the department except where the department seeks enforcement of the agreement under Section 5.3.

5.2 Mediation proceedings.

5.2.1 At any time following the time for filing an answer, the administrator at his discretion may refer a case to the mediation unit for mediation proceedings.

5.2.2 The mediation director may designate a mediator employed by the department or otherwise appointed by the mediation director to conduct the mediation proceedings.

5.2.3 If the mediation does not result in a settlement agreement, the mediation director shall refer the case to the investigation unit.

5.2.4 If the mediation does not result in a settlement agreement and the respondent has not yet filed an answer, the respondent must file an answer to the charge within 20 days of the respondent's receipt of notification that the charge is being referred to the investigation unit.

5.2.5 If the mediation does not result in a settlement agreement and the respondent has filed an answer, the respondent must file a response to any pending request for information, and may file a supplementary answer, within 20 days of the respondent's receipt of notification that the charge is being referred to the investigation unit.

5.2.6 The mediation director and staff, including appointed mediators, may not participate in the investigation of any case referred to the investigation unit.

5.3 Enforceability of mediation settlement agreements.

5.3.1 A mediation settlement agreement reached during a mediation conference shall be set forth in writing and signed by the parties.

5.3.2 Allegations of breach of a mediation settlement agreement shall be brought to the attention of the mediation director. The mediation director shall review and investigate the allegations of breach of a mediation settlement agreement to determine whether a breach has occurred.

5.3.3 The mediation director shall issue written findings to the parties with regard to the allegation of breach of a mediation settlement agreement.

5.3.4 The administrator in his discretion will determine whether to forward the allegations of a breach of the mediation settlement agreement to the Attorney General for review.

6.0 Investigation

6.1 Timing of investigations.

6.1.1 The administrator shall promptly initiate an investigation into stated allegations of discrimination when:

6.1.1.1 The administrator refers a charge for investigation in accordance with 19 Del.C. §712(c)(2)(c); or

6.1.1.2 The mediation director refers a case to the investigation unit after unsuccessful mediation.

6.1.2 The department shall complete its investigation as promptly as possible.

6.2 Investigatory procedures.

6.2.1 In the conduct of investigations, all investigatory powers granted by 19 Del.C. §§107-108 shall be available to the department. In its discretion, the department may conduct investigations using, among other things, written requests for information, fact finding conferences, subpoenas, on site visits, interviews, and depositions as provided in these regulations.

6.2.2 In connection with an investigation, the department may require the submission of information relating to:

- 6.2.2.1 The race, marital status, genetic information, color, age, religion, sex, national origin or disability of employees;
- 6.2.2.2 The employment records of employees;
- 6.2.2.3 The procedures for advertising or notifying the public of the availability of jobs;
- 6.2.2.4 The procedures for hiring or selecting employees;
- 6.2.2.5 The testing, seniority, promotion and discharge procedures; and
- 6.2.2.6 Such other information as the department determines to be reasonably necessary to carry out the provisions of the Discrimination in Employment Act or Handicapped Persons Employment Protections Act.
- 6.3 Requests for Information.
 - 6.3.1 The department may serve requests for information to assist the department in its investigation. Unless otherwise specified in a request for information, the response shall be due to the department within 14 days following service.
- 6.4 On Site Visits.
 - 6.4.1 The department may conduct on site visits to assist the investigatory process for the purpose of gathering evidence, interviewing witnesses, observing a respondent's facilities, and reviewing documents.
 - 6.4.2 The department shall provide the respondent with written notice of the on site visit at least 14 days prior to the visit. The notice shall specify the date and time of the visit.
 - 6.4.3 The respondent shall grant access to its premises, documents, and employees during a scheduled on site visit.
- 6.5 Subpoenas.
 - 6.5.1 The administrator may issue a subpoena as he deems necessary to assist the investigatory process. The administrator shall issue a subpoena in the name of the department, and the subpoena shall direct the person designated to personally appear and bring any books, records, documents and any other evidence which relates to any charge under investigation, or, in lieu of personal appearance, to produce any books, records, documents and any other evidence which relates to any charge under investigation.
 - 6.5.2 A subpoena shall state the time and place where the person designated is directed to appear.
 - 6.5.3 A subpoena shall be served either by personal service by any person 18 or more years of age by delivery of a copy thereof to the person named therein, by overnight delivery by commercial courier, or by registered or certified mail, return receipt requested.
- 6.6 Depositions.
 - 6.6.1 The department may take depositions of witnesses under oath as part of any investigation when, in the discretion of the administrator, such depositions will aid the investigatory process.
- 6.7 Enforcement of subpoenas.
 - 6.7.1 If any person fails to comply with a subpoena issued by the department, he shall be subject to the appropriate enforcement provisions of 19 **Del.C.** §108.
- 6.8 Fact-finding conferences.
 - 6.8.1 Fact-finding conferences, as part of a discrimination investigation, are subject to the following:
 - 6.8.1.1 As part of its investigation and at the discretion of the administrator, the department may convene a fact-finding conference for the purpose of obtaining evidence, identifying the issues in dispute, ascertaining the positions of the parties and exploring the possibility of settlement. The fact-finding conference is not an adjudication of the merits of the charge.
 - 6.8.1.2 The department shall provide the parties with written notice of the fact finding conference at least 30 days prior to the conference. The notice shall specify the date, time and location of the conference and shall identify the individuals requested to attend on behalf of each party, and any documents which a party is requested to provide at the conference.
 - 6.8.2 The conference shall be conducted as follows:
 - 6.8.2.1 The department employee acting as fact-finder shall conduct and control the proceedings.

- 6.8.2.2 With prior notice to the department, the parties may request to bring witnesses to the conference in addition to those whose attendance may be specifically requested by the department. The fact-finder has discretion over which witnesses shall be heard and the order in which they are heard. The fact-finder may exclude any witness or other person from the conference, except one representative of each party and counsel shall be permitted to remain throughout.
- 6.8.2.3 The department may request the parties to provide affidavits from witnesses who intend to appear at the fact-finding conference.
- 6.8.2.4 A party may be accompanied at a fact-finding conference by his or her attorney, and by a translator, if necessary.
- 6.8.2.5 An attorney for a party who has not previously entered his appearance shall do so at the outset of the conference.
- 6.8.2.6 Because the fact-finding conference is a means of investigation and not a hearing on the merits of a case, the parties shall not be entitled to cross-examine witnesses. All questioning shall be conducted by the fact-finder, unless in his discretion the fact-finder permits questions to be asked by other persons present at the conference.
- 6.8.2.7 During the conference, the fact-finder may allow a recess to permit the parties to discuss settlement.
- 6.8.3 Postponements of a fact-finding conference shall be subject to the following:
 - 6.8.3.1 Except in extraordinary circumstances, requests for postponements must be made by notice to all parties at least 14 days prior to the conference.
 - 6.8.3.2 Any opposition to a request for postponement must specifically state the basis for the opposition and must be received by the department at least seven days prior to the conference.
 - 6.8.3.3 If a party or witness fails to appear at a scheduled fact-finding conference, the department may proceed with the conference without the party.
- 6.8.4 If the respondent or the charging party refuses or fails to attend a scheduled fact-finding conference, the department may in its discretion schedule an alternate conference date. The department may subpoena any party or witness who failed to attend the initially scheduled fact-finding conference. The department may also subpoena any documents which either party was requested to bring, and failed to bring, to the fact-finding conference.

7.0 Administrative Dismissal

- 7.1 The administrator may in his discretion administratively dismiss a charge for reasons including but not limited to the following:
 - 7.1.1 Lack of jurisdiction;
 - 7.1.2 The charging party is unavailable or unwilling to participate in the investigation, or to attend a scheduled conference or conciliation;
 - 7.1.3 Relief is precluded by the respondent's bankruptcy or other special circumstances as determined by the administrator;
 - 7.1.4 The charge was not timely filed under 19 **Del.C.** §712(c); or
 - 7.1.5 The charge on its face fails to state a claim under the Delaware Discrimination in Employment Act or Handicapped Persons Employment Act.
- 7.2 The department will determine whether to administratively dismiss a charge under 19 **Del.C.** §712(c)(5).
- 7.3 Prior to administratively dismissing a charge under 19 **Del.C.** §712(c)(5) for lack of jurisdiction, untimeliness or failure to state a claim, the administrator shall notify the charging party of the reason for the proposed dismissal and shall offer the charging party the opportunity to respond.
 - 7.3.1 The administrator shall make his final determination, considering all responses received within 14 days of the date of notice.

8.0 **Withdrawal of Charge of Discrimination**

- 8.1 A pending charge may be withdrawn by the charging party within 60 days of the commencement of the action. After 60 days the charge may only be withdrawn with the consent of the administrator.
- 8.2 A request for withdrawal shall be in writing and shall be signed by the charging party and his attorney if applicable.

9.0 **Final Determinations**

- 9.1 Issuance of findings.
 - 9.1.1 Following the completion of an investigation of a charge, the administrator shall determine whether or not reasonable cause exists to support the allegations of the charge.
 - 9.1.2 If the administrator determines that reasonable cause exists to believe a violation of 19 Del.C. Ch. 7, Subchapter II or III has occurred, he shall issue to the parties a finding of reasonable cause.
 - 9.1.3 If the administrator determines that the conditions for issuing a finding of reasonable cause have not been met, he shall issue a finding of no reasonable cause.
 - 9.1.4 If the administrator determines that reasonable cause exists as to some but not all of the allegations of the charge, he shall issue a determination setting forth those issues to which he finds reasonable cause exists and those issues to which he finds no reasonable cause exists.
 - 9.1.5 Subject to the provisions of section 9.2, a Notice of Final Determination is final when issued.
- 9.2 Request for reconsideration of finding of reasonable cause.
 - 9.2.1 A party requesting reconsideration of a finding of reasonable cause shall file a written request to the administrator within ten days of receipt of the finding, with a copy to the opposing party.
 - 9.2.2 The administrator shall determine whether reconsideration is warranted within ten days of its receipt.
 - 9.2.2.1 The administrator in his sole discretion shall determine what if any further supporting evidence or information is needed to complete his review, and shall offer the party at least fourteen days to present additional information.
 - 9.2.3 The administrator shall issue his written decision to the parties. The administrator's decision is final when issued.

10.0 **Conciliation**

- 10.1 Timing of conciliation proceedings.
 - 10.1.1 Within 30 days from the date of a final determination of "reasonable cause", every attempt will be made to commence conciliation proceedings for the purpose of negotiating a settlement of the charge and compliance with all affected statutes.
- 10.2 Confidentiality of conciliation records.
 - 10.2.1 All information exchanged during conciliation proceedings are considered dispute resolution communications and shall be kept confidential. Records obtained in the course of conciliation should remain confidential and not be used as evidence in any manner unless obtained independent of the conciliation. Parties participating in the conciliation process shall be required to sign and adhere to a confidentiality agreement in a form approved by the administrator.
 - 10.2.2 Conciliation settlement agreements are confidential and shall not be disclosed by the department except where the department seeks enforcement of the agreement under Section 11.
- 10.3 Conciliation conference proceedings.
 - 10.3.1 After a finding of reasonable cause, the administrator shall schedule a conciliation proceeding.
 - 10.3.2 The parties shall have at least 14 days notice of the date, time and place of the conciliation proceeding.
 - 10.3.3 The department employee acting as conciliator shall conduct and control the proceeding.

- 10.3.4 A party may be accompanied at a conciliation proceeding by his or her attorney or another representative, and by a translator, if necessary.
- 10.3.5 The conciliator may exclude any person from the conciliation proceeding, except counsel and translators shall be permitted to remain throughout.
- 10.3.6 An attorney for a party who has not previously entered his appearance shall do so at the outset of the proceeding.
- 10.3.7 A party's failure to attend the conciliation proceeding may be deemed to be a failure of conciliation effort.
- 10.3.8 Any conciliation agreement shall be subject to the approval of the department.

11.0 Enforceability of settlement agreements.

- 11.1 A settlement agreement reached during investigation or conciliation shall be set forth in writing and signed by the parties.
- 11.2 Allegations of breach of a settlement agreement shall be brought to the attention of the administrator. The administrator shall review and investigate the allegations of breach of a settlement agreement to determine whether a breach has occurred.
- 11.3 The administrator shall issue written findings to the parties with regard to the allegation of breach of a settlement agreement.
- 11.4 The administrator in his discretion will determine whether to forward allegations of breach of the settlement agreement to the Attorney General for review.

12.0 Delaware Right to Sue Notice

- 12.1 Issuance of a Delaware Right to Sue Notice.
 - 12.1.1 The administrator shall issue a Delaware Right to Sue Notice under 19 Del.C. §712(c)(3), (5) upon the following:
 - 12.1.1.1 Issuance of a final determination of no reasonable cause;
 - 12.1.1.2 Failure of conciliation efforts; or
 - 12.1.1.3 Administrative dismissal of the charge in accordance with Section 7.
 - 12.1.2 The administrator may issue a Delaware Right to Sue Notice while the charge is pending upon the following:
 - 12.1.2.1 At the request of the Charging Party; or
 - 12.1.2.2 By initiation of the administrator, in his discretion.
 - 12.1.3 Termination of proceedings.
 - 12.1.3.1 Issuance of a Delaware Right to Sue Notice shall terminate further proceedings of the charge by the department.

13.0 Service of Recommendations, Determinations, and Notices

- 13.1 All preliminary recommendations, final determinations and Delaware Right to Sue Notices shall be promptly served on all parties by U.S. Mail or as otherwise indicated by written agreement of the parties.

14.0 Access to Department's Investigatory Files

- 14.1 Confidentiality of department's investigatory files.
 - 14.1.1 The department's investigatory records are confidential and exempt from public access under 29 Del.C. Ch. 100.
- 14.2 Parties' right to obtain factual documents.
 - 14.2.1 After issuance of a Delaware Right to Sue Notice under 19 Del.C. §712(c)(3), (5), while litigation is pending, a party to a charge may make a written request to the administrator for copies of the following information in the department's file of that charge:

- 14.2.1.1 Witness statements; and
 - 14.2.1.2 All factual written data, factual written reports or documentary information obtained or provided to the department in the course of its investigation which is not otherwise subject to confidentiality or privilege.
 - 14.3 A request made under this section must certify that a copy was mailed to the other party or his attorney where appropriate at the address provided.
 - 14.4 Discovery of department's investigatory files by non-parties.
 - 14.4.1 Non-parties to a charge shall not have access to the material in the department's investigatory file of that charge.
 - 14.5 Copying Costs.
 - 14.5.1 The department's fee for copying documents requested under this section shall be the same fee as is applicable to requests granted pursuant to 29 Del.C. Ch. 100. The administrator may waive or modify this fee in the case of an indigent party or in other extraordinary situations for good cause.

15.0 Retention of Investigatory Files

- 15.1 The department shall retain investigative files for two years after the end of the administrative process.
- 15.2 Where a charge is filed concurrently with the United States Equal Employment Opportunity, the department shall retain the investigative file for two years after the end of the federal administrative process.

12 DE Reg. 158 (08/01/08)