

## **BILL ANALYSIS**

Department, Board, Or Commission	Author	Bill Number
<b>Franchise Tax Board</b>	<b>Committee on Budget</b>	<b>AB 103</b>

**SUBJECT:** State Agencies Obtain Written Consent from Attorney General to Employ In-House Counsel for Administrative Adjudicative Proceedings

### **SUMMARY**

Among other items, this bill would require the Franchise Tax Board (FTB) to obtain the written consent of the Attorney General (AG) before employing in-house counsel to represent the FTB or its employees in any judicial or administrative adjudicative proceeding, and prior to contracting with outside counsel.

### **REASON FOR THE BILL**

The reason for the bill is to expand existing law to ensure that the AG maintains authority over certain litigation-related matters, including employment of outside counsel in judicial or administrative adjudicative proceedings involving state employees or agencies.

### **EFFECTIVE/OPERATIVE DATE**

As a provision of a bill providing for appropriations related to the Budget Bill, and identified as a bill related to the budget in the Budget Bill, this provision would be effective immediately upon enactment.

### **FEDERAL LAW**

The Judiciary Act of 1789 created the Office of the Attorney General of the United States (USAG) that evolved over the years into the head of the Department of Justice and chief law enforcement officer of the Federal Government. The USAG represents the United States in legal matters generally and gives advice and opinions to the President and to the heads of the executive departments of the Government when so requested. In matters of exceptional gravity or importance, the USAG appears in person before the Supreme Court.

### **STATE LAW**

Under the Government Code, existing state law generally requires the AG's office to represent state agencies and their employees in all judicial proceedings. A state agency may retain outside legal counsel upon receiving the AG's consent. Existing law provides for an exception

to this requirement for specifically named agencies and boards and for any state agency statutorily authorized to employ legal counsel.<sup>1</sup>

## **THIS BILL**

This bill would expand the AG representation of state agencies and employees to administrative adjudicative proceedings.

The bill defines:

- “In-house counsel” as an attorney authorized to practice law in the State of California who is a state employee, including an excluded or exempt employee, other than an employee of the AG.
- “Outside counsel” as an attorney authorized to practice law in the State of California who is not a state employee, including an excluded or exempt employee.

The bill would require state agencies, including the FTB, to obtain written consent from the AG before employing in-house counsel to represent the agency or its employees in any judicial or administrative adjudicative proceeding, and before contracting with outside counsel.

The bill provides that a state agency, including the FTB, may employ in-house counsel for any purpose, retroactively to the employment of any in-house counsel before the operative date of the bill.

The bill would allow the AG to provide written consent in whatever manner the AG deems most effective, and requires written consent for outside counsel to be obtained before the execution of each contract with outside counsel.

## **IMPLEMENTATION CONSIDERATIONS**

The bill uses the term “administrative adjudicative proceeding”, which is undefined. Absent clarification, the FTB could be required to seek a waiver from the AG’s office before in-house counsel could represent the department or its employees on matters before the State Personnel Board, the State Board of Equalization, or the Employment Development Department.

The uncertainty of obtaining a written consent and the amount of time to secure a written consent from the AG could result in the department failing to meet critical deadlines in order to pursue or defend the department in administrative adjudicative proceedings.

## **LEGISLATIVE HISTORY**

None.

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<sup>1</sup> Gov. Code section 11041.

## **OTHER STATES' INFORMATION**

The states surveyed include *Florida, Illinois, Massachusetts, Michigan, Minnesota, and New York*. These states were selected due to their similarities to California's economy, business entity types, and tax laws.

*Florida* law authorizes the AG to allow other counsel where emergency circumstances or when professional conflict of interest exists.”

*Illinois* law requires the AG to consult with and advise the state's attorneys on matters of state interest. This can include attendance at trial and prosecution assistance if the AG deems this activity necessary to protect the interest of the state or its citizens.

*Massachusetts* law requires the AG to appear for the commonwealth and all state departments, officers, and commissions in all suits and civil proceedings, except criminal recognizances and bail bonds.

*Michigan* requires the AG or the designated solicitor general to represent the state before the Supreme Court and allows the AG, at his or her discretion, to represent the state in any forum for any cause or matter.

*Minnesota* law allows for the engagement of outside counsel by the AG upon certification by the AG, the governor, and the chief justice of the Supreme Court.

*New York* law generally requires the AG to represent the state in all actions and proceedings that the state is interested in and requires that the AG be given prior notice of any action or proceeding affecting the property or interest of the state so that the AG may participate in the action or proceeding if necessary to protect the interest of the state.

## **FISCAL IMPACT**

Department staff is unable to determine the costs to administer this bill until the implementation concerns have been resolved.

## **ECONOMIC IMPACT**

This bill would not impact the state's income tax revenue but may affect the FTB's administration of state income and franchise tax.

## **APPOINTMENTS**

None.

**VOTES**

	<b>Date</b>	<b>Yes</b>	<b>No</b>
Concurrence	06/15/17	52	26
Senate Floor	06/15/17	26	11
Assembly Floor	05/18/17	45	25

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