

## California Compliant: Upcoming Changes to California's Civil Rights Laws?

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California's legislature will adjourn on August 31<sup>st</sup>. In the final weeks of the session, employers will be watching for any substantive changes with respect to workers' rights. The state's Fair Employment and Housing Act (FEHA) is among the laws that may be amended. Senate Bill 1137 (SB 1137) would make clear that employment discrimination based on the "combination" of a person's protected traits is prohibited; the bill aims to "recognize the concept of intersectionality in California's civil rights laws."

### What is *Intersectional* Discrimination?

According to the bill's authors (Senators Lola Smallwood-Cuevas and Maria Elena Durazo), "[i]ntersectionality is an analytical framework that sets forth that different forms of inequality operate together, exacerbate each other, and can result in amplified forms of prejudice and harm." Earlier this year, I wrote about cases discussing intersectional employment discrimination and harassment claims and a previous version of SB 1137. Broadly speaking, the bill would recognize that a person belonging to more than one protected class (e.g., an employee who is a woman and Black) may be mistreated based on *one* of her protected traits *or a combination of them*. For example, an employer might engage in wrongdoing because a worker is:

- a woman;
- Black; or
- a Black woman.

The distinction may be meaningful in evaluating the evidence introduced to support or refute a plaintiff's claim. The specific type of unlawful animus being charged also could affect the scope of claims being asserted by a plaintiff on behalf of other persons who allegedly are similarly situated, and an individual's suitability to serve as the representative plaintiff in class actions.

### Would SB 1137 Expand FEHA's Scope?

SB 1137 would revise the Unruh Civil Rights Act, the Education Code, and FEHA (Government Code Section 12900 *et seq*). The bill would amend Government Code Section 12920 to codify the legislature's intent to prohibit unlawful employment practices "including discrimination not just because of one protected trait, but also because of the combination of two or more protected bases." It also would revise subpart (o) of Government Code Section 12926 to read: "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decision[-]making, or veteran or military status includes any of the following:

1. *Any combination of those characteristics.*
2. A perception that the person has any of those characteristics *or any combination of those characteristics.*
3. A perception that the person is associated with a person who has, or is perceived to have, any of those characteristics *or any combination of those characteristics.*" (*emphasis added*)



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The last item, above, appears to suggest that an unlawful employment practice includes acts motivated by the employee's association with a third person based on a combination of the third person's protected traits (for example, discharging a worker because the worker's spouse is a Black woman, or a disabled veteran).

Still, the proposed changes to FEHA may not expand the scope of prohibited employment practices under California law. California's Civil Rights Department already has said that unlawful harassment includes conduct "based on multiple intersectional grounds." The EEOC has taken a similar position with respect to discrimination claims asserted under Title VII, stating that "certain protected bases overlap, and negative stereotypes and biases may be directed at more than one protected basis at a time" and further that existing law "prohibits employers from discriminating against employees because of the intersection of a protected basis under Title VII...".

### What to Watch

It's possible that Governor Newsom would veto the bill, even if it is passed by both houses of the legislature. Last year, he vetoed **a proposed FEHA amendment** that would have prohibited discrimination based on a person's "caste," stating that it was "unnecessary" (conduct already could be actionable if it was motivated by a person's "national origin" or "ancestry"). The Governor may have the same opinion about SB 1137. Arguably, the legislature has given him a basis to reject the amendments as superfluous; the bill says the revisions "do not constitute a change in... but are declaratory of existing law."

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