

Date of Hearing: June 20, 2023

ASSEMBLY COMMITTEE ON JUDICIARY  
Brian Maienschein, Chair  
SB 16 (Smallwood-Cuevas) – As Amended May 18, 2023

**SENATE VOTE:** 32-7

**SUBJECT:** CIVIL RIGHTS: DISCRIMINATION: ENFORCEMENT

**KEY ISSUE:** SHOULD LOCAL GOVERNMENTS BE AUTHORIZED, AS OF JANUARY 1, 2025, TO ENFORCE STATE ANTI-DISCRIMINATION LAWS; AND SHOULD THE CIVIL RIGHTS DEPARTMENT BE REQUIRED TO DEVELOP GUIDELINES FOR THIS PURPOSE?

**SYNOPSIS**

*California’s Fair Employment and Housing Act (FEHA) prohibits discrimination in housing and employment on the basis of any of the protected characteristics enumerated in the statute. FEHA expressly declares a legislative intent that the state shall “occupy the field of regulation of discrimination in employment and housing exclusive of all other laws banning discrimination in employment and housing” by local governments. In short, FEHA preempts local laws prohibiting employment and housing discrimination; it also effectively prohibits local governments from enforcing state law, given that FEHA does not presently provide any mechanism for local governments to do so. According to the author, while FEHA provides strong protections against discrimination, the state lacks adequate capacity and funding to enforce the law. Allowing local agencies to enforce state law, the author contends, will permit more rigorous and robust enforcement.*

*This bill would declare that nothing in existing law prevents local governments from enforcing FEHA, provided that they do so in compliance with regulations to be promulgated by the Civil Rights Department (CRD). Since no such regulations for local enforcement presently exist, the bill would also require the CRD – which now has exclusive power to enforce FEHA – to promulgate such regulations. The bill also specifies that these regulations shall do all of the following: (1) ensure consistent application of the anti-discrimination laws throughout the state; (2) protect claimants against inadvertent loss of state or federal claims; (3) avoid duplication of investigatory work; and (4) minimize any possible loss of federal funds for CRD’s work. In order to provide time for CRD to do this, the bill’s provision would not become effective until January 1, 2025.*

*This Committee has previously heard, and passed, bills to permit local enforcement of anti-discrimination laws. SB 491 (Bradford, 2017), as introduced, would have similarly permitted local enforcement of FEHA, but the bill was eventually amended to create an advisory group to consider the feasibility of local enforcement. SB 218 (Bradford, 2019) would have created a pilot project permitting Los Angeles to enact and enforce its own anti-discrimination employment laws, so long as the local laws were at least as protective as state law. Both measures were vetoed. This bill is supported by several labor organizations. Several regional apartment associations opposed a prior version of this bill. It is unclear if they remain opposed.*

**SUMMARY:** Provides that nothing in existing law prevents local governments from enforcing state laws prohibiting housing and employment discrimination and requires the Civil Rights Department (CRD) to promulgate regulations governing local enforcement of these state laws. Specifically, **this bill:**

- 1) Provides that a provision in existing law declaring legislative intent that the state occupy the field of regulating housing and employment discrimination does not 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 protected classes, provided that the enforcement complies with the regulations promulgated by the CRD.
- 2) Requires the CRD to promulgate regulations governing local enforcement of state law prohibiting discrimination against protected classes, as described, and specifies that these regulations shall, at a minimum, do all of the following:
  - a) Ensure consistent application of employment and housing discrimination laws across the state.
  - b) Protect complainants against inadvertent loss of federal or state legal claims.
  - c) Avoid duplication of investigatory work.
  - d) Minimize any possible loss of federal funding for the CRD's work.

**EXISTING LAW:**

- 1) Prohibits, under the Fair Employment and Housing Act (FEHA), discrimination in housing and employment on the bases of specified characteristics and establishes procedures for enforcement by the Civil Rights Department. States legislative intent that FEHA shall occupy the field of regulation of discrimination in employment and housing. (Government Code Sections 12900 *et seq.*, 12993.)
- 2) Establishes, under federal law, the Equal Employment Opportunity Commission (EEOC) for the purpose of receiving, investigating, and resolving complaints of employment discrimination. Permits state or local agencies to accept and investigate complaints alleging a violation of federal employment anti-discrimination laws and to enter into a work-sharing agreement with EEOC. Specifies that filing with a state or local agency constitutes "double-filing" with the EEOC. (42 U.S.C. Sections 2000e *et seq.*)

**FISCAL EFFECT:** As currently in print this bill is keyed fiscal.

**COMMENTS:** 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." Yet, the author maintains, lack of enforcement "is a problem that is well documented and if ever there were a time to reverse that pattern, it is now." The author believes that this bill, by allowing local agencies to enforce FEHA's anti-discrimination provisions, "will expand the number of agencies actively addressing the problem of workplace and housing discrimination, and help ensure equity for all Californians."

Specifically, *this bill* would declare that nothing in existing law prevents local governments from enforcing FEHA, provided that they do so in compliance with regulations promulgated by CRD. Given that no such regulations for local enforcement presently exist, the bill would also require the CRD – formerly the Department of Fair Employment and Housing – to promulgate such regulations. The bill specifies that these regulations shall do all of the following: (1) ensure consistent application of the anti-discrimination laws throughout the state; (2) protect claimants against inadvertent loss of state or federal claims; (3) avoid duplication of investigatory work; and (4) minimize any possible loss of federal funds for CRD’s work. In order to provide time for CRD to do this, the bill’s provision would not become effective until January 1, 2025.

***Background on California’s civil rights and anti-discrimination laws.*** In 1959, the California Legislature enacted two important civil rights statutes. The Fair Employment Practices Act prohibited discrimination in employment. Initially this statute targeted racial and religious discrimination, but this list of protected characteristics has expanded over the years to also ban discrimination on account of 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. It was also in 1959 that the Legislature enacted the Unruh Civil Rights Act to prohibit any business establishment from denying to any person full and equal accommodations, advantages, facilities, privileges, or services based on certain protected characteristics. As with the Fair Employment Practices Act, the Unruh Civil Rights originally targeted racial discrimination but has expanded over the years to include sex (which was later defined to include gender, gender identity, and gender expression), ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, and immigration status.

In 1963, the Legislature enacted the Rumford Fair Housing Act in response to widespread and deeply rooted racial discrimination in housing. In 1980, the Fair Employment Practices Act and the Rumford Fair Housing Act were combined to become the present Fair Employment and Housing Act, or FEHA. Enforcement of FEHA fell to the Department of Fair Employment and Housing (DFEH), which also acquired the power to enforce most of the state’s civil rights statutes, including the Unruh Act. In July of 2022, the DFEH was renamed the Civil Rights Department (CRD) to better reflect its more expansive powers and duties. Additional statutes were added in subsequent years to prohibit, among other things, gender pricing discrimination, harassment or intimidation directed at protected classes of people, and human trafficking. Together, these statutes constitute California’s principal civil rights and anti-discrimination statutes.

***State and local enforcement of civil rights and antidiscrimination laws.*** The agencies charged with enforcing California’s civil rights and anti-discrimination statutes vary. The Unruh Civil Rights Act, for example, may be investigated and enforced by CRD, the California Attorney General, a district attorney, or a city attorney. In addition, any person injured by a violation of the Unruh Civil Rights Act may bring a civil action for damages, including any attorney’s fees. However, the provisions on employment and housing anti-discrimination consolidated under FEHA are regulated and enforced only by the CRD, which is authorized to make all rules and regulations relating to workplace and housing discrimination, as well as to receive complaints of discrimination, investigate those complaints, and take appropriate remedial action. Once a complaint is filed, CRD must take a series of legally required steps. In many cases, CRD investigates the case and encourages the parties to resolve the dispute. If the dispute cannot be resolved in this manner, CRD may conduct hearings and, if it finds that discrimination has

occurred, may bring a civil action on behalf of itself and the complainant. In other cases, indeed the majority of cases, CRD may opt *not* to investigate the case and instead provides the complainant a so-called "right to sue" letter, which allows that person to bring a civil action without having to further exhaust any administrative process. Issuance of the right-to-sue letter relieves CRD of any further obligation to investigate the case.

Most relevant to this bill, FEHA expressly states legislative intent that the state "occupies the field of regulation of discrimination in employment and housing encompassed by the provisions [of FEHA], 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." This statement constitutes a classic assertion of express preemption. That is, just as federal laws may preempt state law, state laws may preempt local laws and ordinances. The California courts have generally analyzed state preemption in the same way that courts analyze federal preemption, recognizing three forms of preemption: (1) "conflict preemption," where local law conflicts with state law, and thus state law prevails; (2) "implied" or "field" preemption, where the statutory scheme is so comprehensive in a particular field of law that it impliedly preempts local laws; and (3) "express" preemption, in which the Legislature expressly states that it occupies the field of regulation, which the FEHA statute does. In addition, the same section also provides that nothing in FEHA shall be construed to limit the application of Civil Code Section 51, the Unruh Civil Rights Act. In other words, while CRD may enforce the Unruh Act, it does not prohibit local governments from enforcing the Act. (Indeed, the Unruh Act expressly authorizes local public prosecutors to bring actions under the Unruh Act.) In short, while local officials are expressly authorized to bring actions against discrimination under the Unruh Act and related civil rights statutes, they cannot regulate and enforce the provisions of FEHA.

***UCLA/Rand Study on DFEH Funding:*** In 2008, DFEH Director Phyllis Cheng commissioned a study in anticipation of the 50-year anniversary of FEHA (1959-2009), which eventually resulted in a 2010 UCLA/Rand report, entitled *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act at 50*. Among the many problems identified by the report was the "inadequate funding" that made it more difficult for CRD (then DFEH) to carry out its mission, and especially its capacity to investigate all of the complaints that it received. Three years later, a report prepared by the California Senate Office of Oversight and Outcomes also concluded that DFEH investigation and enforcement was hampered by a combination of "dwindling resources and increased demand." (California Senate Office of Oversight and Outcomes, *Department of Fair Employment and Housing: Underfunding and Misguided Policies Compromise Civil Rights Mission*, December 18, 2013.) In short, while FEHA is arguably one of the strongest and most progressive anti-discrimination laws in the country, the only entity empowered to enforce the law lacks the capacity, resources, and funding to fully carry out its ambitious mission.

***Prior efforts to permit local enforcement: SB 491, the SB 491 Report, and SB 218.*** The UCLA/Rand and the Senate Office of Oversight and Outcome reports prompted calls to expand enforcement capacity in California by allowing local governments and agencies to enforce FEHA in the same way that local public prosecutors may enforce the Unruh Act. In 2017, Senator Bradford introduced SB 491. Early versions of the bill would have expressly permitted local enforcement of FEHA, notwithstanding the language stating legislative intent to "occupy the field." Preemption prevents local governments from enacting *their own laws and ordinances* in the field expressly occupied by the state; it does not, however, prohibit local governments from enforcing *state* laws. However, as a practical matter, local governments cannot enforce

FEHA, not so much because of preemption, but because the FEHA statute developed procedures that assigned the tasks of taking complaints, investigating complaints, and enforcing violations to DFEH or, today, CRD. Presumably, the state *could* preempt local governments from *enacting their own ordinances*, but still allow local governments to participate in enforcing *state law*. At times, the discussion around SB 491 – not unlike some of the discussion around the bill now before the Committee – conflates two distinct issues: the ability of local governments to enact their own housing and employment discrimination ordinances, on the one hand; and their ability to enforce state anti-discrimination laws, on the other hand. In addition to confusion around these issues, SB 491 also raised questions about allowing local governments to enforce a state law drafted with a single state enforcement agency in mind, as well as questions about whether all local governments would be as protective as DFEH in their enforcement of state law, or if local enforcement would diminish uniformity across the state, thus leaving rights to the happenstance of where one lived. In light of these and other questions, SB 491 was eventually amended to require DFEH to appoint an advisory group to study the feasibility of local enforcement of FEHA. Then-Governor Brown vetoed the measure, but nonetheless on his own authority ordered DFEH to study the issue and report back to the Governor and the Legislature.

The DFEH report on SB 491, published in 2018, provided an overview of the FEHA complaint and enforcement process, provided a short history of FEHA’s preemption clause, and laid out the options and prospects for local enforcement. The Report was short on specific recommendations, and instead offered this ambivalent assessment:

An effective mechanism for local enforcement of anti-discrimination laws could further advance the state’s efforts to combat discrimination. If not handled correctly, however, lifting of preemption could have significant negative consequences, including accidental forfeiture of state or federal rights. [DFEH. *SB 491 Report* (November, 2018), p. 3.]

The *SB 491 Report* concluded that lifting FEHA’s preemption clause would leave local jurisdictions with four options: “(1) They could do nothing at all; (2) they could enforce only state law; (3) they could promulgate and enforce local law; or (4) they could enforce state and local law.” The report only considered the second and fourth options, as most proposals focused on the feasibility of local enforcement of *state law*, as opposed to locals doing nothing or passing and enforcing their own laws. While the report conceded that local enforcement of FEHA was “feasible,” it nonetheless raised a number of potential consequences of local enforcement. Many of the concerns raised by the report were similar to those already raised about SB 491 by stakeholders and by various legislative committee analyses. First, some feared that allowing local enforcement could lead complainants (especially workers claiming employment discrimination) to lose state and federal rights if they filed their complaint with a local agency and, because of that, missed the deadline for filing state and federal claims. One solution to this danger was to follow the example of FEHA’s relationship with the federal Equal Employment Opportunity Commission (EEOC), whereby when an employee files a complaint with DFEH, the agency files a complaint on that person’s behalf with EEOC. Conversely, when an employee files a complaint with EEOC, that agency files with DFEH. Presumably, any state law that allowed local enforcement should require filing a simultaneously report with the CRD.

Second, the report noted the possibility of inconsistent enforcement throughout the state. Different jurisdictions might enact very different local laws, and even where local governments enforced a uniform state law, they might adopt different practices and procedures. Third, the report warned that local enforcement, especially where an employee files with both the local

agency and the state, could lead to duplicative, and thus inefficient, investigations. Presumably, this problem could be resolved by requiring communication, coordination, and some sort of work-sharing agreement between the state and the local jurisdiction, similar to those developed between the state and the federal EEOC. Finally, the report noted possible negative effects on statistics and reporting, as DFEH acted as a centralized source of information on the types and number of complaints, their demographic dimensions, and their outcomes. The report acknowledged that the Legislature could require local jurisdictions to report the same information that DFEH reports.

The following year, Senator Bradford introduced SB 218. That bill revised FEHA's preemption language to "authorize the legislative body of a local government, located within the County of Los Angeles [presumably the City of Los Angeles] to enact a local antidiscrimination ordinances relating to employment, including establishing remedies and penalties for violations." In short, rather than allowing a local government to enforce state law, it authorized Los Angeles to enact and enforce its own ordinance prohibiting employment discrimination. While supporters of SB 218 cited the parts of the *SB 491 Report* that acknowledged the benefits and feasibility of local enforcement, opponents of SB 218 latched on just as firmly to the report's enumeration of unintended negative consequences. SB 218 passed out of both houses of the Legislature but was vetoed by Governor Newsom. In his veto message, Governor Newsom wrote:

I am committed to combating and eradicating discrimination and have signed several measures this year to address discriminatory practices. 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. I invite the Legislature to come back with a measure that makes it clear that local enforcement measures are exclusively focused on local ordinances.

***Will this bill avoid the fate of SB 491 and SB 218?*** The bill now before the Committee is apparently a response to the Governor's invitation for the Legislature to come back with something better. In this regard, two points deserve attention. First, this bill is much broader than SB 218, which only applied to *employment discrimination* and only *in Los Angeles*. The bill under consideration applies statewide to both employment and housing discrimination. It is difficult to see how a broader bill will fare better than a narrowly tailored bill. Second, Governor Newsom's message asked the Legislature to come back with a measure that "exclusively focused on local ordinances." The bill under consideration does not do that; it would allow local agencies to enforce *state* law.

It is unclear how this broader, statewide bill, which allows local governments to enforce state law, instead of focusing exclusively on local ordinances, will garner a more favorable response from the same Governor. To be sure, this bill pays attention to many of the criticisms raised against previous bills by Governors Brown and Newsom in their veto messages. However, it does not resolve the issues so much as it punts to the CRD and hopes that it will resolve them when drafting regulations. As noted above, this bill directs CRD to adopt regulations that will (1) ensure consistent application of employment and housing discrimination laws across the state; (2) protect claimants against inadvertent loss of state or federal claims; (3) avoid duplication of investigatory work; and (4) minimize any possible loss of federal funds for CRD's work. Not

surprisingly, this list summarizes the negative and unintended consequences raised in past iterations of this measure, and in the DFEH *SB 491 Report*. The bill does not resolve these concerns; rather, it directs CRD to adopt regulations that will address them.

***ARGUMENTS IN SUPPORT:*** The California Labor Federation (CLF) supports this bill because it will “clarify local governments are not restricted from enforcing California’s fair employment and housing laws to better protect Californians from discrimination.” CLF writes that the “pandemic laid bare the systemic inequities in housing, employment, health care, and other areas. . . The need for enforcement is more urgent than ever in the wake of the pandemic.” CLF contends that the Department of Fair Employment and Housing (DFEH) receives thousands of complaints, and as such they “need every tool available to ensure robust enforcement of these critical laws.” CLF believes that “SB 16 will clarify this right of local agencies to enforce FEHA employment and housing protections, adding another layer of enforcement to support DFEH’s work. It will give Californians the option to file a claim with a local agency in lieu of filing with the state or federal agency. It also preserves workers’ state claims by creating a dual-filing process so that any charge filed with a local agency that raises a FEHA claim will also be filed with DFEH . . . SB 16 simply clarifies that local entities can enforce the Act, creating more tools to fight the scourge of discrimination in housing and employment-settings.”

The California Faculty Association (CFA) supports this bill because, even though the state has made “strides in securing civil rights for all out residents, yet we understand that gaps remain in enforcement due to capacity constraints. SB 16 provides a timely and potent solution to the ongoing issue of understaffed and overworked state-level enforcement bodies. . . With local authorities involved, not only can we expect faster resolution of discrimination cases, but also an increased sensitivity to local issues and concerns. By empowering local governments to enforce the FEHA's provisions, SB 16 offers an intelligent, efficient, and locally-sensitive approach to promoting fairness and equality in our society.”

Several organizations support this bill for substantially similar reasons.

***ARGUMENTS IN OPPOSITION.*** Several regional apartment associations opposed a prior version of this bill for the following reason: “SB 16 is a violation of the FEHA because it conflicts with general law. The Civil Rights Department is the only state department exclusively empowered with enforcement authority to prohibit discriminatory employment and housing practices identified within the California Civil Rights statutory scheme.” [NOTE: The bill in print requires CRD to adopt regulations governing local enforcement; it is unclear if this removes their opposition.]

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

CA African American Chamber of Commerce  
California Faculty Association  
California Federation of Teachers AFL-CIO  
California Labor Federation, AFL-CIO  
California State Association of Counties  
California State Council of Service Employees International Union  
California Teachers Association  
Greater Sacramento Urban League

Oakland Privacy  
Protection of The Educational Rights for Kids  
Southern California Black Worker Hub for Regional Organizing

**Opposition (to a previous version of the bill)**

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

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