

Memorandum 2022-51

Equal Rights Amendment: Introduction of Study

Earlier this year, the Commission¹ was authorized and requested to “undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]”² More specifically:

[The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission’s report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination....³

The full language of the resolution is attached as an Exhibit.

This memorandum proposes a general approach to the conduct of this study and provides a brief summary of outreach efforts to date.

PROPOSED APPROACH

This study encompasses the entirety of California law. Sex-based discrimination could arise in any part of life, including reproductive policy, childcare, education, employment, family law, healthcare, elder law, and probate. Identifying all instances of sex-discrimination language and disparate impacts under the law and proposing remedies will be a massive undertaking.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Most materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

2. 2022 Cal. Stat. res. ch. 150.

3. *Id.*

In order to make the work more manageable, the staff recommends that it be divided into two stages.

Stage One — Codify the Equal Rights Amendment in California Law

In the staff's view, the overall thrust of the legislative assignment in this study is to conform California law to the effect of the Equal Rights Amendment ("ERA"), so as to eliminate any "defects that prohibit compliance with the ERA."⁴

As a first step toward that result, the Commission could examine the substantive effect of the Equal Rights Amendment. The Commission could then consider how to codify that effect in California's own statutes. Such a reform would not change federal law, but it would secure the benefits of the ERA in California immediately.

An important benefit of such a reform is that it would establish a legal principle that could then be relied on by the Commission in conducting the second stage of this study.

Early enactment of a general governing principle would also provide some measure of immediate relief. After enactment, the People would have a new legally enforceable standard that could be used to redress sex-based discrimination through the courts. If the Commission were instead to delay making any recommendation in this study until after all of the assigned work had been completed, such relief would likely be delayed for years.

Stage Two — Apply the Codified ERA to Existing California Law

In the second stage, the Commission could work with consultants who have expertise in different parts of California law and policy. Those experts could help the Commission locate relevant defects in the law. The Commission could then analyze how to remedy those defects.

Without an established governing principle to guide the second stage, it would likely be difficult to manage the work. The Commission would be left making a series of ad hoc "I know it when I see it" determinations. The staff believes it would be easier and more effective for the Commission to first establish a clear legal principle, and then apply that principle uniformly across the law.

4. *Id.*

Recommendations

The staff recommends that the Commission take the approach described above — begin by framing an enforceable legal standard to codify the effect of the ERA in California, then apply that standard to identify and remedy specific instances of sex-based discrimination in the law.

Regardless of whether the Commission adopts that approach or a different approach, one of the key initial steps will be to determine the proper scope of the study. In particular, the Commission will need to understand the meaning of discrimination “on the basis of sex,” as used in the resolution. That issue should be addressed early, as it will frame the scope of the work (and the Commission’s authority on this topic).

How would the Commission like to proceed?

OUTREACH

The staff began its outreach on this topic by contacting the two organizations that sponsored the authorizing resolution. Specifically, the staff has spoken with Katherine Spillar (Executive Director of the Feminist Majority Foundation) and Betsy Butler (Executive Director of the California Women’s Law Center). The staff greatly appreciates their assistance.

In particular, they proposed and coordinated with two academic experts who could assist the Commission in this study. They are Erwin Chemerinsky, Dean of the University of California Berkeley School of Law, and Brad Sears, Associate Dean of Public Interest Law at the University of California Los Angeles School of Law. Professor Sears is also the founding Executive Director of the Williams Institute, which conducts independent research on sexual orientation and gender identity law and public policy.

The staff has just started the process of contacting relevant groups to invite their participation in the study. Initially, this effort will focus on groups working for gender equality and civil rights generally. The staff will provide an update on that work at the November meeting.

Respectfully submitted,

Brian Hebert
Executive Director

Senate Concurrent Resolution No. 92

RESOLUTION CHAPTER 150

Senate Concurrent Resolution No. 92—Relative to equal rights.

[Filed with Secretary of State August 30, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SCR 92, Leyva. The Equal Rights Amendment: the California Law Revision Commission: study.

This measure would authorize and request that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law to remedy defects related to inclusion of discriminatory language on the basis of sex, and disparate impacts on the basis of sex upon enforcement thereof.

WHEREAS, The United States House of Representatives passed the Equal Rights Amendment to the United States Constitution (ERA) in 1971 by approval of at least two-thirds of that chamber; and

WHEREAS, The United States Senate passed the ERA in 1972 by approval of at least two-thirds of that chamber; and

WHEREAS, California was among the earliest states to ratify the ERA, doing so on November 13, 1972; and

WHEREAS, The Commonwealth of Virginia became the 38th state to ratify the ERA on January 27, 2020; and

WHEREAS, Article 5 of the United States Constitution requires that any amendment thereto be approved by two-thirds of both chambers of the United States Congress and ratified by three-fourths of the states; and

WHEREAS, Upon Virginia's ratification, legislatures of three-fourths of the states duly ratified the ERA; and

WHEREAS, Notwithstanding the United States archivist's failure to perform their ministerial duty to verify the duly made state ratifications, certify the amendment, and publish notice thereof in the Federal Register and United States Statutes at Large, the ERA has satisfied all requirements imposed by Article 5 of the United States Constitution; and

WHEREAS, The ERA states that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex"; and

WHEREAS, Section 3 of the ERA states that the amendment will take effect two years after the date of its ratification; and

WHEREAS, Representative Jackie Speier recently introduced House Resolution 891 in the 117th Congress with 155 cosponsors to express the sense of that chamber that the ERA is valid; and

WHEREAS, Senators Benjamin Cardin and Lisa Murkowski introduced Senate Joint Resolution 1 in the 117th Congress to eliminate the ratification deadline stated solely in the preamble of the ERA, which 50 additional Senators currently cosponsor; and

WHEREAS, Representative Jackie Speier introduced House Joint Resolution 17 in the 117th Congress to eliminate the ratification deadline stated solely in the preamble of the ERA, which the United States House of Representatives passed on March 17, 2021; and

WHEREAS, The Legislature deems it appropriate and necessary to undertake a comprehensive study of California law to identify any defects that prohibit compliance with the ERA; and

WHEREAS, The California Law Revision Commission is authorized to study topics set forth in the calendar contained in its report to the Governor and the Legislature that have been or are thereafter approved for study by concurrent resolution of the Legislature, and topics that have been referred to the commission for study by concurrent resolution of the Legislature or by statute; now, therefore, be it

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination; and be it further

Resolved, That the Secretary of the Senate transmit copies of this resolution to the author for appropriate distribution