

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

SB 1340 (Smallwood-Cuevas)
Version: April 10, 2024
Hearing Date: April 16, 2024
Fiscal: Yes
Urgency: No
ME

SUBJECT

Discrimination

DIGEST

This bill authorizes local entities to enforce the employment components of California's state civil rights laws through a specified process. The bill requires data reporting to the California Civil Rights Department (CRD) by state contractors and subcontractors of demographic information of employees, as specified. Additionally, the bill requires the Department of Industrial Relations to establish the California Public Infrastructure Task Force, as specified.

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 FEHA and local governments cannot. The State enforces FEHA through 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 in employment.

The bill is sponsored by the Southern California Black Worker Hub who back the possibility of expanding civil rights enforcement locally. The Committee has received no timely opposition to the bill. If the bill passes out of this Committee, it will be heard next in the Senate Labor, Public Employment and Retirement Committee.

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).)

Existing state law:

- 1) Prohibits workplace discrimination, as specified, on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status, through the Fair Employment and Housing Act (FEHA). (Gov. Code § 12940.)
- 2) 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.) CRD also has the function, duty, and power to investigate, approve, certify, decertify, monitor, and enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Government Code section 12990.
- 3) 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.)

- 4) Permits aggrieved parties to petition the court of jurisdiction for review of administrative determinations. (Code Civ. Proc. § 1094.5.)
- 5) If a civil action is not brought by CRD within 150 days after the filing of a complaint, or if CRD earlier determines that no civil action will be brought by CRD, CRD is required to promptly notify the person claiming to be aggrieved in writing that CRD shall issue, on request, a right-to-sue-notice. If the person claiming to be aggrieved does not request a right-to-sue notice, CRD shall issue the right-to-sue notice upon completion of its investigation, and not later than one year after the filing of the complaint. (Gov. Code §12965(c)(1)(A).)
- 6) Expresses the intent of the Legislature to occupy the field of enforcing 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).)
- 7) Notwithstanding 6), above, provides that a city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/ AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/ AIDS discrimination, may also bring a civil action under FEHA against the person, employer, labor organization, or employment agency named in the notice. (Gov. Code §12965(c)(2).)
- 8) Where CRD initiates a civil action, or is about to do so, and the party accused of engaging in unlawful practices under FEHA is a state contractor or is a supplier of goods and services to the state, the director of CRD shall send a written notice of the civil action and a copy of the civil complaint to the appropriate awarding agency and request a report of any action which the awarding agency takes in response to the department's notification and filing of a civil action. (Gov. Code § 12966.)
- 9) FEHA prescribes procedures and remedies available in the case of failure to eliminate an unlawful practice under its provisions through specified means, including authorizing a court to assess a civil penalty against a defendant, as specified. (Gov. Code § 12965.)
- 10) Requires specified state agencies to convene relevant stakeholders to provide input on recommendations to establish terms to be included as a material part of a contract, including measurable results to ensure that investments maximize benefits to marginalized and disadvantaged communities, meet with those stakeholders, as specified, and consult with the department and other specified entities for the purposes of developing those recommendations, as specified. (Pub. Contract Code § 6990.1.)

- 11) Provides that it is the intent of the Legislature in enacting the provisions described in 10) to develop procurement models in alignment with initiatives to enhance the state's training and access pipeline for quality jobs and the application of community benefits on infrastructure and manufacturing investments funded by specified federal law. (Pub. Contract Code § 6990.)
- 12) Establishes the Department of Industrial Relations, one of the functions of which is to foster, promote, and develop the welfare of wage earners of California, to improve their conditions, and to advance their opportunities for profitable employment.

This bill:

- 1) States that is the intent of the Legislature that, to the extent possible, the funding for the provisions of the bill include, but not be limited to, the federal Infrastructure Investment and Jobs Act, the Inflation Reduction Act of 2022, and the CHIPS and Science Act of 2022.
- 2) Authorizes efforts by any city, city and county, county, or other political subdivision of the state (local agency) to enforce state law prohibiting employment discrimination against any of the enumerated classes of persons covered by the FEHA.
- 3) Adds Article 1.1 to the Fair Employment and Housing Act that specifies the process a complainant must follow in order to have their complaint processed by the local agency.
- 4) Requires CRD to establish and maintain a comprehensive database to track all infrastructure contracting and procurement activities by state agencies, which shall include, but shall not be limited to, all of the following: contracts awarded by state agencies, including, but not limited to, project details, pay scales for employees of the contractors and subcontractors, and relevant compliance measures or terms; contractors and subcontractors utilized by state agencies; and demographic data of employees of contractors and subcontractors utilized by state agencies, including, but not limited to, race, gender, marital status, and county of residence.
- 5) Requires CRD to annually publish a report summarizing the data collected pursuant to 4) that includes both of the following: any disparities or trends CRD observed; and recommendations for improving equity and inclusion in public infrastructure and procurement.
- 6) Requires CRD to collaborate with relevant state agencies, local governments, and stakeholders to develop and implement strategies for promoting diversity, equity, and inclusion in public infrastructure contracting and procurement, and, requires

CRD to conduct outreach and educational activities to raise awareness of civil rights laws and regulations that impact public infrastructure contracting and procurement.

- 7) Requires the Department of Industrial relations to establish a California Public Infrastructure Task Force (Task Force) which shall consist of representatives from all of the following entities that engage in public infrastructure contracting and procurement projects: state agencies; local governments and agencies; contractors and subcontractors; unions; apprenticeship and preapprenticeship programs; job and worker centers; community colleges; Tribal Employment Rights offices; and Women in Apprenticeship and Nontraditional Occupations grantees.
- 8) Specifies that the Task Force shall do all of the following: regularly conduct meetings to make recommendations regarding recruiting and removing barriers to employment in public infrastructure projects for underrepresented communities; conduct outreach and engagement activities with contractors and subcontractors to promote employment in public infrastructure projects for underrepresented communities; provide ongoing compliance assistance at the prebid and postbid stages to contractors and subcontractors in public infrastructure projects regarding their nondiscrimination obligations; and evaluate the efforts of contractors and subcontractors to recruit and utilize talent from underrepresented communities in public infrastructure projects.
- 9) Makes legislative findings to satisfy constitutional provisions that require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. In this case the Legislature makes the following findings to demonstrate the interest protected by the limitation and the need for protection of that interest to be: "In order to protect the personal information of individual workers participating in the contractor diversity survey, it is necessary for the information to be kept confidential."
- 10) Requires CRD, in collaboration with the Division of Labor Standards Enforcement, to develop partnerships with local agencies that allow local agencies to assist with preventing and eliminating unlawful practices under FEHA, as specified.
- 11) Requires a local agency that pursues a complaint pursuant to these provisions to receive, investigate, and adjudicate the complaint using procedures that are substantially similar to the procedures that CRD must adhere to within one year of the complaint being filed with the local agency.
- 12) Authorize a person claiming to be aggrieved by an alleged unlawful practice to file a verified complaint with CRD that requests that the complaint be pursued by a local agency pursuant to these provisions.

- 13) Prescribes procedures of a complaint pursued by a local agency.
- 14) Requires CRD to include information about local agencies entering partnerships and complaints being processed by local agencies pursuant to these provisions, as specified, and defines various terms for these purposes.
- 15) Specifies that while it is the intention of the Legislature that FEHA occupy the field of regulation of discrimination in employment and housing, FEHA does not limit or restrict the application of the Unruh Civil Rights Act.
- 16) Provides that, commencing on January 1, 2026, nothing in FEHA shall be construed to limit or restrict efforts by local entities to enforce state law prohibiting discrimination against classes of persons covered by FEHA in employment, provided that the enforcement complies with the provisions described above.
- 17) Requires CRD to establish and maintain a comprehensive database to track all infrastructure contracting and procurement activities by state agencies, as specified.
- 18) Requires a contractor or subcontractor under an infrastructure contract awarded by a state agency to report to CRD specified demographic data.
- 19) Requires the contractor or subcontractor to conduct a survey to collect this data, as specified.
- 20) Requires CRD to annually publish a report summarizing certain data, as specified, and requires data collected pursuant to these provisions to be confidential, as specified.
- 21) Requires CRD to collaborate with relevant state agencies, local governments, and stakeholders to develop and implement strategies for promoting diversity, equity, and inclusion in public infrastructure contracting and procurement. The bill would require CRD to conduct outreach and educational activities to raise awareness of civil rights laws and regulations that impact public infrastructure contracting and procurement.

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 FEHA has sometimes been criticized, however. Existing law restricts the power to enforce FEHA to the Civil Rights Department (CRD) (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 employment discrimination 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

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 Korbly & 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

indicated that they were not aware of what rights and recourses they have for addressing the employment discrimination they faced.⁷

From the perspective of the author and sponsor 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

<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.*

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

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 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 have largely been addressed in the current bill 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 worker 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). 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 EEOC, the EEOC automatically files the claim with CRD as well. This process is known as dual filing.

Dual filing happens because of worksharing agreements that CRD 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

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.

¹⁰ *Id.* at p. 3.

¹¹ *Id.* at pp. 9-18.

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. To address this concern the bill requires the complainant to first file their complaint with CRD and for CRD to either make the determination to pursue their case or issue a right to sue letter and a right to pursue their complaint through a local agency. The complainant can then decide to either pursue their complaint in court or to pursue their complaint through the local agency who has entered into a partnership with CRD. This way CRD, who has a broad view of discrimination claims across the state, can be informed about the new complaint and choose whether the complaint should be pursued by CRD. The complainant is barred from pursuing their complaint through another local agency arising out of the same underlying facts and circumstances.

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 a small 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.

To address this issue the bill contains the following provisions. Pursuant to the bill, CRD, in collaboration with the Division of Labor Standards Enforcement, must develop partnerships with local agencies that allow local agencies to assist with preventing and eliminating unlawful employment practices. The bill provides that CRD shall not enter into a partnership with a local agency until the local agency demonstrates to CRD's satisfaction that the local agency has the capacity to receive, investigate, and adjudicate the complaint using procedures that are substantially similar to those that apply to CRD under Article 1, the Fair Employment and Housing Act within one year of the complaint being filed with the local agency.

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 inefficient 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.

To address this concern, the author drafted the bill to require the complainant to file their complaint first with CRD and then letting CRD choose whether to pursue the action. CRD can then issue a right to sue letter and a right to seek local agency enforcement letter. The worker can then pursue local enforcement or go straight to court. If the worker pursues local enforcement and the local agency chooses not to pursue the action then the worker can go to court. This system ensures that CRD is aware of the case being investigated and pursued through the local agency and has first choice on whether to pursue the action. This is important because CRD has a statewide view of bad actors and can pursue the most egregious cases on behalf of several employees. The complainant is barred from pursuing their complaint through another local agency arising out of the same underlying facts and circumstances. The bill also provides that if a local agency determines that a complainant is not entitled to relief, the local agency shall provide written notice of both of the following: the decision denying relief; and any applicable statute of limitations for the complainant to seek relief pursuant to a private right of action. The bill also provides that a complainant who receives this notice may pursue a private right of action within six months of the local agency's determination and that if a complainant pursues a private right of action, the local agency's determination shall not be binding on the superior court.

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. This bill is written in a way that allows for CRD to choose to pursue actions in the same manner it does under current law. What is different with this bill is that instead of just issuing a right to sue letter to the worker, CRD would also issue a right to pursue local enforcement letter to the worker. Under this bill and under current law, CRD would still operate the same up until the point of issuing the right to sue letter. Thus, this bill will not change the funding agreements between CRD and the federal government.

Given the conclusions of the SB 491 report and the considerations set forth above, this much seems clear: if the potential benefits of local enforcement of employment 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. This bill creates such a framework. SB 1340's mechanisms in concert are intended to address all of the issues set forth in Comment 4, above.

5. 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.

6. Requires the Department of Industrial Relations to set up a Public Infrastructure Task Force and Requires CRD to publish specified demographic information

This bill contains a provision that requires the Department of Industrial Relations to set up a California Public Infrastructure Task Force, consisting of specified members, to, among other things, regularly conduct meetings to make recommendations regarding recruiting and removing barriers to employment in public infrastructure projects for underrepresented communities and to provide ongoing compliance assistance to contractors and subcontractors in public infrastructure projects regarding their nondiscrimination obligations. This provision of the bill is within the jurisdiction of the Senate Labor, Public Employment and Retirement Committee and will be analyzed by that Committee should this bill pass the Senate Judiciary Committee.

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.

The bill additionally requires data reporting to CRD from state contractors regarding demographic information of employees. This bill requires CRD to establish and maintain a comprehensive database to track all infrastructure contracting and procurement activities by state agencies. The bill requires a contractor or subcontractor under an infrastructure contract awarded by a state agency to report to CRD specified demographic data, and requires the contractor or subcontractor to conduct a survey to collect this data. The bill requires the contractor or subcontractor to make clear that participation in the survey is voluntary and will not result in an adverse action against the employee. The bill requires CRD to annually publish a report summarizing certain data and requires data collected pursuant to these provisions to be confidential. The bill requires CRD to collaborate with relevant state agencies, local governments, and stakeholders to develop and implement strategies for promoting diversity, equity, and inclusion in public infrastructure contracting and procurement. The bill additionally requires CRD to conduct outreach and educational activities to raise awareness of civil rights laws and regulations that impact public infrastructure contracting and procurement. The bill contains provisions that ensure that participation in the disclosure of personal information by the workers is voluntary and that a worker who does not want to disclose information will not face any adverse action. The bill also provides that this information will remain confidential in order to protect the privacy of individual workers.

Specifically, the bill provides that commencing on July 1, 2025, and annually on July 1 thereafter, a contractor or subcontractor under an infrastructure contract awarded by a state agency shall report to CRD the demographic data of their employees; specifically their race, gender, marital status, and county of residence.

The contractor or subcontractor shall provide each employee with the option to participate in the survey. The contractor or subcontractor shall distribute a written disclosure to each employee prior to, or concurrently with, a survey that shall notify the employee that: the employee's decision to disclose their demographic information is voluntary; the contractor or subcontractor is prohibited from taking an adverse action against an employee if the employee declines to participate in the survey; and that the aggregate data collected for each demographic category will be reported to CRD. The bill requires that the survey shall be completed using a standardized form to be specified by CRD. The bill specifies that a contractor or subcontractor shall not in any way encourage, incentivize, or attempt to influence the decision of an employee to participate in a survey conducted pursuant to this bill. The bill requires a contractor or subcontractor who is required to conduct a survey pursuant to this bill to do both of the following: 1) collect survey response data from employees in a manner that maintains the anonymity of the responding employee and the confidentiality of the data reported; and 2) transmit the survey response data to CRD in a manner that does not associate the survey response data with an individual employee. The bill prohibits a contractor or subcontractor from taking an adverse action against an employee who declines to participate in the survey. The bill requires CRD to annually publish a report summarizing the data collected, beginning July 1, 2026, that includes any disparities or

trends CRD observed and recommendations for improving equity and inclusion in public infrastructure and procurement. The bill specifies that CRD shall publish the information in the aggregate and shall not identify an individual employee. CRD is also required to include a statement on their website that indicates that information posted is provided for informational purposes only. The demographic data collected is confidential and shall not be released by CRD or a contractor or subcontractor except to comply with a properly authorized civil, criminal, administrative, or regulatory investigation or subpoena, summons by federal, state, or local authorities, or as otherwise authorized by this section. These provisions are designed to protect the personal information of employees.

7. Arguments in support of the bill

According to the author:

The ongoing need for transparency, tracking, reporting, enforcement of social and economic equity in state government contracting/manufacturing practices still represent significant concerns in California workforce development and contracting processes. These issues have been well documented and partially addressed in previous legislation (most recently SB 150, 2023). During recent public hearings the Administration has stated their commitment to implementing/enforcing recent legislation. SB 1340 would serve as a clean-up measure to SB 150 by additionally requiring the California Civil Rights Division (CRD) to track, report, enforce existing equity metrics/fair labor standards for contracting and procurement efforts impacting infrastructure/green job industries and related manufacturers. It would clarify the need for more CRD staff, increased oversight abilities, and partnerships with other local enforcement organizations while also requiring outside reporting standards/3rd party audits. This measure will seek to utilize designated (SB 150) federal funding and existing state dollars to ensure that living wage jobs are made available throughout the State while ensuring that our public agencies are actively addressing the problem of workplace discrimination, development and workforce access for all Californians.

In support, the Southern California Black Worker Hub, the sponsors of the bill write:

All workers deserve protections in the workplace, and when these protections are violated, all workers deserve the full due process of the law in remedying claims of discrimination in a timely and affordable manner, one that does not preclude workers on the basis of race, gender, class, nationality or citizenship. Those who experience discrimination should have their claims reviewed in a timelier manner so they can return to work and recover lost wages. Across the state, Black workers are overrepresented in workplace discrimination claims, with a third of Black workers reporting experiencing prejudice or discrimination during the COVID-19 pandemic alone. Discrimination has

deepened a crisis for Black workers, and the unemployment, underpayment, and underrepresentation of Black workers in professional jobs are direct effects of workplace discrimination.

While the law tasks the California Civil Rights Department, formerly the Department of Fair Housing and Employment, with the enforcement of workplace discrimination through the Fair Housing and Employment Act, SB 1340 would strengthen the state's enforcement capacity by providing authority to local civil and human rights departments to adjudicate workplace discrimination cases in partnership with the California Civil Rights Department. The bill would provide another valuable avenue to all Californians who encounter discrimination by empowering them to file complaints with local departments in the cities where the discrimination occurred. Under the current state process, addressing workplace discrimination within the judicial system is too costly for most low-wage workers, especially Black workers who represent a disproportionate number of violations and employment complaints and are less likely to receive remedies in the court system. Across the state, research has shown that California has seen an approximately 34% increase in discrimination complaints since the 1980s, though we have not seen a proportionate growth in the state's capacity to handle and process these complaints. We cannot rely on the current system to adequately address worker complaints without the power and reach of local enforcement.

SB 1340 is an important bill that would provide meaningful access to millions of our state's workers by empowering them to seek justice for complaints of workplace discrimination and mobilizing local enforcement agencies.

SUPPORT

Southern California Black Worker Hub (sponsor)

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: SB 16 (Smallwood-Cuevas, 2023) allows for local enforcement of FEHA, as specified. The bill is in the Assembly Appropriations Committee.

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.
