

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 16 (Smallwood-Cuevas)
Version: December 5, 2022
Hearing Date: March 28, 2023
Fiscal: No
Urgency: No
TSG

SUBJECT

Civil rights: discrimination: enforcement

DIGEST

This bill authorizes local governments to enforce the housing and employment components of California's state civil rights laws.

EXECUTIVE SUMMARY

The Fair Employment and Housing Act (FEHA) protects Californians against discrimination in the workplace and with respect to their housing. Under existing law, only the state may enforce the FEHA. Local governments cannot. The State enforces the FEHA through the Civil Rights Department (CRD). With limited resources and a handful of offices throughout the state, CRD must process around 24,000 complaints alleging discrimination annually and investigates about a quarter of them. With the aim of fortifying California's civil rights enforcement regime and bringing it closer to the people it is designed to protect, this bill would authorize - but not require - local governments to undertake enforcement of the FEHA.

The bill is author-sponsored. Support comes from a variety of organizations who back the possibility of expanding civil rights enforcement locally. Opposition comes from some housing providers who contend that only CRD has the requisite capabilities to enforce state civil rights law well. If the bill passes out of this Committee, it is currently slated to be heard next on the Senate Floor, though amendments that the author proposes to offer in Committee would trigger a referral to the Senate Appropriations Committee first.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) Makes it unlawful, pursuant to Title VII of the Civil Rights Act of 1964, for employers with 15 or more employees to discriminate on the basis of race, color, sex, pregnancy status, religion, or national origin in all aspects of an employment relationship, including hiring, discharge, compensation, assignments, and other terms, conditions and privileges of employment. (42 U.S.C. 2000e *et seq.*)
- 2) Establishes an administrative agency, the Equal Employment Opportunity Commission (EEOC), charged with receiving, investigating, and adjudicating allegations of workplace discrimination. (42 U.S.C. § 2000e-4.)
- 3) Requires an aggrieved worker to exhaust the EEOC's administrative remedies before filing an action for discrimination in court. (42 USCS § 2000e-5(f)(1).)
- 4) Permits state or local agencies to accept and investigate allegations that federal workplace antidiscrimination laws have been violated, provided that the state or local agency has entered into a worksharing agreement with the EEOC that requires specified case-handling procedures and coordination with the EEOC such that filing with the state or local agency also constitutes filing with the EEOC (so-called "dual filing"). (42 U.S.C. § 2000e-5(c).)
- 5) Makes it unlawful, pursuant to the Fair Housing Act, for a provider of housing accommodations to discriminate in the sale or rental of housing, including against individuals seeking a mortgage or housing assistance, or in other housing-related activities on the basis of race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, and disability. (42 U.S.C. § 3604.)
- 6) Provides that a federal administrative agency, the Department of Housing and Urban Development (HUD), shall receive and investigate complaints of housing discrimination. (42 U.S.C. § 3610(a).)
- 7) Establishes procedures by which HUD may certify state and local public agencies to accept referrals of housing discrimination complaints for investigation and enforcement. (42 U.S.C. § 3610(f).)
- 8) Does not require an aggrieved person to file an administrative complaint with HUD prior to filing a lawsuit for discrimination in court. (42 U.S.C. § 3613(a)(2).)

Existing state law:

- 1) Prohibits workplace discrimination, as specified, on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical

condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status through the Fair Employment and Housing Act (FEHA). (Gov. Code § 12940.)

- 2) Prohibits housing providers from discriminating on the basis of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information through the FEHA. (Gov. Code § 12955.)
- 3) Establishes an administrative agency, the Civil Rights Department (CRD), responsible for receiving, investigating, and adjudicating allegations of housing and workplace discrimination under the FEHA. (Gov. Code § 12930.)
- 4) Requires an aggrieved worker to exhaust CRD's administrative remedies prior to filing a lawsuit in court for workplace discrimination. (Gov. Code §§ 12960 and 12965.)
- 5) Permits aggrieved parties to petition the court of jurisdiction for review of administrative determinations. (Code Civ. Proc. § 1094.5.)
- 6) Expresses the intent of the Legislature to occupy the field of enforcing the FEHA's prohibition on workplace discrimination to the exclusion of any city, city and county, county, or other political subdivision of the state. (Gov. Code § 12993(c).)

This bill:

- 1) Authorizes efforts by any city, city and county, county, or other political subdivision of the state to enforce state law prohibiting housing or employment discrimination against any of the enumerated classes of persons covered by the FEHA.

COMMENTS

1. The issue this bill is intended to address

California's Fair Employment and Housing Act (FEHA) is one of the strongest anti-discrimination laws in the nation. Its purpose is to prohibit and punish unequal treatment of any Californian on the basis of race, religion, color, national origin, disability, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, among other grounds, in the areas of housing and employment. (Gov. Code § 12920.)

California's enforcement of the FEHA has sometimes been criticized, however. Existing law restricts the power to enforce the FEHA to the Civil Rights Department (formerly

known as the Department of Fair Employment and Housing or DFEH).¹ Local governments are preempted from attempting such enforcement themselves.²

Responding to all of the civil rights concerns across one of the nation's largest and most populous states presents an enormous challenge. According to a 2013 report by the California Senate Office of Oversight and Outcomes: "years of tight budgets have whittled away the state's ability to protect workers and enforce the law."³ The report concluded that "[o]ver the long run, DFEH and state leaders must come to grips with the chasm between the broad legal mandate to provide effective remedies – including full investigations into all proper claims alleging discrimination – and the relatively miniscule allotment of resources appropriated for that purpose in the state budget."⁴ CRD has received some additional resources since that time, but its workload remains large and challenging.

In its 2020 Annual Report, CRD stated that it received just under 24,000 intake forms alleging discrimination throughout that year. In over half of these cases, the complainant elected to bypass CRD's involvement and to proceed directly to court by requesting a right-to-sue letter. CRD went on to investigate the complaints in 5,784 cases.⁵ The remaining intake forms involved complaints that CRD determined were outside of its jurisdiction (things like unpaid wages or overtime violations, for example), so CRD conducted no further investigation.

The author wants to see more investigation and enforcement, citing the need for "strong and swift enforcement of anti-discrimination laws." As evidence of this need, the author points a recent survey of nearly 2,000 of Black workers in Southern California in which a third of respondents reported experiencing discrimination at work during the pandemic, of whom just under half were laid off or terminated and 16 percent were furloughed.⁶ Of particular relevance to this bill, the majority of the surveyed workers indicated that they were not aware of what rights and recourses they have for addressing the employment discrimination they faced.⁷

¹ Gov. Code § 12993(c). Given the recent name change, the acronyms DFEH and CRD will be used interchangeably in this analysis based on the entity's name at the time most relevant to the reference.

² *Ibid.*

³ Korby & Adkisson. *Department of Fair Employment and Housing: Underfunding and Misguided Policies Compromise Civil Rights Mission* (Dec. 18, 2013) California Senate Office of Oversight and Outcomes <https://sooo.senate.ca.gov/sites/sooo.senate.ca.gov/files/fair%20employment%20and%20housing%20final.pdf> at p. 1 (as of Mar. 10, 2023).

⁴ *Id.* at pp. 1-2.

⁵ *2020 Annual Report*. California Civil Rights Department <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/01/2020-DFEH-Annual-Report.pdf> at p. 11 (as of Mar. 10, 2023).

⁶ Thomas et al. *Essential Stories: Black Worker COVID-19 Economic Health Impact Survey* (Feb. 2022) The UCLA Center for the Advancement of Racial Equity at Work <https://www.labor.ucla.edu/publication/essential-stories-black-worker-covid-19-economic-health-impact-survey/> at p. 6 (as of Mar. 10, 2023).

⁷ *Ibid.*

From the perspective of the author and sponsors of this bill, the State's reliance on CRD as the sole government agency enforcing FEHA raises other concerns as well. Even with offices in a few locations throughout the state, CRD can feel removed and impersonal to civil rights complainants.

2. The initial legislative effort to enable local enforcement of civil rights (SB 491, Bradford, 2017) and the resulting advisory group study

Looking for a way to boost California civil rights enforcement and bring civil rights enforcement closer to the people it affects, in 2017 Senator Bradford introduced SB 491. As introduced, SB 491 simply called for eliminating FEHA's provision preempting local enforcement. There was some question, however, about the potential ramifications of making such a move. Could the blanket removal of the bar on local enforcement inadvertently cause some complainants to lose state or federal causes of action? Could it result in inconsistent enforcement of civil rights laws across the state and even allow for weaker civil rights protections in some parts of the state? Might DFEH lose some of its already limited resources as a result of lifting preemption?⁸

With these and other questions in mind, the author of SB 491 ultimately opted to convert the bill into a mandate for a task force to study the matter and return to the Legislature with recommended legislation. While he vetoed SB 491, then Governor Brown embraced its intent and ordered DFEH to convene an advisory group to study the concept of local civil rights enforcement.

3. The SB 491 advisory group report on local enforcement of FEHA

In response to the orders from Governor Brown, DFEH assembled an advisory group of seven stakeholders and experts to study how local civil rights enforcement could be carried out. In addition to the author of this bill, the advisory group included a law professor, a labor lawyer, an official from the City of Los Angeles, worker advocates, and a representative from the California Chamber of Commerce.

After the advisory group concluded its work, DFEH released the resulting report on December 5, 2018. The report concluded that "DFEH and the advisory group find that local enforcement of anti-discrimination laws is feasible."⁹ Indeed the report stated that "[a]n effective mechanism for local enforcement of anti-discrimination employment laws could further advance the state's efforts to combat discrimination." At the same time, however, the report warned that "[i]f not handled correctly [...], lifting of

⁸ Sen. Com. on Judiciary, Analysis of SB 491 (2017-2018 Reg. Sess.) as amended May 1, 2017, pp. 4-5.

⁹ *SB 491 Report* (2018) California Department of Fair Employment and Housing <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/SB491Report2018.pdf> (as of Apr.14, 2019) at p. 4.

preemption could have significant negative consequences, including accidental forfeiture of state or federal rights.¹⁰

The report went on to list a series of additional technical considerations that should be taken into account in the design of legislation authorizing local enforcement.¹¹

4. Primary concerns associated with local enforcement of FEHA

The SB 491 report and analysis of the other previous legislative attempts to open up civil rights enforcement to local jurisdictions have raised a number of issues that need to be addressed in order to avoid unintended negative consequences. The most significant of those issues are briefly described below.

a. Danger of loss of state and federal discrimination claims

Housing and employment discrimination often violates both state and federal law. The aggrieved person therefore has the option of seeking relief from either the state agency tasked with enforcing state civil rights laws, or the corresponding federal agency. To complicate matters, there are different filing deadlines for state and federal complaints.

Under current practices in California, when an aggrieved person files a claim with CRD and the claim alleges a violation of both state and federal civil rights laws, CRD automatically files the claim with the EEOC (employment discrimination) or HUD (housing discrimination) as well. The same thing happens in reverse: if the claim alleges violations of both state and federal laws but the person files the claim with the relevant federal agency, the relevant federal agency automatically files the claim with DFEH as well. This process is known as dual filing.

Dual filing happens because of worksharing agreements that CRD, HUD and the EEOC have with one another. Dual-filing acts to ensure that complainants do not lose state claims when they file federally, and vice versa.

If state preemption were lifted in California and local agencies also began to receive allegations of housing and employment discrimination, that change would add an additional layer of complexity. For example, in a case involving violation of a local ordinance, state law, and federal law, the state and federal agencies might never know about the claim if the aggrieved person filed their complaint with the local agency only. The aggrieved person might lose the opportunity to seek state and federal remedies as a result.

¹⁰ *Id.* at p. 3.

¹¹ *Id.* at pp. 9-18.

b. Risk of inconsistent civil rights enforcement across the state

Another concern about simply lifting preemption is that it might lead to inconsistent workplace civil rights enforcement across the state. While the language of FEHA would remain the same, a local anti-discrimination agency in Modoc County, for example, might interpret that language differently from an anti-discrimination agency in San Francisco. The resulting inconsistencies could be confusing and might also contribute to the politicization of civil rights enforcement.

Beyond interpreting the FEHA, the quality of investigation of complaints might diverge. Some local jurisdictions might decide to develop and invest in quite robust local anti-discrimination enforcement agencies, while other jurisdictions might not. Indeed, given the cost associated with operating a local civil rights enforcement agency, it seems likely that only the largest cities will have the resources available to consider it.

c. Potential for inefficient or even conflicting duplication of work

Lifting preemption without some formal coordination between local and state workplace civil rights enforcement could leave open the possibility that multiple investigations of the same allegation would take place at various levels of government. In addition to being an efficient use of public resources, simultaneous investigations by multiple agencies would be burdensome for complainants and defendants alike. In some instances, simultaneous investigations might even result in contradictory outcomes, with one agency exonerating the defendant while the other comes to the conclusion that a civil rights violation has indeed taken place.

d. Possibility of partial loss of federal revenue for CRD

Authorizing local enforcement of state civil rights laws has the potential to disrupt some of the funding that CRD relies on for its civil rights enforcement work. CRD receives some federal funds for its work based on the agreements it has with its federal counterparts, the U.S. Department of Housing and Urban Development as well as the Equal Employment Opportunity Commission. Turning some of CRD's work over to local entities could have impacts on that federal funding. That could, potentially, lead to less enforcement overall.

5. Statutory or regulatory path forward?

Given the conclusions of the SB 491 report and the considerations set forth in Comment 4, above, this much seems clear: if the potential benefits of local enforcement of employment and housing civil rights laws are to be realized without risking harmful unintended consequences, then the local enforcement will need to take place within a legal framework that anticipates and addresses those concerns.

The bill in print does not provide such a framework. That is deliberate but should not be taken as an indication that the author believes no such framework is necessary. Rather, the absence from the bill in print of a legal framework for coordinating the processing of federal, state, and local housing and employment discrimination complaint reflects the author's openness to considering various approaches to constructing this framework.

One obvious path forward would be to follow the approach taken by Senator Bradford with his bill SB 218 in 2020. SB 218 established a statutory framework allowing for local enforcement of statewide civil rights standards. It accomplished that aim in three steps. First, SB 218 removed language in existing law that preempts local jurisdictions from enforcing workplace civil rights laws. Next, the bill authorized local governments to enact local workplace civil rights ordinances that are at least as strong as FEHA and to establish local government agencies charged with enforcing those ordinances. Finally, in its third step, SB 218 laid out all the ways that a local workplace civil rights agency would interact with CRD and the EEOC when processing allegations of workplace civil rights violations. SB 218's mechanisms were complex, but in concert, they were intended to address all of the issues set forth in Comment 4, above. (For a detailed description of SB 218's content, see Sen. Com. on Judiciary, *Analysis of SB 218 (2019-2020 Reg. Sess.)* as amended Apr. 9, 2019, pp. 4-5.) Unlike this bill, SB 218 would only have applied to the employment discrimination side of FEHA and, in its final versions, would only have authorized local enforcement within the County of Los Angeles.

Ultimately, however, Governor Newsom elected to veto SB 218, concluding that "[a]s crafted, this measure could create confusion, inconsistent enforcement of the law and increase costs without a corresponding increase in worker protections." As a result, any attempt to build a *statutory* framework for governing local enforcement of the FEHA will presumably either involve revising the framework proposed by SB 218 or starting fresh.

An alternative approach would be to establish clear parameters for what the Legislature wants the legal framework for local civil rights enforcement to achieve, but leave the details to CRD to develop through the *regulatory* process. There are, arguably, at least two main virtues to this approach. First, it allows the Legislature to ensure that its primary objectives and concerns are addressed while leaving the technicalities in the hands of the administrative agency that is best equipped to understand all of the nuances and that will ultimately be tasked with implementation. Second, proceeding through the regulatory process will enable stakeholders to continue to engage in the realization of this idea through testimony and public comment.

With these considerations in mind, the author proposes to offer amendments in Committee that adopt the regulatory approach for the time being. Should a statutory approach emerge during the legislative process that satisfies both legislators and the

Governor alike, then the author has the option of going in that direction with the bill instead.

6. Models of local civil rights enforcement from elsewhere

A “Fair Employment Practice Agency,” or “FEPA,” is a government agency tasked with enforcing workplace civil rights laws through worksharing agreements with the EEOC that include dual filing. Most states have a statewide FEPA. In California, the statewide FEPA is CRD.

Because of the preemption that this bill would lift, there are no local FEPAs in California.¹² Elsewhere in the country however, local FEPAs are common. In its SB 491 report, DFEH’s advisory group identified about 50 local jurisdictions across the country with FEPAs, including major cities like Baltimore, Philadelphia, New York, Miami, and Seattle.¹³

While there is ample precedent for local FEPAs, however, the SB 491 advisory group’s report did not find any examples where local FEPAs enforced state anti-discrimination laws. Instead, the local FEPAs generally enforce ordinances specific to their local jurisdiction.¹⁴ The local civil right enforcement proposed by this bill diverges from that pattern by allowing local governments to enforce the FEHA itself.

7. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- direct the Civil Rights Department to promulgate regulations governing local enforcement of FEHA by a date to be specified and in accordance with specified guidance; and
- require local jurisdictions that choose to pursue local enforcement of FEHA to proceed according to those regulations.

A mock-up of the amendments in context is attached to this analysis.

¹² The San Francisco Human Rights Commission investigates allegations of discrimination within that city and county. However, its jurisdiction is explicitly limited to “all incidents of discrimination within the scope of this ordinance to the extent such functions are not within the exclusive responsibilities of the California Fair Employment Practices Commission or any federal or other State agency.” (San Francisco Administrative Code § 12A.5(g).)

¹³ *SB 491 Report* (2018) California Department of Fair Employment and Housing <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/SB491Report2018.pdf> (as of Mar. 11, 2023) at p. 9.

¹⁴ *Id.* at 10.

8. Arguments in support of the bill

According to the author:

Any form of discrimination robs people of their human dignity and often also of their financial stability and their health. When discrimination is allowed to ensue unchecked it also robs our communities of valuable opportunities to be better and to be stronger. Lack of enforcement of anti-discrimination laws is a problem that is well documented and if ever there were a time to reverse that pattern, it is now. SB 16 would do this by specifying nothing in the FEHA restricts the ability of local agencies from enforcing the Act's provisions. This will expand the number of agencies actively addressing the problem of workplace and housing discrimination, and help ensure equity for all Californians.

In support, the California State Association of Counties writes:

[...] [T]he pervasiveness of discrimination throughout the state makes it difficult for a single state agency to bear the sole responsibility for enforcement. While municipalities and other local agencies could assist in the Act's enforcement, there is no clear direction on whether local agencies actually have the authority to do so. SB 16 would specify that nothing in the FEHA restricts the ability of local agencies from enforcing the Act's provisions. This will expand the number of agencies actively addressing the problem of workplace and housing discrimination and will help ensure equity for all.

9. Arguments in opposition to the bill

In opposition to the bill, Housing Contractors of California writes:

[...] enforcement of complex laws requires significant training and experience by the enforcing agents. Having local jurisdictions join enforcement in discrimination claims will not promote enforcement, but cause more confusion. Laws should be enforced by those agencies who have committed the time and resources to train and vet their staff to effectively enforce the laws assigned to them. Agencies should stay in their lane of expertise. Discrimination claims should only be enforced by the California Civil Rights Department.

SUPPORT

California African American Chamber of Commerce
California State Association of Counties
Oakland Privacy
Service Employees International Union – California State Council

OPPOSITION

Affordable Housing Management Association – Pacific Southwest
Apartment Association of Orange County
East Bay Rental Housing Association
Housing Contractors of California

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 218 (Bradford, 2019) would have authorized local governments within the County of Los Angeles to enact and enforce workplace anti-discrimination laws, including establishing remedies and penalties for violations, subject to specified procedural requirements. In his message vetoing SB 218, Governor Newsom wrote that: “I am committed to combating and eradicating discrimination [...]. However, I don’t support lifting a preemption that has been in place for decades in the manner proposed in this bill. As crafted, this measure could create confusion, inconsistent enforcement of the law and increase costs without a corresponding increase in worker protections. This bill leaves ambiguities about local governments’ ability to enforce both local ordinances and FEHA.” The Governor went on to invite the Legislature to “come back with a measure that makes it clear that local enforcement measures are exclusively focused on local ordinances.”

SB 491 (Bradford, 2017) would have directed CRD to convene a group of experts and stakeholders to study the ramifications of authorizing local enforcement of FEHA and to report back to the Legislature with findings and draft legislation. In his message vetoing SB 491, then Governor Brown wrote that he agreed with the author “that it is time for the state to reassess whether the state should allow local authorities to enforce FEHA,” but that the bill as drafted was too broad. He directed CRD to create an advisory group to explore the matter and report back by December 31, 2018.

AB 2534 (Shelley, 2000) would have provided that local governments are not preempted from providing or maintaining greater protections against discrimination than FEHA. AB 2534 died in the Assembly Judiciary Committee.

Amended Mock-up for 2023-2024 SB-16 (Smallwood-Cuevas (S))

Mock-up based on Version Number 99 - Introduced 12/5/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 12993 of the Government Code, as amended by Section 9 of Chapter 630 of the Statutes of 2022, is amended to read:

12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part. This part does not repeal any of the provisions of civil rights law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, reproductive health decisionmaking, or sexual orientation, unless those provisions provide less protection to the enumerated classes of persons covered under this part.

(b) The provisions in this part relating to discrimination in employment on account of sex or medical condition do not affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided the terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

~~(c)-(1) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state.~~

~~(2) Notwithstanding paragraph (1), this part does not limit or restrict the application of Section 51 of the Civil Code.~~

~~(3)(A) Notwithstanding paragraph (1), this part does not, or limit or restrict efforts by any city, city and county, county, or other political subdivision of the state to enforce state law prohibiting discrimination against any of the enumerated classes of persons covered under this part in employment and housing, provided that such enforcement complies with the regulations promulgated pursuant to subparagraph (B).~~

~~(B) Pursuant to its authority under subdivision (e) of section 12930, the department shall promulgate regulations governing local enforcement of state law prohibiting discrimination against any of the enumerated classes of persons covered under this part in employment and housing by . The regulations shall, at a minimum, do all of the following:~~

~~(i) Ensure consistent application of employment and housing discrimination laws across the state.~~

(ii) Protect complainants against inadvertent loss of federal or state legal claims.

(iii) Avoid duplication of investigatory work.