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Senator Thomas Umberg, Chair
2021-2022 Regular Session

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TSG

SUBJECT

The Upward Mobility Act of 2021: boards and commissions: civil service:
examinations: classifications

DIGEST

This bill proposes a series of measures intended to promote greater diversity on California's volunteer boards, encourage greater diversity among California's civil service elite, and discourage discrimination in the state's civil service employment practices. The bill also requires state agencies to collect more nuanced data about California's residents of African descent.

EXECUTIVE SUMMARY

Although California's civil service is theoretically objective and founded upon principles of merit, recent reports from Black civil servants and data from the California Department of Human Resources (CalHR) provide troubling evidence that, in practice, the civil service system is falling well short of those standards. This bill aims to address the problem through a series of related measures. In broad strokes, the bill: (1) mandates greater demographic diversity on the state's volunteer boards and commissions; and (2) makes changes to the state's civil service system to discourage discrimination and encourage the advancement of civil servants of color. At the same time, the bill requires state agencies to collect demographic information about Californians of African descent in a more nuanced way, so as to capture, among other things, differences in how descendants of American slaves may be fairing in comparison to Californians who trace their ancestry in Africa through a different path.

The bill is author-sponsored. Support comes from proponents of racial justice. Opposition comes from critics of affirmative action who contend that the bill takes race into account in ways that are unconstitutional and counterproductive. The bill passed out of the Senate Labor, Public Employment, and Retirement Committee by a 4-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits the States, pursuant to the United States Constitution, from denying any person within its jurisdiction the equal protection of the laws. (U.S. Const., art. XIV, Sec. 1.)
- 2) Prohibits, pursuant to the California Constitution, the denial of the equal protection of the laws to any person. (Cal. Const., art. 1, Sec. 7(a).)
- 3) Provides, pursuant to the California Constitution, that a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin. (Cal. Const., art. 1, Sec. 8.)
- 4) Prohibits the state, pursuant to the California Constitution, from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. (Cal. Const., art. 1, Sec. 31.)
- 5) Creates the state civil service that includes every officer and employee of the State except a limited number of specified, exempted officers and employees. Requires that the state make permanent appointments and promotions in the civil service based on the "merit principle": a general system based on merit ascertained by competitive examination. (Cal. Const., art. VII, §§ 1 and 4.)
- 6) Creates the State Personnel Board (SPB) to enforce the civil service statutes and prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions. (Cal. Const., art. VII, §§ 2 and 3.)
- 7) Establishes the State Civil Service Act to facilitate the operation of the Constitution's merit principle for the state civil service. (Gov. Code § 18500.)
- 8) Creates the California Department of Human Resources (CalHR) and vests it with the powers, duties, and authorities necessary to operate the state civil service system pursuant to Article VII of the California Constitution, the Government Code, the merit principle, and applicable rules duly adopted by the State Personnel Board. (Gov. Code § 18502.)
- 9) Authorizes CalHR to designate an appointing power to design, announce, or administer examinations for the establishment of employment lists as specified. Permits a designated appointing power to contract with CalHR or another designated appointing power for this purpose. (Gov. Code § 18930.5.)

- 10) Requires SPB to prescribe rules consistent with a merit based civil service system to govern appointments classifications, examinations, probationary periods, disciplinary actions, and other matters related to SPB's authority under Article VII of the California Constitution. Authorizes SPB to conduct audits and investigations of the personnel practices of CalHR and appointing authorities to ensure compliance with civil service policies, procedures, and statutes. (Gov. Code § 18502.)
- 11) Permits CalHR and SPB to delegate, share, or transfer between them responsibilities for programs within their respective jurisdictions pursuant to an agreement. (Gov. Code §18502.)
- 12) Requires SPB to establish minimum qualifications for determining the fitness and qualifications of employees for each class of position. Authorizes CalHR to require applicants for examination or appointment to provide documentation to establish the applicants' qualifications. (Gov. Code § 18931.)
- 13) Requires all state appointing authorities to establish an effective program of upward mobility for employees in low-paying occupational groups. An upward mobility program is one in which the state develops and publishes career opportunities and provides assistance which will allow employees in low-paying occupations to develop and advance to their highest potential. (Gov. Code §§ 19400 and 19401)
- 14) Requires all upward mobility programs to include annual goals that include the number of employees expected to progress from positions in low-paying occupational groups to entry-level technical, professional, and administrative positions, and the timeframe within which this progress shall occur. Existing law also makes CalHR responsible for approving each department's annual upward mobility goals and timetables. (Gov. Code § 19402.)
- 15) Permits an appointing power, or its authorized representative, to take adverse action against an employee for one or more of causes for discipline as specified. (Gov. Code § 19574.)
- 16) Requires CalHR to administer the state's Personnel Classification Plan, including the allocation of every position to the appropriate class in the classification plan, and allocate positions based on the positions' duties and responsibilities. CalHR must include positions in the same class based on the principle of shared criteria, as specified. (Gov. Code § 19818.6.)
- 17) Prohibits the inclusion of any question relative to an applicant's race, sex, marital status, or religion in any application blank or form required to be filled in and submitted by an applicant to any department, board, commission, officer, agent, or

employee of this state. Provides that subsequent to employment, the state may collect such data, as specified, for research and statistical purposes. (Gov. Code § 8310.)

- 18) Requires state agencies that collect demographic data, either directly or by contract, regarding Californians' ancestry or ethnic origin to use separate collection categories and tabulations for each major Asian group and each major Pacific Islander group, as specified, and to include such categories in every such demographic report by state entities published or released on or after July 1, 2012. (Gov. Code § 8310.5.)
- 19) Declares that it is the state's policy that the composition of state boards and commissions shall be broadly reflective of the public including ethnic minorities and women. (Gov. Code § 11140.)
- 20) Requires the Governor and every other appointing authority to be responsible for nominating a variety of persons of different backgrounds abilities, interests, and opinions but clarifies that it is not the intent of the Legislature that they utilize formulas or specific ratios in complying with the policy. (Gov. Code § 11141.)

This bill:

1. Requires that on or after January 1, 2022, all state boards and commissions consisting of one or more volunteer members or commissioners shall have at least one volunteer board member or commissioner who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender. These diversity requirements shall only apply as vacancies on state boards and commissions occur and only to a vacancy that may be filled by appointment by the Governor or the Governor's designees, the chair of a board or commission or the chair's designees, the Speaker of the Assembly, and the President pro Tempore of the Senate or Senate Rules Committee, or any combination thereof.
2. Strips SPB of the authority to conduct independent audits and investigations of personnel practices of CalHR and appointing authorities.
3. Directs CalHR to oversee compliance with rules prescribed by SPB consistent with a merit-based civil service system to govern appointments, classifications, examinations, probationary periods, disciplinary actions, and other matters related to the board's authority under Article VII of the California Constitution.
4. Authorizes CalHR, at the direction of and in conjunction with the SPB, to conduct audits and investigations of personnel practices of other departments and

appointing authorities to ensure compliance with civil service policies, procedures, and statutes.

5. Requires CalHR, pursuant to a process established by SPB, to investigate complaints filed by employees in a state department's equal employment opportunity program and personnel office, other civil service employees, applicants, and members of the public alleging violations of civil service laws and report findings to the SPB for adjudication.
6. Requires state agencies that collect demographic data regarding Californians' ancestry or ethnic origin, either directly or by contract, to use separate collection categories and tabulations for the following and to include such categories in every such demographic report by state entities published or released on or after July 1, 2022:
 - a) African Americans who are descendants of persons enslaved in the United States, as defined; and
 - b) African-Americans who are not descendants of persons enslaved in the United States, including, but not limited to, African Blacks, Caribbean Blacks, and other African Americans or Blacks, as defined.
7. Requires SPB to establish a process that includes diversity and best practices in each aspect of the design, announcement, and administration of examinations for the establishment of employment lists.
8. Requires SPB to incorporate standards for statements of qualifications used in determining fitness and qualifications of employees for each class of positions.
9. Requires CalHR or a designated appointing power to announce or advertise, in addition to all other elements under existing law, the functional core competencies, as defined, and any applicable standard statement of qualifications.
10. Requires CalHR or the appointing power to video record and otherwise electronically record examinations that have an oral examination component and maintain all other examination materials, including examination questions and any written material for each examination.
11. Requires CalHR or the appointing power to video record and otherwise electronically record examinations that have an oral examination component and maintain all other examination materials, including examination questions and any written material, for three years. Requires that examinees be informed that they are being recorded.
12. Requires CalHR to develop by July 1, 2022, model upward mobility goals based on each department's workforce analysis and to post the model goals on its internet

website. Authorizes the model goals to include race, gender, and LGBTQ identity as factors to the extent permissible under state and federal equal protection laws.

13. Requires CalHR, on before July 1, 2022, to provide a copy of the model upward mobility goals and corresponding report outlining the workforce analysis used to develop such goals to each member of the Legislature.
14. Requires any appointing authority unable to meet its annual upward mobility goals and timetables for two consecutive fiscal years to submit a report to CalHR, the Director of the Department of Finance, and the Legislative Analyst explaining why it failed to achieve its goals and what requirements are necessary to facilitate achieving its goals in the subsequent two fiscal years.
15. Requires each appointing power to provide CalHR no later than every April 1 a report detailing specified racial, ethnic, sexual orientation, and gender data of employees against whom adverse action was taken, if the employee elects to provide this information. Requires CalHR to include this data in its existing annual workforce analysis and census report which must be submitted to the Legislature by June 1 of every year.

COMMENTS

1. Impetus for the bill

California's state civil service system is founded on the "merit principle." (Cal. Const., art. VII, §§ 1 and 4.) Originally intended as a way to eliminate the use of state jobs for political patronage, the "merit principle" means that all applicants for civil service jobs must take examinations to demonstrate that they are qualified for the position. Only candidates who pass the exam can be considered for a civil service job and those candidates scoring in the highest tier are supposed to receive consideration before the appointing authority goes on to consider those who scored in the next tier down, and so on. Promotion to a new class of position within the civil service also requires taking and scoring well on an exam.

This system is meant to be objective and uninfluenced by racial bias or other forms of discrimination. The author of this bill points out, however, that recent evidence from two different sources suggest that, in practice, there is significant racial disparity in upward mobility within the civil service system and that aspects of the examination system may themselves be susceptible to subtle but significant forms of discrimination.

The author first highlights findings from the California Department of Human Resources 2018 Annual Census of Employees in State Civil Service.¹ That report shows

¹ 2018 Annual Census of Employees in State Civil Service (Mar. 2020) California Department of Human Services <https://www.calhr.ca.gov/Documents/ocr-census-of-employees-2018.pdf> (as of Jul. 4, 2021).

that people of color are reasonably well-represented in the state civil service when viewed as a whole. In 2018, people of color composed 57.5 percent of all California civil servants, while whites made up the remaining 42.5 percent.² When the data is broken down by salary range, however, a very different picture emerges. Among civil servants making \$40,000 and below, annually, there are far more people of color (63.1 percent) than whites (36.9 percent). As salaries increase, however, that gap steadily decreases, reaching near parity at salaries between \$100,000 and \$130,000 annually, and then reversing: among civil servants earning \$130,000 and above, 50.1 percent are white, while only 41.9 percent are people of color.³ The same inversion can be observed with respect to gender: women outnumber men in the lower civil service salary ranges, but men predominate heavily in the higher salary ranges. This data strongly suggests that while California's civil service may be open to all generally at lower levels of compensation, something is preventing women and people of color from reaching the higher echelons of the civil service.

Part of what may be at work is suggested by the second set of evidence that the author highlights: two letters submitted by Black civil servants working at the California Air Resources Board (CARB) and the California Department of Corrections and Rehabilitation (CDCR), respectively. The letter and action plan from the CARB employees describes a "culture of systemic racism and implicit bias at CARB."⁴ Among other things, the CARB letter states that Black CARB employees are "consistently passed over for interviews, upward mobility assignments, and promotions"⁵ and provides some detailed examples.⁶ The letter and action plan from the CARB employees concludes that: "[t]here is a notable lack of Black employees and Black representation in management."

The letter from a coalition of Black employees at CDCR raised similar concerns, according to media coverage about it:

"Black employees who have experience and higher education are marginalized and underutilized," the group wrote. "Black excellence and intelligence is not valued or welcomed. CDCR does not value Black advancement."

² *Id.* at p. 9.

³ *Id.* at p.18.

⁴ *A Letter and Action Plan for Racial Change at the California Air Resources Board*. Available at http://media.sacbee.com/static/newsroom/CARB_EmployeeLetter.pdf (as of Jul. 4, 2021) at p. 12.

⁵ *Id.* at p. 9.

⁶ *Id.* at pp. 2-3.

According to the letter, Blacks make up 10% of the agency's workforce, "and the vast majority of those employees are in lower classifications within the agency."⁷

Taken together, the letters and CalHR's civil service census data suggest that the existing civil service system and its theoretical reliance on the "merit principle" have not succeeded in producing genuinely equitable hiring and promotion.

2. Components of the bill

This bill employs a multi-faceted approach to trying to address some of the problems detailed in Comment 1, above. In broad strokes, the measures proposed by the bill can be described as being directed to achieving two goals: (1) encouraging greater diversity within the high levels of California civil service and on volunteer state boards and commissions; and (2) discouraging discrimination in civil service hiring practices.

a. Mandating greater diversity on volunteer state boards and commissions

California's myriad state boards and commissions carry out tasks such as administrative adjudication of disputes, helping to set policy in specialized areas, taking public testimony, and conducting oversight, among other things. Serving on these boards and commissions provides individual California residents with an opportunity to help determine how California operates. It also frequently acts as a springboard into elected office and other leadership positions within state government.

Existing law declares that it is the state's policy that the composition of state boards and commissions shall be broadly reflective of the public including ethnic minorities and women. (Gov. Code § 11140.) Current law goes on to require the Governor and every other appointing authority to be responsible for nominating a variety of persons of different backgrounds, abilities, interests, and opinions but clarifies that it is not the intent of the Legislature that they utilize formulas or specific ratios in complying with the policy. (Gov. Code § 11141.) In short, existing law expresses an aspiration for diversity on state boards and commissions, but does little to ensure that it exists in fact.

The author of this bill contrasts that relatively laissez faire approach with recent California laws mandating increases in gender and other forms of diversity on corporate boards. (SB 826, Jackson, Ch. 954, Stats. 2018; AB 979, Holden, Ch. 316, Stats. 2020.) Using those bills as a model, this bill would mandate the inclusion of at least one board member or commissioner from an underrepresented community on each volunteer state board or commission. The bill defines being from an underrepresented

⁷ Kasler and Venteicher. *Black Employees Allege Racial Bias in Hiring, Promotions at California Prisons* (Nov. 2, 2020) Sacramento Bee <https://www.sacbee.com/news/politics-government/the-state-worker/article246896837.html> (as of Jul. 4, 2021).

community as anyone “who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”

Because this formulation draws distinctions based on race, ethnicity, gender identity, and sexual orientation, both state and federal constitutional doctrines are implicated, as the opposition to this bill points out.

The most rigid of those standards is Section 31 of Article I of the California Constitution or “Proposition 209,” as it is known based on the ballot initiative from which it came. That constitutional provision prohibits discrimination or the granting of preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting, regardless of what justification the government may have for it. Since this bill only covers *volunteer* boards and commissions, however, Proposition 209 is not applicable.

By contrast, the Equal Protection Clauses of both the U.S. and California Constitutions are relevant. The federal Constitution says: “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., Amend. XIV, § 1.) Very similarly, the state Constitution states that: “[a] person may not be... denied equal protection of the laws.” (Cal. Const., art. 1, § 7(a).) Courts applying the constitutional concept of equal protection have ruled that laws drawing suspect classifications between people and treating them differently on that basis are subject to heightened judicial scrutiny. Specifically, in order for a court to uphold a statute that draws distinctions based on membership in a protected class, the court must find that the statute is supported by a compelling government interest and that it is narrowly tailored to the purpose of furthering that interest.

With regard to the compelling state interest component of strict scrutiny, courts have set a high bar and warned that evidence must be marshalled in advance. (*Connerly, supra*, 92 Cal.App.4th 16, 37.) Conclusive statements about the government’s interest are not enough; “governmental specificity and precision are demanded” and “simple legislative assurances of good intention cannot suffice.” (*Id.* at 36.)

Remedying past discrimination can be a sufficiently compelling interest to pass strict scrutiny, but for that to be so, the government must meet two criteria. (*Connerly, supra*, 92 Cal.App.4th 16, 37.) First, the government must identify the discrimination to be remedied with some degree of specificity. (*Id.* at 38.) “A generalized assertion that there has been discrimination in a particular industry or region is insufficient and mere statistical anomalies, without more,” will not suffice. (*Id.* at 38, internal citations omitted.) Second, the government must have strong evidence on which to conclude that the remedial action is necessary. It is not enough for the governmental entity in question to concede past discrimination and, while statistical analysis may be valuable

evidence in some instances, statistical generalizations alone cannot meet the government's burden. (*Ibid.*)

As Comment 1 of this analysis details, there are compelling reasons to believe that California must do more to open up leadership positions within state government to individuals of color. It can also be argued that the bill is tailored carefully to meet this purpose. The bill allows its requirement for greater diversity to be met as vacancies come open, thus avoiding a significant pitfall that has doomed other remedial policies under strict scrutiny review. Unlike a number of affirmative action programs that have been struck down because they required "displacement" of an individual of one race or gender in order to bring another individual of a different race or gender (*see, e.g., Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267 (white teachers with seniority let go to spare teachers of color with less seniority from personnel cuts)), this bill operates outside of that sort of zero-sum paradigm.

Still, just as the recent California legislation requiring greater diversity on corporate boards drew swift – though as yet unsuccessful – constitutional challenges in court, this aspect of the bill is likely to become the subject of lawsuits as well. To protect the bill against the possibility that the courts might ultimately strike down this provision in the bill, the author may wish to consider including a severability clause, thus ensuring that the remaining elements of the bill will still stand.

b. Modifications to the relationship and roles for the State Personnel Board and CalHR as well as to the civil service examination process

The SPB and CalHR work together to operate the civil service system, including the overseeing the examinations and conducting investigations into complaints about state employment practices. This bill proposes to modify several aspects of how the SPB and CalHR administer the civil service system with an eye toward eliminating some practices that could enable discriminatory outcomes.

First, the bill provides a greater role for CalHR in auditing and investigating civil service employment practices. According to the author, as things stand today, SPB often conducts reviews of complaints from civil servants by requesting a second opinion from another manager from the same state agency. Naturally, that often results in confirmation that the subject of the complaint acted appropriately. By giving CalHR a greater role in these investigations, the author hopes to inject greater independence and objectivity into the reviews.

Second, the bill directs the SPB to create a standard statement of qualification to be used whenever such statements will be as part of a civil service examination. Standardizing these statements will make them uniform and prevent them from being tailored to boost any one candidate or group of candidates.

Third, the bill requires the announcement or advertisement for a civil service exam to include information about the core competencies that an applicant is required to have in order to be considered eligible for the particular set of positions in question. Here again, the purpose appears to be both transparency up front and reducing subjectivity on the back end.

All three of these proposed modifications appear to be responsive to one of the action plan items submitted by the Black CARB employees. They recommended that CARB:

[e]stablish clear guidelines for experience requirements on job and exam postings that cannot be stretched to fit the qualifications of desired employees. This has occurred in the past to help white and non-Black POC employees/candidates apply for a position or get on an eligibility list, while Black employees/candidates have not been (and are not) afforded the same opportunities.

By requiring standard statements of qualifications and ensuring that the core competencies for the job are detailed up front, the bill appears to do just that.

c. Requiring upward mobility goals and associated reporting

As Comment 1 details above, there appears to be significant problem with upward mobility within the California civil service. Women and people of color outnumber men and white people among civil servants who earn the lowest salaries, but the reverse is true among civil servants at the high end of the salary scale. This indicates that lower-paid civil servants are not making their way up the career ladder to positions of greater authority and compensation.

That dynamic is occurring in spite of existing laws requiring all entities that hire civil servants to establish upward mobility programs for employees in low-paying occupational groups. An upward mobility program is one in which the state develops and publishes career opportunities and provides assistance intended to enable employees in low-paying occupations to develop and advance to their highest potential. (Gov. Code §§ 19400 and 19401.) These upward mobility programs are supposed to include annual goals that set forth the number of employees expected to progress from positions in low-paying occupational groups to entry-level technical, professional, and administrative positions, and the timeframe within which this progress shall occur. (Gov. Code § 19402.)

In evident frustration with the limited success of these existing upward mobility programs to move women and people of color into the higher echelons of the civil service corps, this bill attempts to push them faster and farther. By July 1, 2022, according to the bill, CalHR must develop model “upward mobility goals” based on

each department's workforce analysis, post the model goals on its internet website, and provide copies to each member of the Legislature.

To give these model goals some teeth, the bill requires any appointing authority unable to meet its annual upward mobility goals and timetables for two consecutive fiscal years to submit a report to CalHR, the Director of the Department of Finance, and the Legislative Analyst explaining why it failed to achieve its goals. The report is also supposed to explain what the appointing authority thinks it will take for the appointing authority to achieve its upward mobility goals within the subsequent two fiscal years.

In setting the model goals, this bill authorizes CalHR to include race, gender identity, and sexual orientation as factors. However, presumably sensing the potential applicability of the constitutional limitations discussed earlier in this Comment, the bill goes on to state that these protected classes can only be used as factors "to the extent permissible under state and federal equal protection laws."

d. Recording oral examinations and keeping copies of written examination materials

Civil service examinations sometimes include oral or written components. Currently, if an examinee or applicant comes to suspect that discrimination may have played a factor in the examination or hiring process, evaluation of what actually took place during the examination may come down to a battle over credibility. To avoid these sort of disputes and ensure there is clear evidence of what takes place during these exams, the bill would require all oral components of a civil service examination to be recorded by video or some other electronic means. The examinee would be informed of the recording in advance. In addition, the written materials for any examination would have to be kept for three years.

These could probably be described as best practices for discouraging discrimination in this context. The recording not only preserves evidence of exactly what took place during the exam, it also acts as a deterrent, since the examiner will be aware that the examiner's actions, tone, and exact statements can later be the subject of scrutiny.

As it currently appears in print, however, these provisions are a little vague as to their scope. Because the language starts out by referring to civil service examinations with an oral component, it is not clear whether written materials and questions must be retained for all civil service examinations or just for those with an oral component. The author intends the former, and proposes to offer amendments in Committee that will clarify the point.

e. Reporting on discipline of state employees

Finally, the bill proposes a mechanism for trying to discourage discrimination in relation to the discipline of civil servants. The bill would require state agencies to report

to CalHR annually regarding all adverse actions taken against employees, with corresponding demographic information, if the civil servant agrees to provide it. CalHR would then be responsible for compiling and including this data in its annual report to the Legislature about the status of the civil service.

This mechanism should enable CalHR and the Legislature to identify any discriminatory patterns in how state agencies are disciplining civil servants. Here again, the practice may serve as much as a deterrent as a way of monitoring things after the fact. Managers who are aware that the adverse actions they take against employees are being tracked by race, gender, and other protected categories may begin to examine their own behavior for indications that they are singling out particular types of employees in unequitable ways.

3. Breaking out demographic data for African-Americans

Somewhat apart from the bill's primary focus on civil service hiring and promotion, the bill would also modify the way in which state agencies go about collecting demographic information.

In recognition that the terms "Asian" or "Asian Pacific Islander" encompass people from an enormous variety of ancestral backgrounds with distinct reasons for emigrating to California, and very different experiences of life once they arrived, existing law requires state agencies to use far more nuanced categories when collecting data about Californians of Asian descent. (Gov. Code § 8310.5.) By contrast, despite the existence of a wealth of diverse subgroups among Californians of African descent, most state agencies presently collect data under the category of Black or African-American alone.

This bill would instead direct state agencies to collect and report demographic data using a more nuanced categorization of Californians of African descent. Specifically, beginning July 1, 2022, the state agencies would have to break out data collection about Californians of African descent using the following categories: (1) African-Americans who are descendants of persons enslaved in the United States; or (2) African-Americans who are not descendants of persons enslaved in the United States, including, but not limited to, African Blacks, Caribbean Blacks, and other African Americans or Blacks. The bill goes on to provide even more nuanced definitions for each category.

Collection of data in this way may enable the state to identify and respond to more nuanced patterns of well-being and need within the broader community of Californians of African descent. It should also help to facilitate any eventual program of reparations for slavery. The data should offer insight into the generational impact of slavery down to the present, thus helping to quantify if and how the horrific effects of slavery have continued to have impact through the generations. The data would also presumably stand as a record of who would be eligible for reparations for slavery in the event that such reparations are eventually forthcoming.

4. Who should count as being part of an underrepresented community for purposes of the bill?

In separate letters addressing this bill, Café de California (the Chicano Latino State Employees Association) and the Association of California State Employees with Disabilities both offer general support, but implore the author to include individuals with disabilities among those coming from underrepresented communities thus making their presence on a volunteer state board or commission sufficient to meet the bill's mandate for increasing diversity. Similar questions could be raised about whether other sometimes underrepresented groups, such as military veterans, for example, should be included as well. This bill is modeled off of AB 979 (Holden, Ch. 316, Stats. 2020), which mandated the inclusion on corporate boards of more directors "from an underrepresented community" and used the same definition for that phrase that is found in this bill. (Corp. Code § 301.4(e)(1).) Nonetheless, assuming the bill moves forward, the author may wish to consider whether it would add value to include people with disabilities and military veterans to the definition of "board member or commissioner from an underrepresented community."

5. 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:

- clarify that all written materials and questions associated with a civil service examination must be retained, whether or not there was an oral component to the examination;
- add a severability clause; and
- make other technical, non-substantive changes.

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

6. Arguments in support of the bill

According to the author:

Upward mobility is integral to achieving racial justice, and we should be setting the example. The existing systems in place at our own state agencies fail to create inclusive workplace environments, and hinder qualified individuals to move on up within their department simply based on the color of their skin. In September 2020, California took a bold step to address racial inequity in the private sector when [the Governor] signed my bill, Assembly Bill 979, that requires diversity on corporate boards of corporations based in California – a policy that will help drive upward mobility

for people of color. We already mandated the private sector to do their part. It's high time for the state to step up and do its part.

In support of the bill, Coalition for a Just and Equitable California writes:

[...] [D]iversity in our state workforce means more than just increasing access to positions on boards and commissions for African Americans, particularly those who descend from U.S. Slavery and the employment discrimination of the Jim Crow era. Workforce diversity means our state takes an active, not passive, role in ensuring access, enforcement, and ultimately outcomes. We know our state has more work to do to fully achieve the kind of workforce diversity it both desires and deserves. AB 105 is a big step in the right direction.

In further support of the bill, the African-American Community Empowerment Council writes:

Systemic barriers have historic and lasting consequences, which results in some individuals from underrepresented groups receiving unequal access or being excluded from participation in employment, services, or programs. Such outcomes are avoidable and result from institutional-level practices and policies that may be unintended to those who do not experience them, but that have serious and lasting impacts on the lives of those affected by limiting their career trajectories. Policymakers must recognize that every impediment to full participation in California's civil service system perpetuates a legacy of unequal opportunity for everyone.

7. Arguments in opposition to the bill

In opposition to the bill, Californians for Equal Rights writes:

Under the veneer of addressing "barriers to upward mobility and inclusion for people of color working in California's civil services system", AB105 proposes setting up annual goals and timetables for civil service positions which will "include race and gender as factors". This is tantamount to instituting government handouts and racial preferences, thereby violating the state constitution, stoking racial divisions, and legalizing racial discrimination in public employment. AB 105's implementation would undoubtedly lead to de facto quotas and preferences, which violates a series of federal legislation and the U.S. Constitution.

SUPPORT

African American Community Empowerment Council
California State NAACP
Coalition for a Just and Equitable California
National Assembly of American Slavery Descendants, Los Angeles

OPPOSITION

Californians for Equal Rights Foundation

RELATED LEGISLATION

Pending Legislation:

AB 313 (C. Garcia, 2021) modifies the Limited Exam and Appointment Program (LEAP) administered by CalHR, which provides an alternative to the traditional civil service examination and appointment process to facilitate the hiring of persons with disabilities. AB 313 is currently under consideration in the Senate Labor, Public Employment and Retirement Committee.

AB 316 (Cooper, 2021), among other provisions, requires CalHR to prepare a report on pay equity in relation to gender and ethnicity in each classification under the Personnel Classification Plan where there is an underrepresentation of women and minorities. AB 316 bill is currently under consideration in the Senate Labor, Public Employment and Retirement Committee.

Prior Legislation:

AB 3121 (Weber, Ch. 319, Stats. 2020) established the Task Force to Study and Develop Reparation Proposals for African Americans, with a Special Consideration for African Americans Who are Descendants of Persons Enslaved in the United States.

ACA 5 (Weber, Res. Ch. 23, Stats. 2020) proposed, subject to voter approval, to amend the California Constitution by repealing Section 31 of Article I relating to the prohibition against discrimination or preferential treatment, among other provisions. The measure appeared on the November 2020 General Election ballot, but failed passage by California voters.

AB 979 (Holden, Ch. 316, Stats. 2020) required a publicly held domestic or foreign corporation whose principal executive office is located in California to have a minimum of one director from an underrepresented community, as defined, by no later than the close of the 2021 calendar year. The bill required such a corporation with more than four but fewer than nine directors to have a minimum of two directors from underrepresented communities, and such a corporation with nine or more directors to

have a minimum of three directors from underrepresented communities by no later than the close of the 2022 calendar year.

SB 826 (Jackson, Ch. 954, Stats. 2018) required a publicly held domestic or foreign corporation whose principal executive office is located in California to have a minimum of one female director on its board by no later than the close of the 2019 calendar year. The bill additionally required such a corporation with five directors to have a minimum of two female directors and such a corporation with six or more directors to have a minimum of three female directors by the end of calendar year 2021.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)

Assembly Floor (Ayes 58, Noes 12)

Assembly Appropriations Committee (Ayes 12, Noes 3)

Assembly Public Employment and Retirement Committee (Ayes 5, Noes 1)

Amended Mock-up for 2021-2022 AB-105 (Holden (A))

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

SECTION 1. This act shall be known, and may be cited, as the Upward Mobility Act of 2021.

SEC. 2. Section 11140 of the Government Code is amended to read:

11140. (a) It is the policy of the State of California that the composition of state boards and commissions shall be broadly reflective of the general public.

(b) On or after January 1, 2022, all state boards and commissions consisting of one or more volunteer members or commissioners shall have at least one volunteer board member or commissioner from an underrepresented community.

(c) For purposes of this section, the following definitions apply:

(1) "Board member or commissioner from an underrepresented community" means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.

(2) "Volunteer member or commissioner" means an "administrative volunteer" as defined in subdivision (b) of Section 3111, who is selected to serve on a board or commission by the appropriate nominating authority and who does not receive any compensation or financial gain from any state agency, as defined in Section 11000. A volunteer may receive per diem and remain a volunteer within the meaning of this section, and that volunteer shall not be considered to be an employee solely on the basis of receiving the per diem.

(d) Notwithstanding the date specified in subdivision (b), the requirements of this section shall only apply as vacancies on state boards and commissions occur.

(e) Subject to subdivision (d), this section shall only apply to a vacancy appointment by the Governor or the Governor's designees, the chair of a board or commission or the chair's designees, the Speaker of the Assembly, and the President pro Tempore of the Senate or Senate Rules Committee, or any combination thereof.

SEC. 3. Section 18502 of the Government Code is amended to read:

18502. (a) There is hereby created in state government the Department of Human Resources. The department succeeds to and is vested with the following:

(1) All of the powers and duties exercised and performed by the Department of Personnel Administration.

(2) Those powers, duties, and authorities necessary to operate the state civil service system pursuant to Article VII of the California Constitution, this code, the merit principle, and applicable rules duly adopted by the State Personnel Board.

(b) (1) The State Personnel Board shall prescribe rules consistent with a merit based civil service system to govern appointments, classifications, examinations, probationary periods, disciplinary actions, and other matters related to the board's authority under Article VII of the California Constitution. The State Personnel Board shall ensure that all changes to regulations are circulated for public comment.

(2) The department shall oversee compliance ~~of~~ with rules prescribed by the State Personnel Board consistent with a merit-based civil service system to govern appointments, classifications, examinations, probationary periods, disciplinary actions, and other matters related to the board's authority under Article VII of the California Constitution.

(3) The department, at the direction of and in conjunction with the State Personnel Board, may conduct audits and investigations of personnel practices of other departments and appointing authorities to ensure compliance with civil service policies, procedures, and statutes.

(4) Pursuant to a process established by the State Personnel Board, the department shall investigate complaints filed by employees in a state department's equal employment opportunity program and personnel office, other civil service employees, applicants, and members of the public alleging violations of civil service laws and report findings to the State Personnel Board for adjudication.

(c) This section shall not limit the authority of the Department of Human Resources and the State Personnel Board to delegate, share, or transfer between them responsibilities for programs within their respective jurisdictions pursuant to an agreement.

(d) The rules and regulations of the State Personnel Board and of the Department of Personnel Administration shall remain in effect unless and until contradicted by the terms of this chapter or amended or repealed by the board or the Department of Human Resources.

SEC. 4. Section 8310.6 is added to the Government Code, to read:

8310.6. (a) A state agency, board, or commission that directly or by contract collects demographic data as to the ancestry or ethnic origin of Californians shall use separate collection categories and tabulations for the following:

(1) African Americans who are descendants of persons enslaved in the United States.

(2) African Americans who are not descendants of persons enslaved in the United States, including, but not limited to, African Blacks, Caribbean Blacks, and other African Americans or Blacks.

(b) The data collected pursuant to the different collection categories and tabulations described in subdivision (a) shall be included in every demographic report on ancestry or ethnic origins of Californians by the state agency, board, or commission published or released on or after January 1, 2022. The data shall be made available to the public in accordance with state and federal law, except for personal identifying information, which shall be deemed confidential.

(c) As used in this section, the following definitions apply:

(1) "African Americans who are descendants of persons enslaved in the United States" means individuals who self-identify as Black or African American with at least one ancestor who was enslaved or subject to chattelization in the United States.

(2) "African Blacks" means individuals with origins from the continent of Africa, including, but not limited to, one or more of the following countries: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Republic of the Congo, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, or Zimbabwe.

(3) "Caribbean Blacks" means individuals with origins from Caribbean countries, including, but not limited to, one or more of the following countries: Belize, Puerto Rico, Cuba, Jamaica, Haiti, Trinidad and Tobago, Guyana, Barbados, Grenada, St. Croix, St. Kitts, the Bahamas, and the Dominican Republic.

(4) "Other African Americans or Blacks" means individuals with African ancestry originating from any country not included in paragraph (2) or (3).

SEC. 5. Section 18553 is added to the Government Code, to read:

18553. "Core competencies" mean the particular education, experience, knowledge, and abilities that each applicant is required to have in order to be considered eligible for a particular group of classifications.

SEC. 6. Section 18930.1 is added to the Government Code, to read:

18930.1. The board shall establish a process that includes diversity and best practices in each aspect of the design, announcement, and administration of examinations for the establishment of employment lists.

SEC. 7. Section 18931 of the Government Code is amended to read:

18931. (a) The board shall establish minimum qualifications for determining the fitness and qualifications of employees for each class of position. The department may require applicants for examination or appointment to provide documentation as it deems necessary to establish the applicants' qualifications.

(b) The board, in developing the qualifications referenced in subdivision (a), shall also incorporate standards for statements of qualifications used as examination criteria for the State of California in determining the fitness and qualifications of employees for each class of position. The department may require applicants for examination or appointment to provide documentation as it deems necessary to establish the applicants' qualifications.

(c) Whenever the law requires that an applicant for a position as a peace officer be screened to ensure that the applicant is free from emotional and mental impairment, the department or the designated appointing authority shall undertake that screening subject to the applicant's right to appeal to the board.

SEC. 8. Section 18933 of the Government Code is amended to read:

18933. (a) Within a reasonable time before the scheduled date, the department or a designated appointing power shall announce or advertise examinations for the establishment of eligible lists. The announcement shall include the following:

- (1) The date and place of the examination.
- (2) The nature of the minimum qualifications and the functional core competencies.
- (3) The general scope of the examination.
- (4) The relative weight of its several parts if more than one type of test is to be utilized.
- (5) Any other information the department deems proper.
- (6) The standard statement of qualifications, if applicable.

(b) The department shall notify the Department of Veterans Affairs when any promotional examination for the establishment of an eligible list is announced or advertised to eligible candidates. The notification shall state the job position and include all of the information listed in paragraphs (1) to (6), inclusive, of subdivision (a).

SEC. 9. Section 18936 of the Government Code is amended to read:

18936. (a) ~~All examination materials, Examinations that have an oral examination component shall be video and otherwise electronically recorded and all other~~

~~examination materials, including examination questions and any written material, shall be maintained for each examination for three years, after which they shall be disposed of pursuant to a policy adopted by the board. Examinees shall be informed that they are being recorded.~~

(b) Examinations that have an oral examination component shall be video or otherwise electronically recorded. Examinees shall be informed that they are being recorded. The recordings shall be maintained for each examination for three years, after which they shall be disposed of pursuant to a policy adopted by the board.

(b) The final earned rating of each person competing in any examination shall be determined by the weighted average of the earned ratings on all phases of the examination, according to the weights for each phase established by the department or a designated appointing power in advance of the giving of the examination and published as a part of the announcement of the examination.

(c) The department or a designated appointing power may set minimum qualifying ratings for each phase of an examination and may provide that competitors failing to achieve those ratings in any phase shall be disqualified from any further participation in the examination.

SEC. 10. Section 19402 of the Government Code is amended to read:

19402. (a) All upward mobility programs shall include annual goals that include the number of employees expected to progress from positions in low-paying occupational groups to entry-level technical, professional, and administrative positions, and the timeframe within which this progress shall occur. The Department of Human Resources shall be responsible for approving each department's annual upward mobility goals and timetables.

(b) (1) By July 1, 2022, the Department of Human Resources shall develop model upward mobility goals based on department workforce analysis and shall post the model goals on its internet website.

(2) The model upward mobility goals may include race, gender, and LGBTQ as factors to the extent permissible under state and federal equal protection laws.

(3) On or before July 1, 2022, the Department of Human Resources shall provide a copy of the model upward mobility goals and a corresponding report outlining the workforce analysis used to develop the model upward mobility goals to each member of the Legislature. The report shall be submitted in compliance with Section 9795.

(c) If the appointing authority is unable to meet its annual upward mobility goals and timetables for two consecutive fiscal years, the appointing authority shall submit a report explaining why it failed to achieve its goals and what requirements are necessary to facilitate achieving its goals in the subsequent two fiscal years. The appointing authority

shall submit the report to the department, the Director of the Department of Finance, and the Legislative Analyst.

SEC. 11. Section 19574 of the Government Code is amended to read:

19574. (a) The appointing power, or its authorized representative, may take adverse action against an employee for one or more of the causes for discipline specified in this article. Adverse action is valid only if a written notice is served on the employee prior to the effective date of the action, as defined by board rule. The notice shall be served upon the employee either personally or by mail and shall include: (1) a statement of the nature of the adverse action; (2) the effective date of the action; (3) a statement of the reasons therefor in ordinary language; (4) a statement advising the employee of the right to answer the notice orally or in writing; and (5) a statement advising the employee of the time within which an appeal must be filed. The notice shall be filed with the board not later than 15 calendar days after the effective date of the adverse action.

(b) Effective January 1, 1996, this subdivision shall apply only to state employees in State Bargaining Unit 5. This section shall not apply to discipline as defined by Section 19576.1.

(c) (1) No later than April 1 of each year, each appointing power shall provide to the Department of Human Resources a report detailing all of the following information:

(A) The total number of adverse actions served on state employees in the preceding calendar year.

(B) The ethnicity or race of each employee served with an adverse action in the preceding calendar year, if available.

(C) The gender identity or sexual orientation of each employee served with an adverse action in the preceding calendar year, if available.

(D) The statutory basis for discipline under Section 19572 for each adverse action served in the preceding calendar year.

(E) A brief factual summary of the basis for discipline for each adverse action served in the preceding calendar year.

(F) The type of discipline imposed in each adverse action, including, but not limited to, outright termination, the nature of any demotion, the length of any suspension, or any other type of discipline.

(2) No later than June 1 of each year, the department shall include in its annual workforce analysis and census report the items as reported by each appointing authority pursuant to this subdivision and submit this report to the Legislature.

(3) This report shall be submitted in compliance with Section 9795.

(4) The information required pursuant to subparagraphs (B) and (C) of paragraph (1) may be provided at the discretion of the employee, and an appointing power shall not require an employee to disclose this information.

SEC. 12. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.