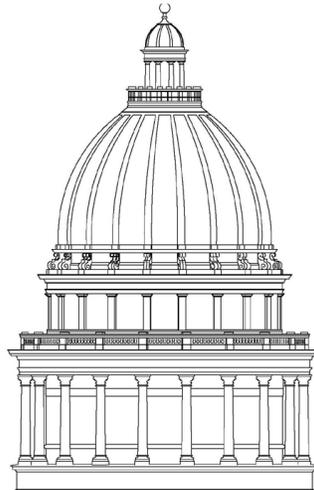


REPORT TO THE  
**UTAH LEGISLATURE**

Number 2017-02



**A Performance Audit of the  
Utah Antidiscrimination and Labor Division's  
Employment Discrimination Unit**

January 2017

Office of the  
LEGISLATIVE AUDITOR GENERAL  
State of Utah





STATE OF UTAH

# Office of the Legislative Auditor General

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JOHN M. SCHAFF, CIA  
AUDITOR GENERAL

January 26, 2017

TO: THE UTAH STATE LEGISLATURE

Transmitted herewith is our report, **A Performance Audit of the Utah Antidiscrimination and Labor Division's Employment Discrimination Unit** (Report #2017-02). A digest is found on the blue pages located at the front of the report. The objectives and scope of the audit are explained in the Introduction.

We will be happy to meet with appropriate legislative committees, individual legislators, and other state officials to discuss any item contained in the report in order to facilitate the implementation of the recommendations.

Sincerely,

John M. Schaff, CIA  
Auditor General

JMS/lm



# Digest of A Performance Audit of the Utah Antidiscrimination and Labor Division's Employment Discrimination Unit

The Utah Labor Commission Antidiscrimination and Labor Division (UALD or the division) is charged with enforcing prohibited employment acts under both federal and state law. UALD administers the Utah Antidiscrimination Act, Utah Fair Housing Act, and other sections of the Utah Labor Code as specified in statute. This audit focuses on the division's Employment Discrimination Unit.

## Chapter II Investigation Process is Insufficient And Mediation Needs Better Processes

We found that UALD's investigative process is inadequate to justify case outcomes. Also, UALD lacks a sufficient training program to equip investigators with the necessary skills. In addition, we believe improvements can be made to the mediation process. Finally, amendments to the statute could improve UALD program effectiveness and provide clarification.

**Investigative Process is Inadequate to Justify Case Outcomes.** While UALD does maintain employment discrimination investigation case files, we found it difficult to follow the evidence justifying a resulting determination and order, and there is little oversight to ensure investigation outcomes. Additionally, a lack of policies puts UALD at risk for conducting inadequate and inconsistent investigation and has reduced case timeliness.

**UALD Lacks a Sufficient Training Program to Equip Investigators with the Necessary Skills.** Another contributor to our concern about the adequacy of UALD's investigations is the lack of training. The employment discrimination unit has no formal training program, which they should develop. We found other programs that can provide UALD guidance on developing a training program.

**Improvements Can Be Made to the Mediation Process.** UALD offers voluntary mediation as an alternative way to settle a charge of discrimination. To preserve the integrity of the mediation process, we believe UALD should require all their mediators receive court-qualified mediation training. In addition, we believe UALD's mediation program should follow the process as intended in the law.

**Amendments to Statute Could Improve UALD Program Effectiveness and Provide Clarification.** In our review of UALD's program, we found instances in the *Utah*

*Code* that could be amended to assist UALD in program management and clarification. We believe that the Legislature could consider granting UALD a different subpoena power than is currently authorized. We also found some of the terminology used in parts of UALD's statute should more accurately reflect division practices.

### **Chapter III Low Rate of Cause Findings And Insufficient Accountability Are Concerning**

The Utah Antidiscrimination and Labor Division's (UALD) low rate of cause findings<sup>1</sup> in employment discrimination investigations adds to our concerns regarding the adequacy of investigations, and contributes to public perceptions of division bias. Furthermore, UALD should improve public accountability for investigation outcomes.

**Low Rate of Cause Findings Is a Concern.** We are concerned with UALD's infrequent cause findings following a full investigation into allegations of employment discrimination. UALD finds cause in only 0.4 percent of their investigations, a lower percentage than the Equal Employment Opportunity Commission (EEOC). Furthermore, UALD's rate of cause findings is lower than the national average of state Fair Employment Practices Agencies (FEPAs). This rarity of cause findings contributes to our concerns addressed previously in Chapter II regarding the adequacy of UALD's investigations, and increases the division's risk of allegations of bias.

**Public Accountability for Investigation Outcomes is Insufficient.** UALD should ensure their performance success measures established with the Governor's Office of Management and Budget (GOMB) accurately reflect desired performance goals. In addition, UALD provides limited performance information to the public.

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<sup>1</sup> A cause finding or outcome means UALD determined there was reasonable cause to believe illegal discrimination occurred based on evidence obtained during an investigation.

## **Chapter IV**

### **UALD Needs to Address Inadequate Performance Measures and High Turnover**

This chapter addresses concerns that we have regarding internal performance. We found that employee performance expectations lack clarity and adequate measures. Additionally, high turnover of UALD investigators limits program progress.

**Employee Performance Expectations Lack Clarity and Adequate Measures.** UALD lacks sufficient internal expectations and measures for employment discrimination investigators. UALD needs to develop investigator evaluation forms that are clear, correct, and provide useful measures. We believe these weaknesses contribute to investigator productivity and high turnover. Improved performance measures will help management understand how investigators are performing and provide investigators with needed guidance to have a clear understanding of what is expected.

**High Turnover Limits Program Process.** Since 2011, the division has had three different directors. While we did not evaluate management changes, Utah's Department of Human Resource Management (DHRM) confirmed high turnover for UALD's employment discrimination investigators. Turnover appears to be a consequence of several issues, including a lack of appropriate training, clear processes, consistent guidance, and ongoing development. Starting pay does not appear to be a significant factor influencing turnover. Additionally, UALD must address limited upward mobility for its investigators.

## **Chapter V**

### **UALD Budget Requires Improved Oversight**

The administration of the Utah Antidiscrimination and Labor Division's (UALD) budget needs improved oversight. UALD appears to be in violation with the terms of a federal contract with the Department of Housing and Urban Development (HUD). In addition, several essential administrative functions have been overlooked, including thorough record keeping, precise accounting, compliance with statute regarding work program changes, and additional purchasing procedures, to name a few.

**UALD Needs to Comply with the Terms of Its Federal Contract.** We found that UALD has violated the terms of a contract with HUD. The division has not provided the required state match of 20 percent for fair housing activities. More precise accounting could get the division closer to being in compliance with the contract.

**Essential Administrative Functions Have Been Overlooked.** Several basic administrative functions have been overlooked and UALD has not maintained essential records. Also, the Labor Commission has not consistently submitted work program changes required by law. The Labor Commission would also benefit from additional purchasing procedures. In addition, the Labor Commission and the UALD director should work to ensure that training and outreach needs are met.

# REPORT TO THE UTAH LEGISLATURE

Report No. 2017-02

## **A Performance Audit of the Utah Antidiscrimination and Labor Division's Employment Discrimination Unit**

January 2017

Audit Performed By:

Audit Manager	Brian Dean, CIA, CFE
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# Chapter I Introduction

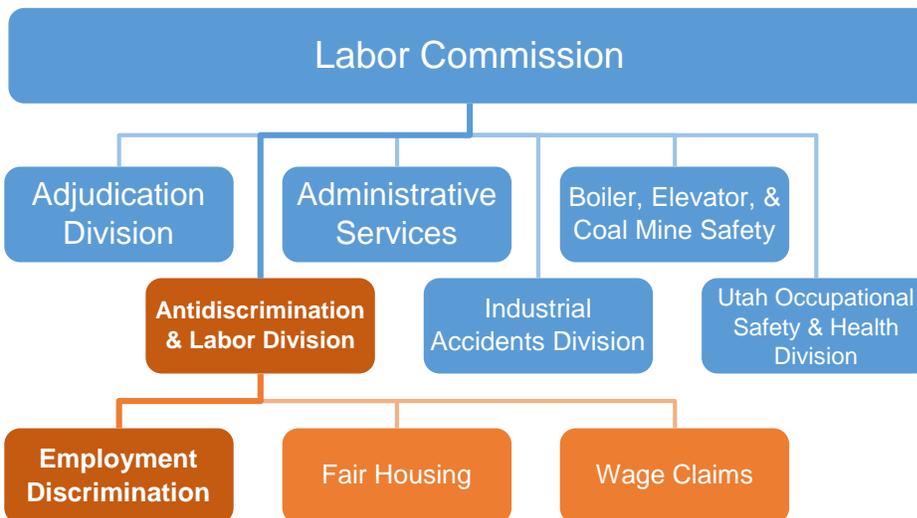
The Utah Labor Commission's Antidiscrimination and Labor Division (UALD or the division) is charged with enforcing prohibited employment acts under both federal and state law. UALD administers the Utah Antidiscrimination Act, Utah Fair Housing Act, and other sections of the Utah Labor Code, as specified in statute. This audit focuses on the division's Employment Discrimination Unit.

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**UALD enforces state and federal employment discrimination laws.**

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**Figure 1.1 Labor Commission Organization.** UALD is one of six divisions within the Labor Commission. This audit focuses on one of the division's three units, which processes employment discrimination cases.



*Source: Auditor summary of Labor Commission and UALD organizational structure*

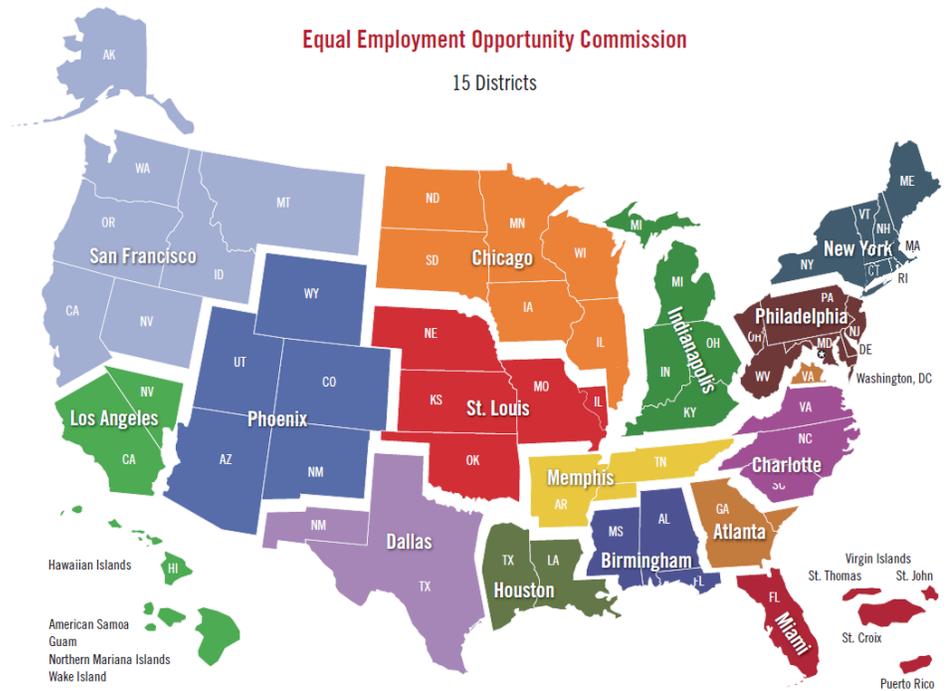
UALD acts as an agent of the United States Equal Employment Opportunity Commission (EEOC) through a work-share agreement and contract. The EEOC divides the nation into 15 districts, made up of 94 state and local Fair Employment Practice Agencies (FEPAs), of which Utah is one. Utah is located within the Phoenix District Office along with Arizona, Colorado, part of New Mexico, and Wyoming. An employee alleging employment discrimination (charging party) may file an employment discrimination claim under state and federal laws either through a FEPA or directly to the EEOC. Figure 1.2 shows a map of EEOC's 15 districts, including the Phoenix district.

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**A work-share agreement allows UALD to function as an agent of the EEOC.**

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**Figure 1.2 EEOC Field Program Districts.** The EEOC maintains work-sharing agreements and a contract services program with 94 state and local FEPAs organized into 15 districts. Utah is part of the Phoenix District Office.



Source: U.S. Equal Employment Opportunity Commission

**This audit focuses on UALD’s Employment Discrimination Unit.**

As mentioned previously, this audit focused on UALD’s Employment Discrimination Unit. We looked specifically at processes for the investigation and mediation of employment discrimination cases that should alleviate both the risk and the appearance of bias. The responsibility is on UALD to ensure that all charges of discrimination filed through the division are managed through processes that are both fair and thorough.

### **UALD Has Three Separate And Distinct Missions**

UALD investigates and resolves discrimination complaints and enforces wage laws. The division also promotes public awareness through education and outreach. UALD’s three programs include (1) Employment Discrimination, (2) Fair Housing, and (3) Wage Claims. The Employment Discrimination Unit of UALD was the focus of our audit and Chapters II, III, and IV address issues specific

only to that program. Chapter V addresses budget concerns that include both Employment Discrimination and Fair Housing units.

### **UALD Processes Allegations Of Employment Discrimination**

UALD’s focus is to administer and enforce the Utah Antidiscrimination Act of 1965 (*Utah Code* Title 34A, Chapter 5), which prohibits employment discrimination based on race, color, religion, sex, age, national origin, disability, sexual orientation, gender identity, pregnancy, and childbirth or pregnancy-related conditions.

The Employment Discrimination Unit receives complaints of alleged acts of employment discrimination from employees (charging parties) against employers (responding parties). Complaints may become formal charges for the purposes of mediation (for early resolution), investigation, or other attempts at a resolution such as having the charge waived to the EEOC, requesting the right to sue in court, or withdrawing the charge by the charging party upon the receipt of desired benefits.

The program also acts as a resource to employees and employers concerning laws that prohibit employment discrimination. The division helps make employers aware of conditions that lead to employment discrimination through seminars and other outreach efforts.

### **UALD’s Complaint Process Includes Intake, Mediation, and Investigation**

The complaint process begins with intake, where UALD processes inquiries and helps employees determine whether a complaint can be filed as a formal charge. In general, UALD has statutory jurisdiction over cases filed within 180 days of the last alleged discriminatory or prohibited employment act occurred and where the employer has at least 15 employees (in most cases). Charges filed more than 180 days after the act, up to 300 days, are sent (“waived”) to the EEOC.

Within 10 days of a charge being filed, UALD sends the formal charge and information about voluntary mediation to both the charging party and the responding party and assigns an investigator to the case. The case is also forwarded to the EEOC for dual filing under

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**The Employment Discrimination Unit receives, investigates, and resolves charges of employment discrimination.**

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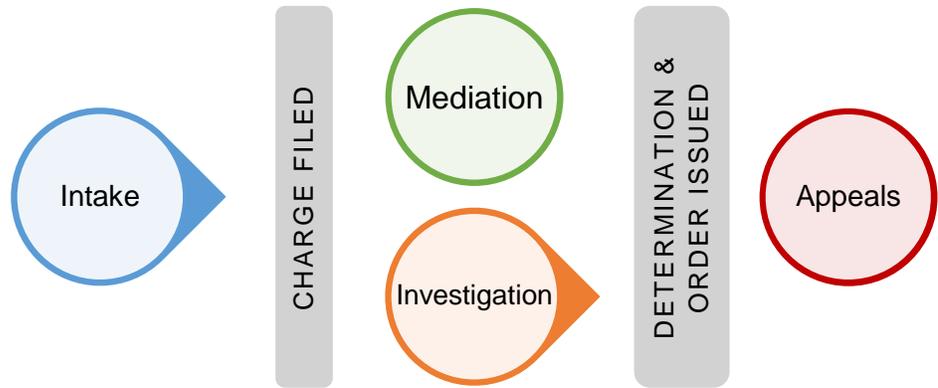
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**UALD’s authority is limited to employers with at least 15 employees (in most cases) and cases in which the last alleged discriminatory act was within 180 days of filing the charge.**

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applicable federal laws. Figure 1.3 summarizes UALD’s complaint process.

**Figure 1.3 Phases of UALD’s Complaint Process.** In addition to handling the first three phases of the complaint process, UALD also manages filing of charges and issuance of determinations. Appeals are handled through the Labor Commission’s Adjudication Division.



Source: Auditor generated  
\* Mediation is an opt-out program, which may result in a settlement between the parties if successful. If not, the case goes to investigation.

UALD’s Employment Discrimination Unit is responsible for the first three phases of the complaint process, including the filing of a charge and issuance of a determination. The purpose of mediation and investigation is to resolve charges of alleged discrimination after they have been filed through intake.

### **Intent of Mediation and Investigation Is to Resolve Charges**

Mediation is a voluntary opportunity for the charging and responding parties to sit down together to resolve and settle a case with the assistance of a mediator. Investigation is a fact-finding process that may use requests for information, interviews, document reviews, and on-site visits to investigate and resolve charges of employment discrimination.

An investigation may result in a final determination by the division of reasonable cause (cause) or no reasonable cause (no cause) to believe illegal discrimination occurred. A party may appeal the decision of the division. There are three options to appeal the decision as shown below.

**UALD’s basic process includes intake, mediation, and investigation.**

**Parties may negotiate a settlement through mediation rather than wait for completion of an investigation and issuance of a determination.**

- A party may request a “de novo”, evidentiary hearing before a Labor Commission administrative law judge (ALJ). A de novo hearing allows the parties to present all their evidence before an ALJ. In these formal adjudicative hearings, the division’s findings are not considered.
- A party may request an EEOC Substantial Weight Review, where the division sends a copy of the case file to the EEOC for review to determine whether the evidence gathered supports the determination issued by UALD.
- A party may request a Notice of Right to Sue (NRTS), which allows the charging party 90 days to file a claim of discrimination in federal district court.

While mediation is a good opportunity for parties to settle cases without investigation, some cases must be investigated to determine whether there is evidence to support reasonable cause to believe discrimination occurred. As an agent contracted by the EEOC to manage charges of discrimination, UALD receives some federal funding for investigations.

### **EEOC Pays UALD to Investigate Complaints**

Through the work-sharing agreement, the EEOC contracts with UALD to investigate and resolve employment discrimination complaints. Cases filed with the division are dually filed with the EEOC under applicable federal laws and then handled by UALD. Under the work-sharing agreement, for federal fiscal year 2016, the EEOC will pay UALD up to \$335,850 for case processing, training, and outreach.

As an EEOC Fair Employment Practices Agency (FEPA), UALD is empowered to act as an agent of the EEOC and has authority to enforce Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

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**Charging parties have several options to appeal a decision by UALD.**

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**UALD receives a portion of its funding from EEOC in exchange for processing cases.**

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## **UALD Operates with State and Federal Funding**

UALD's state fiscal year 2016 appropriation was about \$2.3 million, which represents a 6.6 percent increase from fiscal year 2015. Funding comes in the form of general funds, dedicated credits, and federal funds. Of the \$2.3 million total budget, the division expended just over \$2 million. Its largest expenditure category is personnel. Much of its savings are associated with turnover in the division.

### **UALD Receives Most of Its Funding from the State**

In fiscal year 2016, UALD was appropriated just over \$1.5 million from the general fund. In addition, it was appropriated about \$36,000 in dedicated credits. Dedicated credits come from penalties charged to employers for failing to provide a detailed pay statement to an employee at the time of payment (*Utah Code 34-28-3(5)*). The purpose of these dedicated credits is to help the division pay for the administration of the program.

### **Federal Funding Supports UALD's Employment Discrimination and Fair Housing Units**

UALD receives federal funding for both its employment discrimination unit and its fair housing unit. Both grants are administered on a federal fiscal year (October through September), and provide per case funding as well as additional funds for training and outreach. As noted previously, the amount of the 2016 employment discrimination grant from EEOC was for a maximum of \$335,850. The total of the fair housing contract with the Department of Housing and Urban Development (HUD) was about \$191,000.

Because much of the actual funds available in both contracts is based on productivity, both contracts require written justifications to draw down money at the end of the contract period. Thus, the appropriation of federal funds is an estimate. In state fiscal year 2016, the Legislature appropriated \$754,000 in federal funds.

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**Most of the division's funding comes from the state's general fund.**

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**Federal funding supports UALD's employment discrimination and fair housing efforts.**

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## **About Half of UALD's Staff Support the Employment Discrimination Unit**

UALD was budgeted 25 full-time equivalents (FTEs) in fiscal year 2016. However, turnover contributed to an actual FTE number of about 23.7. As mentioned previously, this audit focused on the Employment Discrimination Unit, comprised of:

- UALD director
- One investigations manager
- Four investigators
- Three mediators (who serve all three UALD programs)
- Four support staff

These 13 employees manage charges of discrimination and help parties achieve resolution through various processes. UALD has experienced significant turnover of employment discrimination investigators, which will be discussed in more detail in Chapter III.

## **UALD's Employment Discrimination Unit Manages Charges of Discrimination**

Intake support staff process public inquiries about employment discrimination. A portion of these inquiries result in formal charges of alleged employment discrimination. Public inquiries may come through phone calls, walk-in visits, e-mails, and filling out intake questionnaires. During fiscal year 2016, staff processed 8,123 such inquiries. Figure 1.4 shows annual inquiries processed by the Employment Discrimination Unit over the last six fiscal years.

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**A significant portion of UALD's workforce is dedicated to enforcing employment discrimination laws.**

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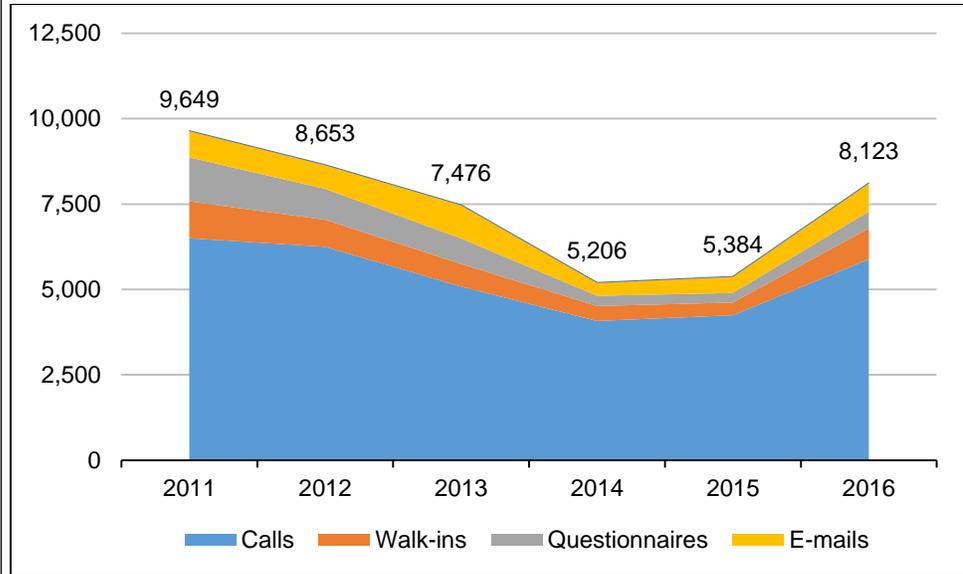
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**The Employment Discrimination Unit processed 8,123 public inquiries during fiscal year 2016.**

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**Figure 1.4 Employment Discrimination Intake Statistics.** UALD’s Employment Discrimination Unit processed between 5,206 and 9,649 public inquiries each year during fiscal years 2011 through 2016.

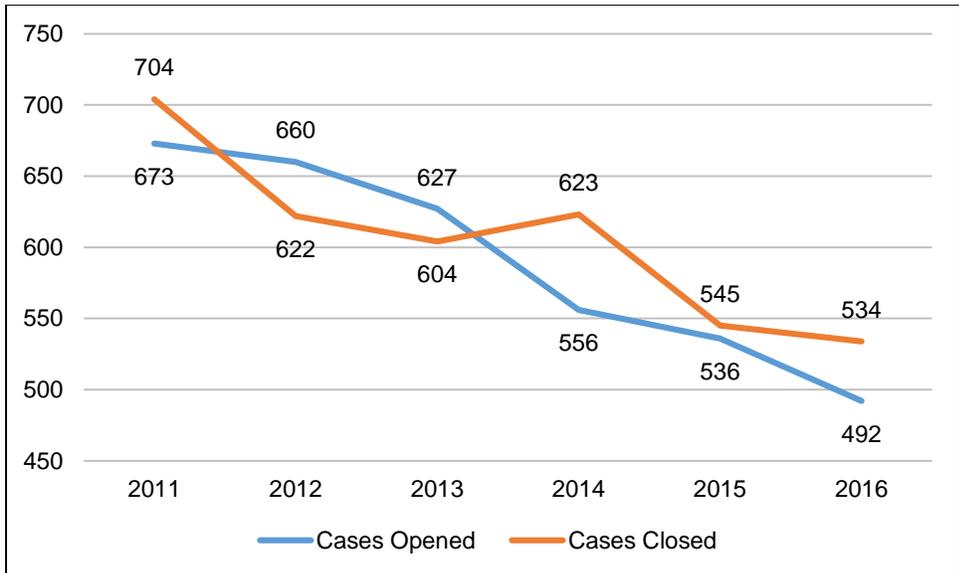
After declining over several years, public inquiries began increasing again in fiscal year 2015.



Source: Auditor analysis of UALD charge data

While inquiries declined during fiscal years 2011 through 2014, it appears inquiries are rising to previous levels. Of the 8,123 inquiries processed during fiscal year 2016, 492 inquiries (6 percent) resulted in formal charge cases to be investigated by the Employment Discrimination Unit. During the same period, UALD closed 534 cases (about 44 per month), which were open for an average of 250 days. This means UALD closed nine percent more cases than it opened during the fiscal year. Figure 1.5 summarizes case openings and closings during the last six fiscal years.

**Figure 1.5 Employment Discrimination Case Openings and Closings.** The total number of cases opened and closed by UALD over the last six fiscal years has declined; however, UALD has begun closing more cases than it has opened during the same period, thus reducing outstanding caseload.



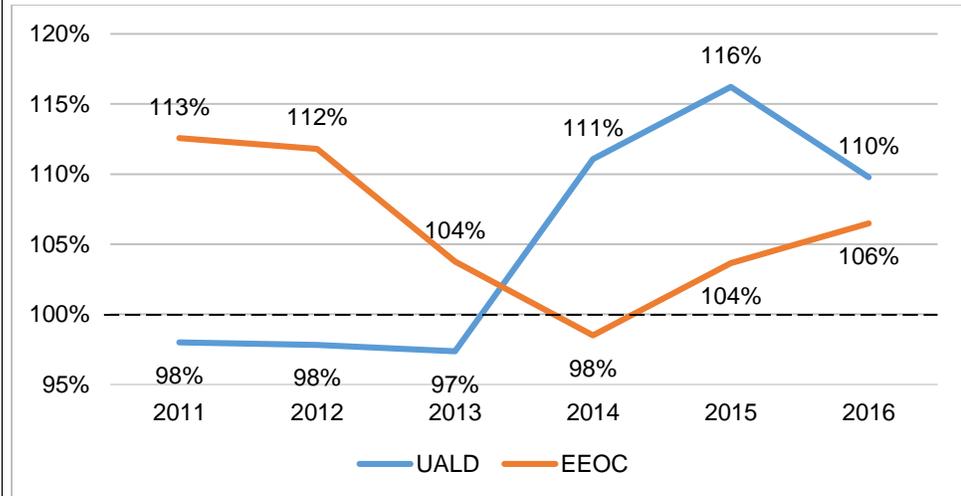
Source: Auditor analysis of UALD charge data

**The number of cases filed and processed at UALD has steadily declined during the last six fiscal years.**

Figure 1.5 shows that both the number of cases opened and the number of cases closed each fiscal year have declined. The figure also shows that UALD has improved its ratio of closures to openings by closing more cases than were opened. During fiscal year 2016, UALD closed 9 percent more cases than it opened. This indicates the division has been reducing overall caseload. Figure 1.6 shows a comparison of ratios of cases closed to cases opened during federal fiscal years 2011 through 2016 for UALD and the EEOC.

**Figure 1.6 Ratio of Cases Closed to Cases Opened by UALD and the EEOC During Federal Fiscal Years 2011 through 2016.** UALD began closing more cases than it opened—thus reducing outstanding caseload and surpassing EEOC’s ratio—in federal fiscal year 2014.

**UALD has managed to reduce its workload by closing more cases than it opened during the last several fiscal years.**



Source: Auditor analysis of UALD and EEOC charge data

As shown, UALD improved its ratio of cases closed to cases opened during federal fiscal years 2014 through 2016, while EEOC’s ratio declined slightly. UALD’S improvement is associated with a decline in case filings as shown in Figure 1.5, but also demonstrates that UALD has begun reducing backlog accumulated during prior years when it closed fewer cases than it opened. Further analysis of division performance will be discussed in the chapters that follow.

## Audit Scope and Objectives

We were asked to review UALD’s Employment Discrimination Unit to ensure practices and procedures adequately guide the investigation of employment discrimination complaints. UALD’s processes should ensure employee complaints are adequately managed, impartial, and thorough.

This report addresses UALD’s performance in the following areas:

- **Chapter II:** Employment Discrimination Investigation and Mediation
- **Chapter III:** Accountability
- **Chapter IV:** Employees
- **Chapter V:** Budget

## **Chapter II**

# **Investigation Process Is Insufficient And Mediation Needs Better Processes**

We found that the Utah Labor Commission's Antidiscrimination and Labor Division's (UALD) investigative process is inadequate to justify case outcomes. Also, UALD lacks a sufficient training program to equip investigators with necessary skills. In addition, we believe improvements can be made to the mediation process. Finally, amendments to the statute could improve UALD program effectiveness and provide clarification.

### **Investigative Process Is Inadequate To Justify Case Outcomes**

While UALD does maintain employment discrimination investigation case files, we found it difficult to follow the evidence used to justify determination and orders, and there is little oversight to justify investigation outcomes. Additionally, a lack of policies puts UALD at risk for conducting inadequate and inconsistent investigations. This lack has also caused a reduction in case timeliness.

#### **Following the Evidence to Justify an Investigation Outcome Is Difficult**

While we did not find evidence that would have reversed the outcome of an investigation (nor would it have been appropriate for us to review files for that purpose), we were unable to identify exactly what and how evidence was used to reach case conclusions.

UALD maintains two case files. One is an electronic system that records certain information, such as actions and events during the investigation, some case processes, the charge, and charging and responding party (employee and employer) information. The other is a physical case file that includes some of the same information, such as the charging document and party information, but also the response to the charge, rebuttal, and any evidence submitted by either party. UALD does not scan in the evidence to be maintained electronically, but the ability to review investigations and case files in general could improve if all records were maintained digitally. During our review,

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**UALD maintains both a physical and electronic file for investigations. However, neither clarifies how a determination and order is reached.**

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we examined both the physical file (when available) and the electronic case history.

**Evidence Justifying Determination and Orders Was Difficult to Follow.** We selected 10 employment discrimination investigation case files to review how the investigations were managed and investigated. Eight of the cases had investigation files that we could review and five of those resulted in a final determination and order (the document UALD generates after a charge has been fully investigated). After reviewing the entire case files for the five cases, it was difficult to scrutinize how the evidence collected during the investigation resulted in the final determination.<sup>2</sup> Three of the 10 cases had files that we reviewed, but they did not result in a final Determination and Order.

Two of these cases selected from our sample of 10 did not have physical investigation files for review. One case was waived to the EEOC, which means the physical case file was sent to the EEOC and all we could review was the electronic case history. The second case was settled through mediation and never went to investigations. We reviewed the electronic history before and after mediation, but no physical investigation file. In addition, as will be discussed in the next section, mediation records are not kept; therefore, we could not review specifics of the mediation process on the case.

Figure 2.1 shows the breakdown of the cases reviewed, the UALD outcome (the case status at finalization), whether a physical file was available for use to review, and whether a determination and order was finalized.

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<sup>2</sup> Our review of 10 cases found that 5 resulted in final determination and orders. We did not expand our review beyond the five cases because we found that, with every case we selected, it was difficult to scrutinize the evidence. The investigations manager agreed with this conclusion; therefore, there was no reason to review additional cases.

**Figure 2.1 We Reviewed 10 Cases with Six Outcomes.** Five of the 10 cases resulted in a final determination and order that we reviewed for case outcome.

Outcome of Cases	Physical File Available for Review	Resulted in Final Determination and Order
No Cause	4	4
Cause	1	1
Negotiated Settlement Agreement		
Transfer/Waiver to EEOC		
Notice of Right to Sue	1	
Withdrawn	2	
	<b>8</b>	<b>5</b>

*Source: Auditor analysis of UALD data*

The new division director agreed that the evidence and reasoning behind determinations is difficult to follow for any outside review. The director stated that employment discrimination investigations need a process for how they base their determinations and what specific evidence is used to form that basis. For example, in reviewing one case, witnesses cited a company policy that turned out to be a company practice. However, this fact was difficult to find in the case file and was not noted for easy review.

**UALD’s Case Management Checklist Is Inadequate.**

Investigators use a case management checklist to help manage cases. The checklist is intended to help improve the quality, timeliness, and efficiency of an investigation. However, we found the form to be inadequate in both guiding the investigation and explaining the investigative process. For example, in our examination of the cases we reviewed, we found concerns with the checklists that include:

- Checklists not being filled out adequately
- One note showing investigator uncertainty about the process
- Fundamental yes/no questions not providing a place for the investigator to respond appropriately, allowing for varied interpretations between investigators
- A conclusion being made without reference to how the conclusion was supported

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**UALD’s new director agreed that their investigations are difficult to follow and need better processes.**

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**Case management checklist should better guide investigators in managing an investigation.**

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The new director agrees that the current checklist is lacking, and reports that she and the new employment investigations manager are currently improving it. In addition to the checklist being more functional, the director said that it will also be used in the division's new process of conducting random audits on investigations, which will reportedly be implemented soon.

**Other Investigative Programs Appear to Manage Evidence Better Than UALD Does.** For comparison to the UALD's employment discrimination investigations program, we met the Division of Occupational and Professional Licensing's (DOPL) chief investigator. He explained that about 30 percent of their cases are forwarded to the Attorney General's office. When these cases are forwarded, each piece of evidence and the way the investigation was conducted are included. For cases that are not forwarded, the investigators write closing summaries explaining what documentation was received for the investigation.

We also reviewed the training materials for the U.S. Department of Housing and Urban Development (HUD), another program UALD runs for the State of Utah. These materials discuss the importance of managing the supporting documentation, and recommend keeping a log of the documents asked for and received.

### **There Is Little Oversight to Justify Investigation Outcomes**

Several possible outcomes could result from filing a charge of discrimination. However, the only point of meaningful scrutiny each investigation receives is when UALD's investigations manager reviews an investigator's finalized determination and order.<sup>3</sup> The investigations manager's current review process is informal, lacking a standardized approach and documentation of the review. UALD management stated they are formalizing this review by developing a scorecard to

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<sup>3</sup> There is another review process, called a Substantial Weight Review (SWR), where within 15 days of a final determination and order, a party may request the EEOC review the investigation. UALD communicates this option to the parties along with the appeal rights. Since 2010, UALD knows of only three cases in which parties requested a SWR but has never heard of any cases being overturned. Parties are not required to inform UALD that a SWR has been requested and, according to UALD management, the EEOC has never addressed a concern with the division.

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**UALD may benefit by looking to other programs for ways to better manage investigation evidence.**

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**UALD should formalize the investigation manager's process for the review of determination and orders.**

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allow for more standardized, documented reviews that can be measured.

For case outcomes not resulting in a final determination and order, investigations, if conducted, are not reviewed for investigative adequacy or appropriateness. If the charge is mediated or settled, there may be little or no investigation conducted. If a charge results in a final determination and order that is appealed to the Labor Commission's Adjudication Division, the trial is de novo, meaning it is a new review of the charge. The director of the Adjudication Division indicated that UALD investigations are not used or reviewed in an appeal because the division needs to remain impartial. If a party requests a right to sue in federal court, the case is also de novo. According to the EEOC, "Courts have generally recognized that the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of the agency." Further, one case held that "courts may not review the sufficiency of an investigation."

We believe that inadequate outside reviews and informal internal reviews have contributed to reduced accountability of investigations and the determination and order process. If a party does not agree with an investigation's outcome, it can be appealed with little examination of how the investigation was conducted. If a charge is settled through mediation (discussed later in this chapter), the settlement agreement is the final document and any prior investigation is not considered. The lack of accountability in how investigations are conducted and determination and orders are justified opens UALD up to allegations and suspicions of bias. More formalized and meaningful oversight from the investigations manager can help ensure UALD's employment discrimination investigations are thorough and consistently performed. Accordingly, UALD's new director reports that she has recently initiated a new internal audit process to provide more oversight to investigations.

### **A Lack of Policies Puts UALD at Risk for Conducting Inadequate and Inconsistent Investigations**

UALD does not have a functional policy manual guiding the investigative process, contributing to our concerns about the adequacy of investigations. An outdated policy manual exists, created three directors ago in 2009. The investigations manager stated that it does not accurately reflect current practices. For example, the manual does

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**We believe that UALD could better protect itself from allegations of bias and favoritism with a comprehensive, up-to-date policy manual.**

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not reflect an accurate case management checklist or codes used for electronic case management. In addition, we found that in discussing how to investigate charges, none of the investigators referred to the policy manual for information about how to investigate charges. Our review found that if the manual were updated and made relevant, it could possibly be incorporated into the investigator's tool kit.

A lack of guiding policies places the division at risk of conducting inconsistent and inadequate investigations. We believe UALD exposes itself to accusations of bias and favoritism when conducting investigations without an established process to ensure that bias is not happening. The lack of policies, coupled with little justification on how investigations are conducted, increases the risk of allegations of bias. The new director agreed with our concerns after reviewing our case analysis. Both the director and the investigations manager indicated that UALD is in the process of developing policies to improve practices and formalize investigations.

For comparison, we reviewed DOPL's investigative priorities and procedures policy manual. DOPL's manual addresses case prioritization and management, including what to consider when conducting an investigation, expectations for case completion time, and use of subpoena authority (UALD's subpoena authority is addressed later in this chapter).

### **Both Lack of Policies and Poor Compliance Have Reduced Case Timeliness**

In the absence of case management policies, we found that case timeliness has sometimes suffered. In cases where restrictions or guidance had been established to help manage a case, those restrictions have been ignored. In *Administrative Rule* R606-1-3, UALD is required to mail a copy of the charge to the responding party (the employer) within 10 working days; the employer must submit a response within 30 days from the date the charge was mailed.

On average, over the last six fiscal years (2011 through 2016), those requirements have been exceeded by a few days. We are reluctant to strongly criticize the few days' overage because of variability of mail in transit that affects those numbers. Furthermore, the policy requiring 30 days for a response to be submitted was changed from 10 to 30 days in March 2015, affecting both timeliness data for one fiscal year and the overall average.

In the ten reviewed cases, all but one case exceeded the policy’s response time requirement, with four exceeding by 10 days or more. Figure 2.2 shows the number of days a response was received beyond the policy limits of either 10 or 30 days.

**Figure 2.2 Nine of 10 Cases We Reviewed Exceeded Policy Limits on Response Receipt by UALD.** Case #2 was the only reviewed case for which the response was received within policy requirements.

Case Reviewed	Number of Days Response <u>Exceeding</u> Policy Requirement*
1	11
2	(9)
3	1
4	18
5	1
6	5
7	2
8	39
9	63
10	4

*\*As stated previously, the administration policy was either 10 or 30 days, depending on when the case was processed.*

As shown in Figure 2.2, the latest response was received 63 days after the response was required. Over that time, eight entries were posted in the case history about the division reminding the party to file a response.

Another example of a timeliness concern is waiting to receive the charging party’s rebuttal to the responding party’s response. Because there is no policy requiring a certain number of days for submitting the rebuttal, we are uncertain if the rebuttal is a necessary step in investigating charges. However, we reviewed cases where the rebuttal was requested several times by the investigator. Examples include the following:

- In one case, a letter was sent in June to the charging party requesting a rebuttal. The charging party eventually amended the charge in mid-August, by which time the case history noted three separate “second and final request[s]” for a rebuttal.

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**Parties to an investigation have been allowed to disregard deadlines for responses and rebuttals.**

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- In another case, 112 days lapsed from the time the response was filed to the charging party withdrawing the charge with benefits.<sup>4</sup> During that time, the case history showed a second request for rebuttal had been made, followed by nine separate email reminders indicating that no rebuttal had been received.
- In a third case, a deadline was given for providing the rebuttal; however, a rebuttal was not received until 57 days beyond the deadline.

We question if UALD finds the rebuttal valuable when charging parties are given numerous chances to submit one. If rebuttals are important to the proper progress of an investigation, policy should be established requiring a deadline for the submission of rebuttals, to help move cases along.

Developing a formal, standard, and documented investigation program should meet two purposes. First, we believe it should improve UALD's management and investigation of employment discrimination charges. Second, it should improve public perception that those with charges of employment discrimination will receive a thorough and fair evaluation of their complaints.

### **UALD Lacks Sufficient Training Program to Equip Investigators with Necessary Skills**

The lack of formal investigation training adds to our concern about the adequacy of UALD's investigations of alleged employment discrimination. The employment discrimination unit has no formal training program; we believe UALD should develop one. We identified other programs that can provide UALD guidance on developing a training program.

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<sup>4</sup> A withdrawal with benefits is the term used to signify that the charging party withdraws the charge upon receipt of some type of benefit from the responding party.

## **UALD Should Develop a Formal Training Program**

UALD management and investigators agrees there is a lack of formal training. The initial training provided to new investigators is an explanation of the cases and application of relevant statute, and job shadowing. There is an internal database that contains past work product for review and other documents to help explain the work. New investigators may initially work on less complicated cases with other investigators and the investigations manager. Staff used terms like “micromanaging” and “handholding” to describe the initial investigation training process.

When the investigators do receive training, whether internal or external, they do not keep records or track how much training they receive. Training for more seasoned investigators is also informal and not tracked. About once a year, the EEOC sends a trainer to Utah to conduct public training. This year, UALD asked the trainer to speak to the division specifically about investigations. We attended this training and found it to be informal, unstructured, and not specific to UALD’s needs. UALD staff also expressed frustration with the training and commented that it lacked needed guidance.

While we found the same informal training practices in other states, we learned that the EEOC does offer (for a cost) both new and seasoned investigator training annually. We do not believe UALD has sent investigators to this training in the past or currently. The director expressed frustration that the division has not been allocated enough budget for training and believes more training is needed. The EEOC provides the division \$1,500 per year for training. As will be discussed in Chapter V, the Labor Commission has underspent its budget for the last two years. We believe additional funds could be allocated to training employment discrimination investigators.

UALD management told us they are in the process of developing a training program and reported that they recently formed a training committee and plan to provide more structured training. The program should be developed, monitored, and documented to ensure investigators are receiving adequate and consistent training.

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**Training for both seasoned and newly hired investigators is insufficient.**

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**UALD should make it a priority to ensure investigators consistently receive proper training.**

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**An established training program can help UALD management steer investigators towards consistent and thorough case handling.**

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## **Other Programs Can Provide UALD Training Program Guidance**

We also met with DOPL to understand how they train their new investigators. DOPL has a comprehensive, formal training program for their new investigators. In addition to shadowing another investigator, the program includes required weekly sign offs by the trainer and unit supervisor on what has been completed; all three phases must be signed off. DOPL's chief investigator stated that the average time to complete the training is four to six weeks. He believes that it takes a year or two to build a seasoned investigator. Turnover is high at UALD and benefitting from seasoned investigators is a luxury they have not had. We discuss UALD's turnover in Chapter IV.

The federal Housing and Urban Development Department's (HUD) training materials state that, for an investigation to be credible, both the investigator and the investigation must be perceived as fair, impartial, and thorough. Having an established training program, where investigators are consistently taught the same process for conducting investigations, assures the public that each investigator will approach investigations using established standards and methodologies.

Developing a formal and standard training program can:

- 1) Prepare investigators for case management and
- 2) Provide UALD with more credibility and assurance that investigators will investigate cases using a sound understanding of what constitutes employment discrimination and how it should be investigated.

In summary, we believe that a formal, standardized training program will help UALD become consistently more efficient and effective in their case processing and management. Consistent application of the rules and processes will also improve UALD's appearance of impartiality and professionalism.

## Improvements Can Be Made To the Mediation Process

UALD offers voluntary mediation as an alternative way to settle a charge of discrimination. To preserve the integrity of the mediation process, we believe UALD should require all mediators receive court-qualified mediation training. In addition, we believe UALD's mediation program should follow the process as intended in the law.

Fundamentally, mediation is a confidential avenue for resolving disputes. The Utah Courts Mediation Best Practice Guide asserts that:

A mediator should maintain the confidentiality of mediation communications, which may occur before, during, or after mediation, regardless of whether the mediation communications are verbal, nonverbal, or written.... A mediator should refuse to disclose a mediation communication, the mediator's notes, and mediation records, unless ordered by a court to do so.

According to the director of the Utah courts mediation division, mediations are private and a record is kept only if mediation results in an agreement. It is common for a mediator to shred the records of a mediation. Indeed, UALD mediators do shred their notes after a mediation takes place. According to UALD's mediation director, the EEOC has strict confidentiality requirements.

Figure 2.3 shows the outcome of mediation cases that were closed in fiscal year 2016.

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**Mediation is a private process offering a quicker outcome to a discrimination charge than is likely with an investigation.**

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**Figure 2.3 In Fiscal Year 2016, 49 Percent of the Closed Mediated Cases Resulted in Successful Outcomes.** Thirty-one (31) percent of all cases that closed in fiscal year 2016 participated in mediation.

<b>Cases Closed in Fiscal Year 2016:</b>		<b>534</b>
Participated in Mediation	168	31%
<b>Results of the 168 Cases that Participated in Mediation:</b>		
Successful Mediation*	82	49
Unsuccessful Mediation	66	39
Other Outcome**	20	12%
<b>Average Number of Days in Mediation</b>		<b>43</b>

*Source: Auditor analysis of UALD data*

*\* A successful mediation means the parties mutually agree to the terms and conditions of a settlement that fully resolves the case.*

*\*\* The outcome of these 20 cases is labeled "Mediation Held – Negotiations Ongoing/Follow up After Resolved" and should have had a mediation conclusion different than this, but there appears to be a case management issue in cleaning up the case at closure.*

### **Mediators Should Receive Court-Qualified Training**

Because mediation is a private process, we believe that UALD should ensure the most reliable program possible by requiring all mediators be court-qualified trained. During the audit, we heard complaints about a poorly, and possibly inappropriately, conducted mediation by one mediator. However, because UALD does not keep records of mediation proceedings, we could not substantiate any complaints.

Although the training cannot guarantee an appropriately conducted mediation, requiring that all mediators complete court-qualified mediation training at least establishes that UALD has taken steps to create a sound mediation program.

During the audit, we observed three mediations and found them to be conducted differently. According to the courts' mediation director, there is a wide range of acceptable mediation styles as long as the mediator does not make the final decision. In none of the mediations we attended did the mediator make the final decision.

The courts' mediation director explained that there is no nationwide certification for mediation. Therefore, in Utah, it appears that going through a court-qualified mediation training program and

**Because mediation is private, having court-qualified, trained mediators will help UALD create a more reputable process.**

receiving a certificate of training completion may be the most appropriate credential a UALD mediator can achieve. We believe UALD should require this training for their mediators. We discussed our concerns with the UALD director, who agrees that court-qualified training for the mediators is a good idea. In addition, the new UALD director plans to require the mediation director to randomly observe mediations to ensure they are conducted appropriately.

In the recent past, UALD had one mediator whose professional license had been suspended years ago; this mediator was the mediator about whom we had heard complaints. The courts' best practices guide states that a mediator with a professional license should comply with the rules of that license. While the courts' mediation rules do not specifically preclude a person with a suspended professional license from being listed on their mediation roster, the courts' general counsel stated that it would be very difficult for this person to be approved for the roster. We believe that requiring mediators to take court-qualified mediation training (which allows the mediator to be on the court roster) will enhance their ability to conduct successful mediations. This in turn helps safeguard the integrity of UALD's mediation program.

### **Mediation Process Should Follow Intent of Utah Law**

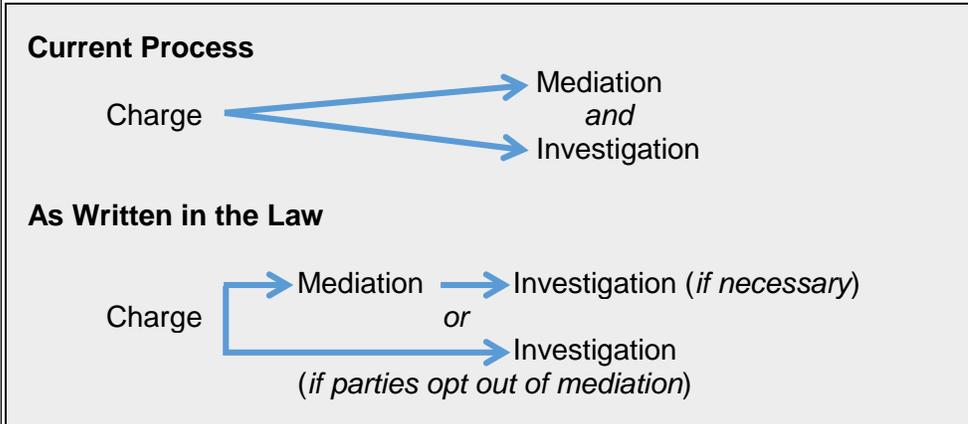
Another concern we have with UALD's mediation program is that it operates contrary to the law. *Utah Code 34A-5-107* establishes that, once a charge is filed, the division shall first attempt a settlement between the parties through mediation. If no settlement is reached, the division shall conduct a prompt, impartial investigation. However, currently UALD attempts mediation at the same time an investigator is assigned a case. Assigning a case to investigations at the same time it is assigned to mediations is contrary to the intent of the law. Figure 2.4 shows the current mediation process and then the mediation process as established in statute.

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**Having court-qualified trained mediators can help UALD ensure that requirements have been met, encouraging appropriate mediations.**

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**Figure 2.4 UALD’s Current Mediation Process Does Not Follow the Process Established in Statute.** Currently, UALD assigns a case to both mediation and investigation at the same time. Statute establishes a more linear process. An investigation is to follow an attempt at mediation, unless a party opts out of mediation.



Source: Auditor generated

We asked the UALD director what she believes is the preferable process. She said the process as established in statute is more desirable, which is to mediate first and investigate second if the mediation is not successful. Of course, in cases where mediation is rejected, the investigation can begin as soon as the charge is filed and the investigator’s caseload permits.

In Colorado, an investigation is not conducted at the same time as mediation. Parties have 60 days to resolve the mediation or the charge is moved to investigations. Arizona and Wyoming also wait to investigate until after mediation is finalized. New Mexico representatives stated that, in general, mediations do not run concurrently with investigations. Therefore, we believe UALD should refrain from assigning a case to investigations until mediation has concluded or one of the parties has opted out of mediation.

### **Amendments to Statute Could Improve UALD Program Effectiveness And Provide Clarification**

In our review of UALD’s program, we found instances in the *Utah Code* that could be amended to assist UALD in program management and clarification. We believe that the Legislature could consider granting UALD a different subpoena power than is currently

**Statute establishes a linear process from a charge being filed to mediation and/or investigation. UALD should follow this process.**

authorized. We also found that some terminology used in parts of UALD's statute should more accurately reflect division practices.

### **UALD Could Be Granted Different Subpoena Power**

*Utah Code 34A-5-104(4)* grants UALD the power to subpoena witnesses to compel their attendance at a hearing, to take testimony, and to compel a person to produce documents at a hearing. We believe that this provision may not be the subpoena authority that UALD needs. First, UALD does not hold hearings, so this specific authority is of no use to UALD. Second, the authority that we believe would be of more use to UALD is the ability to obtain evidence for an investigation.

*Administrative Rule R606-1-3* provides that, during an investigation, UALD may obtain records. However, we do not believe this authority may be strong enough for UALD to adequately overcome some barriers to receiving records and conducting investigations. We reviewed one case in which an employer refused to give the UALD investigator an internal investigation they had conducted regarding the individual who was allegedly discriminating against the charging party. We believe the case could have progressed more efficiently if UALD could have subpoenaed the evidence needed to conduct the investigation, such as employment records, policies, and records of discipline.

In conducting investigations, the EEOC is entitled to all information relevant to allegations that have been listed in the charge. The EEOC may use a subpoena to obtain this information. Colorado investigators are also given subpoena authority to conduct investigations. Finally, for housing discrimination complaints, federal HUD investigators are given subpoena authority to investigate claims.

As the EEOC's only presence in Utah to investigate employment discrimination claims, UALD has the responsibility to fully investigate. We believe the Legislature could consider granting UALD subpoena authority to compel parties to produce documents to support or rebut claims made during an investigation.

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**The Legislature could consider providing UALD with subpoena power to compel parties to produce documents.**

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## Legal Terminology Should More Accurately Reflect Division Practices

*Utah Code* 34A-5, the Utah Antidiscrimination Act, grants UALD authority over employment practices and other types of discrimination. In this section, we discuss our concerns with how the statute expresses some of UALD's authority to investigate claims. This is not an exhaustive review of the applicable statute. We discussed these concerns with interested parties, including the UALD director and the Labor Commissioner, who agree.

We believe that, as contained in statute, UALD's procedures for filing, handling, and finalizing a claim of discrimination should more accurately reflect actual practices. We suggest the Legislature consider the following amendments to clarify the regulations established in *Utah Code* 34A-5:

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**Statute should be clarified and corrected to accurately explain Utah's process for managing employment discrimination cases.**

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- Although given the authority to do so, UALD does not hold hearings. References in statute to the division holding hearings should be reviewed to ensure their use is contextually correct.
- In the context of mediation, section (3) states that an investigator should attempt a settlement. However, the mediators, not investigators, attempt settlements.
- Section (3) also states that the investigator shall attempt a settlement (see the previous concern) by conference, conciliation, or persuasion. The reference to conciliation and persuasion are inaccurate and possibly inappropriate. "Conciliation" is a term used when an investigation results in a cause finding (where discrimination has been found). Clearly, at the beginning of a mediation, there is no basis for cause to be found. The use of the term "persuasion" is inappropriate because it is the job of the investigator to be impartial. We believe the use of persuasion has been taken out of context from federal statute, in which it is used solely when cause has been found.
- Relating to the adjudicative process (which is not under UALD's authority, but is under the adjudication division's authority) subsection (7) appears to allow a charging party to amend their allegations of discrimination at the appeal level. However, according to the director of the adjudication

division, when appealing the outcome of a UALD investigation, they can only hear the issues brought up in the charge. Therefore, this subsection may be providing unauthorized power.

This is not an exhaustive review of the statute relating to discrimination claims. Therefore, we recommend the Legislature consider an examination of each section of ~~344-5~~ to ensure it fulfills the Legislature's desire for the way discrimination charges are handled.

## Recommendations

1. We recommend that the Utah Antidiscrimination and Labor Division (UALD or division) consider digitally maintaining all investigation records.
2. We recommend that the division develop a case management tool to assist both investigators and supervisors with managing the activities and assessing the investigation of a charge of employment discrimination.
3. We recommend that the division create a comprehensive policy and procedures manual for the management of employment discrimination cases.
4. We recommend that the division develop policies to enforce administrative rules and other internally established deadlines for certain investigative processes.
5. We recommend that the division develop an employment discrimination training program for both seasoned and newly hired investigators.
6. We recommend that the division require all mediators to be court-qualified trained mediators.
7. We recommend that the division's mediation manager periodically observe mediations to ensure appropriate mediations are being conducted.
8. We recommend that the division develop policies to ensure mediation practices follow the process established in statute.
9. We recommend that the Legislature consider granting UALD a different subpoena power, authorizing the ability to compel parties to produce documents at the division's request that are related to the investigation of an employment discrimination charge.
10. We recommend that the Legislature consider amending statute to more accurately reflect the processes and terminology describing investigative practices.

## **Chapter III Low Rate of Cause Findings And Insufficient Accountability Are Concerning**

The Utah Antidiscrimination and Labor Division's (UALD) low rate of cause findings<sup>5</sup> in employment discrimination investigations adds to our concerns regarding the adequacy of investigations, and contributes to public perceptions of division bias. Furthermore, UALD should improve public accountability for investigation outcomes.

### **Low Rate of Cause Findings Is a Concern**

We are concerned with UALD's infrequent cause findings following a full investigation into allegations of employment discrimination. UALD finds cause in a lower percentage of cases than the Equal Employment Opportunity Commission (EEOC). Furthermore, UALD's rate of cause findings is lower than the national average of state Fair Employment Practices Agencies (FEPAs). This rarity of cause findings contributes to our concerns addressed in Chapter II regarding the adequacy of UALD's investigations, and increases the division's risk of allegations of bias.

#### **On Average, UALD Finds Cause Less Often Than the EEOC and Other States**

We analyzed employment discrimination case outcome measures for UALD, the EEOC, and FEPAs in other states. During state<sup>6</sup> fiscal year 2016, UALD did not find cause in any of the cases it closed and finds cause in a lower percentage of cases than its peers. We discussed this finding with UALD's new director, who agreed that a low rate of

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**UALD rarely finds reasonable cause to believe discrimination occurred.**

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<sup>5</sup> A cause finding or outcome means UALD determined there was reasonable cause to believe illegal discrimination occurred based on evidence obtained during an investigation.

<sup>6</sup> Because UALD is accountable to both the state and EEOC, this chapter contains references to both state fiscal years (July 1 through June 30) and federal fiscal years (October 1 through September 30).

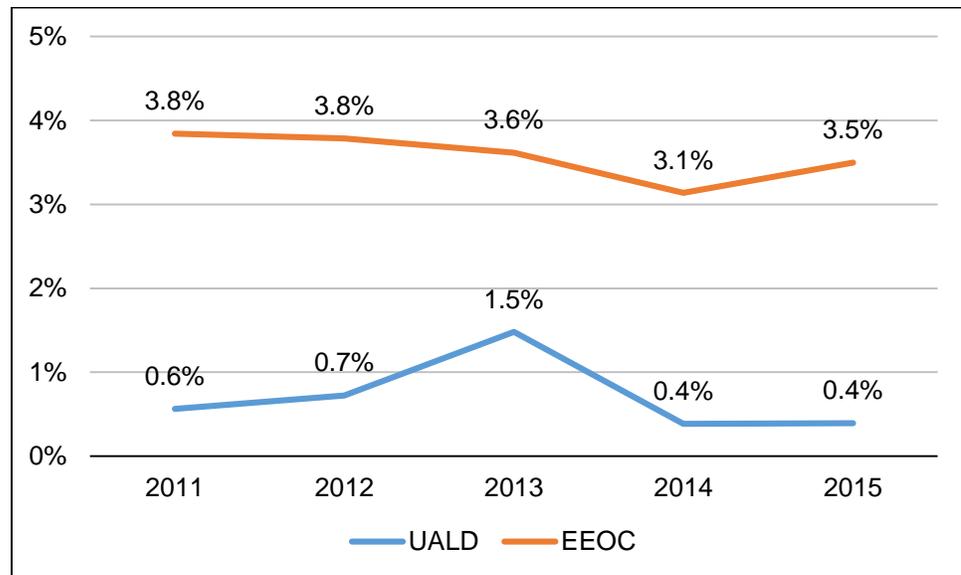
**A low rate of cause findings contributes to negative public perceptions of bias.**

cause findings is concerning and believes it is a result of inadequate investigative processes.

**Infrequency of Cause Findings Is Concerning.** UALD's low rate of cause findings raises questions about the adequacy of investigations. It also contributes to a negative public perception of division bias against employees alleging discrimination (charging parties) by their employers (responding parties).

UALD found cause in only 0.4 percent of the cases it closed during federal fiscal year 2015. This percentage is lower than that of the EEOC (3.5 percent), and the average of FEPAs nationwide (1.5 percent) during the same period. Further analysis reveals that UALD's rate of cause findings has been consistently low compared to the EEOC over the last five federal fiscal years (2011 through 2015), as shown in Figure 3.1.

**Figure 3.1 Percentage of Cause Findings by Federal Fiscal Year.** EEOC consistently found cause in a higher percentage of employment discrimination cases than UALD during federal fiscal years 2011 through 2015.



Source: Auditor analysis of UALD and EEOC outcome measures

**UALD consistently finds cause less frequently than the EEOC.**

While EEOC has averaged 3.6 percent cause findings over five federal fiscal years, UALD has only averaged 0.7 percent. UALD is also not keeping up with its comparators in surrounding states.

We contacted other FEPAs in EEOC's Phoenix District, and each reported higher rates of cause findings than UALD. For example,

- Arizona reported 5 to 6 percent
- Colorado reported 3 percent (calculated from annual report)
- New Mexico reported 7 to 8 percent (adding that the number has normally been 10 to 12 percent)
- Wyoming reported 6 percent

Using a simple calculation for comparison, the 5.3 percent average of the lowest reported percentages listed above is 7.5 times greater than UALD’s five-year average of 0.7 percent.

**Lack of Cause Findings Does Not Equate to Lack of Claims with Potential Merit.** EEOC considers cause findings, negotiated settlements, and withdrawals with benefits as “merit resolutions” because they are closures with outcomes favorable to charging parties. Because investigative evidence has supported cause findings, they do have merit. However, the other potential merit resolutions (negotiated settlement and withdrawals with benefits) may or may not have meritorious allegations. While cases resulting in anything other than a cause finding may certainly have had potentially meritorious allegations, it is impossible to determine without an investigation and supporting evidence whether that was the case.

Figure 3.2 summarizes employment discrimination cases with merit resolutions for UALD, the EEOC, and FEPAs during federal fiscal year 2015.

**Figure 3.2 Federal Fiscal Year 2015\* Merit Resolutions for UALD, EEOC, and Other States.** For overall merit resolutions, UALD’s rate of 23.1 percent appears in line with the EEOC and FEPA rates of 18.1 and 24 percent, respectively.

Federal Fiscal Year 2015* Potential Merit Outcomes	UALD Closures	EEOC Closures	FEPA Closures
Cause Findings	0.4%	3.5%	1.5%
Negotiated Settlements	17.4	8.9	8.1
Withdrawals with Benefits	5.3	5.7	14.4
<b>Total</b>	<b>23.1%</b>	<b>18.1%</b>	<b>24.0%</b>

*Source: Auditor analysis of UALD and EEOC data*

*\* We were unable to get EEOC and aggregate other state (FEPA) data for federal fiscal year 2016. This could be because the federal fiscal year recently closed.*

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**UALD’s rate of cause findings is significantly lower than the rates of cause findings in other states.**

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**The division’s rate of merit resolutions is more in line with the rates of comparators.**

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**Negotiated Settlements Are Mediated Agreements Between Parties.** UALD closed a higher percentage of cases for negotiated settlements than EEOC and other states.

Federal Fiscal Year 2015 Potential Merit Outcome	UALD Closures	EEOC Closures	FEPA Closures
Negotiated Settlements	17.4%	8.9%	8.1%

*Data from Figure 3.2*

This selection from Figure 3.2 shows that UALD closed a significantly higher portion of its cases (17.4 percent) for settlements than the EEOC (8.9 percent) and other FEPAs (8.1 percent). Settlements are agreements negotiated through mediation between the charging and responding parties.

**Charging Parties May Withdraw Their Cases Upon Receiving Desired Benefits from Responding Parties.** UALD's rate of case closure for charging party withdrawals with benefits was lower than that of the EEOC and the average of other states.

Federal Fiscal Year 2015 Potential Merit Outcome	UALD Closures	EEOC Closures	FEPA Closures
Withdrawals with Benefits	5.3%	5.7%	14.4%

*Data from Figure 3.2*

While UALD's rate (5.3 percent) was lower than that of the EEOC (5.7 percent), it was much lower than the average of other states (14.4 percent). A withdrawal with benefits occurs when a charging party withdraws a claim upon receipt of some benefit from the responding party. In such cases, benefits are negotiated outside UALD's purview and the division may not be privy to the details of the outcome.

**UALD Most Often Finds No Cause to Believe Discrimination Occurred**

The majority of UALD's cases, 67.7 percent<sup>7</sup>, were closed with a finding of no cause. This means the division determined there was no reasonable cause to believe illegal discrimination occurred based upon evidence obtained in investigation. Figure 3.3 shows this percentage is

<sup>7</sup> Sixty-seven (67.7) percent of UALD's cases were closed with a no cause finding. Twenty-three (23.1) percent were closed with potential merit outcomes. The remaining nine (9.2) percent were closed for administrative reasons.

**UALD has a higher percentage of negotiated settlements than the EEOC and other states.**

**Few charging parties settle with responding parties outside UALD's program.**

higher than both the 65.2 percent reported by EEOC and the average of 60.3 percent for FEPAs during the same period.

**Figure 3.3 No-Cause Findings Represent Most of UALD’s Case Closures.** UALD had a higher percentage of no-cause findings than both the EEOC and the nationwide average of state FEPAs.

Federal Fiscal Year 2015 No Cause Outcome	UALD Closures	EEOC Closures	FEPAs Closures
No Cause Findings	67.7%	65.2%	60.3%

*Source: Auditor analysis of UALD and EEOC data*

UALD’s higher rate of no-cause findings and low rate of cause findings raises further questions about the adequacy of investigations. We believe this also may contribute to negative public perceptions of division bias against employees alleging discrimination (charging parties) by their employers (responding parties).

**Several Factors Contribute To Low Rate of Cause Findings**

In addition to the concerns discussed in Chapter II (lack of processes and policies, little oversight to justify investigations, and a lack of training), we believe several other factors contribute to UALD’s low rate of cause findings. First, UALD lacks performance expectations for the division, which will be discussed later in this chapter. Additionally, poor performance measures for UALD employees, investigator turnover, and changes in management could also contribute to UALD’s infrequent cause findings. These concerns are discussed in Chapter IV.

Additionally, UALD’s investigations manager believes a 2014 change in how the EEOC requests cases that would have resulted in cause findings may have negatively impacted UALD’s rate of cause findings. He reported that, in 2014, the EEOC requested the opportunity to review all UALD’s cause findings before they were finalized. Reportedly, the EEOC wanted to pursue any cause cases related to certain internal EEOC goals. We were unable to confirm this change with the EEOC.

Waivers are cases UALD transferred to EEOC for a variety of reasons. Some were transferred because the alleged harm to the charging party occurred outside Utah’s 180-day statute of jurisdictional limitation, but within EEOC’s 300-day limit. Others

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**Most investigations find no reasonable cause to believe illegal discrimination occurred.**

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**The division’s low rate of cause findings is influenced by several factors, including a lack of processes and investigator training, weak performance measures, and high turnover.**

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**We were unable to determine whether a reported practice change by the EEOC negatively impacted UALD's rate of cause findings.**

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were requested by the EEOC for pursuit of litigation related to certain EEOC enforcement goals. Cases may be waived to the EEOC at any point during UALD's charge process.

Our review of UALD case waiver data for federal fiscal years 2011 through 2016 shows that UALD waived an average of 81 cases a year to the EEOC. However, the number of waivers from 2013 (before the reported change in EEOC practice) to 2016 decreased by four. Eighty-three (83) cases were waived to the EEOC in 2013 and 79 were waived in 2016. Therefore, we are unable to see the effect of the reported change. The reduction in waivers could reflect an overall reduction in cases opened during this period, as shown in Figure 1.5. Furthermore, because waived cases were ultimately processed by the EEOC, we are unable to determine the outcomes and whether any resulted in a cause finding.

## **Public Accountability for Investigation Outcomes Is Insufficient**

UALD should ensure that its performance success measures established with the Governor's Office of Management and Budget (GOMB) accurately reflect desired performance goals. In addition, UALD provides limited performance information to the public.

### **UALD Should Ensure That Success Measures Accurately Reflect Desired Performance Goals**

With the GOMB, UALD has developed one success measure, measuring the performance of their management of employment discrimination cases. This measure counts the number of cases closed each month with either a cause or no-cause finding. After we discussed the measure with UALD and GOMB, we discovered that UALD and GOMB were using two different measures, and that GOMB's existing analysis did not reflect UALD's internal measure.

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**UALD has been using a different success measure than the GOMB.**

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During the audit, UALD management reported they were working toward a success measure goal of closing 80 percent of employment discrimination cases within 180 days. However, when we met with GOMB to better understand the measure, they reported no knowledge of this measure. GOMB was measuring how many cases were closed with a finding of cause or no cause within 12 months of being opened. The measure used a 2013 baseline of 42 percent closed

within 12 months. In follow-up discussions, UALD's director reported she is working with GOMB to update the measure and ensure both are in line.

In deciding how much time (whether 12 months or 180 days) should be used to measure cause and no-cause case closures, we believe UALD should assess how amended charges affect this measure. Charging parties are permitted to amend their charges as needed. When the charge is amended, it essentially restarts the investigation clock. In our case review, we found instances of a charge being investigated, amended, and then reinvestigated. Because UALD does not assign a new case number or start the clock over again when a charge is amended, we believe this distorts case closure measures for accurately measuring UALD's performance.

### **UALD Provides Limited Performance Information to the Public**

The Labor Commission's annual reports lack sufficient data to help the public understand UALD's performance. Annual reports for the EEOC and other FEPA's are more comprehensive and useful. Public reports with performance information can improve accountability and transparency; furthermore, they can help mitigate any negative perceptions of the division. Reported data can also be consistently measured on an annual basis to evaluate division performance.

The Labor Commission's 2015 annual report contained little information about performance by UALD's employment discrimination unit. The report did not highlight any employment discrimination unit specific accomplishments as it did for other Labor Commission units and divisions. The only data provided for the division was number of cases investigated and mediated, and an amount of compensation collected.

Also concerning is that the data reported to the Labor Commission each year is inconsistent. For example, the 2015 report showed count of cases closed and amount of damages collected, while the 2014 report showed the following:

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**The Labor Commission's annual report contains little useful information about UALD's performance.**

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**UALD can proactively demonstrate greater accountability by reporting some basic performance statistics.**

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**Similar agencies in other states report substantially more information than UALD.**

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- Number of inquiries
- Damages collected
- Number of people who benefited from outreach efforts
- Mediation success rate

An additional concern is that division staff were unsure of how some of the numbers for the annual reports were obtained.

Other states and the EEOC report substantially more information in annual reports. For the audit, we had to generate that information for UALD because it was not available. EEOC and some FEPA reports included information about the following:

- Inquiries processed (Figure 1.4 in Chapter I)<sup>8</sup>
- Cases opened (Figure 1.5 in Chapter I)
- Workload reduction (Figure 1.6 in Chapter I)
- Mediation results (Figure 2.3 in Chapter II)
- Case outcomes (Figure 3.2 in Chapter III)
- Average days to close cases (Figure 3.4 in Chapter III)
- Pending workload
- Cases processed by type of alleged discrimination
- Cases processed by protected class

UALD should determine, develop, and publish outcome statistics to be consistently measured annually for performance reporting and to hold itself accountable to the public.

As an example, in addition to the figures mentioned throughout this report, Figure 3.4 shows the number of cases closed by state fiscal year, as well as average days to close cases, and percentages of cases meeting the two success measures.

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<sup>8</sup> Similar UALD data generated by auditors for this report are noted in parentheses adjacent to listed items.

**Figure 3.4 Sample Employment Discrimination Data (State Fiscal Years 2011 through 2016).** UALD could provide context for its reported number of cases closed by reporting average days to close, or cases closed within its established success measure.

	Cases Closed*	Average Days Open	Percent Closed ≤180 days	Percent Closed ≤365 days
2011	704	269	29%	74%
2012	622	287	31	66
2013	604	290	29	59
2014	623	266	29	74
2015	545	280	37	62
2016	534	250	36%	78%

*Source: Auditor analysis of UALD data.  
\* All case outcomes*

While the purpose of Figure 3.4 is to show information that can be reported by the division, it illustrates opportunities for further analysis of UALD’s performance. Such reporting over time would allow the division to contextualize its performance results, evaluate its progress, and recognize areas for improvement.

For example, Figure 3.4 shows that UALD closed 704 cases in 2011 and 534 in 2016. This is a 24 percent reduction in the number of cases closed. However, UALD has only decreased the average number of days a case is open from 269 in 2011 to 250 in 2016, only a 7 percent reduction. In analyzing productivity, one might question why the percent of cases closed decreased by such a large number while the number of days those cases were open only decreased slightly.

As case closures relate to the 180-day measure, this figure also shows that from 2011 to 2016, UALD increased the percent of cases closed within that period (180 days) from 29 to 36 percent, a 7 percent improvement. This figure also allows UALD to review case closures for a 365-day period, if desired. Under that analysis, this figure shows that UALD increased the percent of cases closed within 365 days from 74 to 78 percent, a 4 percent increase.

Such reporting should also reassure the public that the division holds itself accountable for achieving program results and is striving to improve its program. UALD should also consider reporting to the

**Improved reporting would help the division evaluate the progress of its program and develop improvements.**

public its accomplishments in meeting contractual requirements with the EEOC.

**Limited Accountability to EEOC May Contribute to Weak Accountability by UALD.** It is not surprising that UALD's accountability is lacking when accountability to the EEOC has been lacking. In a 2011 report, the EEOC's Office of Inspector General (OIG) reported that they lack performance goals and objectives for FEPAs. The OIG further stated that without these goals and objectives, the EEOC was not holding itself accountable for achieving program results.

The OIG recommended the EEOC develop and implement measurable strategic performance goals and objectives reflective of the program and include them in an annual performance and accountability report. The EEOC appears to have complied with these recommendations; however, it is unclear whether the EEOC has required greater accountability from UALD and other FEPAs. UALD should make strides to hold itself accountable in the absence of any requirements for accountability by entities the division answers to.

## **Recommendations**

1. We recommend that the Utah Antidiscrimination and Labor Division (UALD or division) determine and implement the success measure that accurately reflects its internal performance measure goals.
2. We recommend that UALD consider how amended charges affect case closure measures.
3. We recommend that the division determine, develop, and publish the desired outcome statistics to be consistently measured annually for performance reporting.

# **Chapter IV**

## **UALD Needs to Address Inadequate Performance Measures And High Turnover**

This chapter addresses concerns that we have regarding internal performance. We found that employee performance expectations lack clarity and adequate measures. Additionally, high turnover of UALD investigators limits program progress.

### **Employee Performance Expectations Lack Clarity and Adequate Measures**

UALD lacks sufficient internal expectations and measures for employment discrimination investigators. UALD needs to develop clear, correct investigator evaluation forms that provide useful measures. We believe these weaknesses contribute to investigator productivity and high turnover. Improved performance measures will help management understand how investigators are performing and provide investigators with needed guidance to understand performance expectations.

### **Investigator Evaluation Forms Are Unclear and Incorrect**

We reviewed performance evaluation forms for current investigators and found that they are inconsistent and unclear and contain errors. The evaluation forms have multiple expectations of the same caseload, with different closure requirements. For example, an investigator might be expected to close a certain number of cases during part of the year, and to close a different number of cases for the remainder of the year, all while carrying the same caseload.

Another problem we found was that time periods listed on the evaluation forms were incorrect (often not updated to reflect the actual period being evaluated), unclear, and arbitrary to any goal or measure. For example, some forms covered time (years) prior to an investigator's employment with UALD.

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**Poor employee performance measures weaken productivity and contribute to high turnover.**

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**Inadequate evaluation forms cause confusion about what is expected from investigators.**

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**Arbitrary and variable goals make it difficult for investigators to meet expectations.**

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It is ineffective and unfair to hold investigators to inadequate measures. Forms lacking clear guidance and correct information make it difficult, if not impossible, for an investigator to understand what is expected and how to achieve desired results. UALD should develop a performance evaluation form that provides clear direction and correct information so that investigators can successfully meet expectations.

### **Investigator Evaluation Forms Lack Useful Measures**

Performance measures on investigators' evaluation forms fail to correlate with division performance expectations for success measures or EEOC contract requirements. In addition, our review of federal fiscal year 2016 investigator performance revealed that only one investigator met two measures of all the expectations. This investigator and the other investigators (for all measures) fell short.

UALD investigator performance is measured four different ways during overlapping and varying periods of time. The four measurements are the following:

1. For federal fiscal year 2016 (that is October 1, 2015 to September 30, 2016) the whole employment discrimination unit should have resolved (closed) 470 cases. With four investigators during that time, this measure required closing about 118 cases per investigator, or about 10 per month.
2. For the period of January 22, 2016 to December 1, 2016, investigators were expected to close 80 percent of their cases within 300 days.
3. For the same period as #2, investigators were expected to draft and submit an average of 12 determinations per month, or 120 case determinations during that 10-month period.
4. For the period of August 5, 2016 to January 13, 2017, investigators are expected to close 80 percent of their cases within 180 days.

With four different expectations, it is difficult to understand exactly which measure an investigator should try to meet. In fact, between August 5, 2016 and December 1, 2016, the investigators were under two different requirements for 80 percent of their cases (completing

them within either 180 or 300 days). In addition, going from a 300-day requirement to a 180-day requirement meant that the investigator was expected to increase productivity by 40 percent. Furthermore, none of the investigators managed to meet the division's new internal success measure of 80 percent of closures in less than 180 days.

Additional review showed that the expected measures may change during the year depending on the performance of other investigators. Inconsistent and variable goals make it difficult for investigators to achieve desired results. UALD should develop an employee evaluation tool that accurately reflects applicable and useful performance measures.

## **High Turnover Limits Program Progress**

Since 2011, the division has had three different directors. While we did not evaluate management changes, Utah's Department of Human Resource Management (DHRM) confirmed high turnover for UALD's employment discrimination investigators. Turnover appears to be a consequence of several issues, including lack of appropriate training, unclear processes, inconsistent guidance, and ongoing investigator development. Starting pay does not appear to be a significant factor influencing turnover. In addition to turnover, UALD must address limited upward mobility for its investigators.

### **Investigator Turnover Is High**

We met with DHRM to discuss turnover rates for UALD investigators. They said the annual turnover rate for investigators appears high and is higher than state averages. Because this audit focused on the employment discrimination unit, we only reviewed turnover for the employment discrimination investigator position. For the last five state fiscal years (2012 through 2016), the turnover rate for the investigator position averaged 46 percent per year.

With DHRM's assistance, we reviewed the turnover rates for all at-will state employees for the last five fiscal years (2012 through 2016). The average turnover rate for these state employees was 11 percent, while the average rate for a similar investigator position was 15 percent statewide. Therefore, at an average of 46 percent, UALD's

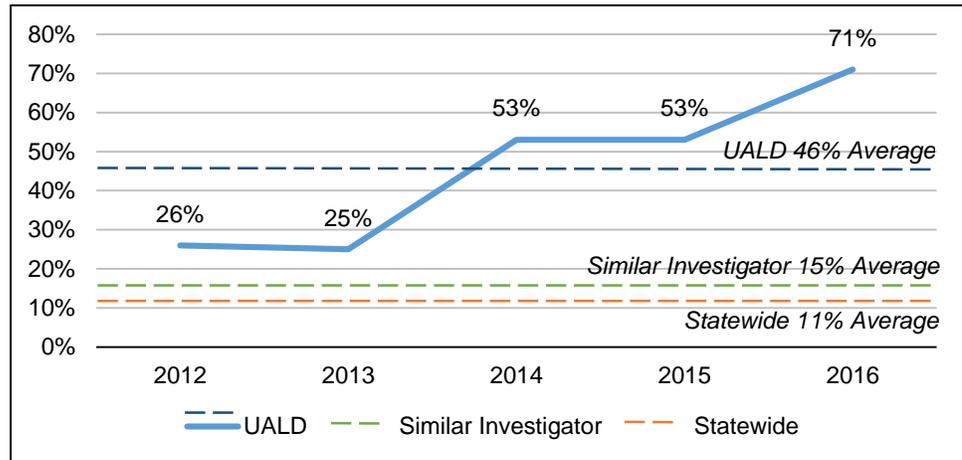
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**Very high investigator turnover hinders the division's ability to improve.**

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turnover for the investigator position is very high. Figure 4.1 shows turnover over percentages by year.

**Figure 4.1 Employment Discrimination Investigator Turnover.** The turnover rate for employment discrimination investigators has increased over the last five fiscal years.



Source: Auditor analysis of UALD data

Figure 4.1 shows that investigator turnover has been consistently high during the last five state fiscal years. Nine employees left investigations during this time. This is concerning because investigators do not stay long enough to gain necessary experience and become seasoned. Both the EEOC and the Division of Occupational and Professional Licensing (DOPL) told us that it takes up to two years to train and season an investigator.

### Starting Pay Does Not Appear To Be a Significant Factor

Starting pay does not appear to be a significant influence on turnover. DHRM suggested that we compare UALD’s investigator salary to the salary of a similar position located in DOPL. According to DHRM, this was the most comparable position to UALD investigators in the state.

Our analysis with DHRM showed that pay range for comparable investigators is between \$17.89 and \$30.41 per hour, while pay range for UALD investigators is between \$17.89 and \$28.39 per hour. Average hourly rate for UALD investigators is about \$0.68 below the average hourly rate for DOPL investigators. We believe this difference is caused by DOPL investigators having more experience than UALD

The turnover rate for employment discrimination investigators greatly exceeds state averages.

Starting pay for UALD investigators appears to be consistent with starting pay for similar state positions.

investigators. DOPL's investigators averaged about five years of experience while UALD's averaged about one year of experience. Although we did not do a comparison between cost of living between states, a FEPA representative in Wyoming reported slightly higher starting pay for investigators, while representatives in Arizona, and New Mexico reported lower pay for investigators than in Utah.

### **Upward Mobility for Investigators Must Be Addressed**

While other agencies might have an Investigator I position that progresses to Investigator II, III, and so on, UALD has just one investigator position. The next step would be the single investigations manager position. UALD used to have an employee who was classified as a senior investigator but discontinued use of this designation after this person retired.

The Labor Commission only had two exit interviews for UALD investigators. One employee reported that UALD suffered from poor management, including inadequate support, funding, staffing, training, performance appraisals, appreciation, compensation, and processes. Both interviews cited lack of opportunities for advancement. According to DHRM, UALD does not have a career path for its investigators, though other state agencies with similar positions have career paths. We believe that lack of a career path is another factor in UALD's high turnover. Representatives from FEPAs in Arizona, Colorado, New Mexico, and Wyoming reported they do not have a problem with consistently high turnover.

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**Lack of a career path for investigators impedes employee retention.**

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## **Recommendations**

1. We recommend that the Utah Antidiscrimination and Labor Division (division) develop an employee evaluation tool that accurately reflects applicable and useful performance measures.
2. We recommend the division consider a career path for investigators, providing opportunities for advancement.

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## **Chapter V**

# **UALD Budget Requires Improved Oversight**

The administration of the Utah Antidiscrimination and Labor Division's (UALD) budget needs improved oversight. UALD needs to comply with the terms of its federal contract with the Department of Housing and Urban Development (HUD). In addition, several essential administrative functions have been overlooked, including thorough recordkeeping, precise accounting, compliance with statute regarding work program changes, and additional purchasing procedures, to name a few.

### **UALD Needs to Comply with the Terms of Its Federal Contract**

We found that UALD has violated the terms of a contract with HUD. The division has not provided the required state funding match of 20 percent for fair housing activities. More precise accounting could get the division closer to complying with the contract.

UALD is assigned a total budget by the Legislature. However, the division includes three distinct units: the employment discrimination unit, the fair housing unit, and the wage claim unit. The Labor Commission has discretion to set and amend the budget for each unit within the assigned UALD budget. Therefore, a budget review of the employment discrimination unit would be incomplete without considering the fair housing and wage claim portions of the UALD budget as well.

### **UALD Has Not Provided The Required State Match**

Each year, UALD enters a contract with HUD. Like the contract with the Equal Employment Opportunity Commission (EEOC), the HUD contract pays UALD based on the number of various case outcomes. In addition, HUD provides funding for training and outreach. One contract provision stipulates that 20 percent of UALD's total budget (excluding HUD funds) must be spent on fair housing activities. However, the Labor Commission has only been able to

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**UALD failed to provide the required 20 percent state funding match under its HUD contract.**

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document spending about 9 percent of UALD's total budget on fair housing.

The annual contract between HUD and the Labor Commission has a maintenance of effort clause. Maintenance of effort is an assurance to maintain a certain level of state funding. The clause states the following:

The Recipient must spend at least 20 percent of its total annual budget on fair housing activities if it enforces antidiscrimination law(s), other than fair housing law. The term "total annual budget" means the entire budget assigned by the jurisdiction to the agency for enforcing and administering antidiscrimination laws, but does not include FHAP [HUD] funds.

This clause is applicable to UALD because it enforces employment antidiscrimination laws.

The maintenance of effort clause in the HUD contract is closely modeled after federal law, codified in 24 CFR § 115.307, which states:

If an agency that participates in the FHAP [HUD] enforces antidiscrimination laws other than a fair housing law (e.g., administration of a fair employment law), the agency must annually provide a certification to HUD stating that it spends at least 20 percent of its total annual budget on fair housing activities. The term "total annual budget" as used in this subsection, means the entire budget assigned by the jurisdiction to the agency for enforcing and administering antidiscrimination laws, but does not include FHAP funds.

UALD is only allowed to use HUD funds to administer the Utah Fair Housing Act. Thus, HUD funds may be used for fair housing intake, mediation, investigations, outreach, and administration. Figure 5.1 shows that in federal fiscal year 2016, UALD spent \$355,829 on fair housing activities.

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**The maintenance of effort clause, based on federal law, is to assure Utah's HUD program maintains a certain level of state funding.**

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**Figure 5.1 Federal Fiscal Year 2016 Sources of Revenue for the HUD Program.** UALD’s Fair Housing unit spent \$355,829 in federal and state funds to meet its contractual obligation of providing services under the HUD contract.

Sources of Revenue	Amount
HUD funds spent	\$191,350
State funds spent	164,479
<b>Total Fair Housing Expenditures</b>	<b>\$355,829</b>

Source: FINET, Labor Commission

Figure 5.1 shows the most recent complete federal fiscal year because that’s the period of performance on the grant.

To fulfill the requirements in the HUD contract, UALD must spend 20 percent of its budget, after subtracting the HUD funds used to run the program, on the fair housing program. Figure 5.2 shows that UALD underspent state funds on the fair housing program.

**Figure 5.2 UALD Underspent State Funds on the HUD Program by \$203,678 for Federal Fiscal Year 2016.** The Fair Housing unit should have spent \$368,157 in state funds to meet its contractual obligation, but only spent \$164,479.

	Expenditure Amounts
Total UALD Expenditures	\$2,032,137
Less HUD Funds Spent (see Figure 5.1)	(191,350)
Adjusted UALD Expenditures	1,840,787
20 Percent of Adjusted UALD Expenditures*	368,157
State Funds Spent (see Figure 5.1)	(164,479)
<b>Underspent on Fair Housing Program</b>	<b>\$ 203,678</b>

Source: FINET, Labor Commission

\* Calculation: \$1,840,787 \* .20 = \$368,157

Based on the \$191,350 that UALD drew down in HUD funds, the division underspent on fair housing by \$203,678.

**The Labor Commission Could Not Provide Documentation That It Has Assessed Compliance with This Requirement.** We cannot verify that UALD or the Labor Commission has assessed its compliance with the HUD contract prior to our identification of the issue during this audit. If this calculation has been made in the past, it has not been documented. The Labor Commission reports that HUD has not raised any concerns with the amount of state money that it spends on fair housing in the past. However, the grant administrator

from HUD confirmed this and agrees with our interpretation of the clause.

**Attorneys in the Office of Legislative Research and General Counsel (LRGC) Concurred with Our Interpretation.** We discussed this issue with legislative attorneys, who agreed with our interpretation of the contract clause and corresponding law, that the 20 percent maintenance of effort must be met with non-HUD funds. Therefore, HUD funds spent should be removed before the calculation. A copy of the legal opinion can be seen in Appendix A.

**The Maintenance of Effort Clause Has Likely Been Included in the Contract for Several Years.** The agency was only able to provide three years' worth of HUD contracts. Each contract contained the maintenance of effort clause, which requires the 20 percent match with state funds. We believe that this clause has most likely been included in contracts prior to the three most recent ones, as the requirement has been in federal statute since at least 2010.

HUD requires recipients of these funds to submit annual narratives to report case statistics and how HUD funds were spent. However, HUD does not require that the recipient report total state dollars spent either division wide or on fair housing activities. Thus, HUD likely does not have the information required to determine whether the Labor Commission has met its contractual obligation to spend at least 20 percent of the UALD budget (excluding HUD funds) on fair housing.

### **More Precise Accounting Will Help UALD Meet 20 Percent Requirement**

UALD could benefit from more accurate accounting within the three units in its division. Several expenditures shared between the three units (employment discrimination, housing discrimination, and wage claims) are being attributed to just one unit. During the 2016 Legislative Session, UALD was given an ongoing appropriation for a fulltime outreach employee. The employee is intended to conduct outreach for employment discrimination, housing discrimination, and wage claims. Until recently, the outreach employee's salary of \$41,000 plus benefits has been paid entirely from the employment discrimination budget.

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**HUD has not required UALD to report its expenditure of state funds on fair housing.**

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Similarly, UALD's past and current directors' total salaries and benefits have been allocated entirely to the employment discrimination unit for at least the past three fiscal years. The current director earns about \$85,000 plus benefits. Because the UALD director oversees all three units (employment, housing, and wage), his or her compensation should be drawn from each unit proportionately.

Additionally, it appears that charges for UALD's employee UTA passes are being charged solely to the wage claims unit. In fiscal year 2016, UALD reported spending \$7,349 on UTA passes from the wage claims unit's budget. The fair housing and labor discrimination units' budgets did not have corresponding charges. The finance director confirms that this charge covers not only wage claim employees, but employment discrimination and fair housing employees' passes as well.

The failure to appropriately distribute expenditures among the three units makes it difficult to justify costs associated with federal grants and contracts. As discussed previously, UALD failed to meet its contractual obligation to spend 20 percent of its total budget on fair housing activities. While a more accurate distribution of expenditures among the three units will likely still not meet the 20 percent requirement, it will get UALD closer.

## **Essential Administrative Functions Have Been Overlooked**

Several basic administrative functions have been overlooked and UALD has not maintained essential records. Also, the Labor Commission has not consistently submitted work program changes required by law. Further, the Labor Commission would benefit from additional purchasing procedures. In addition, the Labor Commission and the UALD director should work to ensure that training and outreach needs are met.

### **UALD Has Not Maintained Necessary Records**

Over the course of the audit, UALD struggled to produce several important requested documents. UALD was unable to locate contracts with EEOC and HUD from past years. The division also could not produce records of the expenditure of federal dollars. The contract

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**More accurate accounting for the allocation of expenditures will help UALD ensure contract requirements are met.**

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with HUD stipulates that the agency should keep appropriate documentation of all records associated with the expenditure of HUD funds. The HUD contract also requires the agency to submit detailed annual reports to justify its draw of federal funds. The agency could not find some of these required reports.

In the absence of contracts and narrative reports, it was difficult to determine how much HUD money was drawn down under each contract. The Labor Commission does not always draw down HUD funds in the same year for which the funds are contracted. For example, the Labor Commission submitted the narrative to HUD and drew funds associated with the contract from federal fiscal year 2014 in state fiscal year 2016. Other draws on HUD grants recorded by the Labor Commission in the Division of Finance's online accounting journal did not include grant years in the description. Thus, we had to rely on the department to recreate records of when the funds were drawn down and with what contract years the funds were associated. This lack of documentation is one reason that we only looked at one year of HUD funds compared to state fair housing program funds.

The HUD contract requires that the Labor Commission maintain documentation of the expenditure of federal funds. The maintenance of records clause in the three most HUD contract states that the Labor Commission agrees to maintain records demonstrating its financial administration of HUD funds.

**UALD Could Not Produce Any Documentation Associated with Past Performance Measures.** Records of UALD's monthly performance and the measures used to assess this performance could not be located. The previous division director did not document established performance standards or consistently measure against these standards. Thus, new performance measures had to be developed and a new baseline established upon the arrival of the new division director.

As a result, the division has had to redevelop and document new measures. UALD's delay in establishing performance measures may have discouraged management from requesting new building blocks. Appropriations requests from executive agencies (like the Labor Commission) must first be approved by the Governor's Office of Management and Budget (GOMB). While performance measures are not absolutely required by GOMB to request additional funding from

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**UALD could not produce several documents associated with the HUD contract.**

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**UALD could not locate records of past performance measures.**

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the Legislature, GOMB states that the measures help establish the need for additional funding. Requests from agencies that have established performance measures are typically more likely to be approved.

Division representatives cited employee turnover as a contributing factor to its inability to locate certain documents as well as its delay in drawing down HUD funds. The division should develop practices that allow it to maintain all necessary documentation, regardless of turnover. The practices should be established in internal policy.

### The Labor Commission Has Not Submitted Legally Required Work Program Changes

While the Labor Commission operates under one line item, the Legislature assigns a budget to each program within the line item. While the Labor Commission is allowed to move money from one program to another, *Utah Code* requires agencies with this type of appropriation to file work program changes to document and justify when money is moved.

In fiscal years 2015 and 2016, UALD appears to have underspent its budget. The Labor Commission itself also came in under budget both years. However, in both years, at least two programs came in over budget, indicating that money had been moved from one program to another. While we do not believe that the funds were spent inappropriately, we are concerned that we cannot determine from which program the money came and for what it was used.

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**The Labor Commission should be submitting required work program changes every time money is moved from one division to another.**

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**Figure 5.3 UALD Spent Less than Its Budgeted Total While Three Other Programs Came in Over Budget in the Past Two Years.** Work program changes were not reported to the state Division of Finance.

Fiscal Year 2015			Fiscal Year 2016		
Division	Budgeted	Actual	Division	Budgeted	Actual
UALD	\$2,145,000	\$2,072,166	UALD	\$2,305,400	\$2,032,562
Adjudication	1,206,100	1,243,474	Adjudication	1,311,400	1,273,276
Appeals Board	12,100	15,280	Appeals Board	12,100	14,324
L. C. Admin.	\$1,988,900	\$1,963,615	L. C. Admin.	\$1,820,900	\$1,954,161

*For simplicity, the figure only displays UALD and all programs that were over budget in either year. In addition to UALD, several other programs within the Labor Commission came in under budget each year.*

Figure 5.3 shows information from the Division of Finance. UALD underspent its budget by \$73,000 in 2015 and \$273,000 in 2016. Much of these savings were likely the result of employee turnover and vacancies. For example, in 2016, UALD was budgeted for 25 full-time equivalent (FTE) employees but only used about 23.7 FTEs. It is unclear whether the UALD balances lapsed, rolled over into the next budget year, were unrealized federal funds (in the case of predicted drawdowns based on performance from federal grants), or funds were transferred to the overspent programs listed above.

*Utah Code 63J-1-206* mandates that, for a department, agency, or institution to transfer money appropriated to it from one program to another program within an item of appropriation, the following procedure shall be followed:

The department, agency, or institution seeking to make the transfer shall prepare: (A) a new work program for the fiscal year involved that consists of the currently approved work program and the transfer sought to be made; and (B) a written justification for the new work program that sets forth the purpose and necessity for the transfer. The Division of Finance shall process the new work program with written justification and make this information available to the Governor's Office of Management and Budget and the Legislative Fiscal Analyst.

We spoke with representatives from the Office of the Legislative Fiscal Analyst who stated that the Labor Commission should be filing a work program change with the Division of Finance every time money is moved from one division to another. The work program change should include a written justification.

A report from the Division of Finance shows that the Labor Commission did not record any adjustments between programs within its line item in 2015 and 2016. In 2014, the Labor Commission moved funds from its Administration Division to the Boiler and Elevator Safety Division and to UALD. However, the transaction description states "adjust between divisions." Thus, we cannot determine the reason for the transfer of funds.

We recommend that the Labor Commission submit this documentation in the future. The existence of work program change reports will increase transparency and create an opportunity for

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**Work program changes filed two years ago did not contain explanations, as required in statute.**

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additional oversight (regarding the use of savings) in the future. The Legislature could also consider creating multiple line items by division or program. Creating additional line items would increase transparency and oversight. However, it gives the agency less flexibility during tight budget years.

### **The Labor Commission Would Benefit from Additional Purchasing Procedures**

Management oversight and additional purchasing procedures would help increase the transparency of requests and approvals for unbudgeted items and services. In the past, the former labor commissioner allowed the department's finance director to approve unbudgeted requests less than \$5,000 from division directors. This threshold is documented in Labor Commission policies and procedures.

The \$5,000 policy appears to be based on state purchasing rules, as \$5,000 is the threshold at which an agency must go through the Division of Purchasing to solicit competitive bids. However, the purpose of the state purchasing rules is to ensure that competitive bidding occurs, not necessarily to ensure that the agency is using its resources for the most vital needs of its divisions.

Based on the Labor Commission's current policies, all items that cost less than \$5,000 can be purchased at the discretion of the finance director, including items or services that have not been budgeted for. We are concerned that the finance director can authorize unbudgeted purchases under \$5,000, initiate the purchase, and record the expenditures. According to policy on internal controls from the Utah Division of Finance, these three duties (authorize, initiate, and record) conducted by one individual signify a lack a separation of responsibilities, though such separation is required in an effective internal control environment. Lowering the threshold at which outside approval is required would help reduce risk. The Labor Commission should also consider formalizing the request and approval process in policy.

Approved unbudgeted requests from directors are not documented in a way that distinguishes them from other, budgeted expenditures. Thus, it was impossible to track and review instances in which savings from one area were spent in another area and to determine for what purposes the funds were used. The lack of documentation of

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**Internal controls over purchasing need improvement.**

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unbudgeted requests and approvals makes it difficult for management or auditors to assess whether savings were utilized on the most pressing needs.

### **UALD Needs to Ensure Training and Outreach Needs Are Met**

Staff training and community outreach in UALD require improvement. The employment discrimination unit has received \$1,500 dollars per year from EEOC to fund employee training for at least the past two complete federal fiscal years. The Labor Commission has not budgeted additional funds for training beyond the federal funds. As discussed in the previous section, UALD had a budget surplus in both 2015 and 2016, which could have been applied to training and outreach.

In federal fiscal year 2016, the unit only spent \$1,215 on training. This figure includes associated travel, lodging, and per diem. Because UALD has underspent the federal funds provided for training, we are concerned that they could be in violation of contractual requirements that may be placed on the division to spend the total funds. In addition, as discussed in Chapter II, UALD employment discrimination investigators lack needed training. Additional training funds are needed to both cover the federal funds provided and to ensure investigators are receiving sufficient training to do the job.

In 2016, the Legislature funded one FTE to provide employment, housing, and wage claims outreach. However, the appropriation did not cover travel and per diem for the employee. Travel and per diem for this employee have not been specifically allocated in the UALD budget and thus, most of the outreach has taken place locally; only about 7 out of 45 outreach locations visited were outside the Wasatch Front since the position was funded in March, 2016. Improving budgeting and management concerns addressed in this chapter would assist UALD in ensuring that training and outreach needs are met.

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**In federal fiscal year 2016, UALD did not spend the minimum amount of money required for training.**

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## Recommendations

1. We recommend that the Utah Antidiscrimination and Labor Division (UALD) comply with all requirements stipulated in its contract with the Department of Housing and Urban Development (HUD), including the maintenance of effort clause and the maintenance of records clause.
2. We recommend that UALD reevaluate where costs are being allocated to ensure the costs are reflective of the efforts worked in each unit and to help meet HUD grant requirements.
3. We recommend that ULAD retain essential records, including records associated with federal grants and the drawdown of federal funds.
4. We recommend that UALD file work change programs when moving money from one division or program to another.
5. We recommend that the Labor Commission consider lowering the monetary threshold at which approval is required for unbudgeted requests and consider documenting the approval or denial of significant unbudgeted requests.
6. We recommend that the Labor Commission formalize the process for requesting and approving unbudgeted expenditures in policy.
7. We recommend that UALD devote more funds to employee training and fully fund the activities of the outreach employee.

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# Appendix

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Michael E. Christensen  
Director

John L. Fellows  
General Counsel

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January 3, 2017

Deanna Herring, JD  
Audit Supervisor  
Office of the Legislative Auditor General  
W315 State Capitol Complex, Salt Lake City, Utah 84114

**Subject: Legal Opinion Related to the Fair Housing Assistance Program**

Dear Ms. Herring:

You have asked our office for a legal interpretation of 24 C.F.R. § 115.307(a)(5) (2007) (hereinafter "rule"). Specifically, you asked whether the rule allows an agency to count its expenditure of Fair Housing Assistance Program (hereinafter "FHAP") funds toward the rule's requirement that an agency spend 20% of its total annual budget on fair housing activities. Our office concludes that an agency cannot count FHAP funds toward the 20% requirement.

The rule reads as follows:

If an agency that participates in the FHAP enforces antidiscrimination laws other than a fair housing law (e.g., administration of a fair employment law), the agency must annually provide a certification to [the U.S. Department of Housing and Urban Development] stating that it spends at least 20 percent of its total annual budget on fair housing activities. The term "total annual budget," as used in this subsection, means the entire budget assigned by the jurisdiction to the agency for enforcing and administering antidiscrimination laws, but does not include FHAP funds.

There are no court decisions or agency interpretations of the rule; therefore, our analysis is based on a plain reading of the language.

The rule applies to an agency that (1) participates in the FHAP; and (2) enforces antidiscrimination laws other than fair housing laws. An agency that meets these two requirements must annually certify to the U.S. Department of Housing and Urban Development that the agency spends at least 20% of its total budget on fair housing activities. The key to this provision is the rule's definition of "total annual budget." The rule defines "total annual budget" as the agency's entire budget for enforcing and administering antidiscrimination laws *except* FHAP funds. So, an agency's total annual budget is the agency's entire budget for enforcing and administering antidiscrimination laws minus the agency's FHAP funds. An agency must spend at least 20% of those remaining funds on fair housing activities. FHAP funds are not part of the agency's total annual budget, and therefore cannot satisfy the 20% spending requirement.

Sincerely,

Christine R. Gilbert  
Associate General Counsel

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## **Agency Response**

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**State of Utah**  
GARY R. HERBERT  
*Governor*  
SPENCER J. COX  
*Lt. Governor*

**Labor Commission**

JACSON R. MAUGHAN  
*Commissioner*

ALISON A. ADAMS-PERLAC  
*Director*  
*Antidiscrimination and*  
*Labor Division*

January 11, 2017

Mr. John M. Schaff  
Legislative Auditor General  
W315 State Capitol Complex  
Salt Lake City, Utah 84114

Re: Utah Legislative Report No. 2017-02

Dear Mr. Schaff,

The Utah Labor Commission (“Commission”) and the Utah Antidiscrimination and Labor Division (“Division”) appreciate the opportunity to provide the following response to the January 2017 Performance Audit of the Division’s Employer Discrimination Unit. In general, the Commission and the Division agree with the recommendations made in the performance audit and will work diligently to implement improvements and follow the recommendations contained in the audit report.

The Commission has been aware of many of the problems identified in the report and, as outlined below, has been taking steps to address many of the concerns raised in the audit even before the audit began. It should be noted that the Commission hired a new director for the Division in March 2016 with the intended purpose that the new Director work to improve the Division generally and to address some of the concerns outlined by the audit specifically.

Upon starting with the Division and upon the direction of the Commission, the Director set the following four priorities for the Division: 1) timeliness; 2) legal sufficiency, writing, and analysis; 3) professionalism; and 4) efficiency and consistency. Since that time, the Division, including the Employment Discrimination Unit, has been working to set goals and to establish policies to meet all of these priorities. While there has been significant progress, the Commission and the Division recognize that there are more improvements to be made. The audit report is a document the Commission and Division will utilize in guiding continuing improvement efforts in the coming months.

## Chapter II – Investigation Process is Insufficient and Mediation Needs Better Processes

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*Recommendation 1: We recommend the division consider digitally maintaining all investigation records.*

**Response:** The Commission agrees that digitally maintaining all investigation records electronically is ideal. Prior to receiving the audit report, the Division began working with the Utah Department of Technology Services (DTS) to develop an e-records and e-filing plan. The plan requires dedicated resources as it involves numerous steps and will take some time to fully implement. DTS has begun working on updates to the Division's database.

**Action and Timeframe:** With the exception of filings coming into the Division (which can be added to the database), the Commission anticipates that all of the Division's records will be electronic by June 30, 2018. The Division hopes to have electronic filing capability by January 1, 2020.

*Recommendation 2: We recommend the division develop a case management tool to assist both the investigators and supervisors with managing the activities and assessing the investigation of a charge of employment discrimination.*

**Response:** The Commission agrees with this recommendation. A case management tool would be very useful and the Division has undertaken efforts to develop a checklist to assist investigators with case management and allow supervisors to have better oversight of the investigation process.

**Action and Timeframe:** The Division will finalize and implement this checklist by March 1, 2017.

*Recommendations 3 and 4: We recommend the division create a comprehensive policy and procedures manual for the management of employment discrimination cases. We recommend the division develop policies to enforce administrative rules and other internally established deadlines for certain investigative processes.*

**Response:** The Commission agrees with these recommendations. The Division currently has a policies and procedures manual for employment discrimination cases. However, the manual should be updated. Also, additional policies regarding the intake and investigation processes will be necessary to make it more comprehensive and to ensure that it more specifically addresses administrative rules and deadlines.

**Action and Timeframe:** By June 30, 2017, the Division will review, edit, and update its employment discrimination policies and procedures manual to ensure that its intake,

investigation, and case management processes, as well as relevant administrative rules and deadlines are appropriately outlined.

*Recommendation 5: We recommend the division develop an employment discrimination training program for both seasoned and newly hired investigators.*

**Response:** The Commission agrees with this recommendation. The Division's employment discrimination investigators would benefit from more intensive and more frequent training. Since the new director began in March 2016, training has been one of the Commission's priorities for the Division. The Commission feels strongly that it ought to address training needs internally whenever possible. To that end, the Division established its Legal Sufficiency and Training Committee in August 2016. The Committee's charge is to determine what trainings are necessary to assist the Division's legal sufficiency, writing, and analysis goals and its cross-training efforts; and to plan and develop trainings and materials, including annual legal updates to the Division. Since March, the Division has held numerous training sessions to address case management, investigation, and legal updates. The Division is scheduling internal trainings this spring to address legal writing and analysis, standards of proof, cultural competency, and dealing with parties and witnesses with mental illnesses.

Once this training is completed, Division investigators may also benefit from intensive investigation and case management training which is more readily attainable through the Division's federal partner, the EEOC. The Division will research training opportunities through the EEOC Training Institute, which provides intensive investigation and case management training for employment discrimination investigators. The Division has contacted the EEOC Training Institute to explore the cost of having a trainer come to Utah to conduct an intensive investigator training and is awaiting a response. The Division has also contacted other State agencies with investigative rolls to get more information about other available resources and how they address their training needs. The Division is also exploring the cost of sending its investigators to the EEOC Training Institute. Information detailing the cost of the EEOC training and a current training schedule will not be available until March 2017.

**Action and Timeframe:** The Division will develop a plan to address intensive investigator training by June 30, 2017, including ongoing investigator training needs. It will also develop a training plan for new and seasoned investigators and will ensure that all employment discrimination investigators have undergone intensive investigator training by July 1, 2018.

*Recommendation 6: We recommend the division require all mediators to be court-qualified trained mediators.*

**Response:** The Commission agrees with this recommendation. The Division's mediators should be court-qualified to ensure that they are adequately trained. One of the Division's mediators is currently court-qualified. However, its Mediation Unit Manager and contract mediator should undergo court-qualified mediation training.

**Action and Timeframe:** The Division's Mediation Unit Manager will complete court-qualified mediation training by December 31, 2017. If the Division continues to utilize contract mediators, it will only use those who are court-qualified.

*Recommendation 7: We recommend the division's mediation manager periodically observe mediations to ensure appropriate mediations are being conducted.*

**Response:** The Commission agrees with this recommendation. In fact, the Mediation Unit Manager's performance plan was recently updated to include the performance measure of observing each mediator in at least one mediation per month.

**Action and Timeframe:** The Mediation Unit Manager has been observing mediations for the past few months and will continue to do so.

*Recommendation 8: We recommend the division develop policies to ensure mediation practices follow the process established by law.*

**Response:** The Commission agrees with this recommendation. The Division has drafted a policies and procedures manual for its Mediation Unit. The Division Director is currently reviewing the manual to ensure that it appropriately addresses the mediation process outlined by relevant statutes and administrative rules.

**Action and Timeframe:** By September 30, 2017, the Division will review, edit, and finalize its mediation policies and procedures manual to ensure that policies outline and reinforce the mediation process established by law.

*Recommendation 9: We recommend the Legislature consider granting UALD different subpoena power, authorizing the ability to compel parties to produce documents at the division's request, in reference to the investigation of an employment discrimination charge.*

**Response:** The Commission agrees with this recommendation. A change to the Division's subpoena power to allow the Division to compel parties to produce documents at the Division's request, will increase the Division's ability to obtain information relevant to its investigations.

**Action and Timeframe:** If the Legislature deems it appropriate to change the Division's subpoena power, the Division will work with the Office of Legislative Counsel as necessary to develop an appropriate amendment to the statute.

*Recommendation 10: We recommend the Legislature consider amending the statute to more accurately reflect the processes and terminology describing investigative practices.*

**Response:** The Commission agrees with this recommendation. The Division and the Utahans who seek its help would benefit from the statute being amended to improve clarity and to more accurately outline the administrative process.

**Action and Timeframe:** If the Legislature deems it appropriate to amend the statute, the Division will work with the Office of Legislative Counsel as necessary to develop an appropriate amendment to clarify the statute regarding the Division's employment discrimination process and its investigative practices.

### **Chapter III – Low Rate of Cause Findings and Insufficient Accountability Are Concerning**

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*Recommendation 1: We recommend the division determine and implement the Success Measure that accurately reflects their internal performance measure goals.*

**Response:** The Commission agrees with this recommendation. The Division has already addressed this issue. The Division has met with the Governor's Office of Management and Budget (GOMB) and has worked with it to establish appropriate Success Measures for the Division's Employment Discrimination Unit.

**Action and Timeframe:** In addition to a quality measure which the Division is addressing through the checklists mentioned above, the Division's timeliness is being measured on the percentage of its cases with a Determination and Order approved by the Division Director within 180 days from the time the case is filed with the Division. To coincide with this Success Measure, the Division recently updated performance plans for its investigators. Investigators will now be evaluated on the performance measure of closing 80% of the cases on their caseload within 180 days.

*Recommendation 2: We recommend UALD consider how amended charges affect case closure measures.*

**Response:** The Commission agrees with this recommendation. Under the Division's current process, when a charge is amended based on a charging party's request, or based on more information gleaned during the investigation, the clock restarts. The Division is working with DTS to ensure that cases involving amended charges are coded correctly to account for the additional time.

**Action and Timeframe:** By April 1, 2017, the Division will review its process for amending charges and will develop a plan to ensure that they are handled appropriately so that they accurately reflect the time spent by the Division resolving the charge.

*Recommendation 3: We recommend the division determine, develop, and publish the desired outcome statistics to be consistently measured annually for performance reporting.*

**Response:** The Commission agrees with this recommendation. As stated above, the current director started with the Division in March 2016. Unfortunately, there has been a lack of continuity of records from the prior director. For that reason, it was unclear what data the prior director relied upon for the Labor Commission’s annual report.

**Action and Timeframe:** The Division Director has developed a policy to address reporting consistency by relying on a specific report that can be generated in the employment discrimination database to provide data for all future annual reports.

Despite the auditors’ concerns about the Division’s low rate of cause findings, it should be noted that, during the audit period (January 1, 2011 through December 31, 2016), the Division never had a determination overturned on appeal either by the Labor Commission’s Adjudication Division, or by the Utah State Courts. Using the best available data, 533 cases from the Division were appealed to the Adjudication Division during that time. The Adjudication Division issued final orders in 519 of those cases and did not reverse a single case.

## **Chapter IV – UALD Needs to Address Inadequate Performance Measures and High Turnover**

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*Recommendation 1: We recommend the division develop an employee evaluation tool that accurately reflects applicable and useful performance measures.*

**Response:** The Commission agrees with this recommendation. As noted above, the Division has already undertaken efforts to develop a checklist to assist investigators with case management and will allow supervisors to have better oversight of the investigation process. The Employment Discrimination Manager reviews all determinations submitted by the investigators. The Division Director reviews all “cause” determinations and randomly audits and reviews “no cause” determinations for legal sufficiency and analysis, writing, grammar, and punctuation.

**Action and Timeframe:** To ensure that investigators are held accountable if their investigations and/or determinations are inadequate or lack appropriate evidence and analysis, the Division has recently updated its performance plans for all employment discrimination investigators. These performance plans now include the following performance measures, among others:

1. No more than two determinations submitted per quarter will be returned by the Case Manager for substantive work including rewrites, missing facts, and/or legal analysis or for major grammatical errors.
2. No more than two determinations per 6 months will be returned by the Director for substantive work including rewrites, missing facts, and/or legal analysis or for major grammatical errors.

*Recommendation 2: We recommend the division consider a career path for investigators, providing opportunities for advancement.*

**Response:** The Commission agrees with this recommendation. Like the auditors, the Division is very concerned about turnover, particularly among investigators. Providing a two-step classification for discrimination investigators, e.g. Investigator I and Investigator II, may help to address the high rates of turnover among the Division's discrimination investigators.

**Action and Timeframe:** By December 31, 2017, the Division will meet with the Department of Human Resources Management to develop a process for creating a career path for investigators.

## **Chapter V – UALD Budget Requires Improved Oversight**

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*Recommendation 1: We recommend that UALD comply with all requirements stipulated in its contract with HUD, including the maintenance of effort clause and the maintenance of records clause.*

**Response:** The Commission does not necessarily disagree with this recommendation. However, the Commission has never been clear on why its fair housing contract with HUD is relevant to an audit of the Division's Employment Discrimination Unit. Further, despite the recent agreement of HUD management with the auditor's determination that the Commission is not compliance with the contract, HUD has never raised concerns that the Division has been out of compliance with its contract. Moreover, it would be very difficult for the Commission to comply with the maintenance of effort clause, since it would likely be required to terminate personnel from other areas in the Commission and hire additional personnel devoted solely to fair housing work. The current fair housing caseload, however, does not support the need for additional personnel.

As previously noted, there are some records maintenance issues that existed due to prior turnover. It is not clear that the records were not maintained, as they may have been maintained electronically.

**Action and Timeframe:** The current Division Director and Budget Director are now maintaining records of all of the Division's contracts with its federal partners including HUD and the EEOC. The Division is also working to develop policies that require that these records be maintained both physically and electronically for easier reference in the future. The Division will finalize these policies by June 30, 2017.

*Recommendation 2: We recommend that UALD reevaluate where costs are being allocated to ensure it is reflective of the efforts worked in each unit and to help meet HUD grant requirements.*

**Response:** The Commission agrees with this recommendation.

**Action and Timeframe:** The Division has already studied how costs were being allocated among its staff and has worked with the Budget Director to ensure that costs of the Division's employees, including its fair housing staff, are now being allocated appropriately across each of its three units.

*Recommendation 3: We recommend UALD retain essential records including records associated with federal grants and the draw-down of federal funds.*

**Response:** The Commission agrees with this recommendation. As previously noted, there are some records maintenance issues that existed due to prior turnover. It is not clear that the records were not maintained, as they may have been maintained electronically, but they are not accessible.

**Action and Timeframe:** The current Division Director and Budget Director are now maintaining records of all of the Division's contracts and grants (including records related to draw-down of funds) with its federal partners. The Division is also working to develop policies that require that these records be maintained both physically and electronically for easier reference in the future. The Division will finalize these policies by June 30, 2017.

*Recommendation 4: We recommend that UALD file work change programs when moving money from one division or program to another.*

**Response:** The Commission agrees with this recommendation. As with other State agencies, the Commission's Budget Director was unaware of the change to the statute requiring the Commission to file work program changes. However, the Commission recognizes the importance of following the statute and will ensure it is followed going forward.

**Action and Timeframe:** The Budget Director has become familiar with the statute and will file work program changes with the Legislature when required.

*Recommendations 5 and 6: We recommend that the Labor Commission consider lowering the monetary threshold at which approval is required for unbudgeted requests and consider documenting the approval or denial of significant unbudgeted requests. We recommend that the Labor Commission formalize the process for requesting and approving unbudgeted expenditures in policy.*

**Response:** The Commission agrees in part with this recommendation. The Commission has policies in place to address unbudgeted requests. The current monetary threshold is set to provide appropriate oversight by the Commission and to ensure that the Commissioner is aware of unbudgeted requests that may impact the budget. However, the Commission agrees that it should document the approval or denial of significant unbudgeted requests. The Commission will review state finance policy and ensure that its monetary threshold for approval of unbudgeted requests is consistent with state finance policy.

**Action and Timeframe:** By June 30, 2017, the Commission will develop a policy to address unbudgeted requests, how they may be made, and how they should be documented, whether they are approved or denied.

*Recommendation 7: We recommend that UALD devote more funds to employee training and fully fund the activities of the outreach employee.*

**Response:** The Commission agrees with this recommendation. To date, the Commission has fully funded outreach costs, but it may be beneficial for the Division to allocate a portion of its budget each year to these costs. Likewise, the Commission has funded any training requests made by its divisions and will ensure training costs are provided in the future.

**Action and Timeframe:** The Division will review its budget for FY 2018 and determine if funds should be allocated for outreach activities. The Division will finalize this budget by June 30, 2017.

## **Conclusion**

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The Commission and the Division appreciate the effort, recommendation, and guidance of the auditing staff and are committed to improving their processes to ensure that the Division meets the needs of Utah's citizens. As noted, the Division is working to improve its investigation and mediation processes, including better accountability and oversight. It is also taking measures to improve investigator performance and to address high turnover. Finally, the Commission and the Division are working to ensure that the Division's budget has appropriate oversight and is effectively managed. They appreciate the audit's feedback and will use it to help them ensure they are working effectively for the people of the State of Utah.

Sincerely,



Jackson R. Maughan  
Commissioner  
Utah Labor Commission

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