



# SB 491 REPORT

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

2218 Kausen Drive | Suite 100

Elk Grove | California | 95758

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# INTRODUCTION

Pursuant to the Fair Employment and Housing Act (FEHA), and court decisions interpreting the Act, the Department of Fair Employment and Housing (DFEH) is currently the only body in the state authorized to enforce the provisions of the FEHA. In the employment context, those provisions prohibit employment discrimination on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. The preemption of local enforcement is contained in the FEHA's statutory text, which states that "it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part."<sup>1</sup>

On October 14, 2017, in a veto message to SB 491, Governor Brown directed DFEH to create an advisory group to explore allowing the provisions of the FEHA to be enforced by local authorities and to prepare a report to his office and the Legislature by December 31, 2018, with findings and recommendations. This report focuses only on the employment provisions of the FEHA, which were the subject of SB 491.

DFEH convened the advisory group on April 9, 2018, consisting of:

- Lola Smallwood-Cuevas, Project Director, Los Angeles Black Worker Center;
- Lilia Garcia-Brower, Executive Director, Maintenance Cooperation Trust Fund;
- Jennifer Barrera, Senior Vice President, Policy, California Chamber of Commerce;
- Noah Zatz, Professor of Law, UCLA School of Law;
- John Reamer, Director, Bureau of Contract Administration, City of Los Angeles;
- Jane Martin, Senior Political and Community Organizer, Service Employees International Union, United Service Workers West; and
- Jannah Manasala, Shareholder, Weinberg Roger & Rosenfeld.

The group concluded its work on November 13, 2018. The following report explores the potential implications of lifting or amending the preemption provision of the FEHA.

As a preliminary matter, we note that California, with its large and diverse population, strong public policy against all forms of discrimination, and robust enforcement tools, is in many ways a national leader in combatting discrimination in the workplace. An effective mechanism for local enforcement of anti-discrimination employment laws could further advance the state's efforts to combat discrimination. If not handled correctly, however, lifting of preemption could have significant negative consequences, including accidental forfeiture of state or federal rights. This report is intended to set forth options that would avoid such consequences.

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<sup>1</sup> Gov't Code 12993(c).

DFEH and the advisory group find that local enforcement of anti-discrimination laws is feasible. DFEH and the advisory group also find that modification, rather than deletion, of the preemption provision likely raises the fewest policy concerns. Specifically, the Legislature could authorize local jurisdictions to pass and enforce their own local laws prohibiting employment discrimination. The state would thus not occupy the entire field of employment discrimination but would be the only entity responsible for the enforcement of the FEHA.

DFEH also finds that if the preemption provision were simply removed from the statute, local authorities could feasibly enforce the FEHA.

In either case, if the Legislature were to decide to allow for local enforcement, DFEH would urge that careful attention be paid to the practical and policy concerns discussed below, including the parameters of the relationship between DFEH and local enforcement bodies. The resolution of these issues could have significant fiscal and administrative ramifications, affecting the ultimate enforcement of the state's civil rights laws.

It is important to note at the outset that this report considers the views only of DFEH and the above-mentioned advisory group members. The Office of the Attorney General (OAG), however, has overlapping jurisdiction with DFEH over the civil rights laws DFEH enforces.<sup>2</sup> As a practical matter, the OAG does not maintain the same sort of complaint-receipt function as does DFEH, does not serve as a Fair Employment Practice Agency (FEPA) of the Equal Employment Opportunity Commission (EEOC) as explained below, and does not regulate the FEHA. The OAG would thus not be affected by a modification of the FEHA's preemption provision in precisely the same ways as would DFEH. Nevertheless, because the OAG would be impacted by any binding interpretations of the FEHA that might result from local enforcement efforts, and because it has a role in enforcing these laws, that office should certainly be consulted regarding any legislative proposals.

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<sup>2</sup> See [Government Code section 12511](#) and [Cal. Const. Article V section 13](#).

## A. DFEH OVERVIEW

As a framework for these recommendations, some background on DFEH's operations will be relevant.

### 1. THE COMPLAINT PROCESS

DFEH has 238 positions in five offices throughout the state—Elk Grove, Los Angeles, Fremont, Fresno, and Bakersfield. DFEH is charged with accepting, investigating, mediating, and litigating complaints of employment discrimination from individuals throughout California.

By operation of law, no individual may file a complaint of employment discrimination in state court without first exhausting their administrative remedies by filing an intake/complaint form with either DFEH or the federal EEOC and obtaining a right-to-sue letter. In 2017, DFEH received 12,872 requests for such letters (DFEH does not investigate these cases; the issuance of the letters is automated). **In 2017, DFEH investigated 4,346 employment matters, including complaints of discrimination, engagement in a protected activity, harassment, and violations of laws providing for protected health- or baby-bonding-related leave. Investigations are triggered by the receipt of an intake form, DFEH's determination that the matter is one within DFEH's jurisdiction, and service upon the respondent of a formal complaint.**

The complaint process originates with a complainant filing an intake form with DFEH. Individuals can file an intake form online, by telephone, in person, or by mail. When an intake form is received for investigation, the Enforcement Division conducts an initial assessment to ensure DFEH has jurisdiction over the case. Some number of cases are closed at this intake stage for lack of jurisdiction. If DFEH has jurisdiction over a case, and the complainant presents a cognizable claim of employment discrimination, harassment or retaliation, a complaint is drafted by the Enforcement Division, signed by the complainant, and then served upon the respondent. Service of the complaint commences the investigatory process, which involves receipt of a response from the respondent, interviews of witnesses, and an assessment of the merits of the case. Enforcement Division personnel may also help the parties to settle the case. Most of the cases DFEH investigates are closed by the Enforcement Division, either because the cases settle, or because they are found to lack merit. (When a case is closed for either lack of jurisdiction or lack of merit, a state court right-to-sue letter will be issued.) If a case is found to have merit, but is not settled by enforcement, it is referred to DFEH's Dispute Resolution Division, comprised of 12 professional neutrals (mediators) who work statewide. Cases that are not settled in the Dispute Resolution Division are referred to DFEH's Legal Division, which may file a civil complaint. In 2017, 54 employment cases were referred to the Legal Division.

In 2017, the vast majority of employment cases originated in Los Angeles County (934), followed by Sacramento (360), Alameda (267), Orange (245), and San Diego (244).

## 2. DFEH AS A FAIR EMPLOYMENT PRACTICE AGENCY

In its employment cases, DFEH operates as a FEPA of the federal EEOC. This means that DFEH has a contract and work-sharing agreement with EEOC by which the two agencies contractually serve as each other's agents for the processing and drafting of charges, communicate about cases received by each agency, and through which DFEH obtains federal funding for its handling of cases that could otherwise be investigated by EEOC.

The basic contours of the FEPA process are relatively straightforward. When an individual files an employment discrimination complaint with DFEH, and the allegation is one that EEOC could also accept, DFEH dual-files the charge with EEOC. A key aspect of this process is that EEOC will only accept cases filed within 300 days of the last date of harm (rather than DFEH's 365-day statute of limitations). In addition, state law prohibits discrimination against certain protected classes that are not covered by federal law. When a case is dual-filed, the EEOC receives a copy of the charge and the case is assigned an EEOC case number in addition to a DFEH number. DFEH then goes on to process the case, closing it for lack of merit, settling it, issuing a "cause" determination (finding merit but declining to litigate), or litigating the case. Ultimately, all cases will be closed in DFEH's system. If someone files a complaint with the EEOC that is also within DFEH's jurisdiction, the EEOC will generally investigate the case, issuing a state court right-to-sue letter to the complainant at the beginning of the investigation. A federal right-to-sue would be issued by the EEOC at the end of the investigation. DFEH does not issue federal right-to-sue notices; those are produced separately by the EEOC once it is informed by DFEH of a case closure.

Because DFEH has a FEPA contract with EEOC, within 15 days of DFEH's case closure determination, a complainant may request that the EEOC review the determination. If the EEOC disagrees with the closure decision, it will send the case back to DFEH for further processing.

Each federal fiscal year, DFEH negotiates a targeted number of case closures with the EEOC. (For example, the number of case closures was 3,370 for the 2017-18 fiscal year). Every month, DFEH both prepares reports and produces case-related documents to the EEOC to support these case closures. DFEH has a specific unit and personnel charged with this task. The EEOC currently provides DFEH with \$700 per verified case closure, up to the contracted amount. For the last fiscal year, this amounted to \$2,359,000 in federal funding for DFEH.

## B. HISTORY OF THE FEHA'S PREEMPTION CLAUSE

Pursuant to Gov't Code 12993(c), DFEH is the only governmental body in California that may lawfully enforce the Fair Employment and Housing Act.

Preemption of local enforcement dates back to the earliest days of the Act. When it was passed in 1959, the Fair Employment Practices Act—one of two predecessor statutes to the FEHA<sup>3</sup>—contained a clause allowing for a one-year grace period for the completion of any city or county antidiscrimination proceedings:

Nothing contained in this act shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this act becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this act.<sup>4</sup>

The other predecessor statute to the FEHA, the Rumford Fair Housing Act, also contained a preemption clause when it was passed in 1963:

As it is the intention of the legislature to occupy the whole field of regulations encompassed by the provisions of this part, the regulations by law of discrimination in housing contained in this part shall be exclusive, of all other laws banning discrimination in housing by any city, city and county, county, or other political subdivision of the State. Nothing contained in this part shall be construed to, in any manner or way, limit or restrict the application of section 51 of the Civil Code.<sup>5</sup>

In 1980, the Legislature combined the Rumford Fair Housing Act and the Fair Employment Practices Act to create the FEHA.<sup>6</sup> By that time, the Fair Employment Practices Act's

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<sup>3</sup> The other being the Rumford Fair Housing Act of 1963.

<sup>4</sup> Cal. Labor Code § 1431 (Deering 1950).

<sup>5</sup> Rumford Fair Housing Act of 1963, ch. 1853, § 2, *amended by* ch. 992, § 1, 1977 Stat.; *repealed by* ch. 992, § 8, 1980 Stat. 3166. Section 51 of the Civil Code is the Unruh Act, which prohibits discrimination in all business establishments in California.

<sup>6</sup> Stats. 1980, ch. 992.

preemption clause had already been amended to match up more closely to the Rumford Act, stating that:

While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.<sup>7</sup>

This provision has carried through without interruption into the present language of the Act. The language of the FEHA currently states that:

While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, nothing contained in this part shall be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code.<sup>8</sup>

Although preemption of local enforcement is thus not new to the FEHA, the legislative record is silent regarding the rationale for such preemption. The Legislature's intent in preempting local employment ordinances has thus not been considered in drafting these recommendations.

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<sup>7</sup> Stats. 1978, ch. 1254, § 19, pp. 4077-4078.

<sup>8</sup> Gov't Code 12993(c).



## C. OPTIONS FOR LOCAL ENFORCEMENT

If the Legislature were to lift the preemption provision of the FEHA, local jurisdictions would have several options: (1) They could do nothing at all; (2) they could enforce only state law; (3) they could promulgate and enforce local law, or; (4) they could enforce state and local law. This report discusses the second/fourth and third options below.

As a prelude to this discussion, DFEH notes there is nothing in federal law that would prevent California cities, counties, or towns from serving as FEPAs; they are currently prevented from doing so only because of the state preemption provision. In order to become FEPAs, these local jurisdictions would enter into their own work-sharing agreements with the EEOC, setting forth the FEPAs' agreement to accept, investigate, and resolve charges, and detailing the respective responsibilities of the FEPAs and the EEOC. A model work-sharing agreement is available here, [https://www.eeoc.gov/employees/fepa\\_wsa\\_2012.cfm](https://www.eeoc.gov/employees/fepa_wsa_2012.cfm), and is also appended to this document. The most relevant provisions for purposes of this report are that:

- The FEPA and the EEOC must designate each other as agents for receiving and drafting charges, and allow for transfer of charges between the agencies;
- The FEPA must agree to accept all charges within the mutual jurisdiction of it and the EEOC; and
- The FEPA generally agrees to resolve a charge for which it has begun an investigation.
- The FEPA must report to the EEOC on a contracted schedule.

Local jurisdictions would not need to be FEPAs in order to enforce California's Fair Employment and Housing Act or their own local laws. In the absence of a local jurisdiction being a FEPA however, an individual would have to directly file a claim with the EEOC to preserve their federal rights.

The working group has identified about 50 local jurisdictions around the country that are FEPAs, including such major cities as Baltimore, Philadelphia, New York, Miami and Seattle. The states within which each of these jurisdictions are located also have statewide FEPAs whose function is analogous to DFEH's in the employment discrimination context. These local FEPAs include the Maryland Commission on Human Relations; the Pennsylvania Commission on Human Relations; the New York State Division of Human Rights; the Florida Commission on Human Relations; and the Washington State Human Relations Commission.

None of the aforementioned local FEPAs enforce state law. Instead, the local FEPAs are charged with enforcing local laws, which overlap to some extent with state antidiscrimination provisions. For example:

- [Baltimore](#) enforces part of the Baltimore City Code, not Maryland law.
- [Philadelphia](#) only enforces the Philadelphia Code, not Pennsylvania law.

- [New York City](#) only enforces City law, not state law.
- The [Miami-Dade County Commission on Human Rights](#) only enforces “Chapter 11A of the Miami-Dade County Code,” although it also “counsels employees and applicants concerning their right to file discrimination complaints based on federal anti-discrimination laws with the U.S. Equal Employment Opportunity Commission, and complaints based on Florida anti-discrimination statutes with the Florida Commission on Human Relations.”
- [Seattle](#) enforces the Seattle Municipal Code, not Washington law.

The working group has not identified any model under which a local jurisdiction directly enforces a state law.

## 1. ENFORCEMENT OF STATE LAW

This section explores both the practical and technical aspects of local jurisdictions enforcing the FEHA.

In DFEH’s assessment, the FEHA and its implementing regulations provide a body of antidiscrimination law, which, if trained, local jurisdiction attorneys and investigators could follow as capably as does DFEH in its enforcement.

Substantive regulations to the FEHA are currently promulgated by the Fair Employment and Housing Council, an independent regulatory body housed within DFEH. DFEH would recommend that the regulatory process remain centralized and that local jurisdictions not be given authority to issue substantive regulations regarding the FEHA. Allowing local jurisdictions to issue such regulations could result in frequent regulatory conflicts, could make public participation more difficult, and would create logistical challenges to the extent different rulemaking bodies were simultaneously regulating the same provisions.

While local enforcement is thus technically feasible, the more difficult questions concern how such enforcement would work as a practical matter.

Among the issues that **local jurisdictions** would need to resolve are:

- Whether they are equipped to become FEPAs, which means agreeing to accept all charges of employment discrimination that the federal government would also accept;
- Whether they have processes for receiving, investigating, and resolving complaints; and
- Whether they are equipped to represent litigants in civil court proceedings.

Among the issues that the **Legislature** would need to resolve are:

- Whether local agencies should be required to become FEPAs.
  - By becoming FEPAs local agencies would dual-file cases with the EEOC, thus preserving individuals’ rights to ultimately file civil suits in federal court.

- However, in the absence of a local agency being a FEPA, individuals who wished to preserve their federal rights could go directly to the EEOC to file any eligible claims.
- Whether local agencies, like DFEH, would lose the ability to prosecute cases where the investigation was not completed within one year of the intake form being filed. *See* Gov't Code 12965(b).
  - The Legislature could determine whether to have statutes of limitation for claims processing that apply across the board, or could, alternatively, provide local jurisdictions more or less time than DFEH has to investigate FEHA charges.
- Whether local agencies should be authorized to develop their own procedural regulations for handling complaints.
  - DFEH has developed procedural regulations that make sense given its own internal structures and the volume of cases it handles. These regulations could be adopted by local jurisdictions, but might not make sense in the context of different case volumes and types.
  - DFEH could feasibly share its intake forms with local jurisdictions, but local jurisdictions might wish to capture different or additional information than DFEH.
- Whether local agencies should be authorized to develop administrative hearing bodies.
  - Local jurisdictions may wish develop their own bodies of employment discrimination law in addition to the prohibitions of the FEHA (for instance, protection of additional classes). It would make some sense for local agencies to be able to prosecute both these independent legal prohibitions and FEHA violations through administrative hearings. However, there are important policy concerns that would result from allowing the creation of such bodies.
    - Californians in different regions would effectively be subject to different laws. For instance, a hypothetical City of Los Angeles Civil Rights Commission could interpret the same provision of the FEHA differently from a hypothetical San Francisco Civil Rights Commission. Nor can it be assumed that any city would interpret the FEHA in the same way that DFEH would.
    - Californians in different regions would have access to different procedures.
- Whether local agencies should be authorized to take FEHA cases to court.
  - Local agencies might wish to prosecute FEHA cases in court. However, this again would leave open the possibility to local agencies differently interpreting—and thus differently prosecuting—FEHA cases than DFEH would, even within the same jurisdiction.
- Whether local agencies should be authorized to issue right-to-sue notices.

- Administrative exhaustion by obtaining a right-to-sue notice from DFEH is legally required to file a state-court employment discrimination lawsuit. If local agencies are not authorized to issue right-to-sue notices, then complainants would need to come to DFEH to obtain right-to-sues.
- Alternatively, the Legislature could declare that exhaustion of administrative remedies is not required before an individual files a civil suit.
- Whether DFEH should be charged with training local agencies on the FEHA so that all agencies are working from uniform understanding regarding the law. This issue has clear budgetary implications.

## 2. DEVELOPMENT AND ENFORCEMENT OF LOCAL ANTIDISCRIMINATION LAWS

This section explores the technical and practical aspects of local jurisdictions promulgating and enforcing their own local civil rights laws. This option raises fewer policy concerns than permitting local jurisdictions to enforce the statewide FEHA.

As noted above, about 50 jurisdictions around the country already have and enforce some form of local antidiscrimination law or ordinance and operate as FEPAs. The major cities examined by the working group have local laws that overlap to a certain extent with state law, but also offer protection to additional classes beyond those protected by state law. New York City, for instance, protects against discrimination on the basis of caregiver status, which is not protected by New York State. Miami-Dade protects against gender-identity discrimination, a category not protected by Florida law. In these cities, the commissions function as administrative hearing bodies, and do not pursue cases in civil court.

Among the issues that **local jurisdictions** would need to resolve are:

- Whether they wish to pass local antidiscrimination ordinances (additional claims under local laws; separate from the FEHA);
- Whether they should become FEPAs, which means agreeing to accept all charges of employment discrimination that the federal government would also accept;
- Whether they have processes for receiving, investigating, and resolving complaints; and
- Whether they are equipped to establish administrative hearing bodies or otherwise enforce penalties for violation of their local laws.

## 3. RELATIONSHIP BETWEEN LOCAL ENFORCEMENT BODIES AND DFEH

In either scenario discussed above, one of the most difficult questions for the Legislature to resolve is the parameters of the relationship between DFEH and local agencies. Specifically, the Legislature must determine the consequences for local agencies, DFEH, and employers of

having multiple bodies that are statutorily capable of investigating acts of discrimination that are illegal under laws within the separate jurisdiction of each body (for example, an act of employment discrimination that is illegal under a hypothetical local law, state law, and federal law). The resolution of this question would have significant fiscal and administrative impacts. This section of the report is dedicated to exploring those issues, arranged by considering different possible enforcement structures. (As no similar issues would arise from local jurisdictions investigating violations that are within their sole jurisdiction—for example, a hypothetical local law preventing discrimination on the basis of body-piercing—those scenarios are not addressed).

#### a. DFEH and Local Agencies Operate Separately

In this scenario, DFEH and local agencies would operate separately in terms of their handling and processing of cases. Issues/questions that would result and need to be resolved are:

- Whether DFEH should investigate claims that are already being investigated at the local level.
  - If so, the issue of funding would need to be resolved. Because the EEOC will not pay two investigatory bodies for cases based on the same act of discrimination, a local-FEPA and DFEH would have to determine which body would file with the EEOC. This would have fiscal consequences for the body not federally-funded for its work.
  - Duplicative expenditure of resources might result.
  - Employers would face multiple investigations stemming from the same alleged conduct with potentially inconsistent outcomes.
- Whether local jurisdictions would be authorized or required to issue state court right-to-sue notices if an act of discrimination is also impermissible under state law, or whether complainants would need to come to DFEH in order to exhaust administrative remedies, and whether the timelines for doing so would need to be altered.
- If local agencies were not FEPAs, complainants would have to go directly to the EEOC for a federal right-to-sue notice.
- Fiscal Impact: DFEH would require funding to modify its case-management systems to track whether a case had already been filed at the local level.

#### b. Local Agencies Dual-File Cases with DFEH

In this scenario, local agencies would dual-file cases with DFEH in the same way that DFEH dual-files cases with the EEOC. Issues/questions that would result and need to be resolved are:

- Funding and FEPA Status. The EEOC only provides funding for cases investigated by FEPAs. It will only provide funding to the investigating body and will not fund two

bodies to investigate the same act of harm. The investigating FEPA is expected to dual-file directly with the EEOC, rather than using another FEPA as a conduit to dual-file. The purpose of the EEOC's work-sharing agreement is to avoid duplication of work; the intent is that only one body does the work.

- If a local agency were a FEPA, it would dual-file directly with the EEOC and be funded by the EEOC. It could separately dual-file with DFEH. The Legislature would have to consider and resolve what purpose and effect this dual-filing would have.
- If a local jurisdiction were *not* a FEPA, or were investigating a claim illegal under state and local, but not federal law, the Legislature would have to determine whether DFEH should fund that investigation.
- Right-to-sue notices and administrative exhaustion.
  - In a scenario where a local jurisdiction was a FEPA, it would dual-file with the EEOC, and the complainant would receive a federal right-to-sue directly from the EEOC. It could separately dual-file with DFEH to comply with state administrative exhaustion requirements. In this scenario, either DFEH or the local jurisdiction would need to issue the state right-to-sue, as the EEOC would not issue a state right-to-sue based upon a local claim. One option would be to establish a rule whereby the local agency investigation would satisfy FEHA's administrative exhaustion requirement, eliminating the need to separately file with DFEH in order to preserve the right to sue in court for state-law violations. In this scenario, the Legislature would need to examine the underlying statutes of limitations for claims alongside any time limitations on local enforcement. The Legislature would also need to examine whether and under what circumstances a local jurisdiction's forum becomes the exclusive forum for adjudicating rights under the FEHA.
  - If the local jurisdiction were not a FEPA, it could dual-file with DFEH and either DFEH or the local jurisdiction would need to issue the state right-to-sue. The complainant would then need to file separately with the EEOC to obtain a federal right-to-sue, as DFEH could not dual-file a charge with the EEOC that it is not investigating under current EEOC practice.
- Oversight.
  - In a scenario where a local jurisdiction was a FEPA, the EEOC would provide the same 15-day review to complainants and would require the same type of reporting that DFEH currently conducts, including twice-monthly reporting to the EEOC and production of documents to support each case closure. To be a FEPA, the local agency would also have to agree to accept all claims within its jurisdiction along with other contractual provisions.
  - The Legislature would need to determine the parameters of DFEH's oversight. Questions to be considered are:

- Whether DFEH should duplicate the EEOC's oversight in some way or provide oversight only in cases not dual-filed with the EEOC.
- Whether and in what circumstances DFEH would conduct any appellate review of local agency case closures, and a funding stream for such review (as DFEH could not be funded by the EEOC for such work).
- Whether and in what circumstances a case could otherwise be removed from a local jurisdiction to DFEH.
- Reporting requirements from local agencies to DFEH.
  - These might duplicate reporting from a local agency to the EEOC.
- Fiscal Impact: DFEH would require significantly increased funding to serve an equivalent role to the EEOC in the supervision of independent jurisdictions. DFEH would need to develop new case management tools to allow it to receive and track dual-filed cases and would need to develop a new staffing unit for purposes of tracking, reporting, and oversight of cases. DFEH's existing federal funding stream would decrease if local jurisdictions investigated cases that would otherwise have come to DFEH, which might or might not be offset by a decreased caseload (depending on whether DFEH was to serve as an appeals or oversight body, and the specifics of this relationship).

Whatever structure the Legislature might select, any system where cases are transferable between DFEH and a local jurisdiction after an investigation has already commenced could have significant fiscal impacts for the state. As explained above, the FEPA process requires that cases filed with DFEH, which are also within the jurisdiction of EEOC, are dual-filed with EEOC. Among other jurisdictional requirements, EEOC will only allow DFEH to dual-file cases where the date of harm was within 300 days of the dual-filing date. DFEH is provided with a certain amount of funding from EEOC for each such dual-filed case that it ultimately closes. As noted above, EEOC provides funding based on the number of cases closed and will not fund more than one entity for a case based upon the same facts.

This process would be impacted if complainants were allowed to file a complaint with a local jurisdiction and then later terminate the local agency process and bring the same complaint to DFEH, without sufficient time for DFEH to dual-file the case with the EEOC (or after the same case had already been dual-filed with EEOC by the local jurisdiction). While responsible for processing these complaints, DFEH would not be able to receive funding for them.

Even if complainants reached DFEH in a relatively timely fashion, and before dual-filing, DFEH would advise that a system where cases could be removed from local jurisdictions after an investigation has commenced could result in a redundant expenditure of resources and might

result in employers and witnesses being interviewed and having to produce documents multiple times related to the same facts.

However, the Legislature could address these concerns by limiting “forum shopping,” or the ability of parties to transfer cases in investigation from one enforcement agency to another. Some of these concerns could also be addressed by workshare agreements between DFEH and local jurisdictions. Any enforcement model that permits or requires local agencies to dual-file with DFEH will have a fiscal impact.



## D. OTHER POLICY CONSIDERATIONS ATTACHED TO LIFTING PREEMPTION

In addition to the issues discussed above, there are a few overarching considerations that the Legislature might wish to take into account in any discussion about lifting preemption of local enforcement.

- **Precedential Value of Administrative Decisions:** Would local administrative decisions carry weight if appealed to state court?
- **Californians Would Have Access to Different Remedies and Procedures:** Since not all jurisdictions are likely to pass antidiscrimination laws or enforce state law, local enforcement would provide some Californians with access to different procedures, and potentially access to greater remedies, than others.
- **Jurisdictional Disputes:** Under a local enforcement scheme, the Legislature may need to offer guidance about where cases should be brought as complainants and respondents are not always located in the same area (for instance, a company might be headquartered in San Diego, but employ a resident of Orange County; it is unclear what locality should assume jurisdiction of such a claim).
- **Statistics and Reporting:** DFEH currently serves as a centralized source of information on the types and numbers of discrimination complaints that are filed, as well as on the demographics of complainants. The Legislature could require local jurisdictions to report the same information DFEH reports.
- **Public Records:** Members of the public, the Legislature, and the media come to DFEH for information regarding complaints that have been filed with the agency, or broad statistics. Decentralizing the filing of state-law civil rights complaints would also decentralize the location of public records regarding such complaints.

## E. HOW COULD DFEH FACILITATE LOCAL ENFORCEMENT?

Under any modified enforcement scheme, DFEH would propose to continue its current program of outreach, education, and communication to the public.

DFEH, because it serves all Californians, would propose that it still serve as a central source of information about the Fair Employment and Housing Act, including by issuing any statewide statutorily-mandated workplace posters, public education materials, and sample forms. DFEH also is well-positioned to continue its routine involvement in outreach events (speaking engagements, Fair Housing Month events, etc.).

DFEH could also develop materials educating the public about the availability of local enforcement and providing broad-swath information about any differences the public might encounter between local enforcement processes and DFEH.

With appropriate funding, DFEH could also provide technical advice to local jurisdictions as they establish their own processes.

## CONCLUSION

As is clear from the discussion above, there are a variety of ways that preemption could be lifted, each of which will have its own subsequent implications for the enforcement of civil rights law. DFEH and the advisory group urge that any legislative effort aimed at lifting preemption pay close attention to the current structure of civil rights enforcement; to the EEOC's FEPA process; and to the other fiscal and procedural matters raised in this report.

DFEH appreciates the opportunity to provide this report and recommendations regarding allowing local enforcement of the employment provisions of the FEHA. For any questions, please contact Director Kevin Kish at 213-337-4453 or [kevin.kish@dfeh.ca.gov](mailto:kevin.kish@dfeh.ca.gov).

# APPENDIX: EEOC MODEL WORK-SHARING AGREEMENT

FY 2012 EEOC/FEPA MODEL WORKSHARING AGREEMENT WORKSHARING AGREEMENT

BETWEEN

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and  
THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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FOR FISCAL YEAR 2012

## I. INTRODUCTION

1. The (full name of FEPA), hereinafter referred to as the FEPA, has jurisdiction over allegations of employment discrimination filed against employers of (numbers) or more employees occurring within (geographic boundary) based on (list all bases including those for disability, as appropriate,) pursuant to (list all relevant statutes including those for disability, as appropriate) ...

The U.S. Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, has jurisdiction over allegations of employment discrimination occurring throughout the United States where such charges are based on race, color, religion, sex, or national origin, all pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)) (hereinafter referred to as Title VII). The EEOC has jurisdiction to investigate and determine charges of discrimination based on age (40 or older) under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621 et. seq.) (ADEA), for unequal wages based on sex under the Equal Pay Act of 1963, as amended (29 U.S.C. § 206) (EPA), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. § 12101) (ADA), and over the use or acquisition of genetic information as the basis for employment decisions pursuant to Title II of the Genetic Information Nondiscrimination Act of 2008.

- B. In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement, which is designed to provide individuals with an efficient

procedure for obtaining redress for their grievances under appropriate (indicate city, state, etc.) and Federal laws.

## II. FILING OF CHARGES OF DISCRIMINATION

- A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706 (c) and (e) (1) of Title VII. This delegation of authority to receive charges does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge. Charges can be transferred from one agency to another in accordance with the terms of this agreement or by other mutual agreement.
- B. The FEPA shall take all charges alleging a violation of Title VII, the ADEA, the EPA, GINA or the ADA where both the FEPA and the EEOC have mutual jurisdiction, or where the EEOC only has jurisdiction, so long as the allegations meet the minimum requirements of those Acts, and for charges specified in Section III. A. 1. below, refer them to the EEOC for initial processing.
- C. Each Agency will inform individuals of their rights to file charges directly with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of both agencies to the extent of their common jurisdiction.

Normally, once an agency begins an investigation, it resolves the charge. Charges may be transferred between the EEOC and the FEPA within the framework of a mutually agreeable system. Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III (DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES).

- D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, an employment discrimination charge form which within statutory limitations, is acceptable in form and content to the EEOC and the FEPA) to draft charges. When a charge is taken based on disability, the nature of the disability shall not be disclosed on the face of the charge. *(If applicable state statute or local ordinance requires such disclosures, this sentence may be deleted.)*

*(More specific instructions depending on District Office/FEPA procedures should also be included here.)*

- E. Within ten calendar days of receipt, each Agency agrees that it will notify both the Charging Party and the Respondent of the dual-filed nature of each such charge it receives for initial

processing and explain the rights and responsibilities of the parties under the applicable Federal, State, or Local statutes.

### III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

In recognition of the statutory authority granted to the FEPA by Section 706(c) and 706(d) of Title VII as amended; and by Title I of the Americans with Disabilities Act, and the transmittal of charges of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving charges between the FEPA and the EEOC will be divided as follows:

A. The EEOC and the FEPA will process all Title VII, ADA, GINA, and ADEA charges that they originally receive.

1. For charges originally received by the EEOC and/or to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

In addition, the EEOC will initially process the following charges:

-- All Title VII, ADA, and concurrent Title VII/ADA charges jurisdictional with the FEPA and received by the FEPA 240 days or more after the date of violation;

-- All disability-based charges that may not be resolved by the FEPA in a manner consistent with the ADA.

-- All concurrent Title VII/EPA charges;

-- All charges against the FEPA or its parent organization where such parent organization exercises direct or indirect control over the charge decision-making process;

-- All charges filed by EEOC Commissioners;

-- Charges also covered by the Immigration Reform and Control Act;

-- Complaints referred to the EEOC by the U.S. Department of Justice, Office of Federal Contract Compliance Programs, or Federal fund-granting agencies under 29 CFR § 1640, 1641, and 1691.

-- Any charge where the EEOC is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

-- Any charge alleging retaliation for filing a charge with the EEOC or for cooperating with the EEOC; and

-- All charges against Respondents that are designated for initial processing by the EEOC in a supplementary memorandum to this Agreement.

-- **(Add additional provisions specific to District Office here)**

2. The FEPA will initially process the following types of charges:

-- Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

-- Any charge where the FEPA is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an on-going list of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

-- All charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered by the FEPA Ordinance, or where the EEOC is mandated by federal court decision or by internal administrative EEOC policy to dismiss the charge, but the FEPA can process that charge.

-- All charges against Respondents that are designated for initial processing by the FEPA in a supplementary memorandum to this Agreement; and

-- All disability-based charges against Respondents over which the EEOC does not have jurisdiction.

**(Add additional provisions specific to the FEPA here.)**

B. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge subject to agreement of the other agency. Such variations shall not be inconsistent with the objectives of this Worksharing Agreement or the Contracting Principles.

C. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list a copy of the new charge will be sent to the other Agency's litigation unit within working days.

#### IV. EXCHANGE OF INFORMATION

A. Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation

agreements, staffing information, case management printouts, charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract. The Agency accepting information agrees to comply with any confidentiality requirements imposed on the agency providing the information. With respect to all information obtained from the EEOC, the FEPA agrees to observe the confidentiality provisions of Title VII, the ADEA, the ADA and GINA.

- B. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

#### V. RESOLUTION OF CHARGES

- A. Both agencies will adhere to the procedures set out in the EEOC's State and Local Handbook, including current revisions thereto.
- B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the EEOC copies of all documents pertinent to conducting a substantial weight review; the evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements; including, but not limited to:
  - 1. jurisdictional requirements,
  - 2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,
  - 3. relief, if appropriate,
  - 4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders after public hearing or consent orders to which the FEPA is a party.
- C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive and administrative requirements as stipulated in the Contracting Principles.
- D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable State and Local statutes.

#### VI. IMPLEMENTATION OF THE WORKSHARING AGREEMENT

- A. Each agency will designate a person as liaison official for the other agency to contact concerning the day-to-day implementation for the Agreement. The liaison for the FEPA will be (name of person). The liaison official for the EEOC will be (name of person).



B. The agencies will monitor the allocation of charge-processing responsibilities as set forth in the Agreement. Where it appears that the overall projection appears inappropriate, the appropriate portions of this Agreement will be modified to ensure full utilization of the investigation and resolution capacities of the FEPA and rapid redress for allegations of unlawful employment discrimination.

C. The EEOC will provide original forms to be copied by the FEPA, in accordance with the Regulations and the Compliance Manual to be used by the FEPAs in correspondence with Charging Parties and Respondents.

D. If a dispute regarding the implementation or application of this agreement cannot be resolved by the FEPA and District Office Director, the issues will be reduced to writing by both parties and forwarded to the Director of the Office of Field Programs for resolution.

E. This Agreement shall operate from the first day of October 2011 to the thirtieth day of September 2012 and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

Date \_\_\_\_\_, \_\_\_\_\_,  
District Director

U.S. Equal Employment Opportunity Commission  
\_\_\_\_\_ District Office

Date \_\_\_\_\_,

Title: \_\_\_\_\_

FEPA Name: \_\_\_\_\_