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California Is the First State to Adopt Intersectionality of Protected Characteristics

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California continues to be the birthplace of ideas that complicate employment laws.

True to form, it is the first state to adopt the concept of intersectionality in its anti-discrimination statutes.

On September 27, 2024, Governor Newsom signed Senate Bill 1137 (SB 1137) into law. This legislation amends several provisions of existing California law to clarify that unlawful discriminatory practices may include "*any combination*" of protected characteristics or traits – not just a single one.

Of particular importance to companies: SB 1137 thus modifies the Unruh Civil Rights Act, which prohibits discrimination by business establishments, and California's Fair Employment and Housing Act (FEHA), which prohibits harassment and discrimination in employment. The updates to these laws will take effect on January 1, 2025.

Lam v. University of Hawaii

While SB 1137 is the first statutory law of its kind, the concept of intersectional discrimination is not new. Thirty years ago, the United States Court of Appeals for the Ninth Circuit addressed this challenge. In *Lam v. University of Hawaii*, a woman of Vietnamese descent filed a lawsuit against the University of Hawaii Richardson School of Law, alleging that the law school violated Title VII of the Civil Rights Act of 1964 by discriminating against her on the bases of her race, sex, and national origin. Lam had applied but was twice rejected from the law school's Pacific Asian Legal Studies Program.

The lawsuit initially failed. The district court granted the employer's motion for summary judgment, concluding that the law school's favorable treatment of other candidates—an *Asian* male and a white *woman*—was sufficient evidence to counter claims of biased decision-making, given that Lam was an *Asian woman*.

A Ninth Circuit panel reversed the district court's ruling, however, agreeing with other

courts—including those for the Fifth, Eighth, and Tenth circuits—that when a person asserts claims with multiple characteristics, the court must determine whether the employer discriminated based on the *combination* of those characteristics. For example, where there are claims of both racial and sex-based bias, it is not enough to show the employer's favorable treatment of employees on the basis of sex alone, or the basis of race alone. The employer must show that individuals with all of the plaintiff's characteristics received equal treatment.

The panel for the Ninth Circuit reasoned that an "attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences... Accordingly, …when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex." *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (emphasis in original).

Based on this reasoning, SB 1137 codifies the protection of the intersection ("any combination") of California's currently enumerated protected characteristics from discrimination. As the bill states, the amendments do not change existing protections, but rather "are declaratory of existing law."

What Does This Mean for Litigation?

The plaintiffs' bar in California is likely to rely on SB 1137 to tack on additional causes of action for discrimination. For example, an employee who identifies as an African American female alleging that an employer discriminated against her may bring causes of action for (1) race discrimination, (2) sex-based discrimination, and (3) discrimination based on the combination of two protected classes, each in violation of both the Unruh Civil Rights Act and the FEHA. Therefore, in defending against claims with combined traits, an employer must show that it does not discriminate against people with either/any of the relevant traits, or a combination of the traits.

Employer Takeaways

The new amendments created by SB 1137 reiterate the *Lam v. University of Hawai'i* decision, reminding employers that biased treatment of an individual with multiple protected characteristics can lead to increased liability under multiple theories. While this has been generally true under Title VII and related laws, SB 1137 expressly codifies the framework, which may lead to increased litigation.

Further, in keeping with California's tradition of being a legislative trendsetter, other jurisdictions may eventually adopt similar legislation.

To avoid the potential pitfalls of "intersectional bias," employers everywhere should consider assessing and updating their anti-harassment policies and training programs.

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