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AB-2662 Department of Fair Employment and Housing. (2021-2022)

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Assembly Bill No. 2662

CHAPTER 35

An act to amend Sections 12930, 12965, and 12981 of the Government Code, relating to discrimination.

[Approved by Governor June 21, 2022. Filed with Secretary of State June 21, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2662, Kalra. Department of Fair Employment and Housing.

Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing (DFEH) within the Business, Consumer Services, and Housing Agency, under the direction of the Director of Fair Employment and Housing, to enforce civil rights laws with respect to housing and employment and to protect and safeguard the right of all persons to obtain and hold employment without discrimination based on specified characteristics or status.

The FEHA makes certain discriminatory employment and housing practices unlawful, and authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a verified complaint with the DFEH. The FEHA requires the DFEH to make an investigation in connection with a filed complaint alleging facts sufficient to constitute a violation of the FEHA, and requires the DFEH to endeavor to eliminate the unlawful practice by conference, conciliation, and persuasion. With regard to unlawful employment practices, if conference, conciliation, mediation, or persuasion fails and the DFEH has required all parties to participate in a mandatory dispute resolution, as specified, the FEHA authorizes the director, in their discretion, to bring a civil action in the name of the DFEH on behalf of the person claiming to be aggrieved. With regard to housing discrimination, if conference, conciliation, mediation, or persuasion fails and the DFEH has required all parties to participate in a mandatory dispute resolution, as specified, the FEHA requires the director to bring a civil action in the name of the DFEH on behalf of the person claiming to be aggrieved.

This bill would provide that, by performing the functions and duties and exercising the powers set forth in the FEHA, the DFEH represents the interests of the state and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of the FEHA and that this statement is declarative of existing law as stated in specified case law. The bill would specify that the DFEH is acting in the public interest in bringing these civil actions.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

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

SECTION 1. Section 12930 of the Government Code is amended to read:

12930. The department shall have the following functions, duties, and powers:

(a) To establish and maintain a principal office and any other offices within the state as are necessary to carry out the purposes of this part.

(b) To meet and function at any place within the state.

(c) To appoint attorneys, investigators, conciliators, mediators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.

(e) To adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties of the department pursuant to this part.

(f) (1) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Chapter 6 (commencing with Section 12940).

(2) To receive, investigate, conciliate, mediate, and prosecute complaints alleging a violation of Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(3) To receive, investigate, conciliate, mediate, and prosecute complaints alleging, and to bring civil actions pursuant to Section 52.5 of the Civil Code for, a violation of Section 236.1 of the Penal Code. Damages awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the person harmed by the violation of Section 236.1 of the Penal Code. Costs and attorney's fees awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the department. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(4) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, except for complaints relating to educational equity brought under Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code and investigated pursuant to the procedures set forth in Subchapter 5.1 of Title 5 of the California Code of Regulations, and not otherwise within the jurisdiction of the department.

(5) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Section 1197.5 of the Labor Code. The department shall, in coordination with the Division of Labor Standards Enforcement within the Department of Industrial Relations, adopt procedures to ensure that the departments coordinate activities to enforce Section 1197.5 of the Labor Code.

(A) Nothing in this part prevents the director or the director's authorized representative, in that person's discretion, from making, signing, and filing a complaint pursuant to Section 12960 or 12961 alleging practices made unlawful under Section 11135.

(B) Remedies available to the department in conciliating, mediating, and prosecuting complaints alleging these practices are the same as those available to the department in conciliating, mediating, and prosecuting complaints alleging violations of Article 1 (commencing with Section 12940) of Chapter 6.

(g) In connection with any matter under investigation or in question before the department pursuant to a complaint filed under Section 12960, 12961, or 12980:

(1) To issue subpoenas to require the attendance and testimony of witnesses and the production of books, records, documents, and physical materials.

(2) To administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits.

(3) To issue written interrogatories.

(4) To request the production for inspection and copying of books, records, documents, and physical materials.

(5) To petition the superior courts to compel the appearance and testimony of witnesses, the production of books, records, documents, and physical materials, and the answering of interrogatories.

(h) To bring civil actions pursuant to Section 12965 or 12981 of this code, or Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42

U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601 et seq.), and to prosecute those civil actions before state and federal trial courts.

(i) To issue those publications and those results of investigations and research as in its judgment will tend to promote goodwill and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, gender, gender identity, gender expression, marital status, national origin, ancestry, familial status, disability, veteran or military status, genetic information, or sexual orientation.

(j) To investigate, approve, certify, decertify, monitor, and enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Section 12990.

(k) To render annually to the Governor and to the Legislature a written report of its activities and of its recommendations.

(l) To conduct mediations at any time after a complaint is filed pursuant to Section 12960, 12961, or 12980. The department may end mediation at any time.

(m) The following shall apply with respect to any accusation pending before the former Fair Employment and Housing Commission on or after January 1, 2013:

(1) If an accusation issued under former Section 12965 includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, or if an accusation is amended for the purpose of adding a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, with the consent of the party accused of engaging in unlawful practices, the department may withdraw an accusation and bring a civil action in superior court.

(2) If an accusation was issued under former Section 12981, with the consent of the aggrieved party filing the complaint, an aggrieved person on whose behalf a complaint is filed, or the party accused of engaging in unlawful practices, the department may withdraw the accusation and bring a civil action in superior court.

(3) Where removal to court is not feasible, the department shall retain the services of the Office of Administrative Hearings to adjudicate the administrative action pursuant to Sections 11370.3 and 11502.

(n) On a challenge, pursuant to Section 1094.5 of the Code of Civil Procedure, to a decision of the former Fair Employment and Housing Commission pending on or after January 1, 2013, the director or the director's designee shall consult with the Attorney General regarding the defense of that writ petition.

(o) By performing the functions and duties and exercising the powers set forth in this part, the department represents the interests of the state and effectuates the declared public policy of the state to protect and safeguard the rights and opportunities of all persons from unlawful discrimination and other violations of this part. This subdivision is declarative of existing law as stated in *Department of Fair Employment and Housing v. Cathy's Creations, Inc.* (2020) 54 Cal.App.5th 404, 410.

SEC. 2. Section 12965 of the Government Code is amended to read:

12965. (a) (1) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department, acting in the public interest, on behalf of the person claiming to be aggrieved.

(2) Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation.

(3) In a civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel.

(4) A civil action under this subdivision shall be brought in a county in which the department has an office, in a county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices, in the county of the defendant's residence or principal office, or, if the civil action includes class or group allegations on behalf of the department, in any county in the state.

(5) (A) A complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(B) For a complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(C) For a complaint other than those specified in subparagraphs (A) and (B), a civil action shall be brought, if at all, within one year after the filing of a complaint.

(D) The deadlines specified in subparagraphs (A), (B), and (C), shall be tolled during a mandatory or voluntary dispute resolution proceeding commencing on the date the department refers the case to its dispute resolution division and ending on the date the department's dispute resolution division closes its mediation record and returns the case to the division that referred it.

(b) For purposes of this section, filing a complaint means filing a verified complaint.

(c) (1) (A) Except as specified in subparagraph (B), if a civil action is not brought by the department pursuant to subdivision (a) within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought pursuant to subdivision (a), the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint.

(B) For a complaint treated as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to subdivision (b) of Section 12961, the department shall issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

(C) The notices specified in subparagraphs (A) and (B) shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice.

(D) This paragraph applies only to complaints alleging unlawful employment practices under Article 1 (commencing with Section 12940) of Chapter 6.

(2) A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice.

(3) The superior courts of the State of California shall have jurisdiction of actions brought pursuant to this section, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office.

(4) A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so.

(5) A civil action brought pursuant to this section shall not be filed as class actions and shall not be maintained as class actions by the person or persons claiming to be aggrieved if those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants.

(6) In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

(d) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (c), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars (\$25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(e) (1) Notwithstanding subdivision (c), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the department to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the department.

(B) The investigation of the charge is deferred by the department to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the department to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the department, whichever is later.

(3) This subdivision is intended to codify the holding in *Downs v. Department of Water and Power of City of Los Angeles* (1997) 58 Cal.App.4th 1093.

(f) (1) Notwithstanding subdivision (c), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the department, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the department.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the department, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the department, whichever is later.

SEC. 3. Section 12981 of the Government Code is amended to read:

12981. (a) (1) In the case of failure to eliminate a violation of Section 12955, 12955.1, or 12955.7 that has occurred, or is about to occur, through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director shall bring a civil action in the name of the department, acting in the public interest, on behalf of the aggrieved person as a real party in interest, notwithstanding Section 12971, in the same manner and with the same powers as provided in Section 12965, except that where the provisions of this article provide greater rights and remedies to an aggrieved person than Section 12965, the provisions of this article shall prevail.

(2) Prior to filing a civil action pursuant to paragraph (1), the department shall require all parties to participate in the department's mandatory dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation.

(3) A civil action brought pursuant to paragraph (1) shall be filed within 100 days after the filing of a complaint unless it is impracticable to do so. This deadline to file a civil action pursuant to paragraph (1) shall be tolled during a mandatory or voluntary dispute resolution proceeding commencing on the date the department refers the case to its dispute resolution division and ending on the date the department's dispute resolution division closes its mediation record and returns the case to the division that referred it.

(4) The civil action shall be filed in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to that practice are maintained and administered, or in the county in which the aggrieved person would have resided in the housing accommodation. If the defendant is not found within that county, the action may be filed in the county of the defendant's residence or principal office. Any aggrieved person may intervene as a matter of right in the proceeding, and the appeal or other judicial review of that proceeding.

(b) If the department determines that an allegation concerns the legality of any zoning or other land use law or ordinance, the department or the Attorney General shall take appropriate action with respect to the complaint according to the procedures established in this part for other complaints of housing discrimination.

(c) Within one year of the effective date of every final order or decision issued pursuant to this part, the department shall conduct a compliance review to determine whether the order or decision has been fully obeyed and implemented.

(d) Whenever the department has reasonable cause to believe that a respondent has breached a conciliation agreement signed by the department, the department shall initiate a civil action to enforce the agreement.