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**SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT**

**Senator Dave Cortese, Chair**

**2021 - 2022 Regular**

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**Bill No:** AB 105 **Hearing Date:** June 21, 2021  
**Author:** Holden  
**Version:** June 14, 2021  
**Urgency:** No **Fiscal:** Yes  
**Consultant:** Glenn Miles

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

**KEY ISSUE**

Should the Legislature transfer responsibility for the development and auditing of state civil service examinations and hiring procedures from the State Personnel Board (SPB) and from state departments and agencies (i.e., appointing authorities or powers) to the California Department of Human Resources (CalHR) to centralize and change merit based state civil service hiring procedures to increase hiring of self-identified members of underrepresented groups, as specified?

**ANALYSIS**

**Existing law:**

- 1) Creates the state civil service that includes every officer and employee of the State except a limited number of specified, exempted officers and employees. Existing law also requires that the state make “permanent appointment and promotion in the civil service under a general system based on merit ascertained by competitive examination.” Case law and custom refer to this provision as the merit principle and it governs the administration of the state’s civil service system. (CA CONST. art. VII, §1 and §4)
- 2) Creates the State Personnel Board (SPB) to enforce the civil service statutes and prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions. (CA CONST. art. VII, § 2 and §3)
- 3) Establishes the State Civil Service Act to facilitate the operation of the Constitution’s merit principle for the state civil service. (GC § 18500).
- 4) Creates the California Department of Human Resources (CalHR) and vests it with the powers, duties, and authorities necessary to operate the state civil service system pursuant to Article VII of the California Constitution, the Government Code, the merit principle, and applicable rules duly adopted by the State Personnel Board. (GC § 18502)
- 5) Authorizes CalHR to designate an appointing power to design, announce, or administer examinations for the establishment of employment lists as specified. Existing law also permits a designated appointing power to contract with CalHR or another designated appointing power for the purpose of designing, publicizing, or administering an examination. (GC § 18930.5)

- 6) Requires SPB to prescribe rules consistent with a merit based civil service system to govern appointments classifications, examinations, probationary periods, disciplinary actions, and other matters related to SPB's authority under Article VII of the California Constitution. Existing law also authorizes SPB to conduct audits and investigations of the personnel practices of CalHR and appointing authorities to ensure compliance with civil service policies, procedures, and statutes. (GC § 18502)
- 7) Permits CalHR and SPB to delegate, share, or transfer between them responsibilities for programs within their respective jurisdictions pursuant to an agreement. (GC §18502)
- 8) Requires SPB to establish minimum qualifications for determining the fitness and qualifications of employees for each class of position. Existing law also authorizes CalHR to require applicants for examination or appointment to provide documentation as it deems necessary to establish the applicants' qualifications. (GC § 18931)
- 9) Requires all state appointing authorities to establish an effective program of upward mobility for employees in low-paying occupational groups. An upward mobility program is one in which the state develops and publishes career opportunities and provides assistance which will allow employees in low-paying occupations to develop and advance to their highest potential. (GC § 19400 and § 19401)
- 10) Requires all upward mobility programs to include annual goals that include the number of employees expected to progress from positions in low-paying occupational groups to entry-level technical, professional, and administrative positions, and the timeframe within which this progress shall occur. Existing law also makes CalHR responsible for approving each department's annual upward mobility goals and timetables. (GC § 19402)
- 11) Permits an appointing power, or its authorized representative, to take adverse action against an employee for one or more of causes for discipline as specified. (GC § 19574)
- 12) Requires CalHR to administer the state's Personnel Classification Plan, including the allocation of every position to the appropriate class in the classification plan, and allocate positions based on the positions' duties and responsibilities. CalHR must include positions in the same class based on the principle of shared criteria, as specified. (GC § 19818.6)
- 13) Prohibits the inclusion of any question relative to an applicant's race, sex, marital status, or religion in any application blank or form the state requires an applicant to complete and submit to any state department, board, commission, officer, agent, or employee. However, provides that subsequent to employment, the state may collect such data, as specified, for research and statistical purposes. (GC § 8310)
- 14) Requires state agencies that collect demographic data, either directly or by contract, regarding Californians' ancestry or ethnic origin to use separate collection categories and tabulations for each major Asian group and each major Pacific Islander group, as specified, and to include such categories in every such demographic report by state entities published or released on or after July 1, 2012. (GC § 8310.5)
- 15) Declares that it is the state's policy that the composition of state boards and commissions shall be broadly reflective of the public including ethnic minorities and women. (Government Code § 11140)

- 16) Requires the Governor and every other appointing authority to be responsible for nominating a variety of persons of different backgrounds abilities, interests, and opinions but clarifies that it is not the intent of the Legislature that they utilize formulas or specific ratios in complying with the policy. (GC § 11141)
- 17) Prohibits the State from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. (CA CONST., art. I, § 31)

**This bill:**

1. Abolishes the authority for designated appointing powers (i.e., state departments or agencies) to design, announce, or administer examinations for the establishment of employment lists or to contract with CalHR or another designated appointing power for the purpose of designing, publicizing, or administering an examination. Instead, this bill requires SPB to establish a process that includes diversity and best practices in each aspect of the design, announcement, and administration of examinations for the establishment of employment lists.
2. Eliminates SPB's authority to establish minimum qualifications (MQs) for determining the fitness and qualifications of employees for each class of position. Instead, this bill requires SPB, in conjunction with CalHR, to create "standards for statements of qualifications" used as state examination criteria.
3. Eliminates references to MQs that CalHR or appointing authorities are required to post in examination announcements and instead requires them to include "core competencies" and the "standard statement of qualifications, if applicable".
4. Defines "Core competencies" to mean the particular education, experience, knowledge, and abilities that each applicant is required to have in order to be considered eligible for a particular group of classifications.
5. Requires SPB to establish a process that includes diversity and best practices in each aspect of the design, announcement, and administration of examinations for the establishment of employment lists.
6. Requires CalHR or the appointing power to video record and otherwise electronically record examinations that have an oral examination component and maintain all other examination materials, including examination questions and any written material for each examination.
7. Transfers authority from SPB to CalHR to conduct audits and investigations of personnel practices *of CalHR itself* and appointing authorities to ensure compliance with civil service policies, procedures, and statutes.
8. Requires CalHR to oversee compliance with SPB's rules governing appointments, classifications, examinations, probationary periods, disciplinary actions, and other matters related to SPB's constitutional authority.

9. Requires CalHR to investigate complaints filed by the following: employees in a state department's equal employment opportunity program and personnel office; other civil service employees; applicants; and members of the public alleging violations of civil service laws. The bill also requires CalHR to report its findings to SPB for adjudication.
10. Requires CalHR to develop by July 1, 2022, "upward mobility goals" based on each department's workforce analysis and post the model goals on its internet website. This bill authorizes the model goals to include race, gender, LGBTQ as factors to the extent permissible under state and federal equal protection laws.
11. Requires CalHR or before July 1, 2022, to provide a copy of the model upward mobility goals and corresponding report outlining the workforce analysis used to develop such goals to each member of the Legislature.
12. Requires CalHR to oversee the hiring process for two consecutive fiscal years for an appointing authority that is unable to meet its annual upward mobility goals and timetables for two consecutive fiscal years and requires the appointing authority to reimburse CalHR for associated costs unless otherwise prohibited by law.
13. Requires each appointing power to provide CalHR no later than every April 1 a report detailing specified racial, ethnic, sexual orientation, and gender data of its adverse actions against employees and requires CalHR to include the data by every June 1 in its existing annual workforce analysis and census report and submit the report to the Legislature. However, an employee has discretion whether to provide the requested data or information elements regarding race, ethnicity, gender identity or sexual orientation for inclusion in the report and an appointing power may not require the employee to disclose this information.
14. Amends the criteria CalHR must use when allocating positions into the same class in the state's Personnel Classification Plan. The bill appears to make it easier for CalHR to put otherwise different positions into the same classification. For example, the bill eliminates narrow criteria related to positions needing to be sufficiently similar in respect to duties and responsibilities and instead replaces that with much broader criteria that the positions must share a similar objective, scope of job responsibility, and work conditions.
15. Requires state agencies that collect demographic data, either directly or by contract, regarding Californians' ancestry or ethnic origin to use separate collection categories and tabulations for the following and to include such categories in every such demographic report by state entities published or released on or after July 1, 2022:
  - a. African Americans who are descendants of persons enslaved in the United States; and
  - b. African Americans who are not descendants of persons enslaved in the United States, including , but not limited to, African Blacks, Caribbean Blacks, and other African Americans or Blacks, as specified,
16. Requires that on or after January 1, 2022, all state boards and commissions consisting of one or more volunteer members or commissioners shall have at least one volunteer board member or commissioner who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender. These diversity requirements shall only

apply as vacancies on state boards and commissions occur and only to a vacancy appointment by the Governor or the Governor's designees, the chair of a board or commission or the chair's designees, the Speaker of the Assembly, and the President pro Tempore of the Senate or Senate Rules Committee, or any combination thereof.

## **COMMENTS**

### **1. Need for this bill?**

According to the author,

(T)his proposal identifies and reforms processes that hinder upward mobility for people of color in the civil service system. Attention is given to the following four categories: exams, compliance, the appeals process, and annual parity goals for upward mobility.

Over the past few months, the Sacramento Bee has published a series of letters written on behalf of African American employees working at organizations such as the California Air Resources Board (CARB), our California prison system, and the Office of State Publishing. All of these instances have a common denominator; there are barriers to upward mobility and inclusion.

### **2. Committee Concerns and Recommended Amendments**

#### Proposition 209 Prohibition

The committee does not opine on whether the bill violates Proposition 209's constitutional prohibitions against discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. That analysis is beyond the committee's jurisdictional remit. It is perhaps more appropriately in the Judiciary Committee's ambit or that of the Senate as a whole. In any case, the question likely can only be answered by the courts.

#### Committee Concerns

While this bill's goal of increasing underrepresented groups in the state workforce is laudable, the bill makes the following changes that appear to conflict with or undermine the constitutional mandate that the state make permanent appointment and promotion to the civil service under a general system of merit ascertained by competitive examination.

- Redistributes oversight and decision authority from the State Personnel Board to CalHR;
- Centralizes the state's hiring process in CalHR by restricting state agencies and departments' authority related to developing examination and hiring processes;
- Eliminates minimum qualifications in examinations; and

- Alters the criteria for classifying positions to broaden classes, mix positions that are not alike, and potentially dilute requirements for certain technical positions by grouping them with more generalist positions.

The committee has traditionally opposed efforts to weaken the civil service and supported efforts to comply with the merit principle. Centralizing state hiring decisions under one authority that is subject to the political policies of one administration is counterproductive to the committee's efforts to be faithful to the constitution and protect the Progressive Era ideal that the civil service should not be a spoils system.

### Committee Amendments

Committee recommended amendments restore SPB's lead role as intended by the constitution, in various parts of the bill, although where appropriate, accepts the bill's changes that require CalHR to have more of a role than it might have under current law in which its authority is either discretionary or dependent on SPB cooperation.

Committee staff draw particular attention to the bill's transfer of audit authority from SPB to CalHR, thereby creating a system in which CalHR would be responsible for auditing itself.

The amendments also reverse changes to the appointing authorities' autonomy in developing examination and hiring processes that are otherwise compliant with state and federal law. Committee staff has several concerns ranging from separation of powers issues to creating bureaucratic gridlock and interference with departments' hiring flexibility just when they will need to react nimbly to changing employment environments from the pandemic and increased state employee retirements.

For similar reasons, committee staff is also cautious of the bill's provisions that CalHR take control of an agency's hiring process if the department fails to meet certain goals within two years. Instead, committee amendments hold the appointing authority accountable by forcing it to report why it fell short and require it to identify necessary resources to move forward. This path is more collaborative, avoids potential lawsuits, and minimizes unnecessary intrusions on Executive Branch authority.

Committee amendments also restore references to minimum qualifications. MQs are fundamental to protecting the examination system. Under court precedent, merit equals examination. You cannot have a merit system without a meaningful examination system. Arguably, examinations without MQs become meaningless exercises and open the state hiring process up to court challenges that could lead to less flexible processes than are currently available to promote diversity in state employment. While restoring MQs, the recommended amendments retain references to core competencies and the standard statement of qualifications. Committee staff believes CalHR can incorporate those concepts to provide flexibility and still leave MQs intact.

Finally, the amendments provide a technical definition of “volunteer” member or commissioner for the purposes of the bill requiring specified boards and commissions to have at least one volunteer member from an underrepresented community.

### 3. Proponent Arguments

The author states,

AB 105 calls for diversity on all state boards and commissions that have volunteers. The bill seeks to diversify the positions of volunteer board members and commissioners as vacancies occur.

Additionally, the bill requires that SPB establish a process that includes diversity and best practices in each aspect of the design, announcement, and administration of examinations for the establishment of employment lists.

### 4. Opponent Arguments:

According to Californians for Equal Rights,

California State Constitution Article I Section 31(a) was established by the passage of Proposition 209, or the California Civil Rights Initiative in 1996. It equivocally states: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” This principle was overwhelmingly reaffirmed on the November 2020 ballot when 57.2% of California voters rejected Proposition 16, which would have repealed Prop 209. Under the veneer of addressing “barriers to upward mobility and inclusion for people of color working in California’s civil services system”, AB 105 proposes setting up annual goals and timetables for civil service positions which will “include race and gender as factors”. This is tantamount to instituting government handouts and racial preferences, thereby violating the state constitution, stoking racial divisions, and legalizing racial discrimination in public employment.

**5. Double Referral:** This bill contains material that pertains to the jurisdiction of the Senate Judiciary Committee which will also consider the bill at its hearing.

### 6. Related Legislation:

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

Assembly Bill 313 (C. Garcia, 2021) would make changes relating to the Limited Exam and Appointment Program (LEAP) administered by CalHR. The bill is currently under consideration in the Senate Labor, Public Employment and Retirement Committee.

Resolution Chapter 23, Statutes of 2020 (Assembly Constitutional Amendment 5, Weber) proposed to amend the California Constitution by repealing Section 31 of Article I relating to the prohibition against discrimination or preferential treatment, among other provisions. This measure appeared on the November 2020 General Election ballot, but failed passage by California voters.

**SUPPORT**

None on file.

**OPPOSITION**

Californians for Equal Rights

**-- END --**