



Ensuring Equality for All Californians in the Workplace: The Case for Local Enforcement of Anti-Discrimination Laws

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Introduction

It has been more than 50 years since the Civil Rights Movement and the passage of Title VII of the Civil Rights Act of 1964, a landmark federal law that prohibits racial discrimination in the workplace. Yet despite decades of struggle, Blacks and other minorities continue to face discrimination in the workplace, perpetuating cycles of inequities that make it difficult to attain success. Whether working full-time or part-time, Black workers earn only three-quarters of what white workers earn. The wage gap is even more pronounced for Black women.¹ Furthermore, almost two in ten Black workers with higher degrees are still earning low wages.² These trends may be exacerbated in the coming years, as the Trump administration has already proposed divesting significant financial resources from civil rights enforcement, making rigorous state-level protections all the more critical.³

In California, the Fair Employment and Housing Act (FEHA) prohibits discrimination in the workplace based on immutable factors such as race, age, and disability. However, the Department of Fair Employment and Housing (DFEH), the agency responsible for enforcing the law, is underfunded, understaffed, and overburdened by the difficult task of being the first line of defense against both housing and workplace discrimination.

To make matters worse, under the FEHA, local governments are preempted from adopting laws that enforce the state's anti-discrimination protections.⁴ Individuals subjected to discrimination therefore often have no option but to quit or continue experiencing unjust treatment at the hands of their employer until the DFEH (or the courts) are able to intervene. Low-wage workers suffer disproportionately because they are unable to pursue costly and timely lawsuits against discriminatory employers.

Historically, federal authorities and states like California have at times been actively involved in the struggle for civil rights when local authorities refused to recognize and fully execute protections for Black people, women, and other minorities.⁵ In more recent years, the Obama administration implemented many progressive policies that reinforced civil rights protections, including expanding the hate crime statute to include offenses motivated by anti-gay bias and banning all federal contractors from discriminating on the basis of sexual orientation or gender identity.⁶

¹ *Ready to Work, Uprooting Inequality: Black Workers in Los Angeles County*, UCLA Labor Center, Los Angeles Black Worker Center, and UCLA Center for Research on Labor and Employment.

² *Id.* at 5.

³ See Robert Reich, *Trump's Budget is an Assault on Civil Rights*, Newsweek, May 31, 2017, at <http://www.newsweek.com/robert-reich-trumps-budget-assault-civil-rights-618153>.

⁴ *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 110 (2008) (explaining that FEHA "preempts only local laws."); see also *Citizens for Unif. Laws v. Cty. of Contra Costa*, 233 Cal. App. 3d 1468, 1475 (Ct. App. 1991) (The California legislature intended to preempt local, but not state law, in the field of employment and housing discrimination when it enacted FEHA).

⁵ See Margaret Burnham, *The Long Civil Rights Act and Criminal Justice*, 95 Bos. Univ. L. Rev. 687, 692-703 (2015), available at <http://www.bu.edu/bulawreview/files/2015/05/BURNHAM.pdf>.

⁶ David Cole, *Today's Turmoil In Race Relations May Be A Testament To The Progress His Administration Made*, The Nation, Dec. 8, 2016 at 1.

Furthermore, under the Obama administration, the Justice Department's Civil Rights Division conducted high-profile investigations of multiple police departments for systematic civil rights abuses.⁷ These investigations led to a significant increase in consent decrees, which in turn led to reform and continual oversight.⁸

Many of President Obama's initiatives, however, are now on the chopping block. President Trump has proposed several significant cuts to federal civil rights enforcement agencies, including the Department of Education's Office of Civil Rights, which will likely lead to fewer investigations into civil rights violations in our nation's schools.⁹ In addition, the Department of Justice plans to end court-enforced settlement agreements that were previously used to protect civil rights.¹⁰

Shrinking federal investment in civil rights enforcement comes at a time when state agencies are already overburdened by increased civil rights complaints, highlighting the importance of permitting local governments to play a role in enforcing anti-discrimination legislation. In California, estimates are that for every one million employees in the state, 1,000 or more discrimination complaints will be filed each year.¹¹ To put that in perspective, although the State currently receives 34% more employment discrimination complaints than in the 1980s, DFEH has 7% fewer staff members to process and rectify these complaints.¹²

In addition to this underfunded public enforcement of civil rights laws, judicial remedies are often out of reach for many Blacks and other minorities who lack the financial resources to vindicate their rights through court proceedings. Members of these groups often face hurdles, not only in securing effective representation and legal advice, but also in gathering the necessary information to successfully litigate their claims in a timely and effective manner.

Local municipalities could help fill these gaps. Although many local municipalities have some existing infrastructure and the willingness to help respond to employment discrimination complaints, they are unable to do so because FEHA preemption bars them from enforcing the law. But preventing local authorities from playing a role in responding to, mitigating, and preventing workplace discrimination further harms victims of discrimination, who already face uphill battles when seeking to enforce their rights in the courtroom or DFEH proceedings. In addition, as discussed in detail below, there is precedent for federal, state, and local governments co-enforcing workplace laws. A similar cooperative framework is needed to more effectively enforce employment discrimination laws in the workplace.

⁷ *Id.*

⁸ *Id.*

⁹ Juliet Elperin, Emma Brown, & Darryl Fears, *Trump Administration To Minimize Civil Rights Efforts In Agencies*, New York Times, May 29, 2009 at 1.

¹⁰ Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Rights Efforts Across Federal Government*, ProPublica, June 15, 2017 at 1, accessible at: <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

¹¹ Gary Blasi & Joseph W. Doherty, *California Employment Discrimination Law and its Enforcement: The Fair Employment and Housing Act*, UCLA-RAND Center for Law and Public Policy, at 11-12 (2010).

¹² *Id.* at 42-43.

Senate Bill 491 (SB 491) provides such an opportunity. The bill, which recently cleared the California Legislature and now awaits Governor Brown's signature, would—if signed into law—help to modernize employment discrimination provisions by clarifying the role that municipal governments can play in combating discriminatory conduct that occurs in their jurisdiction. As an initial step, SB 491 calls for the convening of a civil rights advisory group—composed of relevant DFEH representatives, community advocates, employers, and employees—to study the feasibility of authorizing local governments to help enforce antidiscrimination statutes. Studying the feasibility of local enforcement and clarifying the affirmative steps that local authorities may take to remedy civil rights violations in their jurisdictions will be critical in curbing unfair treatment at work. SB 491 is therefore a prudent and important first step in combating employment discrimination by engaging local governments.

Involving local authorities will also help strengthen existing mechanisms used to detect, prevent, and rectify employment discrimination. Since local authorities and interested organizations have closer ties to the employees and employers within their jurisdictions, they are ideally situated to respond to discriminatory conduct as it occurs. Involving local government not only offers marginalized communities more effective administrative remedies, but allows local authorities to implement preventative measures to mitigate the risk that discrimination may occur in the first place. Moreover, as local community based organizations (CBOs), such as worker centers, have played a more prominent role in helping vulnerable communities navigate the workplace, local authorities are natural partners with these CBOs to reach and empower victims of discrimination who have historically been disenfranchised.¹³

The paper proceeds as follows: Part I discusses the history of civil rights enforcement at the federal, state, and local levels of government. Part II outlines the challenges of relying on litigation to address employment discrimination on the job. Part III underscores the importance of involving local governments in the enforcement of civil rights. Lastly, Part IV offers recommendations to make this goal a reality.

I. A Historical Perspective: Federal Leadership on Civil Rights

Federal and state governments have a history of intervening when local governments infringe on the civil rights of Blacks and other minorities. After the Civil War, as the presence of the Ku Klux Klan increased, especially in state and local governments, the federal government passed laws to curb their impact on minorities. For example, the federal government passed several Ku Klux Klan acts that prohibited discrimination in various realms of public life, such as voter registration based on race, color, or previous condition of servitude.¹⁴ These acts resulted in direct federal intervention. For example, nine South Carolina counties were placed under martial law and thousands were arrested for failing to comply with federal law.¹⁵

¹³ Janice Fine, *Worker Centers: Organizing Communities at the Edge of a Dream*, Economic Policy Institute, Dec. 13, 2005, accessible at: <http://www.epi.org/publication/bp159/>; see also, Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407 (1995).

¹⁴ History, *Ku Klux Act passed by Congress*, accessible at: <http://www.history.com/this-day-in-history/ku-klux-act-passed-by-congress>.

¹⁵ *Id.*

Federal intervention became most prominent following the Supreme Court's decision in *Brown v. Board*,¹⁶ after which the federal government had to deploy troops to escort Black students into newly desegregated schools.¹⁷ Later, the Voting Rights Act of 1965 suspended the use of literacy tests and voter disqualification devices for five years.¹⁸ The Voting Rights Act also allowed for the U.S. attorney general to initiate proceedings against the use of poll taxes that discouraged Black people from voting.¹⁹

The Civil Rights Movement of the 1960s brought significant organizing among Black workers denied access to quality jobs. The Congress of Racial Equality (CORE) was created to challenge racial discrimination in the workplace in Northern cities.²⁰ The organization monitored the hiring and firing practices of employees and the threats of boycott to fight employment discrimination.²¹ CORE and other similar organizations helped to highlight the scope of the problem for the federal government. Congress passed Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, national origin, or sex and made it illegal to retaliate against those who sought relief.²² The Equal Employment Opportunity Commission (EEOC) was created to enforce non-discrimination laws in the nation's workplaces.²³ The following year, President Johnson's Executive Order 11246 created the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor to address discrimination by government contractors.²⁴

As this history indicates, the federal government has been a champion for civil rights when state and local governments refuse to enforce the rights of Black workers and other minority workers. Under the Trump administration, however, we are seeing the beginning of a reversal of federal involvement with civil rights enforcement.

II. The Difficulties of Using Courts to Confront Racism in the Workplace

Enforcing anti-discrimination laws at the local level becomes all the more important when considering how difficult it is to detect, litigate, and redress instances of discrimination in the workplace.

¹⁶ 347 U.S. 483 (1954).

¹⁷ Library of Congress, *The Aftermath: Brown v. Board at Fifty*, accessible at: <https://www.loc.gov/exhibits/brown/brown-aftermath.html>.

¹⁸ United States Dept. of Justice, *History of Federal Voting Rights Laws*, accessible at: <https://www.justice.gov/crt/history-federal-voting-rights-laws>.

¹⁹ *Id.*

²⁰ Jamie Brown, *CORE and the Fight Against Discrimination in 1960s*, Seattle Civil Rights and Labor History Project, Spring 2008, accessible at: http://depts.washington.edu/civilr/CORE_employerdis.htm.

²¹ *Id.*

²² Equal Opportunity Employment Commission, *U.S. Equal Employment Opportunity Commission*, accessible at: <https://www.eeoc.gov/eeoc/history/cra50th/index.cfm>.

²³ *Id.*

²⁴ *Id.* For more information on the history of antidiscrimination laws applicable to federal contractors, OFCCP's history of the topic is available online. *History of Executive Order 11246*, <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html>, last visited Sep. 24, 2017.

A. Subconscious Racism and Unintentional Acts of Discrimination

Discrimination and acts of intolerance are not just explicit and purposefully committed out in the open. In contemporary society, discrimination occurs in less overt, yet equally destructive ways that prevent people of color from attaining equality in the workplace. Discrimination has become masked by subjective prejudices that factor into various decision-making processes and shape how a person of color is treated. Specifically, decision-makers may not even be aware of their predisposition to discriminate because their actions are informed by implicit biases about members of other races.

Implicit biases are “unconscious beliefs or emotions that an individual associates with members of a given group such as African-Americans, the elderly, the disabled, or men. These biases are thought to be absorbed unconsciously from social norms and cultural images.”²⁵ Advancements in social science research have illuminated the ways in which societal norms and stereotypes about certain groups impact the subconscious, and, in turn, impact how people view and respond to others with different backgrounds. In other words, “an individual may have discriminatory attitudes or stereotypes toward a group without being conscious of these attitudes.”²⁶

In the employment context, implicit biases factor into employment decisions at many different stages. The phrase that “African-Americans have to be twice as good” is rooted in both lived experiences and empirical research.²⁷ Black workers are subjected to more scrutiny than their peers, which, in turn, leads to lower employment rates, pay, and overall employment outcomes and privileges among Black people.²⁸

Consider the following example. A study conducted in 2014 sampled fifty-three partners from twenty-two law firms who²⁹ were asked to evaluate an identical legal memorandum written by a hypothetical third-year associate. Researchers informed twenty-four partners that the memo was written by an African-American associate; the other twenty-nine partners were told that the memo was written by a Caucasian associate. Asked to score the memorandum on a scale from one to five, those who believed the writer to be Caucasian ranked it, on average, 4.1, while those who believed it to be written by an African-American ranked it, on average, 3.2.³⁰

The study also demonstrated that because of heightened scrutiny, small errors assumed to be made by the Black associate were likely to be criticized, while small mistakes assumed to be made by the white associate were ignored. Evaluators critiquing the memo written by the African-American associate tended to highlight the memo’s grammatical and spelling mistakes, while those same mistakes in the Caucasian associate’s memo went unnoticed. Moreover, the memo written by the

²⁵ Amelia Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Underwriting Discrimination*, 58 B.C. L. Rev. 809, 811 (2017).

²⁶ *Id.* at 815.

²⁷ *Id.* at 810.

²⁸ *Id.*

²⁹ *Id.*, citing Arin Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills 2*. Nextions White Paper Series (2014).

³⁰ Wirts, *Discriminatory Intent* at 809-810.

hypothetical African-American associate received substantively different qualitative comments than the memo written by the hypothetical Caucasian associate. “The African-American received feedback such as, ‘Can’t believe he went to NYU!’ and ‘needs a lot of work.’ The Caucasian received comments such as ‘generally good writer’ and ‘good analytical skills.’”³¹

The U.S. Supreme Court has recognized that anti-discrimination laws “tolerate no racial discrimination, subtle or otherwise.”³² Nonetheless, employers routinely make decisions about Black workers that are infected with discrimination—often in the form of implicit bias and greater scrutiny on minorities—which leads to the higher rates of unemployment among Black people.³³

Given the advancements in social science research and education discussed above, it is clear that Black people receive unequal treatment in the workplace, in ways that employers may not even intend or notice. Since discriminatory treatment may be rooted in implicit biases and prejudices that are hard to detect, yet harmful to an individual’s employment, rectifying this behavior goes beyond litigation under existing civil rights laws. Trainings and other outreach initiatives to employers aimed at identifying and preventing this type of discrimination from occurring in the first instance is important, and local authorities, working together with local community-based organizations, are crucial allies in this endeavor.

B. Hurdles and Uphill Battles in Court

It is imperative to involve local authorities in the fight against workplace discrimination because employees encounter numerous obstacles when using the courts to vindicate their rights. Litigation is costly, time-consuming, and often ill-suited for people who are seeking immediate relief or who lack the resources to invest in an expensive lawsuit. Litigation is a last resort, and is difficult to undertake when a worker wishes to stay employed, but is committed to protesting an adverse decision, such as failure to receive a promotion. To a large extent, the ability to afford an attorney, and an attorney’s willingness to take one’s case, dictates a plaintiff’s ability to bring their case to court. Compared to Caucasians, Black plaintiffs are only half as likely to be able to access an attorney to take their case.³⁴

In addition, employees in low-wage occupations are far less likely to secure representation. Scarce resources, a lack of familiarity with and access to the judicial process, and the potential loss of wages (or a job) due to court appointments, make judicial remedies even more unrealistic for low-wage workers.³⁵

³¹ *Id.* at 810.

³² *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

³³ Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, The Atlantic, Oct. 7, 2015, accessible at: <http://www.theatlantic.com/business/archive/2015/10/why-black-workers-really-do-need-to-be-twice-as-good/409276/>.

³⁴ *See Blasi, Enforcement* at 12, *supra*.

³⁵ *Id.*

1. The Complexity of Litigating Discrimination Claims

Even if individuals can afford to bring lawsuits against their employers, judicial enforcement is not always the ideal mechanism to obtain relief. While litigation provides an avenue for those who seek the formality of a court action and significant damages, others need access to a different mechanism for voicing their grievances, particularly those who are still employed, those who applied for, but did not obtain a job, and others who cannot endure the lengthy and costly litigation process.

Successfully litigating discrimination claims—of which there are two types—poses additional, substantive challenges. The touchstone of *disparate treatment* claims under both Title VII and the FEHA is the requirement that plaintiffs establish an entity’s “intent” to discriminate. To show intent, employees must present direct or circumstantial evidence proving that their protected class (i.e., race, religion, etc.) or characteristic was the “but-for” reason the employer acted in a certain manner.³⁶ The narrow judicial interpretation of discriminatory “intent” does not account for instances in which employers unintentionally act on subconscious prejudices or stereotypes in ways that are detrimental to Black people or other minorities. In defining discriminatory intent, California courts may “ignore the effects of both explicit and implicit attitudes and stereotypes,” meaning that they fail to consider how subconscious attitudes may negatively influence a supervisor’s behavior and ultimately lead to the adverse action.³⁷

Disparate impact claims, by contrast, allege that practices or policies have detrimental effects on certain groups as a whole and are correlated with their race, gender, or other protected characteristics.³⁸ Although employees do not need to show discriminatory intent in these cases, they do face the difficult burden of amassing substantial, objective statistical evidence clearly indicating that a policy or practice falls more heavily on their group.³⁹ Employees are not well positioned to gather the necessary statistical information and comparative data about an employer’s historical treatment of certain groups of people, as such information may not be subject to public disclosure, or may be exceedingly costly or time-consuming to assemble.⁴⁰

Thus, litigation is not an ideal mechanism for employees of modest means, for employees who wish to remain employed, or for employees who merely wish to file and resolve a grievance in a timely and less-costly manner. Moreover, navigating court proceedings does not guarantee that an employee will obtain relief in the end.

³⁶ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1484 (9th Cir. 1993) (“disparate treatment theory requires proof of discriminatory intent”); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000) (“Once that showing has been made, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. The burden of persuasion, however, remains at all times with the plaintiff.”)

³⁷ Blasi, *Enforcement* at 19, *supra*.

³⁸ See e.g., *Stout v. Potter*, 276 F.3d 1118, 1121 (9th Cir. 2002) (“A plaintiff establishes a prima facie case of disparate impact by showing a significant disparate impact on a protected class caused by a specific, identified, employment practice or selection criterion.”)

³⁹ See, e.g., *Connecticut v. Teal*, 457 U.S. 440 (1982).

⁴⁰ See, e.g., Carla Rozycki & Emma Sullivan, *Employees Bringing Disparate-Impact Claims*. 26 ABA J. Lab. & Emp. L. 1 (2010).

III. The Role of Local Governments in Enforcing Anti-Discrimination Laws

A. Local Entities Can Provide an Alternative Avenue to Identifying and Redressing Civil Rights Violations

Given the complexities of litigating anti-discrimination claims and the inadequacy of existing public and private enforcement of civil rights laws, it is essential that workers have another avenue to protect their rights. The total individual charges for workplace discrimination claims filed with the EEOC averaged more than 94,000 annually over the last eight years.⁴¹ Meanwhile, the California DFEH received 17,915 complaints in 2015 alone,⁴² the overwhelming majority of which (16,285) alleged employment discrimination.⁴³ Of those nearly 18,000 total complaints, the agency settled just over 1,000 and referred just 130 for litigation.⁴⁴

Investigator caseloads in DFEH have increased from an average of 138 to 203 between 2011 and 2014.⁴⁵ High caseloads are a contributing factor in ongoing difficulties in closing cases in a timely fashion.⁴⁶ In 2015, more than 1,500 inquiries were awaiting contact from the DFEH.⁴⁷ These long delays led to a less robust investigation where pertinent information or witnesses may no longer have been available.⁴⁸ Furthermore, while DFEH has stated that many of its cases are appropriate for site visits, large caseloads have slammed the brakes on site visits involving employment complaints.⁴⁹

At the federal level, the Trump administration's proposed budget called for eliminating 249 full-time staff positions at the EEOC as compared to FY 2016 staffing.⁵⁰ The Trump administration also proposes significant budget cuts to the Department of Education's Office of Civil Rights, which investigates complaints of discrimination in school districts.⁵¹ Administration officials have stated that they will lower the number of investigations due to budget cuts.⁵² As a part of this new approach, the Department of Education will not require civil rights investigators to collect three

⁴¹ *EEOC Charge Statistics*, accessible at: <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (averaging FY 2009-2016 charge data).

⁴² Department of Fair Employment and Housing, *2015 Annual Report*, accessible at: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-2015AnnualReport.pdf>

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 4.

⁴⁵ Department of Fair Employment and Housing, *Report to the Joint Legislative Budget Committee*, accessible at: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-AnnualReport-2011-2014.pdf>

⁴⁶ *Id.*

⁴⁷ Department of Fair Employment Housing, *Budget Change Proposal* at 3, accessible at: http://web1a.esd.dof.ca.gov/Documents/bcp/1617/FY1617_ORG1700_BCP381.pdf

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Center for American Progress, *The Trump Budget Neglects Basic Protections and Funds a Deportation Force Instead*, May 29, 2017, accessible at

<https://www.americanprogress.org/issues/economy/news/2017/05/23/432848/trump-budget-neglects-basic-protections-funds-deportation-force-instead/>

⁵¹ *Id.*

⁵² *Id.*

years of complaint data from specific schools or districts to thoroughly assess systemic compliance with civil rights laws.⁵³

In a similar vein, the Department of Justice is ending court-enforced settlement agreements that were previously used for “[protecting] civil rights, desegregating school systems, reforming police departments, ensuring access for the disabled, and defending the religious.”⁵⁴ In addition, Attorney General Jeff Sessions ordered a sweeping review of all consent decrees involving troubled police departments nationwide.

Local entities can play a critical role in alleviating these enforcement gaps. First, local entities can be an additional line of defense against instances of discriminatory treatment when they initially occur. Just as importantly, local investigation and involvement may help diminish the fear of retaliation that prevents some employees from coming forward to oppose discriminatory treatment in the first place. Local entities can partner with local CBOs, which have ties to workers in specific industries and sectors, as well as roots in certain racial or ethnic communities, to better leverage existing resources and develop relationships with workers and communities. In particular, partnering with local CBOs can improve the success and impact of conducting outreach and education, the detection and reporting of violations, and the identification of high-violation industries and employers for proactive investigations and trainings.

Local agencies may also be better suited to address discrimination even before it occurs. The DFEH is not only responsible for enforcing laws but educating workers and employers about their rights and responsibilities. Currently, the DFEH offers trainings and webinars on FEHA’s provisions. However, local agencies can offer trainings not only on the law but on implicit bias and anti-discrimination. These implicit bias and anti-discrimination trainings could go a significant way towards facilitating awareness about these systemic issues.

Moreover, federal anti-discrimination law envisioned that local or municipal governments would help to enforce the law by investigating discrimination complaints.⁵⁵ Section 706 of Title VII of the Civil Rights Act of 1974 requires that plaintiffs first initiate complaints with state or local employment agencies in the jurisdiction where the discrimination occurred before filing a complaint with the EEOC.⁵⁶ Federal anti-discrimination statutes, including Title VII and the Americans with Disabilities Act, allow the EEOC to enter into “work-share” agreements and relinquish “investigative and adjudicative responsibilities to the state or local agency.” Indeed, California maintains a work-share agreement with the federal government, in which the DFEH and the EEOC partner to provide individuals with “an efficient procedure for obtaining redress for their

⁵³ Jessica Huseman and Annie Waldman, *Trump Administration Quietly Rolls Back Rights Efforts Across Federal Government*, accessible at: <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>

⁵⁴ *Id.*

⁵⁵ Chad Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference*. 31 U. Mich. J.L. Ref. 777, 781 (1998).

⁵⁶ 42 U.S.C.A. § 2000e-5

grievances under appropriate State and Federal laws.”⁵⁷ For example, under the terms of the agreement, the DFEH has the right to initially process employment discrimination claims covered both by FEHA and Title VII and other federal laws. The DFEH’s findings and orders pertaining to those claims are accorded “substantial weight” by the EEOC, provided all relevant background information is provided to the agency. To date, there is no analog that exists between California and local entities that formally shares FEHA enforcement responsibilities, even as certain cities—like San Francisco and San Diego—do help to investigate and mediate employment discrimination claims.

B. The Rising Power of Local Governments: Growing Workforce Regulation and Enforcement

Localities across the country are passing a range of workplace laws—from local minimum wage ordinances, to paid sick day laws, to “ban-the-box” policies prohibiting employers from asking job applicants about their criminal history. The infrastructure and policies that localities are adopting to implement and enforce these laws is instructive in demonstrating how localities can effectively enforce workplace regulations.

The City of San Francisco is a good example of how localities can work to complement state and federal enforcement of workplace laws. While the California Division of Labor Standards Enforcement is responsible for investigating and resolving state wage theft complaints, the City’s minimum wage law, passed in 2003, is currently enforced by a local Office of Labor Standards Enforcement (OLSE).⁵⁸ The City of San Francisco Office of Labor Standards Enforcement works with city agencies to enforce wage theft law, including having the Department of Public Health revoke permits from businesses that violate wage law,⁵⁹ and its Office of Small Business counsels small business owners on wage and hour laws.⁶⁰ The City’s Office of Treasurer and Tax Collector coordinates with OLSE to collect from employers that violate the wage theft ordinance.⁶¹

Importantly, OLSE works in strong partnership with local worker centers and community organizations to help in its enforcement efforts. OLSE created the Workers’ Rights Community Collaborative (WRCC), a collaborative of six worker centers and community-based organizations that focused on education and outreach to workers and businesses about the city’s minimum wage law. In FY 2014-2015, OLSE secured \$4,527,748 in back wages and interest for workers, with 85% of the complaint filed with OLSE coming from WRCC members.⁶² The success of San Francisco’s model has prompted other localities, including Seattle and Los Angeles, to adopt similar models.⁶³

⁵⁷ A copy of the work-share agreement can be found here: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/WorksharingAgreementFFY2016Modified.pdf?la=en>

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Data on file with author.

⁶³ Tia Koonse, Miranda Dietz, & Annette Bernhardt, “Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships.” UCLA Center for Labor Research and Education and UC Berkeley Center for Labor Research and Education. October 2015.

In the civil rights field, the City of San Francisco has a Human Rights Commission which investigates and mediates discrimination complaints and resolves community disputes involving individual or systemic discrimination.⁶⁴ Similarly, the city of San Diego has a Human Relations Commission that is responsible for investigating, resolving, or referring citizens' complaints of discrimination.⁶⁵ The City of Los Angeles has taken several strides in updating and enforcing existing labor laws against formerly incarcerated residents.⁶⁶ However, given FEHA's preemptive power, these cities have limited authority and cannot regulate or enforce provisions of the law.

Moreover, should California consider expanding involvement of local governments in the enforcement of antidiscrimination law, there are existing models to learn from. Indeed, several cities—including New York City, Chicago, and Seattle have local civil rights agencies. For example, the New York City Commission on Human Rights enforces the city's Human Rights Law and can resolve cases that could have been filed under federal law at the EEOC.⁶⁷ Chicago's Commission on Human Relations is empowered to "enter into intergovernmental agreements with... State of Illinois and United States governmental entities which administer and enforce laws similar to the Chicago Human Rights Ordinance and the Chicago Fair Housing Ordinance, for the purpose of more efficiently and effectively carrying out the goals of those ordinances."⁶⁸ In Seattle, state courts long ago determined that the city's fair chance ordinance was a valid exercise of power and not preempted by the state's anti-discrimination laws, clearing the way for robust local action.⁶⁹

Moreover, more than 150 cities and counties nationwide, including local California municipalities, have adopted "ban the box" resolutions that prohibit workplace discrimination against formerly incarcerated residents.⁷⁰ With respect to local enforcement of these fair chances ordinances, employer violations in San Francisco and Los Angeles can result in fines and agency-led investigations or civil actions.⁷¹

⁶⁴ San Francisco Human Rights Commission, *Discrimination Complaints and Mediation Division Overview*, accessible at: <http://sf-hrc.org/>.

⁶⁵ City of San Francisco Human Relations Commission, *Human Relations Commission Duties*, accessible at: <https://www.sandiego.gov/city-clerk/boards-commissions/hr>.

⁶⁶ Beth Avery, *Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies*, NELP, June 5, 2017, accessible at: <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

⁶⁷ NYC Commission on Human Rights, 2016 Annual Report, accessible at: <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/AnnualReport2016FINAL.pdf>

⁶⁸ City of Chicago, Commission on Human Relations, accessible at: <https://www.cityofchicago.org/content/dam/city/depts/cchr/AdjSupportingInfo/AdjFORMS/2016AdjForms/2016OrdinanceBooklet.pdf>

⁶⁹ Seattle Fair Chance Ordinance, accessible at: https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.04FAEMPR_SUBCHAPTER_IGEPR_14.04.020DEPO

⁷⁰ Beth Avery, *Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies*, NELP, June 5, 2017, accessible at: <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.

⁷¹ Copies of the ordinances can be found here: http://clkrep.lacity.org/onlinedocs/2014/14-0746_ORD_184652_12-9-16.pdf, <http://sfgov.org/olse/sites/default/files/FileCenter/Documents/12136-FCO%20FAQs%20Final.pdf>

IV. Recommendations

1. Remove Preemption and Allow Local Agencies to Enforce FEHA

We propose the California legislature adopt the following language in SB 491, “State civil rights legislation will not be construed, in any manner or way, to limit or restrict the application of Section 51 of the Civil Code, or to limit or restrict efforts by any city, city and county, county or other political subdivision of the state, to enforce state law prohibiting discrimination in employment.” Further, we propose that SB 491 authorize local governments to partner immediately with the DFEH to develop a corresponding complaint process, subject to recommendations developed by a civil rights advisory group convened by the agency and composed of Department representatives and civil employer and employee advocates.

If Governor Brown signs SB 491 into law, and DFEH is charged with forming an advisory group, we offer the following recommendations to consider that focus on the short-term after the entity is formed:

- *Emphasize Implicit Bias:* This work could include better understanding what the DFEH currently does to expose and address implicit bias, and determine what more can be done to educate employers, train investigators, and initiate targeted enforcement of this problem.
- *Learn from Other States:* Rather than recreate the wheel, it may be useful to the advisory group—particularly as they are developing recommendations—to better understand how and to what extent other jurisdictions have empowered local governments to help enforce anti-discriminations laws (Chicago, Boston, New York City, Seattle, etc.)
- *Putting Dollars Behind the Mandate:* Given that one of the threads of this report is that DFEH lacks financial resources to handle all of the complaints it receives, it may also be important to understand how local governments might raise revenue if they are no longer barred from taking enforcement action. This work could involve consideration of innovative funding models.
- *Run a Transparent & Diverse Community Engagement Process:* While the recommendations are not due until the end of December 2018, it may be helpful to release preliminary findings to the public and allow for public comment and hearings to discuss the issues further. As part of this work to include diverse stakeholders, and given the nature of this endeavor, it will be important to include communities of color and women. In addition, the advisory board process should allow for deep community engagement and input by taking into account meeting times and locations that fully accommodate community participants.
- *Provide Guidance to Localities:* SB 491 clarifies that, although FEHA occupies the field, local governments can nevertheless refer cases to the DFEH and assist people with the filing of complaints. To better facilitate this process, the advisory group may consider issuing some basic guidance to localities, so as to create some consistency in this process and help ensure that DFEH receives the information it needs to process the referrals.

2. Create Local Administrative Courts and Local Enforcement Tools to Resolve Complaints

We propose that local municipalities create local administrative courts to adjudicate workers’ complaints, similar to the administrative boards that adjudicate and resolve labor disputes.

Currently, in Washington, D.C., for instance, workers can choose to have their complaint adjudicated by an administrative law judge or resolved through mediation by the Office of Wage-Hour.⁷² The administrative law judge has the power to issue subpoenas, evaluate evidence and issue enforceable judgments.⁷³

We propose that the local administrative court could take other administrative action, including, but not limited to, providing notice of violation and an order that directs the non-compliant entity to come into compliance by a specified deadline. If after notice, the entity is still not in compliance, then the commission can issue an administrative citation and financial penalties. California cities could implement a similar process by which workers can choose to have their cases heard by an administrative law judge.

The local administrative court and the enforcement agency would have the ability to require offending employers to take implicit bias and anti-racism training. These trainings will help employers to take steps to remedy workers' grievances sooner. A recent study at Google showed that employees who went through an implicit bias training demonstrated increased awareness of unconscious bias and motivation to overcome it.⁷⁴ A 2012 study on implicit bias training conducted at the University of Wisconsin similarly concluded that participants who received the training showed dramatic reductions in implicit race bias.⁷⁵ In addition, implicit bias training has led to participants having increased concern about discrimination and awareness of personal biases over the duration of the study.⁷⁶

Similar administrative tools such as citations that carry penalties and license revocation have been used by cities in California to enforce wage-theft, child labor, and workers' compensation violations and may prove equally as useful in enforcing anti-discrimination violations.⁷⁷ Municipalities implemented these enforcement mechanisms after state mechanisms proved insufficient at holding unscrupulous employers accountable for wage-theft violations.⁷⁸ The threat of local intervention provides local entities with the leverage needed not only to hold employers accountable for their misconduct, but also incentivizes all employers to proactively comply with the law. Local enforcement also provides employees with a much needed administrative process not only to raise their grievances, but also to obtain adequate relief for their injuries.

In the same way that local intervention provides employees with an effective administrative process to rectify wage-theft violations more quickly, so too will local intervention for employment

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Google, *Learn About Google Workshop Experiment*, accessible at: <https://rework.withgoogle.com/guides/unbiasing-raise-awareness/steps/learn-about-Google-workshop-experiment/>

⁷⁵ Paul Meshanko, *Does Implicit Bias Training Really Work?*, October 26, 2016, accessible at: <http://legacycultures.com/does-implicit-bias-training-really-work/>

⁷⁶ *Id.*

⁷⁷ Tia Koonse, Miranda Dietz, & Annette Bernhardt, "Enforcing City Minimum Wage Laws in California: Best Practices and City-State Partnerships." UCLA Center for Labor Research and Education and UC Berkeley Center for Labor Research and Education. October 2015.

⁷⁸ *Id.* at 3-9.

discrimination claims provide employees with a much needed administrative process to rectify their grievances in a more timely fashion. Local enforcement will also provide workers with another avenue to obtain relief. Consider the story of Daniel Wimberly, a Black worker who filed a DFEH complaint alleging unfair treatment due to his race. Daniel was not paid for his breaks and not given equal opportunities to grow in his company. He also alleged that he was more severely punished compared to other non-Black workers for similar offenses. Daniel's inability to rectify his grievances in a timely fashion prevented him from obtaining the relief needed to fix the current discriminatory conduct and advance in his current position. Local enforcement would provide the adequate support for Black workers like Daniel who wish to address instances of workplace discrimination in a timely and effective manner in order to advance in his career and resume his life.

Conclusion

Convening an advisory group to study the feasibility of local enforcement is just the first step in fixing a widespread and systemic issue. To fully achieve equality in the workplace, it is imperative to modernize civil rights protections by allowing local authorities to play a larger role in preventing and responding to instances of discrimination. Local authorities are well-positioned to train, investigate, monitor, and resolve initial complaints because they have close ties to the geographical areas where the discriminatory conduct occurred. Since the judicial system often remains inaccessible to Black people and other minorities, allowing local intervention will provide a much-needed administrative process that will ultimately help to ensure that workers have access to effective and efficient means of recourse currently unavailable. Moreover, expanding the scope of local authorities will also mobilize local community groups and advocates to organize and form community workshare agreements around anti-discrimination.

The impact of these recommendations will be significant. Local enforcement will help to alleviate DFEH and EEOC's large caseloads and allow these agencies to use their resources more efficiently. Also, local enforcement agencies using an administrative process will free up court dockets. Moreover, an administrative process that incorporates training for both employers and employees will quickly resolve complaints and allow for works to build cooperative relationships at work. Therefore, lifting statewide preemption will lead to greater enforcement of workers' civil rights.