SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 238 (Melendez)
Version: April 6, 2021
Hearing Date: April 20, 2021
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Discrimination: political affiliation: political belief.

DIGEST

This bill: (1) makes it an unlawful employment practice for employers, unions, and other specified entities to discriminate against job applicants, trainees, and employees, among others, on the basis of political affiliation; (2) prevents employers from taking adverse action against an applicant or employee based on their political affiliation or association with a political organization; (3) prohibits business establishments from discriminating against customers based on their political affiliation or political beliefs.

EXECUTIVE SUMMARY

California's civil rights laws protect workers and consumers against discrimination on the basis of specified characteristics including race, religion, nationality, gender, religion, and sexual orientation, among others. Though existing California law provides other significant protections for workers against political coercion by their employers, currently, a worker's political viewpoint is not included among the protected categories in California's workplace civil rights law. Similarly, political viewpoint is not among the protected characteristics listed in the existing California laws that protect the civil rights of consumers. This bill would change that by adding the phrase "political affiliation" to the list of protected categories under California's workplace anti-discrimination laws and by listing "political affiliation" and "political belief" under the protected categories on the basis of which businesses cannot discriminate against consumers. Because the phrases "political affiliation" and "political belief" are undefined and susceptible to a wide variety of interpretations, it is uncertain exactly what impact the bill would have. The author asserts that the bill is intended to encourage "diversity of thought," but because there are policy rationales for at least some limitations on freedom of expression in workplaces and in private business establishments, the bill would likely have unintended and problematic consequences.

The bill is author-sponsored. Support is from a regional employers' advocacy group. There is no opposition on file.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits all business establishments of every kind whatsoever from arbitrarily discriminating against customers in the provision of accommodations, advantages, facilities, privileges, or services. (Civ. Code § 51; *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, cert. denied (1982) 459 U.S. 858.)

2) Prohibits employers from making, adopting, or enforcing any rule, regulation, or policy that either:
   (a) forbids or prevents employees from engaging or participating in politics or from becoming candidates for public office; or
   (b) controls or directs, or tends to control or direct the political activities or affiliations of employees. (Lab. Code § 1101.)

3) Prohibits employers from coercing or influencing or attempting to coerce or influence through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity. (Lab. Code § 1102.)

4) Makes a violation of (1) or (2), above, a misdemeanor, punishable by up to a year in prison and a fine of up to $1000 for an individual, or $5000 for a corporation. (Lab. Code § 1103.)

5) Directs the California Labor Commissioner to investigate a complaint from an employee or the employee's representative claiming that the employee has lost wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises. (Lab. Code § 96(k).)

6) Makes it, pursuant to the Fair Employment and Housing Act, an unlawful employment practice for an employer, a labor organization, or an apprenticeship training program, among others, to discriminate against anyone in hiring, firing, compensation, or in the terms, conditions, or privileges of employment on account of any of the following protected characteristics, whether actual or perceived:
   a) race;
   b) religious creed;
   c) color;
   d) national origin;
   e) ancestry;
   f) physical disability;
   g) mental disability;
   h) medical condition;

i) genetic information;
j) marital status;
k) sex;
l) gender;
m) gender identity;
n) gender expression;
o) age;
p) sexual orientation;
q) veteran status; or
r) military status. (Gov. Code § 12940.)

This bill:

1) Adds "political affiliation" to the list of protected characteristics on the basis of which employers, labor organizations, and apprenticeship programs may not discriminate in hiring, firing, compensation, or in the terms, conditions, or privileges of employment.

2) Adds "political affiliation" and "political belief" to the list of protected categories on the basis of which businesses in California may not discriminate against their customers.

3) States that the addition of (2), above, is declaratory of existing law.

4) Prohibits employers from taking adverse action against an applicant or employee based on their political affiliation, lack of political affiliation, membership in a political organization, or association with a political organization.

COMMENTS

1. Intent behind the legislation

According to the author, the goal of the bill is:

> [T]o protect California residents from discrimination related to their political affiliation. In an age of political correctness and 'cancel culture' it is imperative we preserve the right of Californians to have a free exchange of ideas regardless of the political affiliation they desire -without retribution.

The idea, as the author views it, is to restore greater "diversity of thought."

The bill seeks to achieve this goal through a combination of three related measures. First, the bill would ban private businesses from discriminating against their customers on the basis of political affiliation or political belief. Second, the bill would prohibit

discrimination on the basis of political affiliation in the context of employment. Finally, the bill would prevent employers from taking adverse action against applicants or employees based on their political affiliation or their association with any political organization.

The phrases "political affiliation," "political belief," and "political organization" are not defined in the bill. All three are susceptible to a broad range of interpretation. As a result, the precise impact of the bill is difficult to state with certainty.

However, if – as the author seems to intend -- the phrases are to be interpreted broadly, then all three of the measures proposed by this bill are likely to cause problematic and presumably unintended consequences, as discussed in the Comments that follow.

2. What do "political affiliation," "political belief," and "political organization" mean?

Analyzing the likely impact of this bill, if enacted, is confounded by the fact that the bill outlaws discrimination against employees and customers on the basis of "political affiliation," but does not define what that means; outlaws discrimination against customers based on "political belief," but does not define what is meant by that phrase; and prohibits employers from taking adverse action against workers based on their association with a "political organization," but does not define what such a thing is.

In the narrowest sense, "political affiliation," "political belief," and "political organizations," might refer only to things that are strictly political in the sense of being directly related to party politics. Thus, the phrase "political belief" would refer to a statement like "I agree with the Libertarian Party platform," but not to the general statement that "I believe in the most minimal form of government possible." If the modifier "political" were interpreted in this way, the bill would only prohibit employers from treating people differently according to the political party with which they associate. Presumably, discrimination against people whose beliefs do not align with any particular political party would be prohibited under the bill as well.

Given that the author states that the bill is intended to combat "cancel culture" and "political correctness," it seems unlikely that the author has such a narrow definition of "political" in mind. Instead, it seems likely that the author means the modifier "political" to refer to people's ideological viewpoints more generally.

This broad construction of the phrase "political affiliation" as encompassing political ideology generally is also probably how courts would interpret this statute, if enacted. For one thing, the bill would encompass both discrimination on the basis of political affiliation and discrimination based on "perceived" political affiliation. Campaigning for a particular candidate or espousing certain ideological viewpoints will often lead to the perception of what a person's party registration is, even if the actual registration is unknown. As a practical matter, therefore, discrimination based on general political

viewpoints will get swept up into discrimination based on perceived party registration. For another thing, when called upon to interpret the meaning of similarly open-ended language about what the modifier "political" means, the California courts have construed the term broadly. Existing California law prohibits employers from trying to control or direct the "political activities or affiliations" of their employers. (Lab. Code § 1102.5(b).) In applying the statute, the California courts have ruled that:

> These statutes cannot be narrowly confined to partisan activity. […] The term "political activity" connotes the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons. The Supreme Court has recognized the political character of activities such as participation in litigation, the wearing of symbolic armbands, and the association with others for the advancement of beliefs and ideas. (*Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 487. Internal quotation and citations omitted. Emphasis in the original.)

Thus, though it is far from clear, the likely impact of this bill, if enacted, would be to prohibit employers and business establishments from discriminating on the basis of people's political viewpoints, broadly interpreted and however expressed.

3. Proposed changes to the Unruh Civil Rights Act

The Unruh Civil Rights Act is California's landmark civil rights law for consumers. It prohibits "all business establishments of every kind whatsoever" from discriminating against customers in the provision of accommodations, advantages, facilities, privileges, or services. (Civ. Code § 51(b).) The text of the Unruh Act sets forth a list of grounds on which such discrimination is prohibited: sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, and immigration status. (*Ibid*.) However, California courts have long held that this list is not exhaustive; rather, the Unruh Act prohibits all forms of arbitrary discrimination; the protected characteristics listed in the Act are just examples. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, cert. denied (1982) 459 U.S. 858.)

This bill would add "political affiliation" and "political belief" to the Unruh Act's list of protected characteristics, thus banning private businesses from discriminating against customers on those grounds. Presumably, the author's intent is that no one ought to get thrown out of the corner coffee shop for expressing their political views and that, as result, everyone in the shop will benefit from exposure to a broader array of views.

If that is all the bill required, it would seem relatively uncontroversial, except perhaps to businesses and clients that prefer to keep their own political company. However, because the phrases "political affiliation" and "political belief" are not – and probably

cannot be – confined to the sorts of things people can amiably agree to disagree about over coffee, the bill almost certainly goes much farther and would actually force private businesses to operate much as the proverbial town square does in First Amendment analysis: as a public forum in which all manner of expression must be permitted, no matter how hurtful or offensive. As a result, the bill would almost certainly force private businesses to tolerate opposing political views and even expressions of hate from their customers. The bill may also undermine the ability of private business owners to control what takes place on their premises. It is even possible the bill could be construed to require private businesses to adhere to strict political neutrality in the expression of their own viewpoints. Each of these problematic and presumably unintended consequences is discussed in turn, below.

a. Forcing private business to tolerate opposing political views and even hate speech

This bill would force private business to tolerate political views to which they are profoundly opposed, and may even help promote them. For example, supposing a group of abortion rights advocates enter a silkscreening shop owned by a fervent believer that abortion is morally reprehensible. The abortion rights advocates order 10,000 t-shirts that say "Roe v. Wade Rocks!" for distribution at their upcoming rally. Can the owner refuse to make the shirts? Not if this bill is enacted.

The same would apply to hate speech. No matter how odious, hate speech is but an extreme form of political expression. In the context of public forums like streets and parks, it is well established constitutional law that free expression of all political viewpoints must be tolerated, even when the vast majority of society finds the expression hateful and offensive. Thus, for example, neo-Nazis must be allowed to march through the streets of a Jewish neighborhood. (*National Socialist Party v. Skokie* (1977) 432 U.S. 43.)

This bill would apply that same principle – that people cannot be silenced on the basis of their political beliefs – to private businesses. In other words, under this bill, not only would neo-Nazis have the right to march down the public streets, but if they stopped at the Jewish Delicatessen along the way and sat down to order, the business would be obliged to served them or face liability for having discriminated on the basis of political belief.

b. Undermining owners' control over what takes place at their business establishments

Court decisions interpreting the Unruh Act make it clear that the Act does not prevent business establishments from taking steps to control the behavior of their patrons:

> [T]he Act does not prevent a business enterprise from promulgating reasonable deportment regulations. An entrepreneur need not tolerate customers who damage property, injure others or

> otherwise disrupt his business. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30.)

Provided that patrons are not disrupting the business establishment though, this bill would appear to leave businesses powerless to respond to all manner of political activities taking place on their premises.

One can imagine numerous scenarios along these lines involving many issues and every political viewpoint on the spectrum. For example, if workers picketed inside the grocery store where they were striking, it would seem that the store management would only be able to kick the workers out if they disrupted the ability of patrons to make their purchases. So long as the striking workers confined themselves to expressing their political views in non-disruptive ways, any action taken against them would appear to constitute the sort of discrimination prohibited by this bill. Similarly, would a gun store have to let in organized protesters who enter the establishment in "Remember Sandy Hook" t-shirts, peruse the merchandise, and speak audibly to one another about stories of elementary school children killed by gun violence? Would a hotel have to provide accommodations to Antifa protestors the night of a Milo Yiannopoulos speaking event?

c. Possible political neutrality mandate for businesses?

A third troubling and presumably unintended consequence of this bill is the possibility that it would establish a political neutrality mandate for California businesses. Supposing, for instance, that a winery hosts a fundraiser for its preferred candidate for a California State Senate seat, a Republican. Thereafter, the opposing Democratic candidate asks the winery to host a similar fundraiser for the Democratic candidate, too. Under this bill, can the winery refuse? It certainly appears that the winery could not, since the only basis for the refusal would be political affiliation and political belief. Yet if that is the case, the bill may run afoul of the winery's right to express its political viewpoints as well.

4. Proposed changes to the Fair Employment and Housing Act

The second change that this bill proposes to make to California's civil rights laws has to do with workplace discrimination. One of California's signature civil rights laws, the Fair Employment and Housing Act (FEHA) makes it unlawful for an employer, a labor organization, or an apprenticeship training program, among others, to discriminate against anyone in hiring, firing, compensation, or in the terms, conditions, or privileges of employment on account of a long list of protected characteristics, whether actual or perceived. Those protected characteristics include 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, veteran status, or military status. (Gov. Code § 12940.)

To this list of protected characteristics, this bill would add "political affiliation." Presumably, the author's intent is to ensure that workers have space to express their political views free from their employer's interference, influence, or retribution.

In this regard, it is important to note that California already has existing laws that protect workers from political manipulation by their employers. The California Labor Code prohibits employers from: (1) establishing or enforcing rules that prevent employees from participating in politics or becoming candidates for public office (Lab. Code § 1101(a)); (2) controlling or directing the political activities or affiliations of employees; (Lab. Code § 1101(b)); or (3) coercing or influencing employees to adopt or follow any particular course of political action by threatening to terminate their job. (Lab. Code § 1102.) In addition, existing law empowers the Labor Commissioner to receive and investigate complaints from workers that they have been demoted, suspended, or discharged from their jobs for lawful conduct occurring during non-working hours away from the employer's premises. (Lab. Code 96(k).) Such lawful conduct would certainly include conduct expressing a political viewpoint, even if the employer adamantly disagrees with it.

The protections proposed by this bill go beyond existing California law in at least three different ways. First, because the existing Labor Code protections only apply to employees and FEHA also applies to applicants and trainees, the bill would limit the ability of employers to select employees based on political affiliation or activities for the first time. Second, because FEHA applies to legislative and other government employees while the existing Labor Code protections do not, this bill would newly limit the ability of legislators to choose staff based on political affiliation. Finally, the bill would probably prohibit a broader range of employer conduct than the existing law does.

For these reasons, the bill raises a number of policy questions, each described briefly below.

a. *How would the bill work in scenarios involving partisan political work?*

The bill's ban on employment discrimination based on political affiliation raises questions about what would happen in the case of jobs that have an inherent political component to them. For instance, the FEHA applies to government employers, including the Legislature. (Gov. Code § 12926(d).) Thus, if "political affiliation" were included among the categories protected against discrimination in FEHA, as this bill proposes, the rule would apply to legislative hiring.

Imagine the resulting scenarios. Supposing a conservative Republican Senator seeks a Chief of Staff and the applicant with the most experience and qualifications by far is a registered Democratic Socialist from Berkeley who attends Antifa rallies on the weekends. Under this bill, if the Senator chose to hire a Republican candidate in spite of

the Democratic Socialist's superior experience and qualifications, the Democratic Socialist might have a case against the Senator for employment discrimination.

Of course, the Legislature could be exempted from the bill by amendment. However, it is a frequent criticism of the Legislature that it will not apply to itself the same employment rules that it demands of the private sector. There is even current legislation seeking to put an end to the practice. (*See* SB 550, Dahle, 2021 (applying all employment law to the Legislature, regardless of whether there is a provision exempting the Legislature).)

Regardless, there are plenty of jobs outside of the Legislature that are inherently partisan. Political campaigns, political parties, think tanks, non-profit organizations, and political consulting firms all hire employees. This bill would apply to all of them and the same question arises as a result.

One possible response is that political affiliation would, in all of these contexts, constitute a "bona fide occupational qualification" (BFOQ) of the sort that provides an exception to employment discrimination law. (Gov. Code 12940.) It should be noted, however, that "the BFOQ defense is written narrowly, and the Supreme Court has read it narrowly." A BFOQ can be established only by "objective, verifiable requirements that concern job-related skills and aptitudes." (*Ambat v. City & County of San Francisco* (9th Cir. 2014) 757 F.3d 1017, 1024. Internal quotations and citations omitted.) Which party a candidate for a job is registered with – or lack of registration with any particular political party – is objective and verifiable. Political beliefs more generally may not be.

The Committee may wish to inquire how this bill would be workable in the context of such inherently partisan and political jobs.

b. Would the bill allow employers sufficient discretion to identify and hire compatible personnel?

Next, consider the circumstances of the human resources manager for Smokey Joe's BBQ Shack and Whiskey Bar if this bill were enacted. Supposing Smokey Joe's seeks help for its wait staff and a candidate appears at the interview in a Mothers Against Drunk Driving t-shirt topped off with a ballcap emblazoned with a slogan urging people to "Go Vegan!" These political viewpoints would almost certainly qualify for protection under the bill, and Smokey Joe's would be unable to reject the applicant on account of them.

While this hypothetical scenario may be exaggerated, the broader point is that taking an applicant's politics and political viewpoints into account may in some instances help employers determine whether a candidate makes a good fit for the job. This bill would eliminate an employer's discretion in that regard and might even force employers to hire individuals that they know are ill-suited for the tasks they will be asked to perform.

The Committee may therefore wish to inquire further into how this bill might impact hiring decisions.

c. How would the bill impact employer control over the workplace?

Beyond the decision about whom to hire, a ban on discrimination based on political affiliation might reduce employers' ability to control what takes place at their worksites. Imagine co-workers Dan, David, and Roger. As they perform their jobs inspecting toys coming off an assembly line, Dan, David, and Roger get to talking politics. Dan and David relentlessly hound Roger about his political beliefs and the political party they think Roger belongs to. Roger complains about Dan and David's behavior to the employer. Under this bill, can the employer try to stop Dan and David from talking politics or will this open the employer up to liability to Dan and David for political affiliation discrimination? On the other hand, does the employer have an obligation to make Dan and David stop, because otherwise a hostile political environment may have been created for Roger in the workplace, thus exposing the employer to liability under the bill? With situations and conundrums like these in mind, the Committee may wish to inquire further into how this bill would impact employers' rights and responsibilities with regard to political expression that takes place in the workplace.

d. Is the bill necessary given existing state law in this area?

As previously discussed, California already has strong laws protecting workers from political manipulation by their employers. (Lab. Code §§ 1101 and 1102.) Given the existence of these laws, the Committee may wish to inquire why additional legislation in this area is warranted.

5. Proposed changes to the Labor Code

Finally, this bill also proposes to add to the existing protections for worker's political expression contained in the California Labor Code. As discussed in Comment 4, above, the California Labor Code prohibits employers from: (1) establishing or enforcing rules that prevent employees from participating in politics or becoming candidates for public office (Lab. Code § 1101(a)); (2) controlling or directing the political activities or affiliations of employees; (Lab. Code § 1101(b)); or (3) coercing or influencing employees to adopt or follow any particular course of political action by threatening to terminate their job. (Lab. Code § 1102.)

To these existing Labor Code prohibitions, this bill would add yet another: that California employers must not take adverse action against an employee or applicant based on their political affiliation, lack of political affiliation, or their association with a political organization.

Because the provisions of the Labor Code do not generally apply to government employers unless the Legislature explicitly says that they do (*Johnson v. Arvin-Edison Water Storage Dist.* (Cal. App. 5th Dist. June 3, 2009) 174 Cal. App. 4th 729, 736), this bill would not raise the question regarding hiring legislative staff that is raised in Comment 4, above. However, it would raise the question of how the bill would be workable in the context of inherently partisan work such as a political campaign or advocacy organization, particularly since the proposed Labor Code provision, unlike FEHA, makes no exception for bona fide occupational qualifications. More generally, the proposed changes to the Labor Code raise the same other questions as the proposed changes to FEHA: what impact would they have on the ability of employers to select well-suited personnel for the job, and what impact would they have on an employer's ability to control the workplace.

The most important distinction between the bill's proposal for changes to FEHA and its proposal for changes to the Labor Code may therefore be in the enforcement mechanisms backing the underlying laws. Employers found to have violated FEHA can be liable for backpay, reinstatement pay, attorney's fees and costs; and possibly punitive damages if the employer acts with malice or reckless indifference. (Gov. Code § 12965.) Employers found to have violated Labor Code Section 1102 are criminally liable. They can be imprisoned for as long as a year and fined up to $1000 for an individual, or $5000 for a corporation. (Lab. Code § 1103.)

6. Arguments in support of the bill

According to the author:

> It is unfathomable to me that corporations and members of the public would ruin a person's career, business and family because of their political ideology. The efforts to silence differing opinions and voices should be a growing concern for all of us. A climate of intolerance has been established and has stifled healthy and normal debate. Anyone who values their own freedom of speech should be concerned. This cannot and should not be allowed to continue.

In support of the bill, the Southwest California Legislative Council writes:

> A free society shouldn't allow thoughts and ideas to be censored. Free speech covers all speech, not just that with which you agree.

SUPPORT

Capitol Resource Institute
Southwest California Legislative Council

OPPOSITION

None known.

RELATED LEGISLATION

Pending Legislation: SB 249 (Melendez, 2021) prohibits California educational institutions from discriminating on the basis of political affiliation. SB 249 will be heard in the Senate Judiciary Committee on the same day as this bill.

Prior Legislation:

AB 22 (Bonta, Ch. 834, Stats. 2017) removed a provision in the law that had authorized dismissal of public employees for advocating for or being a member of the Communist Party.

SB 1322 (Lowenthal, 2008) would have, among other things, removed a provision in existing law that authorizes the suspension or dismissal of specified school or community college employees based on their knowing membership in the Communist Party. In his message vetoing SB 1322, then Governor Schwarzenegger wrote: "[m]any Californians have fled communist regimes, immigrated to the United States and sought freedom in our nation because of the human rights abuses perpetuated in other parts of the world. […] Therefore, I see no compelling reason to change the law that maintains our responsibility to ensure that public resources are not used […] for communist activities."

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