New Developments in Workplace Sexual Harassment

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Continuing Legal Education (CLE) materials

Berkeley Center on Comparative Equality and Anti-discrimination Law

PLENARY 1

New Developments in Sexual Harassment/Violence in the Workplace

Hypothetical

Juanita Dorado worked for HiTech as an Executive Assistant. In 2019, she began supporting a senior manager, Bill Bossey.

Over the next months, Bossey made numerous remarks, which became increasingly sexual in nature, to Dorado about her appearance. He also began asking Dorado if she would have dinner with him after work. Dorado responded with comments like, "Let's keep it professional," and otherwise ignored his comments and invitations.

After employees began working remotely in March 2020, Dorado hoped that Bossey would stop bothering her, but he began to send her slack messages with graphic sexual references. Bossey thought he was being funny with a co-worker, and other co-workers had sent him Tik-Tok videos of a sexual nature. He also made a lewd joke during a team video conference, on which CEO Don LeChef was also participating. Dorado saw LeChef laughing at the joke on the call. Later, LeChef, who is a famous billionaire entrepreneur, tweeted the lewd joke to his millions of followers.

The next day Bossey sent Dorado graphic sexual photos and a message describing the sex acts he planned for her. The photos and messages caused Dorado, who has a history of childhood sexual abuse, to have a panic attack.

Dorado asked HR to intervene to stop the unwelcome sexual conduct. She verbally described the slack messages and photos to her HR business partner but asked that her identity not be disclosed to Bossey or LeChef. Dorado did not mention the joke told by LeChef during the call because it was made public on the twitter page.

Five days later, Bossey sent more sexually explicit messages to Dorado. Due to the stress of the situation, Dorado took a two-week medical leave. During the leave, Bossey texted Dorado repeatedly to ask her what was wrong. Also during the leave, HR, which investigated, informed Dorado that HR had not substantiated any company policy violations but had verbally counseled Bossey who told HR that he would like to apologize, if Dorado felt offended. The HR Director is a direct report to LeChef. The HR Director did not mention anything about the LeChef joke on twitter.

Dorado extended her medical leave and filed a lawsuit. Because HiTech is a prominent company and some of the allegations reference CEO LeChef, the case filing received significant press coverage. LeChef responded by tweeting that Dorado was "a gold digging liar and that she was not a very good employee who has performance issues that are well documented." Several women responded to the tweet by saying that Bossey had done the same thing to them when they worked at HiTech. Bossey is now claiming that he is being defamed and wants to sue Dorado and her attorneys.

What potential issues should counsel for Dorado and HiTech consider?

2021 Harassment Update

Case Update:

Bailey v. San Francisco District Attorney's Office, S265223, pet. rev. grntd., December 30, 2020 (First DCA, Div. 1, 2020 WL 5542657)

[A co-worker made a highly offensive racial statement in plaintiff's presence at their workplace. Plaintiff sued under FEHA alleging causes of action for discrimination and harassment, failure to prevent discrimination, and retaliation. The trial court granted a defense summary judgment motion. The court of appeal affirmed concluding no reasonable trier of fact could conclude in this context that a "co-worker's single statement…, without any other race-related allegations" could amount to "severe or pervasive racial harassment."]

Issue presented: Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation?

Note: Although the facts involve racial harassment, the California Supreme Court may use the *Bailey* case to clarify the objective test for hostile work environment harassment more generally.

Pollock v. Tri-Modal Distribution Services, Inc. (2021) 11 Cal.5th 918--Quid pro quo harassment claims based on allegations of failure to promote under Government Code section 12960 accrue and the statute of limitations begins to run when the employee knew or reasonably should have known of the employer's unlawful employment decision.

Christian v. Umpqua Bank (9th Cir. 2020) 984 Fed.3d 801—A bank customer's repeated pestering of an employee in February, which included asking for dates, giving the employee flowers on Valentine's day, and sending notes and letters stating the customer and employee were "soulmates" and "meant to be together," in addition to the customer badgering the employee's co-workers in September of the same year about how the customer could get a date with the employee, were sufficient to raise a genuine dispute of fact as to whether the harassment was severe and pervasive.

Fried v. Wynn Las Vegas, LLC (9th Cir. 2021) 18 Fed.4th 643—An employee complained to his manager that a customer sexually propositioned him. The manager directed the employee to complete the customer's pedicure. The customer continued to harass the employee causing the employee to feel "absolutely horrible" and "uncomfortable." Held a reasonable jury could conclude the manager condoned the customer's conduct and conveyed the message that sexual harassment would be tolerated in the salon because the manager failed to stop it.

Smith v. BP Lubricants USA, Inc. (2021) 64 Cal.App.5th 138—All persons are prohibited from aiding or abetting workplace discrimination or harassment. As a result, a supervisor *or* co-worker may be held liable under FEHA where 1) the employee was subjected to harassing conduct; 2) the supervisor or co-worker knew that the conduct violated FEHA; and 3) the supervisor or co-worker gave the harasser substantial assistance or encouragement to violate FEHA.

Statutory Update:

SB 331—Amends Civil Code section 1001, effective January 1, 2022, and Government Code section 12964.5. Effective January 1, 2022, confidentiality provisions in settlement and separation agreements involving claims of workplace harassment and discrimination on any basis (not just those based on sex or sexual harassment) are prohibited.

Government Code section 12964.5 (which currently prohibits employers from including a non-disparagement clause that bans an employee from disclosing information about sexual harassment in exchange for a promotion, bonus, or continued employment) is amended to make it unlawful to prohibit an employee from disclosing information about any type of unlawful conduct in the workplace unless the agreement contains language consistent with, "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

These requirements also apply to a current or former employee's separation from employment agreement which must provide notice about an employee's right to consult an attorney, and a reasonable time (at least five business days) for the employee to do so. If an employee accepts the agreement before five business days, it must be "knowing and voluntary" and not due to inducements from the employer. These requirements do not apply to agreements reached in court, before an administrative agency, in arbitration, or through an employer's internal complaint process.

Any settlement or severance amount paid to an employee remains confidential. Similarly, confidentiality provisions are permissible in releases and agreements aimed at protecting an

employer's trade secrets or other confidential information not involving unlawful acts in the workplace.

SB 352—Amends Military and Veterans Code sections 58, 392, and adds section 475. In addition to sexual assault crimes, acts of sexual harassment committed by active service members lawfully ordered to any type of state duty may be prosecuted by the office of the district attorney or other equivalent civilian prosecutorial authority. In addition, the military department must report by July 1st of each year statistical data relating to incidents of sexual harassment involving service members and make this data available on the department's internet website.

AB 1143—Amends Code of Civil Procedure section 527.6. A petitioner who has suffered harassment and is seeking a temporary restraining order/restraining order after hearing is required to personally serve the alleged harasser/respondent. However, if the court determines that, after a diligent effort, the petitioner has been unable to effect personal service, and there is evidence the respondent is evading service/cannot be located, then the court may designate another method of service.

SB 807—Amends various Government Code sections. Generally, SB 807 makes procedural modifications to how the Department of Fair Employment and Housing (DFEH) enforces California's civil rights laws. For example, it expands current record retention requirements for employers to four years from the date records were created or the date employment action was taken. It extends the period during which an individual can file a civil action by tolling the period while DFEH investigates and/or takes action on a complaint. Modifications also affect when and how the DFEH can appeal adverse superior court decisions and tolls the time DFEH has to file a civil action while dispute resolution is pending. In addition, DFEH now has two years to complete its investigation and issue a right-to-sue notice for employment discrimination complaints treated by the DFEH as a class complaint.

WORKSHOP 1A

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Publications

#NotHere: 5 Steps to Prevent Harassment in the Workplace in Wake of the #MeToo Movement

November 1, 2018 | Legal Alerts

One year later, the #MeToo movement has caused a seismic cultural shift in American society and in the workplace. It continues to gain momentum and attracts wide-sweeping media coverage keeping the issue of sexual misconduct against women at the forefront of our national dialogue. For its efforts, the movement is poised to strengthen the enforcement of existing laws, spur enactment of new regulations, and most notably, to fundamentally change how women and men interact in the workplace.

Recent EEOC activity is evidence of the movement's success. In the year since the movement began, the EEOC filed 41 lawsuits alleging sexual harassment, which is a 12% increase over fiscal year 2017. Similarly, it recovered $70 million from sexual harassment claims compared to $47.5 million in fiscal year 2017. The EEOC

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has made it clear that preventing sexual harassment claims is a high priority and is in the process of revising its guidance on the subject.

While #MeToo focuses on high profile claims against executives, celebrities, and politicians, the Time's Up initiative has expanded the activism to low wage and blue collar workers. Since its inception, its legal defense fund has provided nearly $22 million dollars to cover legal costs for workers to pursue sexual harassment lawsuits against their employers.

What can employers do to mitigate the risk of sexual harassment claims or of unwittingly cultivating a culture of harassment in their workplace? The following are five steps employers should take to prevent harassment and send a clear message: #NotHere.

1. Mandate a workplace culture of respect.

In addition to merely expressing their commitment to a harassment-free workplace, employers must take intentional actions to create and maintain a respectful work environment. To create and maintain a culture of respect, a company must know its core values and purpose. From there, employers should recruit, hire, retain and make decisions with those core values and purpose in mind. Management must bridge any gap between the levels by having clear expectations, effective communication, and a respectful and professional attitude. If employers continuously allow improper behavior and fail to take action, they can expect such behavior to continue to permeate the workplace. Employers must take a stance against disrespectful and inappropriate behavior and mandate that employees treat each other professionally and with respect.

2. Leadership must lead by example.

If the leadership of the company does not believe in a workplace culture of respect, employees will not either. The company's executives and managers must lead by

example. Leaders of an organization must make preventing harassment a priority and clearly voice that it will not be tolerated. Leadership actions can be symbolic and send a strong message to employees. The bottom line is that leaders want employees who are inspired to come to work, which results in a happy, productive workplace. If employees are experiencing harassment, it will significantly impede that outcome.

3. Have a receptive channel to launch complaints.

Employers must provide multiple ways in which employees may voice any concerns or complaints. Whether it is through a hotline, email, human resources or management, employees must have multiple places to go to present any complaint. Importantly, employees must be able to avoid complaining to the alleged harasser. Additionally, employees must be able to raise concerns without fear of reprisal and feel that they have an open channel of communication with someone in the company who can receive their complaint and effectively take action.

Employers should ensure that employees understand the complaint process and know of all avenues through which they may raise concerns. Employers should not simply provide employees with a 50-page handbook at the start of employment with the complaint procedure buried within. Instead, employers need to adequately provide the information to employees periodically and in a variety of ways.

4. Managers and employees must be trained.

Employees need to be generally familiar with the company policy against harassment and discrimination and the company's stance against improper and disrespectful conduct. Employees should be trained on behaviors that foster respect and civility in the workplace, behaviors that are not consistent with the company's expectations, the complaint process and where to go if they experience harassment directly, or

as a witness. Employees must understand that the company will promptly investigate and resolve any issues without fear of reprisal for bringing the complaint.

Managers must know the company complaint process and the importance of anti-retaliation in responding to complaints. Managers should be trained in skills for addressing improper behavior, de-escalating conflict, and handling harassment complaints. Individuals within the company who are responsible for conducting investigations should receive skills-based training on how to effectively investigate harassment and other workplace concerns. Significantly, managers must be able to effectively end improper conduct and cultivate a culture of respect and professional behavior. Managers should also learn how to avoid liability and the legal ramifications of harassment in the workplace.

5. Employers must promptly and effectively respond to complaints.

Employers must promptly respond to harassment allegations by conducting an investigation and resolving any issues. Not only can this step provide employers with an important legal defense should litigation ensue, but it is a critical step in preventing any further issues internally. As soon as possible and without unreasonable delay, the employer needs to respond to the complainant to let him/her know that the employer will be looking into the complaint.

Following the initial communication, the appropriate person needs to conduct a thorough investigation and gather the necessary information and documentation. The investigator must interview the complainant, the accused and any witnesses. After collecting the pertinent information, the employer must take action to resolve any issues and close the investigation. It is important that employers keep an open dialogue with the complainant and communicate the status of the investigation to the extent possible given the

circumstances. The complainant should not feel that the employer failed to act in response to his/her complaint.

In the wake of the #MeToo movement, employers must send a clear message: #NotHere. Employers must take a stance against harassment and create a culture of respect. By taking proactive measures with respect to training and policies, it will help prevent harassment from permeating the workplace.

To learn more about the authors' work in counseling employers on how to cultivate workplaces free of harassment, click here.

To read their op-ed in the Cincinnati Business Courier on this topic, click here (subscription required).

Dinsmore & Shohl: Facing Change In The Boardroom

BY TAMMY R. BENNETT, ESQ.

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"**Not everything** that is faced can be changed," wrote James Baldwin 60 years ago, "but nothing can be changed until it is faced." The dramas of 2020 placed racial injustice and disparities squarely before us. Have we truly faced them?

Under the immediate impact of Covid-19 and the "race pandemic," businesses expressed support in public statements; some made long-overdue changes to company logos and other aspects of branding. Such gestures matter. At the same time, they raise a bigger question: What actionable steps can legal employers take to move the needle on diversity in deeper and more lasting ways?

One crucial answer: diversify governance. Exploding sexual harassment claims spurred by #MeToo and increased visibility of systemic race disparities following George Floyd's murder highlight how corporate cultures are buffeted by shifting social norms and societal polarization. In this new normal, corporate governance requires directors not just with financial acumen but also social acuity and cultural insight, especially into marginalized communities.

As a result, ESG-minded investors have been intensifying their attention to board diversity, already a growing governance focus. Empirical studies generally support the common intuition that individuals of differing cultural backgrounds and lived experiences interpret situations and solve problems differently—and that by marshaling varied perspectives, diverse teams achieve more creative solutions, give their organizations competitive advantages, and enhance profitability.

Thinking about knowns and unknowns helps frame the value of diversified boards. Decision-makers need information, which is always limited. Awareness of the limitations—known unknowns—fosters prudent caution and efforts to fill knowledge gaps. The biggest danger is lack of awareness—unknown unknowns—like ignorance of cultural characteristics that can doom a marketing campaign or harm employee retention, with bottom-line consequences. Board diversity can reduce this culture risk and other organizational perils.

A good analogy: blind spots, zones where other vehicles are invisible to the driver's field of vision and mirrors. Board diversification is like building the habit of checking blind spots regularly, especially before lane changes (or a blind-spot warning feature built into the vehicle). Having multiple perspectives and multiple voices at the table yields enhanced visibility into the organization's relevant surroundings. Recognizing and appropriately managing risks in the cultural environment matters just as much as IT departments' relentless scanning of communications inputs and neutralizing identified cybersecurity threats.

An understanding of both the power of diverse boards and corporations' societal responsibilities led to the SEC's landmark adoption of NASDAQ's board diversity rules in August 2021. The new rules require most listed companies to elect at least one self-identified member of an underrepresented minority (including LGBTQ+) and at least one woman. Enhancing transparency, disclosure is made on a standardized matrix, and "name and shame" sanctions—non-compliant companies must publicly disclose their non-compliance—add teeth.

Board diversity is as relevant to law firms as to their corporate clients—maybe more so. Importantly, for the underrepresented to give voice to their perspectives and truly benefit the firm, organizations must thoughtfully cultivate environments that foster an authentic sense of inclusive belongingness in all board members. Thus, the importance of psychological safety as a precondition for genuine inclusiveness.

Changing the faces and voices at the table can better equip law firms to effectively manage culture risks while advancing diversity, inclusion and cultural competence firm-wide, in their client interactions and in the communities they serve. S

DDI

Global Leadership Forecast 2021

The Largest Leadership Study of Its Kind

***Global Leadership Forecast 2021* is the most expansive leadership research project of its kind.** It is the ninth forecast since DDI first began this stream of research more than 20 years ago. This report examines responses from 2,102 human resource professionals and 15,787 leaders around the world. The research, which spans more than 50 countries and 24 major industry sectors, summarizes best talent practices and provides key trends to guide the future of leadership. The full set of leader demographics is depicted below.

A New Era Driven by Crisis

A crisis is the true test of leadership. In our darkest moments, we look to our leaders to find the light. In the past year, leaders have faced a constant barrage of crises, from a global pandemic to economic crisis to deepening political divisions.

Through each of these tough moments, leaders have had to dig deep, demonstrating vision, purpose, courage, and strength to move forward without a clear road map.

For 20 years, we have intended the *Global Leadership Forecast* to be a true "forecast," helping you to predict what's next. However, what came through clearly in this year's study is that companies are gearing up for an era of constant crisis, one in which predictability is scarce.

The leaders who are succeeding in this time are those who have been able to rapidly learn new skills and change. They've learned to lead their teams virtually. They've gotten comfortable with uncomfortable discussions around race and inclusion. Most of all, they've learned to act with empathy and compassion, recognizing that we don't leave our humanity at the door when we clock in to work.

This ability to embrace uncertainty and develop new skills rapidly will be the hallmark of great leadership in the years ahead. Meanwhile, leaders who continue business as usual will be your greatest risk.

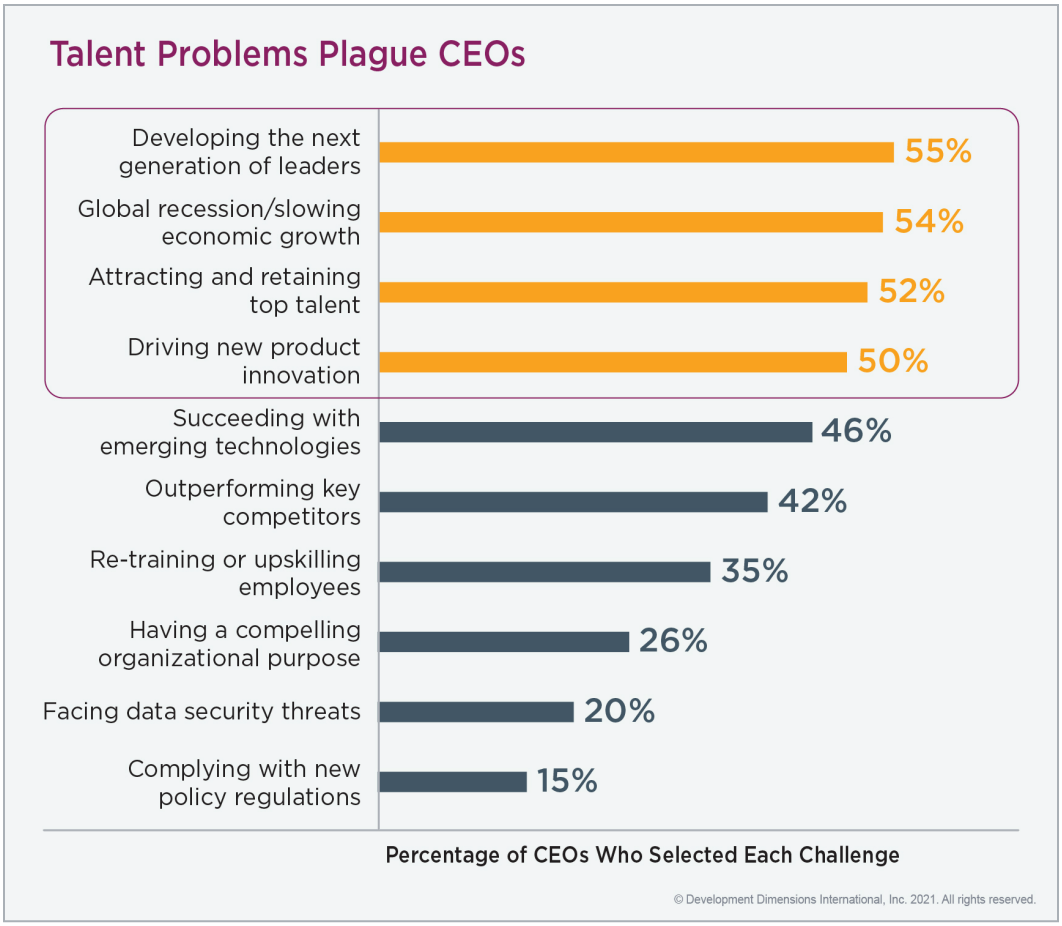
In line with this dramatic shift in leadership, we have also changed our approach to publishing this study. This year, we are proud to introduce the *Global Leadership Forecast* series. Rather than publishing our data in one large report, we will publish a series of smaller reports. The intention is to remain agile to answer new and pressing questions as we face rapid change.

As you review this report, note that each section is divided into two parts. The first part examines the data and conclusions. The second is about where to focus, defining actions you can take to capitalize on the findings. We invite you to share your questions, feedback, and thoughts on new challenges you and your leaders are facing.

After all, data is only as good as how you use it.

CEO Top Challenges

The Pressure Is On to Develop and Retain Top Talent



What's keeping CEOs up at night? The top challenges for the year ahead according to CEOs were clearly focused on talent. Developing the next generation of leaders and attracting/retaining top talent ranked in the top three challenges, along with global recession/slowing economic growth.

The only other challenge selected by at least 50% of CEOs as a top concern was driving new product innovation. CEOs acknowledged how critical it is for them to have top talent and effective leaders to drive their strategies forward and position their organization for future success.

> *According to HR professionals, identifying and developing future talent continues to be a top skill they look for in leaders. It's also the single-most critical skill they'll need in the next three years.*

of CEOs say that developing the next generation of leaders is their top challenge

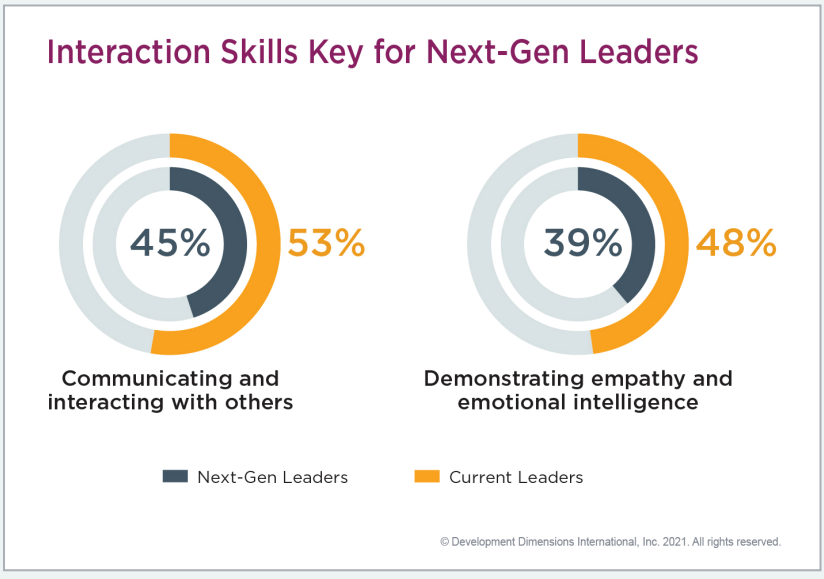
Where to focus

Build Next-Gen Talent

As younger generations step into leadership, there are substantial changes happening and looming for leaders. We examined what differentiates the next generation of leaders, currently those high-potential employees who don't have formal leadership responsibility. These employees range in age from 21 years to an average of 38 years old. They are also more likely to be from diverse racial/ethnic backgrounds (32% of this group compared to 28% of current leaders).

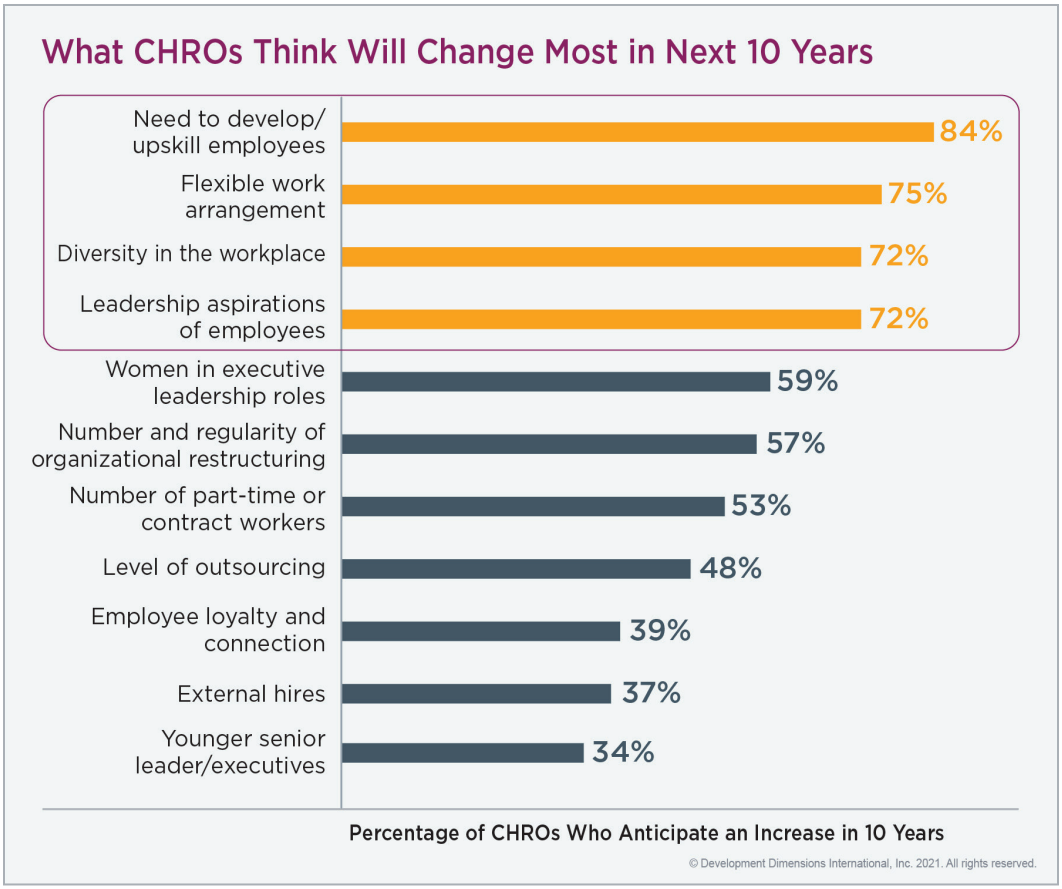
Overall, this group said:

- **They need feedback.** Leaders at all levels want feedback, but this next generation of leaders is looking for even more coaching and feedback from their managers. Specifically, 30% said they wanted more coaching and feedback from their managers than they are currently getting, in comparison to only 25% of current leaders.
- **They need to up their EQ.** They need more help growing their communication and interaction skills, recognizing a greater need for developing empathy.
- **D&I is a requirement.** They are looking for better inclusion and diversity from their organizations. Overall, they were more negative about how their organizations are approaching bias and fairness. Only 56% of next-gen leaders said their leaders challenge themselves and others to recognize and eliminate biases, in comparison to 67% of current leaders.
- **Flexibility is key.** Their organizations are doing well with flexible work practices. An equal percentage of these next-gen leaders (72%) and their leaders said that flexible arrangements are common and supported.
- **They crave clarity.** Compared to leaders, this group struggles to act decisively without clear direction, and is unsure how to apply data to decision making. In addition, they worry about reacting to change, both internally and externally with customers.



The Future of Work Is Here

How the Workplace Will Transform



The pandemic electrified company operating models and HR practices, but it also brought on the future of work much faster than expected. For the past decade, analysts have been writing about automation, the fourth industrial revolution, and the growing role of AI, data, and technology at work. All of this has now come to reality.

The top area CHROs think will change the most in the next 10 years is developing and upskilling employees. It's also clear that flexible work, contract workers, and dynamic work models are here to stay. While many companies had very little infrastructure to plan and manage contingent work before, it has now gone mainstream and must be treated in HR as a strategic workforce segment.

In addition, the role of women, minorities, and intersectionality is critical today and will be so in the future as 72% of CHROs cite this as high priority. The problem is no longer one of driving diversity. The new strategy is to create a culture of inclusion and belonging, from which diversity will result.

As the data show, the leadership model must change. Companies must give young people the opportunity to move into leadership early; they must embrace women and minorities completely as leaders; and they must get ready for younger people to take on the highest levels of leadership.

Finally, the future of work is filled with technology, data, flexibility, and mobility. Companies must design safe workplaces, mobile solutions, and hub work locations that let people move to where work may be, operate in a safe and healthy way, and collaborate easily.

Where to focus

The Certainty of Uncertainty

Preparing for the future of work is all about equipping your leaders to quickly anticipate and react to the speed of change, which is one of the most challenging and uncomfortable things leaders need to do. In fact, only 35% of leaders said they are effective at managing change.

While a global pandemic may be a once-in-a-generation level of disruption, the future will continue to be marked by dramatic and accelerated change, likely at an unprecedented level. As illustrated in the chart below, some industries are particularly vulnerable to the changes, and are also the least prepared to meet these challenges.

To prepare leaders to anticipate and react to the speed of change, our study showed that HR should focus on three key skills:

1. Managing change
2. Influence
3. Building partnerships

These skills are essential in helping leaders engage their teams and peers as they rapidly adapt and change their course of action to meet new demands.

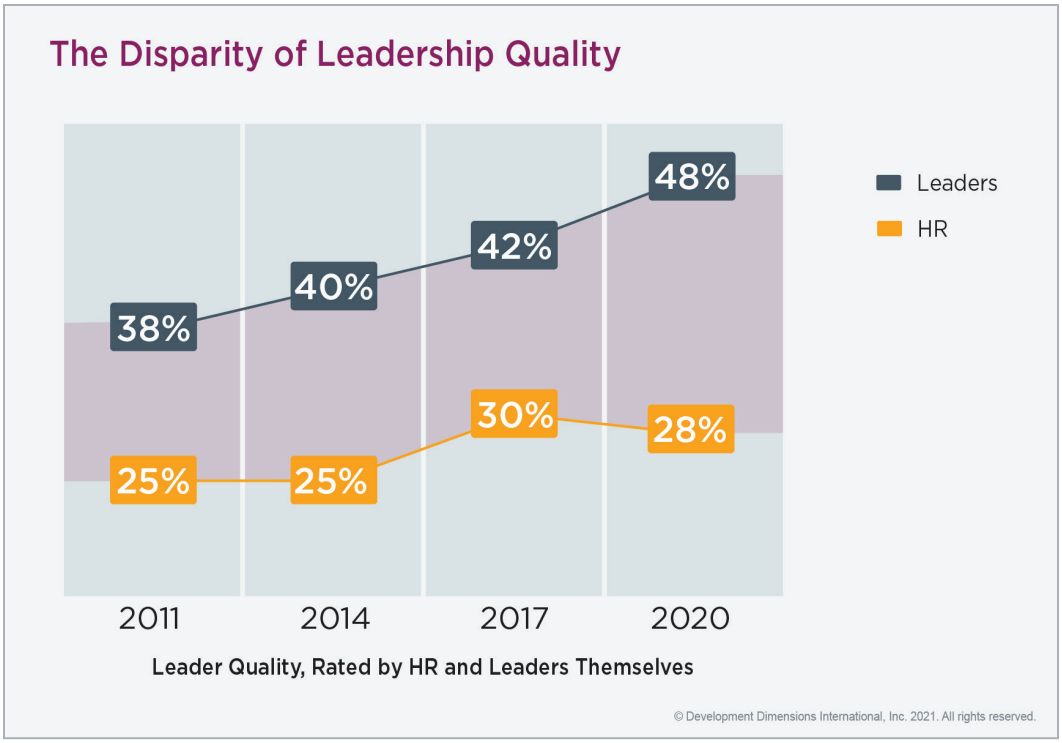
Industries Most Vulnerable to Change

	Future Change Index	Industry Capability to React to Change	Percentage of Leaders Effective at Managing Change
Energy & Utilities	◐	○	33%
Financial Services	◐	●	52%
Healthcare	○	○	38%
Industrial Manufacturing	○	○	30%
Insurance	●	●	45%
Pharma	●	○	31%
Professional Services	◐	●	32%
Retail & Consumer Products	●	○	40%
Technology	◐	●	36%

● High ◐ Moderate ○ Low

The Leader Quality Gap

Leader Confidence Jumps, but HR Is Unimpressed



This year marks the biggest leadership quality gap in a decade.

A full 48% of leaders rate their organization's leadership quality as high, up from only 38% a decade ago. Meanwhile, HR's confidence in their leaders dropped, with only 28% believing they have high-quality leadership.

Why the massive disparity? Likely, it's a case of crisis response. As the pandemic hit, leaders found themselves working harder than ever to pivot the business, while trying to show empathy and connect with their teams on a more human level. And they saw how hard other leaders are working as well. As a result, they were more generous in their quality ratings.

In fact, leadership quality ratings peaked as the pandemic began to hit in full force, especially in terms of how people viewed senior leaders. As people adjusted to a new normal, quality rankings dropped slightly. Meanwhile, HR is focused on the organization more holistically. They see where employees have complaints and where leaders have fallen short.

HR is likely also concerned about what comes next. As businesses change permanently, new challenges loom ahead. While current leaders may be performing, HR may recognize that they don't have the skills to meet future challenges, which is echoed in HR's bench strength ratings elsewhere in this report.

Moving forward, HR can close this gap by working to bring in the leadership talent they need, and by helping leaders identify and build the skills they'll need for the future. That way, leaders' confidence will be based on more than just their optimism.

Leadership ratings peaked 14% higher at the onset of the COVID-19 crisis

Where to focus

Best Practices for Better Leadership

Among organizations that had the highest leader quality overall, these were the top practices they had in common:

1. Leadership development begins with a diagnosis of a leader's strengths and weaknesses.
2. At any time, HR can access the up-to-date status of leadership talent capability across the organization.
3. Competencies required for leaders' success are clearly defined.
4. HR has an effective process for identifying leadership potential.
5. Leadership development modules are positioned as a planned sequence rather than independent events.
6. A senior executive outside of HR champions leadership strategy.
7. There is a core leadership program for all leaders in the organization.

Putting even some of these practices in place will start to have an impact. Organizations that were using at least three of these practices had not only 1.8X higher leadership quality, but also 1.4X higher leadership success rates and 1.5X stronger bench.

Using data and external coaching also consistently scored high across organizations, reflecting leaders' desire to get a more objective picture of their skills. These experiences may help to significantly close the "self-awareness gap" between how leaders rank themselves and how others see them.

Organizations using at least three of these practices had:

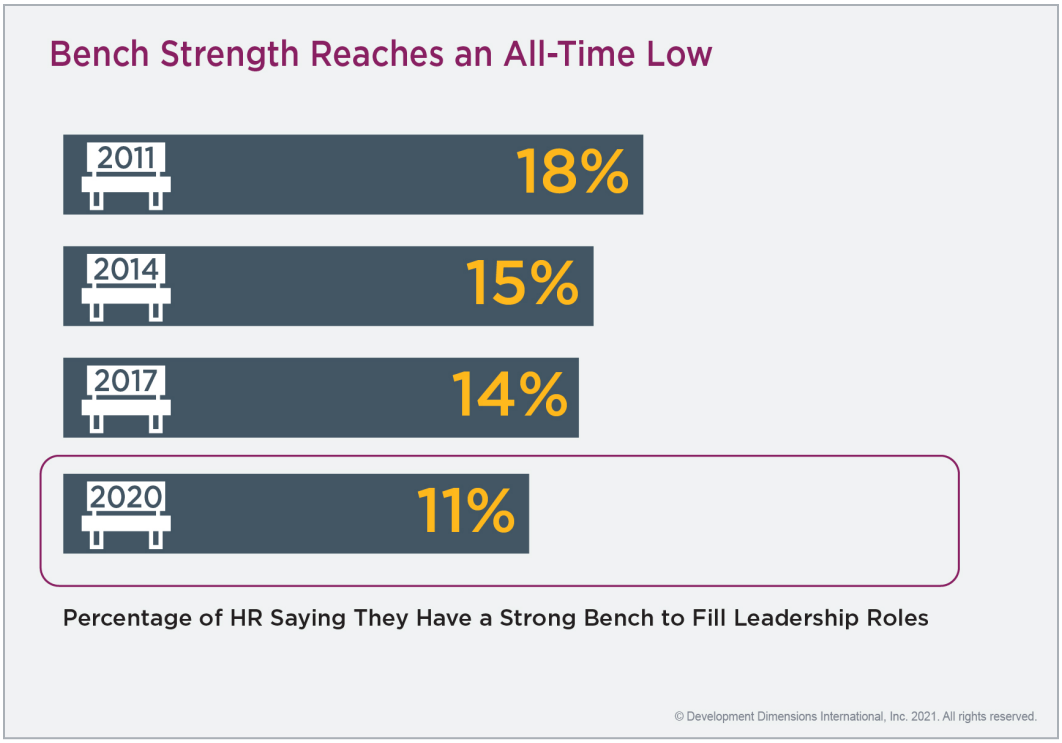
1.8X higher leadership quality

1.4X higher leadership success rates

1.5X stronger bench

The Bench Is Empty

Leadership Talent Is in Short Supply



In line with leaders' concern about developing the next generation of leaders, this year's study saw bench strength continue to drop. Only 11% of HR say they have a strong bench to fill leadership roles, the lowest rate we've seen in the past decade.

Why the drop? Likely the biggest reason is the rise of unpredictability of other challenges. In the past, many organizations could more easily predict their challenges in the next three to five years, and groom leaders who were prepared to meet them. But as markets have shifted rapidly and companies are feeling increased pressure to innovate and redefine their markets, companies need leaders who are prepared to lead during rapid change and re-prioritization.

As a result, companies should be thinking about bench strength much less in terms of one-to-one replacements for key roles. Rather, they should be focused on creating leadership teams with complementary strengths and cross-collaboration, enabling them to better weather change.

Companies can fill **only 47%** of leadership roles

Where to focus

The Leadership Pipeline

As companies focused mainly on survival during the pandemic, many largely ignored their succession and high-potential programs, and their ability to build new leaders fell behind. Consider the gap shown below: In every industry, bench strength is 10–25% below current capabilities. That gap means that as the economy grows again, companies will struggle to have ready-now leaders.

Developing new leaders and finding and upskilling current leaders with the potential to grow is crucial to future success. Today, companies have six generations of employees at work, ranging in age from people in their late teens to vibrant workers in their 70s and 80s. So, the idea of a linear, progressive leadership pipeline must change.

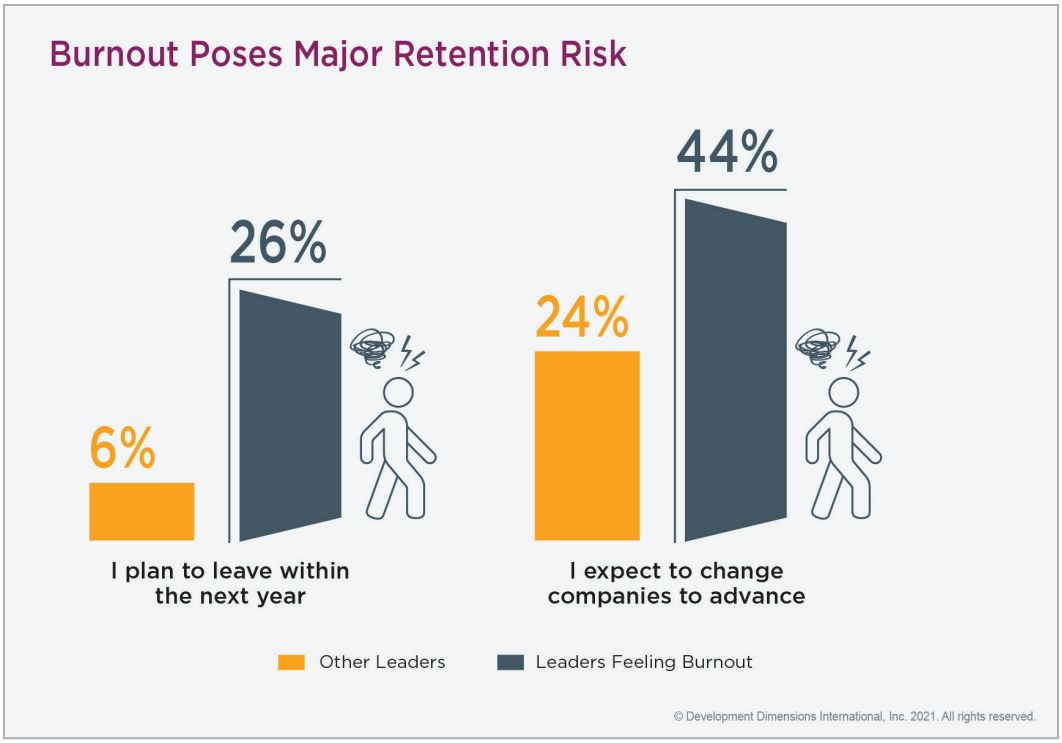
HR leaders must realize their companies have an enormous well of young leaders ready to grow and progress. They need to build an inclusive workplace environment where senior people are comfortable working for younger people and part-time experts can thrive and excel. Companies must also adopt a new model for leadership, driven by the idea that "everyone is a leader" and that leadership must be developed continuously.

Leader Preparedness by Industry

	High-Quality Leaders	Critical Roles That Can Be Filled Now
Insurance	68%	51%
Professional Services	60%	50%
Energy & Utilities	66%	49%
Pharma	63%	47%
Technology	59%	47%
Financial Services	69%	44%
Healthcare	64%	43%
Industrial Manufacturing	61%	42%
Retail & Consumer Products	65%	40%

The Big Burnout

Wellbeing Becomes a Boardroom Topic



Leadership energy has taken a nosedive. Sixty percent of leaders now indicate that they feel "used up" at the end of every workday, a strong indicator of burnout. And those numbers continued to rise as we collected data throughout the study.

The most critical risk of this exhaustion is retention. Among leaders who said they definitely felt used up at the end of the day, 44% said they expected to have to change companies to advance. Furthermore, 26% said they expected to leave in the next year. In comparison, only 24% of leaders who reported not feeling used up said they had to leave to advance, and only 6% expected to leave their current company within the next year.

This stress was even higher for high-potential employees who aspire to leadership. According to more than 1,000 high-potential employees, 86% reported feeling used up at the end of their workday, a 27% increase over the past year. These ambitious future leaders may be reluctant to express their frustration, possibly fearing it could cost them the chance for a key opportunity. However, these high performers are twice as likely to leave as peers who indicated they didn't feel used up at the end of the day (37% vs. 17%).

of high potentials are at risk of burnout

Where to focus

Start with Empathy

How well organizations manage burnout is directly influenced by leaders. However, only 18% of leaders felt confident in helping team members avoid burnout. We examined the difference between organizations that were best prepared to prevent employee burnout and those that were not.

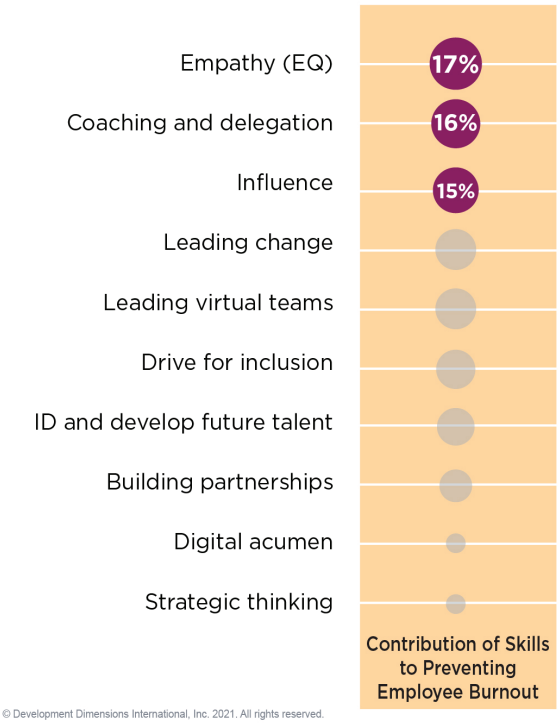
The number-one factor that influences burnout is leaders' ability to demonstrate empathy—connecting with their teams on a more human level. While leaders typically rate themselves well on showing empathy, we saw leaders' self-ratings of empathy drop 15% during the pandemic. This drop showed that as leaders are under stress, many of them struggle to show empathy, even though these are moments when their team members need it most.

> ***We found that the number-one factor that influences burnout is leaders' ability to demonstrate empathy.***

Beyond empathy, leaders' ability to manage the flow of work is most critical. Excellent skills in coaching and delegation ensure that people are getting the right amount of work and resources to complete it. In addition, leaders' ability to influence others plays a major role in helping to prioritize work and energize teams around common goals.

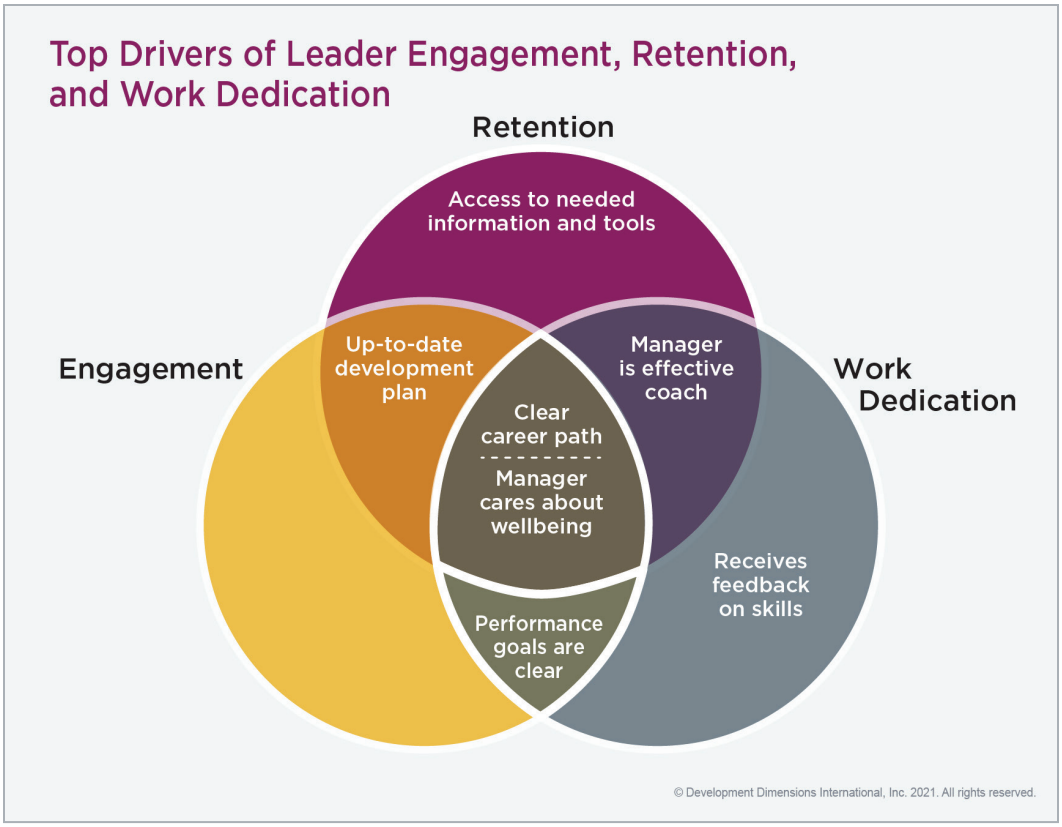
Finally, the research clearly points to how great leaders create followership. In looking at the leadership skills that differentiate high-performing companies from low performers, the three biggest areas are leading change, coaching and delegation, and building partnerships. These capabilities point out that great leaders don't just lead. They also collaborate, partner, and bring people with them.

Leader Skills Mitigate Employee Burnout



Retaining Top Talent

7 Key Factors Influence Retention



The loss of a single highly talented leader is steep. The loss typically includes significant technical and organizational knowledge as well as the investment in their development over the years. In addition, their departure may trigger others to leave or at least slow down team momentum. And that's all before accounting for replacement costs to hire new talent.

To keep these losses to a minimum, we conducted an analysis of which factors are most predictive of leaders' engagement and long-term retention. In order of most impact, leaders who intend to stay:

1. Know what constitutes good performance in their role.
2. Have a clear understanding of their future career path in the organization.
3. Feel that their direct manager genuinely cares about their wellbeing.
4. Have a high-quality development plan.
5. Receive effective coaching from their manager.
6. Get feedback on their skills.
7. Have access to the information and tools needed to do their job well.

Notably, these factors all contributed more to leaders' engagement than things such as their promotion rate, taking on new assignments, or work-life balance.

Where to focus

Energize Leaders' Career Paths

Developing talent is one of the hardest things managers have to do, which is also why it's one of the top ranked worries for CEOs.

However, there are some specific behaviors leaders can focus on that correlate to higher rates of retention among the leaders who report to them:

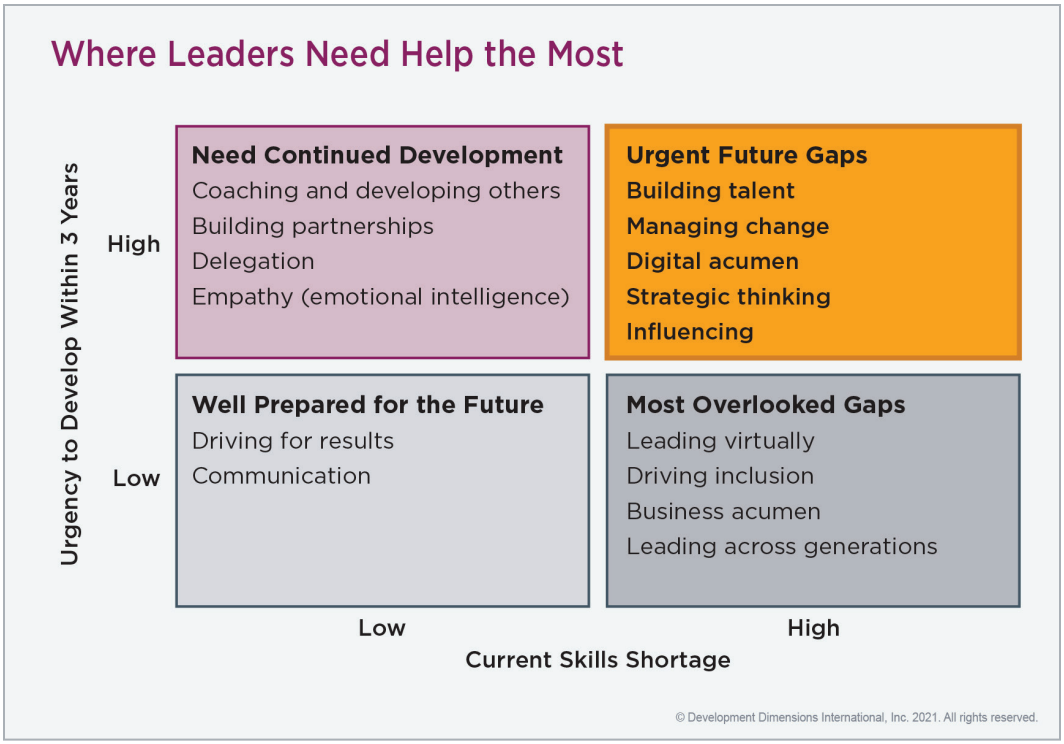
1. Provide opportunities for growth and development.
2. Become an advocate for high-performing team members, ensuring they gain visibility.
3. Be vocal in making the achievements of team members known.
4. Celebrate the success of team members.
5. Share credit with team members.
6. Support the development and advancement of team members, even if it means moving them outside their own direct reporting line.

Efforts to encourage managers to practice these behaviors will pay off. Leaders who described their direct manager as having these attributes were more positive about their organization's leadership overall. Additionally, organizations with a higher percentage of leaders who demonstrate these attributes were more likely to be considered best places to work by their leaders.

Identifying and developing future talent is among leaders' greatest weaknesses

Critical Skills for the Future

Development Doesn't Align with Needs



Which leadership skills will be most critical for future success?

Over the next three years, leaders see their organizations undergoing rapid transformation. As a result, they place a high priority on the skills that will enable them to line up both the technology and people resources they'll need to make that transformation a success.

Unfortunately, fewer than half of leaders feel they are effective in most of these skills. Even worse, they aren't getting development in the skills they need most urgently, as shown in the top left quadrant of the grid. Only 28% of leaders say they are currently being developed in any of these areas.

At the top of the list is identifying and developing future talent, as companies are increasingly concerned about their bench strength to meet new challenges. In line with that, managing successful change will be a top priority.

Without question, that future will also be more digital, as HR and leaders rank digital acumen as a must-have skill. Rounding out the top priorities, leaders will need to quickly get up to speed in building a strategic vision for a new future, and influencing others to ensure success as one unified team.

of leaders are being developed in critical skills for the future

Where to focus

Strengthen Leader Resilience

While HR and leaders rated skills related to rapid change as their top priorities, we also studied which leadership skills most accounted for how prepared organizations were to succeed across the broadest range of business challenges. Organizations with leaders who were stronger in these five skills were more prepared to meet the business challenges they faced, particularly through the pandemic:

1. Leading virtual teams
2. Coaching and delegation
3. Empathy (EQ)
4. Digital acumen
5. Building partnerships

Currently, the majority of leaders feel under-prepared in all five of these critical skills. Most glaringly, fewer than one in five leaders rated themselves effective in leading virtual teams, which has quickly become essential. Rounding out the top priorities, leaders need to build their skills in building a strategic vision and influencing others to build toward one unified future.

Two other core skills, coaching and delegation along with empathy, were foundational across business challenges. These are especially important for leaders who are now having to navigate more difficult conversations and provide support to stretched employees. Additionally, digital acumen was a significant predictor not only for digital transformation readiness, but also for innovation and responding to the competitive environment.

rated themselves as effective in leading virtual teams

How Leaders Want to Learn

Leaders Crave External Validation

In times of uncertainty, leaders want two things: more time to learn, and greater external validation that they're doing the right things.

On average, leaders report spending nearly 4.4 hours per week learning, but would prefer to spend about 7.5 hours. This number also spiked while the survey was open as the pandemic hit, and leaders felt less certain of their skills.

Perhaps a more important trend we spotted this year is the strong desire for external validation and objectivity in their learning. More than anything, leaders wanted outside coaching and developmental assignments to help them grow their skills outside of their day-to-day work. In addition, they expressed a strong desire for assessment to help them pinpoint their development areas.

Leaders sought out 2X more learning and development at the onset of the COVID-19 crisis

Where to focus

Application and Relevance

Above all, leaders' learning preferences showed that they want to know they are truly applying their skills to new challenges. If nothing changes about their career, the development isn't worth it.

On average, leaders who say their organization offers high-quality leadership development say they are able to apply about 72% of what they learned to their job. In comparison, those who rate their company's leadership development programs as low say they can only apply 53% of what they learn to their job.

Leaders also need to get the feedback and validation that shows their new skills are working. Organizations that report their leaders practice and then receive feedback from their managers on key skills are 4.6X more likely to have high leader quality and bench strength compared to those that don't.

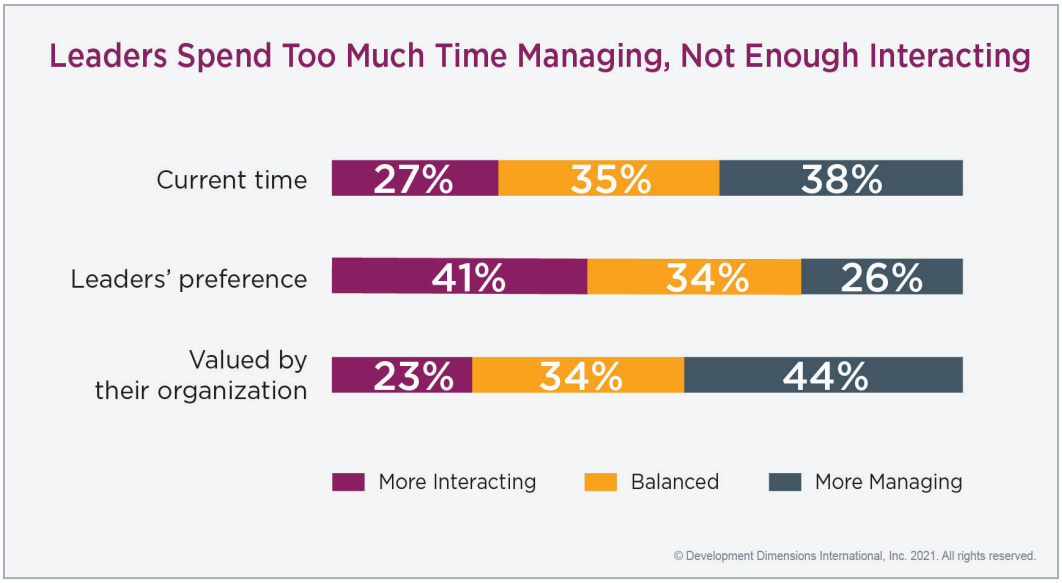
In addition, leaders who said their organization provided high-quality assessment on their skills also reported being more prepared to face business challenges.

Organizations where leaders practice and receive feedback from managers on key skills are

to have high leader quality and bench strength

Leaders Crave Connection

Interactions Matter More Than Managing Work



How much time leaders spend interacting or managing has a huge impact on their teams. Management tasks are what keep leaders inaccessible, disconnected, and working at their desk. Leadership, meanwhile, requires effectively interacting with others—being out front, with people. Effective interactions are what make up the core of leadership.

The moments that leaders can connect and the conversations they have with team members, peers, and customers define how effective (or ineffective) they are. Without positive interactions, coaching suffers, employee engagement dives, and the ability to influence disappears.

Unfortunately, our data show that person-to-person interaction is happening less and less. Leaders at all levels reported they feel overburdened with tasks they have to manage, and aren't able to spend as much time interacting as they would like. On average, leaders prefer to spend almost half (41%) of their time interacting, but currently only spend about a quarter of their workday (27%) interacting with others. This is a harmful trend for engagement. And, even worse, leaders feel their organizations want them to be spending even more time managing than they are.

Leaders want to spend 1.5X more hours interacting with their teams each day

Where to focus

Encourage High-Quality Interactions

Valuing interactions proved to be a strong indicator of leader engagement and retention. Compared to leaders who said their companies favored management activities much more than interaction, leaders who said their companies valued interactions were significantly more likely to rate their leadership as high quality at every level, especially senior levels.

In addition, they reported much higher engagement in their roles. They were also more likely to be energized and feel purpose in their work. Most importantly, they were less likely to feel like they had to leave to progress.

By contrast, there's a harmful reverse trend for leaders who don't get enough interaction. Leaders who indicated that they spend much more time managing than interacting are:

- 32% less engaged in their roles.
- 1.5X more likely to feel used up at the end of the day.
- Twice as likely to leave the organization within the next 12 months.

Leaders who spend more time managing than interacting are:

32% less engaged

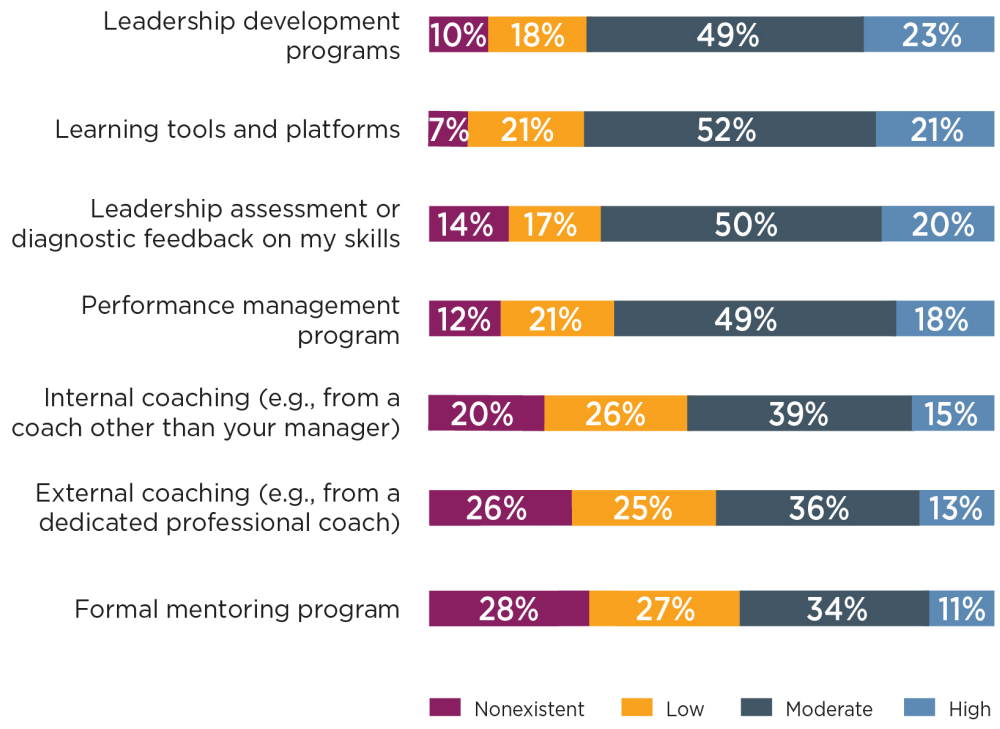
1.5X more likely to feel used up at the end of the day

2X more likely to leave the organization within 12 months

Illuminate the Leader Experience

What Leaders Value Most in Development Experiences

How Leaders Rate Their Programs



How do leaders feel about their development and growth experiences? Over the past decade, employee experience has risen as one of the hottest topics in the workplace, yet little is known about how leaders differentiate and rate their experiences.

For the past several forecast studies, we've examined how leaders rate their organization's development programs and have uncovered a concerning trend. Only 23% of leaders rated their leadership development as high quality this year, a significant drop from previous forecasts. However, this still rates higher than any other experiences leaders are being provided.

Overall, coaching and mentoring are the areas where leaders are least satisfied, along with performance management programs. For many leaders, these programs are simply nonexistent, but among those that do have them, few rate them as high quality.

1 in 4 leaders indicate that leadership development is either nonexistent or low quality at their organization

Where to focus

Improving the Experiences That Matter Most

On the whole, leaders make it clear they aren't all that satisfied with their growth and development offerings, but they also don't value them equally. What are the experiences leaders say were the most valuable? And which mattered most in enabling a smoother transition to their current roles?

These are questions we explored further to see what really defines a successful leadership experience from day one. Four factors stood out for leaders who had better experiences taking on their current leadership role:

1. There were clear and realistic expectations for their performance.
2. Leaders went through a formal assessment to identify their leadership strengths and areas for development.
3. They received feedback about their leadership skills.
4. They received effective coaching from their manager.

Focusing on what matters most to leaders, and improving these experiences, can pay off tremendously. Organizations where leaders indicated that these experiences were consistent had 1.5X higher leader engagement and retention, and were also 2X as likely to be voted as a best place to work by their leaders.

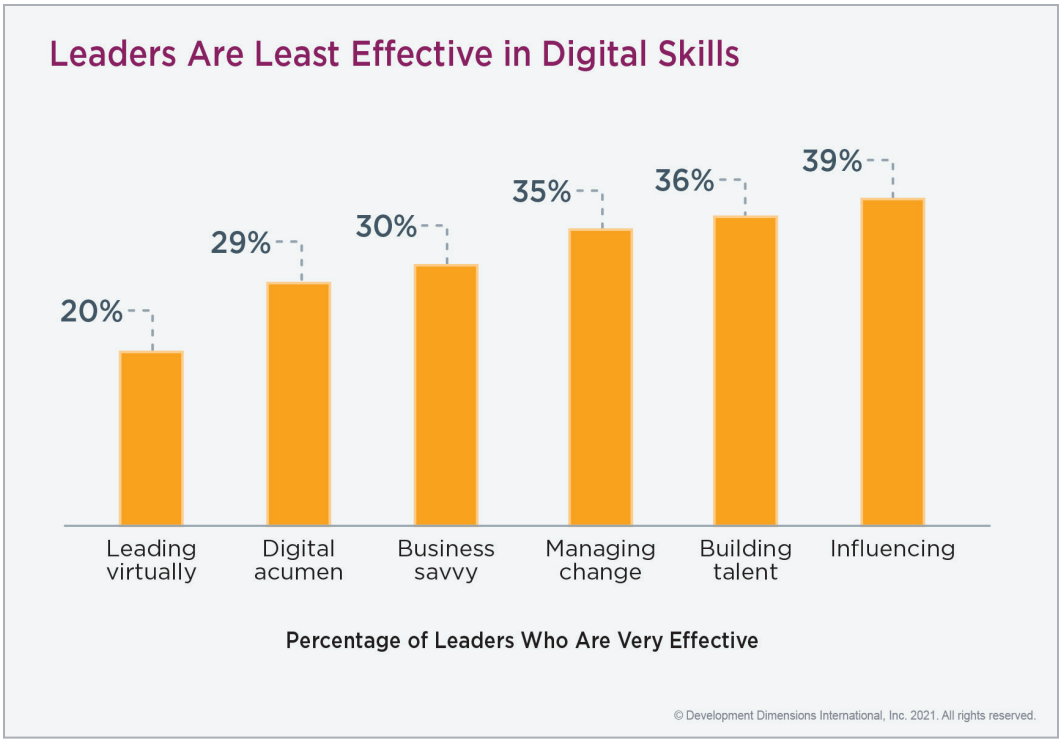
Organizations who provide high-quality development experiences are:

1.5X more likely to have high leader engagement and retention and

2X more likely to be voted as best places to work

Leading a Digital Future

People Skills Drive Digital Transformation



The ability to drive digital transformation will be one of the defining features that separates successful and struggling companies in the coming years. However, leaders are skeptical of their capabilities to drive digital change.

Across a broad set of leadership skills, leaders reported having the least confidence in their digital acumen and ability to lead virtually. In fact, 23% of leaders say they aren't effective at all at leading virtual teams. Our research shows that few organizations are developing these skills in their leaders. Fewer than 30% of leaders said they had ever received development for these two skills.

As a result, few feel prepared for operating within a highly digital business environment. Only 20% of leaders overall feel their organization is prepared for digital transformation, and confidence declines with leader level. In fact, CEOs rated this as one of the challenges their companies are least prepared to meet, with only 19% of CEOs saying they felt prepared.

of CEOs feel very prepared for digital transformation

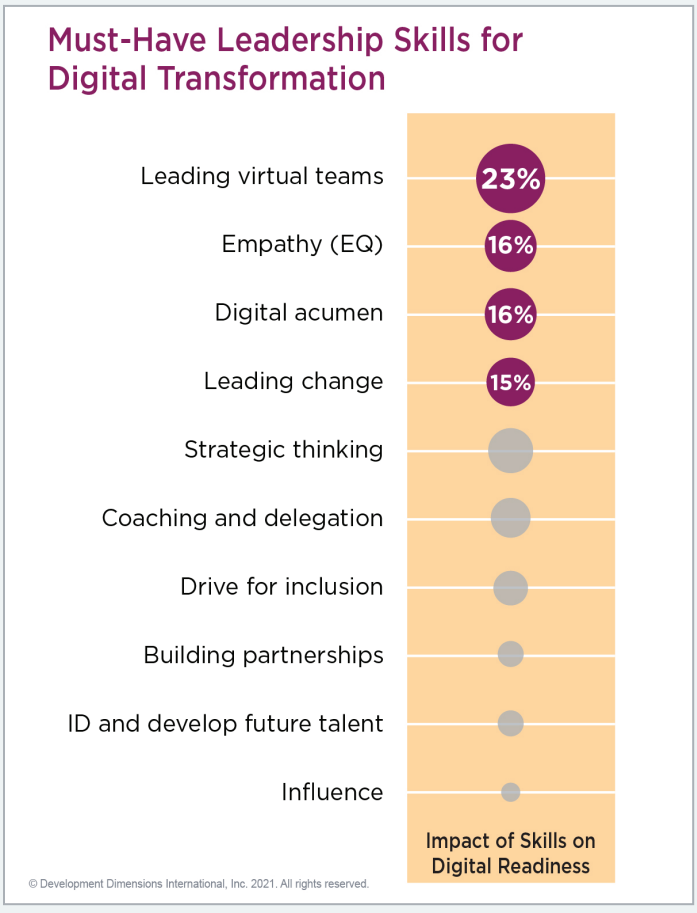
Where to focus

Key Skills Drive Transformation

Successfully driving transformation goes beyond digital acumen and leading virtual teams. The graphic below highlights the skills that are the most significant contributors for organizations that are successfully prepared to operate in a highly digital business environment. Organizations that had already developed leaders in these areas were 1.8X better prepared for digital transformation. They are also more likely to be innovative, with leaders being 1.5X more likely to develop novel products or services in their work.

Preparation in these areas goes beyond what's digital. Work is also entering the biggest era of transformation in decades. The accelerated pace of business and technology change will continue to put pressure on leaders to be upskilled and to act as innovators, designers, and technology partners.

Our research shows that organizations that are reinventing how they approach work and driving a more inclusive, innovative future are building these skills and fostering a culture to support transformation. They are more agile, data-driven, and more likely to encourage an experimental mindset—positioning them better for reinvention after the pandemic.



Global Leadership Forecast 2021

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Recommended Readings on Title VII and Sexual Harassment Law

prepared for

The Berkeley Center on Comparative Equality
2022 Conference on
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Books

Joan Williams, Bias Interrupted: Creating Inclusion for Real and for Good (Harvard Business Review Press, 2021) (evidence-based techniques for lasting diversity and inclusion created for company executives).

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E.E.O.C. Select Task Force on the Study of Harassment in the Workplace

- June 2016 Report of the Co-Chairs of the Select Task Force
- Industry Leaders Roundtable Discussion on Harassment Prevention - March 20, 2019
  A Reconvening of the Select Task Force - June 11, 2018
- Meetings of the Select Task Force - 2015 and 2016
- Members of the Select Task Force
- EEOC Resources

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INTERESTING CASES

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E.E.O.C. v. Nat'l Educ. Association, 442 F.3d 840 (9th Cir. 2005) (bullying treatment of female workers by male supervisor where nearly all subordinates were female had a potential cause of action under Title VII).

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Publications

SEC Continues to Drive ESG -- Approves Nasdaq's Board Diversity Listing Standards

August 19, 2021 | Articles

David J. Lavan and Tammy R. Bennett

In the wake of the pandemic and social justice movement in 2020, the call for diversifying corporate boards has intensified. On Aug. 6, 2021, the Securities and Exchange Commission (SEC) approved the Nasdaq Stock Market's (Nasdaq) proposal to amend its listing standards to promote greater board diversity and to require board diversity disclosures for Nasdaq-listed companies.

Fostering Diverse Perspectives

As indicated in Nasdaq's proposal, empirical studies have demonstrated that demographic diversity among board directors is good for business. There are several reasons diverse boards outperform their non-inclusive competitors. For example, diverse boards better reflect the demographics of key stakeholders, such as customers, shareholders, and employees. But choosing board directors based solely on demographic traits may lead to diverse boards without diverse voices. In a board environment lacking in psychological safety and inclusivity, diverse voices may get ignored or

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remain silent. In that scenario, groupthink may dominate decision-making. Without empowered diverse voices, a board may have the physical appearance of diverse identities but lack varied learned and lived experiences that cultivate diversity of thoughts and opinions that foster rigorous and meaningful discussions about challenging issues. In today's global marketplace, prudent companies do well to focus on increasing the representation of diverse directors while simultaneously creating an environment that maximizes unique perspectives.

Accordingly, Nasdaq-listed companies will be required to:

- Publicly disclose board-level diversity statistics on an annual basis using a standardized matrix template under Nasdaq Rule 5606 (the Board Diversity Matrix Rule); and
- Have, or disclose why they do not have, a minimum of two diverse board members under Nasdaq Rule 5605(f) (the Board Diversity or Disclosure Rule).

This "comply or disclose" or "name and shame" approach has been adopted by the SEC with respect to the adoption of various corporate governance rules by Nasdaq and the NYSE, with the expectation that a potentially awkward disclosure requirement will promote compliance. The Board Diversity Matrix Rule and the Board Diversity or Disclosure Rule are described in greater detail below. In addition, the SEC adopted a third rule requiring Nasdaq to offer certain listed companies access to a complimentary director recruiting service to help advance diversity on company boards (the Director Recruiting Rule).

Board Diversity Matrix Rule

Nasdaq Rule 5606 will require companies to disclose, in a standardized matrix set forth in the rule or in a substantially similar format, (i) the total number of company board members and (ii) how those board members self-identify regarding gender, predefined race, and ethnicity categories and LGBTQ+ status. Nasdaq sample matrices are published here. Foreign private issuers (FPIs) must disclose a similar matrix, but they can apply a broader definition of diversity and report the number of individuals who self-identify as underrepresented in their home country jurisdiction based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity. Companies will be required to publish the board diversity matrix in their annual meeting proxy statement, or alternatively, on the company's

website, provided that the company submits a link to the information through the Nasdaq Listing Center no later than 15 calendar days following the annual meeting. After the first year of publishing the statistics, companies will disclose the board diversity matrix for both the current and the immediately preceding year on an annual basis.

Compliance Date: All Nasdaq-listed companies must comply with the board diversity matrix disclosure rule by the later of (i) Aug. 8, 2022, or (ii) the date the company files its proxy statement for its 2022 annual meeting of shareholders (or if the company does not file a proxy statement, in its annual report on Form 10-K or 20-F).

Board Diversity or Disclosure Rule

Nasdaq Rule 5605(f) requires companies to have at least two diverse board members or to explain the company's reasons for not meeting this diversity objective. For U.S. issuers, one diverse director must self-identify as female, and the other director must self-identify as either a racial or ethnic minority or a member of the LGBTQ+ community. Companies may comply with the rule by having two directors who self-identify in racial or ethnic categories beyond those described in the Nasdaq rule, and explaining that the company considers diversity more broadly than the categories defined in the rule. Smaller reporting companies and FPIs also will be required to have two diverse directors, at least one of whom identifies as female, but companies may satisfy the diversity requirement for the second director by appointing a second director who identifies as female. Unlike U.S. issuers, FPIs may satisfy the board diversity requirement under the broader definition of diversity applies to the matrix disclosures by appointing a director who self-identifies as an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious or linguistic identity in the company's home country jurisdiction. Companies with five or fewer board members can meet the board diversity objective by having only one instead of two diverse directors or can increase their board size to add a diverse director. Where a listed company fails to meet the applicable diversity objective, the company must detail the reasons why they do not have the applicable number of diverse directors. Failure to meet the diversity objective will not subject a company to delisting

Compliance Date*:* All companies are expected to have at least one diverse director by Aug. 7, 2023, larger companies listed on the Nasdaq Global Select Market or Nasdaq Global Market tiers have until Aug. 6, 2025, to have two diverse directors, while smaller companies listed on the Nasdaq

Capital Market tier have until Aug. 6, 2026, to appoint a second diverse director.

Exempt Issuers

While the rules are broadly applicable, including as discussed above to FPIs, excluded are investments and other companies without boards, companies that are not operating, and companies that do not list equity securities, including limited partnerships, asset-backed companies, and special-purpose acquisition companies (SPACs). SPACs are exempt from the rules until the completion of their initial business combination.

Action Items

- Recruiting and onboarding new directors takes time. Nasdaq-listed companies interested in adding diverse directors should begin that process now.
- Director questionnaires elicit biographical information from directors. Consider whether your director questionnaire will need to be revised to elicit the information required under the new rules or standards adopted by significant shareholders.

Dinsmore & Shohl's ESG practice group has been focused on the increasing pace of change in the ESG space, including related regulatory initiatives, which we have addressed in previous alerts. As we all wait to see what the SEC's rule proposal on mandatory climate disclosures—expected 4Q21—looks like, we continue to address other developments in this space. If you have any questions, please contact the authors of this release, David Lavan (202.372.9122) or Tammy Bennett (513.832.5371).

WORKSHOP 1B

2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES

NATIONAL WOMEN'S LAW CENTER | 20 STATES BY 2020

BY ANDREA JOHNSON, RAMYA SEKARAN, SASHA GOMBAR | SEPTEMBER 2020

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INTRODUCTION

Three years after #MeToo went viral, the unleashed power of survivor voices has led to more than **230 bills** being introduced in state legislatures to strengthen protections against workplace harassment and a remarkable **19 states** enacting new protections. Although many of these laws are just starting to take effect, initial reports from the ground show both that they are making a difference in many crucial ways, but that this progress is incomplete. Indeed, states have been slow to adopt some of the reforms that promise to make the biggest difference for those most marginalized by harassment and for preventing workplace harassment.

As state legislative sessions began in 2020, energy remained high for advancing Me Too reforms. Nearly 400 state legislators from 42 states and the District of Columbia—from both sides of the aisle—joined the #20StatesBy2020 pledge declaring their commitment to supporting and working with survivors to strengthen protections against sexual harassment in 20 states by 2020.[1]

The onset of the COVID-19 pandemic stalled much of this momentum as many state legislatures abruptly shut down or shifted to emergency relief efforts just three months into 2020. **At the same time, the need for strong workplace anti-discrimination and anti-harassment laws is clearer and more urgent than ever.** COVID-19 unleashed an economic recession that hit women hardest, with especially high levels of job loss for Black women and Latinas.[2] And the Movement for Black Lives has shined a light on the many forms of oppression that Black women, Indigenous women, and other women of color continue to face at work, often including shockingly low wages and poor working conditions—inequities that the COVID-19 crisis has further exacerbated. Without a safety net or optimism about their chances of finding another job, workers are more desperate to keep a paycheck at any cost and less willing to report workplace abuses, increasing their vulnerability to harassment, discrimination, exploitation, abuse, and retaliation at work. Recognizing this, legislators in states like **North Carolina**[3] have continued to introduce legislation to strengthen workplace anti-discrimination and anti-harassment laws as part of the effort to rebuild from COVID-19.[4]

This report provides an updated overview of the progress that has been made in advancing workplace anti-harassment reforms in the states from October 2017 to September 2020, as well as in New York City which has been especially active in strengthening its anti-harassment laws. The report also highlights some of the stories of how survivors have led the push for these important state law reforms.

CLOSING IN ON WORKPLACE HARASSMENT LAW REFORM IN #20STATESBY2020

At a time when partisan politics seems to have reached a fever pitch, the Me Too movement has seen conservative and progressive state legislators alike, in states from

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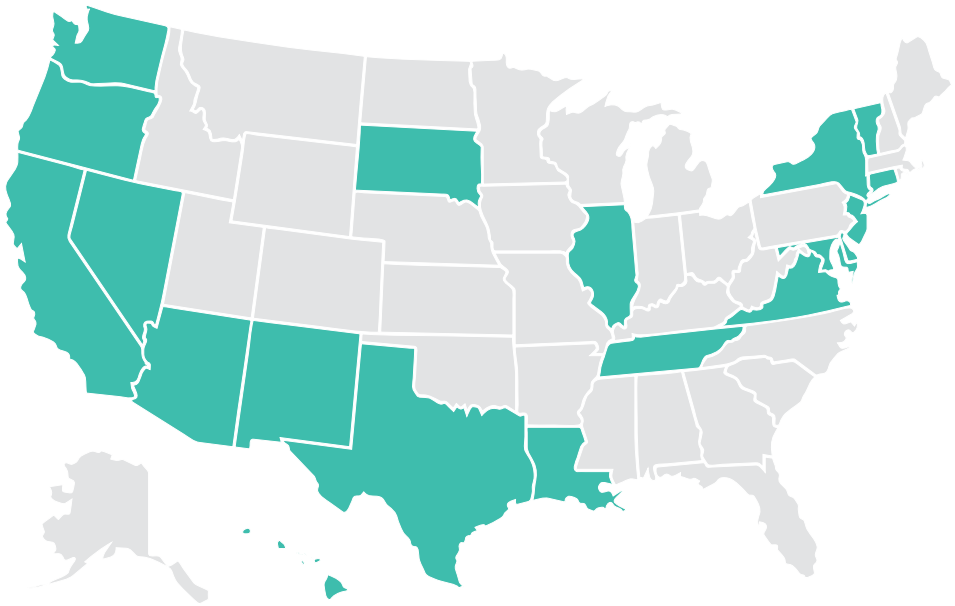

Tennessee to Oregon, speaking out and pushing for long overdue reforms to anti-harassment laws, many of them motivated and united by their own Me Too stories. Many of the Me Too workplace reforms have passed with bipartisan support. Major trends in the new reforms include the following:

- **15 STATES LIMITED OR PROHIBITED EMPLOYERS** from requiring employees to sign nondisclosure agreements as a condition of employment or as part of a settlement agreement.
- **11 STATES AND NEW YORK CITY IMPLEMENTED OR STRENGTHENED ANTI-HARASSMENT TRAINING** requirements for certain employers.
- **7 STATES ENACTED MEASURES TO REQUIRE OR ENCOURAGE EMPLOYER ANTI-HARASSMENT POLICIES**
- **7 STATES LIMITED EMPLOYERS' USE OF FORCED ARBITRATION**, though several of these laws are being challenged in court.
- **6 STATES EXPANDED WORKPLACE HARASSMENT PROTECTIONS** to include independent contractors, interns, and/or volunteers for the first time.

PROGRESS SLOW ON REFORMS THAT WOULD HAVE HIGHEST IMPACT FOR WORKERS MOST IN NEED OF PROTECTIONS

Workers in low-wage jobs—who are disproportionately women of color and immigrant women—experience some of the highest rates of workplace harassment and most severe repercussions for speaking out.[5] They should be the priority focus of workplace policy reforms, and yet, since #MeToo went viral, only Illinois, Maryland, New York, and Vermont have been able to pass the most basic and crucial reform—ensuring that the many low-paid gig workers, domestic workers, home healthcare workers, and other workers who work for smaller employers or as independent contractors have legal protections against workplace harassment

Likewise, only California, Oregon, and New York meaningfully extended their statute of limitations for bringing a workplace harassment claim to three or more years, even though initial reports from jurisdictions that recently enacted this reform emphasize that it has been especially important for workers in low-wage jobs, who otherwise are often forced to choose between using their time to get another job to support their family or finding legal counsel, bringing a harassment claim, and seeking justice. The necessity of this reform has grown even more urgent with the COVID-19 crisis limiting access to courts and agencies and increasing the economic instability of so many workers.

In some states, important protections for low-wage workers were actually rolled back. In D.C. and Michigan, measures that raised the tipped minimum wage so tipped workers would no

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longer have to tolerate harassment from customers to make ends meet were repealed.[6]

Reforms that would more fundamentally shift employers' incentive and ability to prevent harassment have also proven challenging. Since #MeToo went viral, only California and New York have succeeded in updating the standard for what constitutes illegal workplace harassment and only Maryland, Delaware, and New York have updated standards for when employers are liable for that harassment. Existing standards have for too long allowed employers and courts to minimize and ignore the impact and reality of workplace harassment and power dynamics, especially in low-paid workplaces. And only Virginia, New York, and Connecticut have increased the financial relief available to harassment victims to an amount that would meaningfully incentivize employers to address and prevent harassment.

Only Vermont and New York City have taken steps to require climate surveys in more workplaces, despite the importance of such surveys in helping employers understand the prevalence of harassment in their workforce and providing an important anonymous channel for workers to raise concerns. And even the policies passed by Vermont and New York City are relatively modest.

Finally, while much progress was made in 2019 and 2020 in response to workers and survivors demanding broad policy solutions to address workplace harassment, too many reform efforts remain narrowly focused on sexual harassment, undercutting protections for women of color, immigrants, people with disabilities, and others who experience harassment based on multiple identities.

ME TOO WORKPLACE POLICY REFORMS MUST BE FURTHER STRENGTHENED AND EXPANDED

POLICY CHANGE MUST BE DRIVEN BY AND CENTERED ON THOSE MOST HARMED BY HARASSMENT. Workers and survivors should be shaping policy solutions to harassment. Their engagement will help ensure these policies actually meet the needs of those who experience sexual violence and other forms of harassment. In particular, policy change efforts should include and center workers in low-wage jobs; women of color; queer, transgender, intersex, and gender non-binary folks; immigrant workers; people with disabilities; and those who are currently or formerly incarcerated.

THE BE HEARD IN THE WORKPLACE ACT: A FEDERAL BILL AND A MODEL FOR STATE ACTION

In April 2019, U.S. Representative Katherine Clark and Senator Patty Murray introduced in Congress the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act—a landmark, comprehensive workplace anti-harassment bill.[8] This bicameral bill has the support of 169 members of congress and over 50 civil rights, women's rights, and worker's rights organizations. While Congress has yet to move the great majority of anti-harassment reforms that have been introduced since #MeToo went viral, BE HEARD can serve as a legislative model for states looking to carry the torch of Me Too workplace policy reform in the face of congressional inaction.

Specifically, the BE HEARD in the Workplace Act would:

- extend protections against harassment and other forms of discrimination to all workers;
- remove barriers to access to justice, such as short statutes of limitations and restrictively interpreted legal standards;
- promote transparency and accountability, including by limiting the use of abusive NDAs and forced arbitration and requiring companies bidding on federal contracts to report any history of workers' rights violations;
- and require and fund efforts to prevent workplace harassment and discrimination, including by requiring employers to adopt a nondiscrimination policy, requiring the EEOC to establish workplace training requirements and provide a model climate survey to employers, and ensuring that tipped workers are entitled to the same minimum wage as all other workers.

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Lawmakers must craft solutions that don't just benefit those with the most privilege, financial resources, and access to legal systems, but take into account how workplace power dynamics, workers' financial insecurity or immigration status, and employers' and courts' stereotyped assumptions about who is credible and who is not can make it impossible to report harassment, much less settle or file a claim. Policy reforms should also focus on preventing harm before it ever happens, rather than only after it occurs, and on shifting workplace structures to build worker power, like raising the minimum wage, and ensuring equal pay, paid leave, and fair work schedules.

WORKPLACE HARASSMENT REFORMS SHOULD NOT BE LIMITED TO SEXUAL HARASSMENT. Like sexual harassment, workplace discrimination and harassment based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety, and dignity—and these forms of harassment and discrimination often intersect in working people's actual experiences. The sexual harassment a Black woman experiences, for example, may include racial slurs and reflect racial hostility. Indeed, Equal Employment Opportunity Commission (EEOC) charge data indicate that women of color—and Black women in particular—are disproportionately likely to experience sexual harassment at work, highlighting how race and sexual harassment can be intertwined.[7] Legislation that focuses exclusively on sexual harassment has the odd and impractical result of providing a worker who experiences multiple, intersecting violations with only partial protection. Lawmakers should craft solutions that recognize these intersections.

"I don't think you can talk about the history of sexual harassment without talking about race. The early history of this country thrived off the sexual harassment and assault of Black women. Slavery was dependent on the rape of Black women, who became pregnant and gave birth to children who would become slaves. When slavery was no longer legal, Black women's sexuality was then vilified and even criminalized. Current sexual harassment laws reflect that complicated history. The law needs to recognize that race and sex are inevitably intertwined. Attempting to ask plaintiffs/victims to separate race and sex is requesting an impossible feat."

- PHILLIS RAMBSY, RAMBSY LAW AND SPIGGLE LAW FIRM, TENNESSEE, KENTUCKY, AND D.C., MARYLAND, VIRGINIA

"The extension of anti-harassment protections in New York to cover protected characteristics like race, ethnicity, and gender identity is an important victory. Through our helpline and worker focus groups, we regularly hear from women, including domestic workers and house cleaners, who are subjected to intersectional forms of harassment. While it often relates to their gender, it also overlaps with their ethnicity and the languages they speak. By eliminating special carve-outs and streamlining protections, we get closer to addressing discrimination as it actually occurs and ensuring that the law is more inclusive and accessible for all."

- SEHER KHAWAJA, LEGAL MOMENTUM, NEW YORK

"It isn't just white women who are getting sexually harassed, so it is an artificial construct to not include race, national origin, religion, etcetera [when strengthening anti-harassment protections]. Looking forward, we have a moment of opportunity that should be grasped to fill in these gaps on a national and state-wide basis."

- WENDY MUSELL, LAW OFFICES OF WENDY MUSELL; LEVY VINICK BURRELL HYAMS LLP, CALIFORNIA

ME TOO REFORMS SHOULD NOT JUST FOCUS ON THE WORKPLACE. Sexual harassment doesn't just happen in the workplace, and it doesn't just affect adults. Too many students experience sexual violence and other forms of harassment in elementary and secondary schools and in college. And just as in the workplace, often the sexual harassment students experience is entwined with other forms of harassment and discrimination. To prevent harassment at work, we must start by addressing it in schools, as the treatment and behavior students experience from their peers, teachers, and administrators ultimately shapes workplace norms about gender, race, respect, and accountability. States can help schools prevent harassment and assault by promoting the use of regular school climate surveys, requiring age-appropriate consent and healthy relationship education in K-12, requiring educators to receive ongoing training to recognize implicit biases and implement trauma-informed approaches in the classroom, restricting schools' use of strict and gendered dress codes, requiring amnesty policies for students who may fear reporting harassment or an assault when doing so would reveal they violated a student code, and ensuring harassment investigations and disciplinary hearings are fair and equitable for both those alleging harassment and those who are the subject of complaints, including Black and brown students, LGBTQ students, and students with disabilities.

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#20STATESBY2020 ADVANCES

ENSURING ALL WORKING PEOPLE ARE COVERED BY HARASSMENT PROTECTIONS

PROTECTING MORE WORKERS: ***Legal protections against harassment extend only to "employees" in most states and under federal law, leaving many people unprotected. States have been working to extend protections against harassment and discrimination to independent contractors, interns, and volunteers.***

2020

SOUTH DAKOTA enacted legislation extending protections against workplace discrimination to interns.[9]

2019

ILLINOIS enacted legislation to extend protections against all forms of harassment to contractors, consultants, and other individuals who are contracted to directly perform services for the employer.[10]

MARYLAND enacted legislation to extend discrimination and harassment protections to independent contractors and the personal staff of elected officers.[11]

NEW YORK expanded upon its 2018 legislation by passing legislation to ensure subcontractors, vendors, consultants, and others providing contracted services are protected not just from sexual harassment, but from all forms of discrimination in the workplace.[12]

2018

DELAWARE enacted legislation to expand employees covered by its sexual harassment protections to include state employees, unpaid interns, applicants, joint employees, and apprentices.[13]

NEW YORK enacted legislation to protect contractors, subcontractors, vendors, consultants, and others providing contracted services from sexual harassment in the workplace.[14]

VERMONT enacted legislation to prohibit sexual harassment of all people engaged to perform work or services, expanding protections against harassment to independent contractors, volunteers, and interns.[15]

> **"The expansion of New York's law to cover independent contractors and those who work for smaller employers has been critical. It has made it possible to assist more women who come to us through our helpline. Prior to this amendment, we saw too many vulnerable women falling through the cracks—women who equally deserved anti-discrimination protections yet who were arbitrarily excluded based on their employment situation."**
>
> **- SEHER KHAWAJA, LEGAL MOMENTUM, NEW YORK**

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COVERING MORE EMPLOYERS. ***In many states, harassment laws do not cover smaller employers, and federal law does not reach employers with fewer than 15 employees. Since October 2017, states have been working to extend anti-harassment protections to all employers, regardless of size.***

2019

ILLINOIS enacted legislation extending protections against discrimination to all employers, regardless of size. Previously, Illinois' workplace anti-discrimination law covered employers of all sizes for sexual harassment, pregnancy, and disability discrimination claims, but all other antidiscrimination protections extended only to employers with 15 or more employees.[16]

MARYLAND enacted legislation to extend protections from all forms of harassment to all employers, regardless of the employer's size.[17]

NEW YORK enacted legislation to extend protections against discrimination to all employers, regardless of the employer's size. Previously, New York had only extended anti-sexual harassment protections to all employers regardless of size.[18]

2018

NEW YORK CITY enacted legislation to amend its Human Rights Law to extend gender-based anti-harassment protections to all employers, regardless of the number of employees.[19]

¡YA BASTA! COALITION: ENDING SEXUAL VIOLENCE AGAINST JANITORS

The ¡Ya Basta! movement developed in response to a 2015 documentary, *Rape on the Night Shift*, that brought into public consciousness what too many janitorial staff already knew: industry conditions, including isolated work environments and language barriers, made these workers – many of whom are immigrant women – especially vulnerable to abuse.

The documentary brought these issues to the attention of the Service Employees International Union-United Service Workers West (SEIU-USWW), which represents janitors in California. The union surveyed its members and found that approximately half had been sexually harassed or assaulted at work.[20] Janitorial workers with SEIU-USWW who identify as survivors formed the worker-led ¡Ya Basta! Coalition, composed of an array of labor and survivor advocacy organizations, including Worksafe, UC Berkeley's Labor and Occupational Health Program (LOHP), Equal Rights Advocates, Futures Without Violence, and the California Coalition Against Sexual Assault.

Workers from the ¡Ya Basta! Coalition and Immigrant Women Rising – a movement of janitors and allies mobilized by SEIU-USWW – organized to push for legislation (AB 1978) requiring janitorial industry employers to register with the state and provide biennial in-person sexual harassment prevention training with worker input, or risk losing their ability to operate in California. Workers testified in support of the bill, organized rallies across the state, put up billboards, and participated in a hunger strike in front of the state capitol. In September 2016, the Governor signed the legislation into law.

Unfortunately, it soon became clear that more was needed to ensure that trainings were trauma-informed, culturally-aware, industry-specific, and effective. The workers got back to work: they organized to push for legislation that would strengthen the training requirements by requiring that trainings be conducted through a peer-to-peer, or promotoras, education model. In September 2018, 100 janitors marched 100 miles to Sacramento to pressure the Governor to sign AB 2079, which would require employers to conduct the trainings through peer education.[21]

Although Governor Brown vetoed the legislation that year, the workers did not relent. They continued to pressure the government to act and the following year, Governor Brown signed the Janitor Survivor Empowerment Act (AB 547) into law.[22] The new legislation requires the state to curate, with the input of a training advisory committee, a list of qualified organizations and peer trainers to provide the required anti-sexual harassment training. The training advisory committee is required to include representatives from a collective bargaining agent that represents janitorial workers and sexual assault victim advocacy groups. Employers are also required to submit a report confirming training completion to the state.

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RESTORING WORKER POWER AND INCREASING EMPLOYER TRANSPARENCY AND ACCOUNTABILITY

LIMITING NONDISCLOSURE AGREEMENTS (NDAS). ***NDAs can silence individuals who have experienced harassment and empower employers to hide ongoing harassment, rather than undertake the changes needed to end it. Some employers require employees to enter into NDAs when they start a job that prevent them from speaking up about harassment or discrimination. Other times, NDAs are imposed as part of a settlement of a claim. States have been working to limit employer power to impose NDAs in both contexts while still supporting survivors who may want an assurance of confidentiality. The effectiveness of states' different policy approaches remains to be seen, but in California, at least, several employee rights attorneys report initial positive impacts.***

2020

HAWAI'I enacted legislation prohibiting employers from requiring employees, as a condition of employment, to enter into NDAs preventing them from disclosing or discussing sexual harassment or assault occurring in the workplace or at work-related events. It also prevents employers from retaliating against employees for reporting or discussing sexual harassment or assault.[23]

NEW MEXICO enacted legislation prohibiting private employers from requiring employees to sign an NDA in settlement agreements related to sexual harassment, discrimination, or retaliation or from preventing employees from disclosing sexual harassment, discrimination, or retaliation occurring in the workplace or at a work-related event. The legislation does allow for confidentiality about the amount of the settlement or, at the employee's request, facts that could lead to the identification of the employee or factual information related to the underlying claim. No such confidentiality provisions, however, can preclude employees from testifying in judicial, administrative, or other proceedings pursuant to a valid subpoena or legal order.[24]

2019

ILLINOIS enacted legislation to render void any contract provision that would, as a unilateral condition of employment or continued employment, prevent employees or prospective employees from disclosing truthful information about discrimination, harassment, or retaliation. However, these contract provisions are allowed when they are a mutual condition of employment negotiated in good faith and the agreement is in writing; demonstrates actual, knowing, and bargained-for consideration from both parties; and acknowledges the employee's right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.

The legislation also prohibits an employer from unilaterally imposing such an NDA in a settlement or termination agreement, unless including such a provision is the documented preference of the employee and is mutually beneficial to both parties; the employer notifies the employee of their right to have an attorney review the settlement or termination agreement; there is valid, bargained for consideration in exchange for the confidentiality; the provision does not waive any future claims of harassment, discrimination, or retaliation; and the employee is given 21 days to consider the agreement and seven days to revoke the agreement.[25]

LOUISIANA enacted legislation prohibiting settlements of workplace sexual harassment or sexual assault claims against the state that use public funds from containing an NDA preventing the claimant from disclosing the underlying facts and terms of the claims.[26]

NEVADA enacted legislation to render void and unenforceable provisions in settlement agreements that prevent a party from disclosing factual information relating to a civil or administrative action for a felony sexual offense, sex discrimination by an employer or a landlord, or retaliation by an employer or landlord for reporting sex discrimination. The law also prohibits courts from entering an order that would prevent disclosure of this information. The amount of a settlement agreement may still be kept confidential and claimants can request a confidentiality provision to protect their identity, unless a government agency or public official is a party to the settlement agreement.[27]

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NEW JERSEY enacted legislation to make NDAs in employment contracts or settlement agreements that prevent the disclosure of details relating to a claim of discrimination, retaliation, or harassment unenforceable against employees. If the employee publicly reveals sufficient information to identify the employer, the employee will not be able to enforce the employer's nondisclosure obligations. Every settlement agreement must include a notice specifying that although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable. The legislation also prohibits retaliation against an employee who refuses to enter into an agreement with an unenforceable provision.[28]

NEW YORK enacted legislation to render void and unenforceable any provision in an agreement between an employer and an employee or potential employee that prevents the disclosure of factual information related to discrimination, unless the provision provides notice that it does not prohibit the employee from speaking with law enforcement, the Equal Employment Opportunity Commission, a state division or local commission on human rights, or an attorney.[29]

New York also enacted legislation to extend its 2018 law limiting NDAs in sexual harassment settlement agreements to more broadly limit NDAs in settlements relating to all discrimination claims. This legislation also added additional protections for complainants choosing to enter into an NDA, including requiring the provision be written in plain English and in the primary language of the employee and providing that the provision is void if it prevents the employee from participating in an agency's investigation or from disclosing facts necessary to receive public benefits.[30]

OREGON enacted legislation to prohibit employers from requiring an employee or prospective employee as a condition of employment, continued employment, promotion, compensation, or the receipt of benefits to enter into an agreement preventing the disclosure of discrimination (including harassment) or sexual assault that occurred in the workplace, at a work-related event, or between an employer and an employee off the employment premises. An employer may enter into a settlement, separation, or severance agreement with a nondisclosure or a nondisparagment provision preventing the disclosure of factual information relating to discrimination, harassment, or sexual assault only if the employee claiming to be discriminated against requests it and is given seven days to revoke the agreement.[31]

Oregon also enacted legislation prohibiting candidates, political committees of campaigns, and public office holders from using campaign funds and public funds to make payments in connection with a nondisclosure agreement relating to workplace discrimination, including harassment and sexual assault.[32]

TENNESSEE enacted legislation to make void and unenforceable any provision in a settlement agreement entered into by a governmental entity that prohibits the parties from disclosing the details of the claim or the identities of people related to the claim. However, victims of sexual harassment, sexual assault, and other offenses, including sexual exploitation and domestic abuse, retain the ability to keep their identities confidential.[33]

VIRGINIA enacted legislation to prohibit employers from requiring an employee or prospective employee to sign, as a condition of employment, a nondisclosure or confidentiality agreement that has the purpose or effect of concealing the details relating to sexual assault.[34]

2018

ARIZONA enacted legislation to allow an individual who is bound by an NDA to break the NDA if asked about criminal sex offenses by law enforcement or during a criminal proceeding. The legislation also prohibits public officials from using public funds to enter into a settlement with an NDA related to sexual assault or sexual harassment.[35]

CALIFORNIA enacted legislation to prohibit employers from requiring an employee to sign, as a condition of employment or continued employment, or in exchange for a raise or a bonus, a release of a claim or a right, a nondisparagement agreement, or other document that prevents the employee from disclosing information about unlawful acts in the workplace, including sexual harassment. The law clarifies that these provisions do not apply to NDAs or releases in settlement agreements that are voluntary, deliberate, and informed, and provide consideration of value to the employee, and where the employee was given notice and opportunity to retain an attorney or was represented by an attorney.[36]

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California also enacted legislation to prohibit confidentiality provisions in settlement agreements that prevent the disclosure of factual information related to claims of sexual assault, sexual harassment, or other forms of sex-based workplace harassment, discrimination, and retaliation filed in a civil or administrative action. Claimants can request a confidentiality provision to protect their identity, unless a government agency or public official is a party to the settlement agreement. This prohibition does not apply to confidentiality provisions regarding the amount paid under a settlement agreement.[37]

MARYLAND enacted legislation to make unlawful NDAs and other waivers of substantive and procedural rights related to sexual harassment or retaliation claims in an employment contract or policy. The law also protects employees from retaliation for refusing to enter into such an agreement.[38]

TENNESSEE enacted legislation to make it unlawful to require an employee or prospective employee, as a condition of employment, to execute or renew an NDA regarding sexual harassment. Employees covered by an NDA cannot be fired as retaliation for breaking the NDA.[39]

VERMONT enacted legislation to prohibit employers from requiring any employee or prospective employee, as a condition of employment, to sign an agreement that prevents the individual from opposing, disclosing, reporting, or participating in a sexual harassment investigation. The legislation also requires a settlement agreement relating to sexual harassment explicitly state that it does not prohibit the claimant from: filing a complaint with any state or federal agency; participating in an investigation by a state or federal agency; testifying or complying with discovery requests in a proceeding related to a claim of sexual harassment; or engaging in concerted activities with other employees under state or federal labor relations laws. The agreement must also state that it does not waive any rights or claims that may arise after the settlement is executed.[40]

WASHINGTON enacted legislation to prohibit employers from requiring an employee, as a condition of employment, to sign an NDA, waiver, or other document that prevents the employee from disclosing sexual harassment or assault occurring in the workplace, at work-related events, or between employees, or an employer and an employee, off the employment premises.[41] Washington also enacted a separate law providing that NDAs cannot be used to limit a person from producing evidence or testimony related to past instances of sexual harassment or sexual assault by a party to a civil action.[42]

NEW YORK enacted legislation to prohibit employers from using NDAs in settlement agreements or other resolutions of a claim that prevent the disclosure of the underlying facts and circumstances of sexual harassment claims, unless the condition of confidentiality is the complainant's preference. The complainant must be given 21 days to consider the provision and seven days to revoke the agreement.[43]

> **"California's new law limiting the use of NDAs in settlements "has really allowed people to step into their own power and feel their own voice and make that choice themselves, which has been hugely impactful in regaining some of what was stolen by the harasser."**
>
> **- BARBARA FIGARI, THE FIGARI LAW FIRM, CALIFORNIA**

PROHIBITING NO-REHIRE PROVISIONS. ***No-rehire provisions in settlement agreements bar employees from ever working for their employer again. Such provisions may impact the individual's ability to be employed and disincentivize others from coming forward when they experience harassment. To address this problem, states are limiting the use of no-rehire provisions.***

2019

CALIFORNIA enacted legislation to prohibit no-rehire provisions in agreements to settle employment disputes that prevent an employee who has filed a claim against the employer from working again for the employer, or any parent company, subsidiary, division, affiliate, or contractor of the employer. The new law does not prohibit, however, the employer from including a no-rehire provision in a settlement with an employee if the employer has made a good faith determination that the employee engaged in sexual harassment or sexual assault.[44]

OREGON enacted legislation to prohibit no-rehire provisions in agreements resolving claims of discrimination (including harassment) or sexual assault, unless the employee requests it and is given seven days after signing to revoke the agreement. The new law does not prohibit, however, the employer from including a no-rehire provision in a settlement with an employee if the employer has made a good faith determination that the employee engaged in discrimination (including harassment) or sexual assault.[45]

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2018

VERMONT enacted legislation to prohibit no-rehire provisions in sexual harassment settlements that prevent an employee from working again for the employer, or any parent company, subsidiary, division, or affiliate of the employer.[46]

> **"The prohibition on no rehire clauses in settlements "has been so important. It was awful to have clients sign these because they could basically be locked out of an entire industry. It has been very helpful to have really clear guidance on no-rehire clauses because it was so bad for workers in low-wage jobs and so potentially retaliatory."**
>
> **-ELIZABETH KRISTEN, LEGAL AID AT WORK, CALIFORNIA**

STOPPING FORCED ARBITRATION. ***Many employers compel their employees to waive their right to go to court to enforce their rights to be free from harassment and other forms of discrimination. They require employees instead to arbitrate any such disputes. Forced arbitration provisions funnel harassment claims into often secret proceedings where the deck is stacked against employees and can prevent employees from coming together as a group to enforce their rights. While federal law limits states' ability to legislate in this area, some states are working to limit employers' ability to force their employees into arbitration. Many of these provisions are being challenged by employers in the courts.***

2019

CALIFORNIA enacted legislation providing that applicants or employees cannot be forced to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment. The law prohibits employers from threatening, retaliating or discriminating against, or terminating any applicant or employee for refusing to consent to waiving any right, forum, or procedure for a violation of any provision of the FEHA.[47] **Note**: In 2020 a federal district court enjoined California from enforcing this law on the basis that it is preempted by the Federal Arbitration Act. That decision has been appealed to the 9th Circuit.[48]

ILLINOIS enacted legislation to render void any provision that requires, as a condition of employment or continued employment, an employee or prospective employee waive, arbitrate, or diminish any claim of discrimination, harassment, or retaliation, unless the agreement is in writing; demonstrates actual, knowing, and bargained-for consideration from both parties; and acknowledges the employee's right to report allegations to the appropriate government agency or official, participate in agency proceedings, make truthful statements required by law, and request and receive legal advice.[49]

NEW JERSEY enacted legislation to make unenforceable provisions in employment contracts that waive any substantive or procedural right or remedy relating to discrimination, retaliation, or harassment claims. The legislation also specifically provides that no right or remedy under the New Jersey Law Against Discrimination or any other statute or case law can be prospectively waived. Retaliation against an employee who refuses to enter into an employment contract with an unenforceable provision is prohibited.[50] **Note**: this law is currently being challenged in federal court as preempted by the Federal Arbitration Act.[51]

NEW YORK enacted legislation to extend its 2018 prohibition on forced arbitration to all discrimination claims.[52] **Note**: This law has been challenged in court with federal district courts finding it preempted by the Federal Arbitration Act and a state court finding that it was not preempted.[53]

2018

MARYLAND enacted legislation to render void, except as prohibited by federal law, any provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy related to a future claim of sexual harassment or retaliation for reporting sexual harassment.[54]

NEW YORK enacted legislation to prohibit mandatory arbitration to resolve allegations or claims of sexual harassment.[55] **Note**: This law has been challenged in court with federal district courts finding it preempted by the Federal Arbitration Act and a state court in finding that it was not preempted.[56]

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VERMONT enacted legislation to prohibit employers, except as otherwise permitted by state or federal law, from requiring any employee or prospective employee to sign an agreement or waiver as a condition of employment that waives a substantive or procedural right or remedy available to the employee with respect to a sexual harassment claim.[57]

WASHINGTON enacted legislation to make void and unenforceable any provisions requiring an employee to waive their right to publicly pursue a cause of action, or to publicly file a complaint with the appropriate state or federal agencies, relating to any cause of action arising under state or federal anti-discrimination laws, as well as any provision that requires an employee to resolve claims of discrimination in a confidential dispute resolution process.[58]

PROTECTING THOSE WHO SPEAK UP FROM DEFAMATION LAWSUITS. ***When survivors of workplace harassment and assault speak up, they are often not believed and face retaliation. Increasingly, defamation lawsuits are being weaponized by sexual harassers as another retaliatory tactic to silence survivors and others who speak up about harassment. Many states have "anti-SLAPP" (anti-Strategic Lawsuit Against Public Participation) laws to protect individuals who are "slapped" with a meritless defamation lawsuit seeking to silence their exercise of free speech and petition rights regarding matters of public interest. In the last few years, states have strengthened their anti-SLAPP and related laws to provide greater protection to those who speak up about sexual harassment and assault.***

2020

NEW YORK passed legislation, currently awaiting signature by the governor, strengthening its "anti-SLAPP" law by expanding the definition of "public interest" to cover "any subject other than a purely private matter" and requiring an award of attorneys' fees and costs for an individual who defeats a SLAPP lawsuit.[59] The bill sponsor and advocates spoke of this legislation as protecting those who speak out against sexual harassment, abuse, and assault from being "slapped" with defamation lawsuits.[60]

LOUISIANA enacted legislation providing that non-profit organizations cannot be held liable for disclosing to a prospective employer, in good faith, information about a former employee, volunteer, or independent contractor engaging in sexual harassment, assault, abuse, trafficking, or misconduct.[61]

2019

TEXAS enacted legislation providing that charitable organizations, or such an organization's employee, volunteer, or independent contractor, cannot be held liable for disclosing to a current or prospective employer, in good faith, information reasonably believed to be true about a former employee, volunteer, or independent contractor engaging in sexual harassment, assault, abuse, trafficking, or misconduct.[62]

2018

CALIFORNIA enacted legislation amending their "anti-SLAPP" law to include among communications that cannot be subject to a defamation lawsuit complaints of sexual harassment made by an employee, without malice, to an employer based on credible evidence as well as communications between the employer and interested persons regarding a complaint of sexual harassment. The legislation also authorizes an employer to answer, without malice, whether the employer would rehire a former employee and whether a decision to not rehire is based on the employer's determination that the employee engaged in sexual harassment.[63]

TRANSPARENCY ABOUT SEXUAL HARASSMENT CLAIMS. ***When employers resolve harassment claims out of public view, the lack of transparency can prevent accountability for broader reform. To remedy this, several jurisdictions have passed laws requiring the reporting or inspection of claims, complaints, investigations, resolutions, and/or settlements involving workplace harassment.***

2019

ILLINOIS enacted legislation to require every employer to disclose to the Department of Human Rights the total number of adverse judgements or rulings regarding sexual harassment or discrimination against it during the preceding year; whether any relief was ordered against the employer; and the number of rulings or judgements broken down by protected characteristic. This information will be published in an annual report available to the public, but the names of individual employers will not be disclosed. If the Department is investigating a charge of harassment or discrimination, it may request the employer provide the total number of settlements from the preceding five years relating to harassment or discrimination. Employers may not report the name of any victims of harassment or discrimination as part of these disclosures. These requirements remain in effect through January 1, 2030.[64]

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2018

ILLINOIS enacted legislation to require reporting of discrimination, harassment, sexual harassment, and retaliation claims involving executive branch employees, vendors and others doing business with state agencies in the executive branch, board members and employees of the Regional Transit Boards, and all vendors and others doing business with the Regional Transit Boards. The reports must be made publicly available on each office's website.[65]

Illinois also enacted legislation requiring local governments, school districts, community colleges, and other local taxing bodies to report whenever they approve a severance agreement with an employee or contractor because the employee or contractor was found to have engaged in sexual harassment or discrimination. These reports must be made available on the internet and to the local press within 72 hours.[66]

LOUISIANA enacted a law requiring each state agency to make available to the public every year the number of sexual harassment complaints received by the agency, as well as the number of complaints which resulted in a finding that sexual harassment occurred, the number which resulted in discipline or corrective action, and the amount of time it took to resolve each complaint.[67]

MARYLAND enacted legislation to require employers with 50 or more employees to complete a survey from the Maryland Commission on Civil Rights on the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee; the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and the number of sexual harassment settlements that included a provision requiring both parties to keep the terms of the settlement confidential. The aggregate number of responses from employers for each category of information will be posted on the Maryland Commission on Civil Rights' website. The number of times a specific employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment will be retained for public inspection upon request. Employers are required to submit these surveys by July 1, 2020, and July 1, 2022.[68]

Another new law requires each unit of the executive branch of the state government to submit information about its sexual harassment policies and prevention training and a summary of sexual harassment complaints filed, investigated, resolved, and pending in an annual report to the state Equal Employment Opportunity Coordinator and the Maryland Commission on Civil Rights.[69]

NEW YORK CITY enacted legislation to require all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate, to annually report on complaints of workplace sexual harassment to the Department of Citywide Administrative Services. The Department is required to report the number of complaints filed with each agency; the number resolved; the number substantiated and not substantiated; and the number withdrawn by the complainant before a final determination. Information from agencies with 10 employees or less will be aggregated together. This information will be reported to the Mayor, the Council and the Commission on Human Rights, which will post it on its website.[70]

LIMITING THE USE OF PUBLIC FUNDS IN SETTLEMENTS.
When elected officials make taxpayers foot the bill for their harassment, they can avoid real accountability. Like Congress did in its 2018 reforms to the Congressional Accountability Act, several states have been changing their laws to prohibit elected officials and candidates from using public funds to pay for sexual harassment judgements or settlements.

2019

CALIFORNIA enacted legislation prohibiting the use of campaign legal defense funds and campaign funds to pay or reimburse a candidate or elected officer for a penalty, judgment, or settlement related to a claim of sexual assault, sexual abuse, or sexual harassment.[71]

LOUISIANA enacted legislation making state employees and elected officials found to have engaged in sexual harassment responsible for all or a portion of the amount of the settlement or judgment. The amount a state employee shall be responsible for depends on several factors including their ability to pay; whether they were performing their official duties at the time the harassment occurred; the severity of the harassment; and the stage of litigation.[72]

2018

NEW YORK enacted legislation requiring state government officials and employees who have a judgment against them for sexual harassment to personally reimburse the state within 90 days for any payment the state made to the plaintiff.[73]

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FORMER NEW YORK LEGISLATIVE STAFFERS BRING ABOUT SWEEPING STATEWIDE REFORM

In 2018, seven former New York State legislative employees who experienced, witnessed, or reported sexual harassment while working in the legislature came together to demand change. Emboldened by #MeToo, their passions for public service, and their desire to no longer remain silent, they formed the Sexual Harassment Working Group.[74]

In March 2018, the Working Group issued a press release urging the legislature and Governor to conduct a transparent review of the state's sexual harassment laws. Unfortunately, the legislature passed reforms without adequate input from survivors and other experts – reforms that fell short of what was truly needed to address the broken system that had failed survivors for too long.[75]

New York's 2018 elections for state Senate seats and an open state attorney general seat provided another opportunity for the advocates to leverage. Many candidates were eager to demonstrate their support for women. The Working Group ensured that harassment was part of the discussion by sending questions about the issue to the attorney general debate moderators.[76]

The Working Group held group strategy sessions, conducted research, and brought together a broad coalition of civil rights organizations, women's rights and girls' rights advocacy groups, transgender rights advocates, and workers' rights litigators. From that organizing, the Working Group published public policy recommendations for protecting New York employees—both public and private—from harassment. The Working Group also called for a public hearing to provide stakeholders, especially survivors, an opportunity to utilize the most powerful tool of all to push for change – their lived experiences.[77]

Their efforts were successful. On February 13, 2019, the New York legislature held its first joint legislative public hearing on sexual harassment in over 27 years. Dozens of witnesses signed up to testify, including the Working Group, and the hearing lasted 11 hours.[78] Members of the Working Group recall the power of being able to confront the legislature with their vulnerability and the trauma they had experienced in a public and formal way. While the legislative process often involves negotiations behind closed doors, the public hearing created a unique kind of accountability. Following the hearing, when legislators brought solutions to the table, advocates and the public eye were watching to ensure that proposals were responsive to the powerful lived experiences the survivors had shared in such a public way.

This hearing, followed by a second hearing that May, a lobby day in Albany, press conferences, and a roundtable discussion of the proposed reforms with legislators organized by the Working Group and other advocates, led to the passage in August 2019 of a suite of groundbreaking reforms to prevent and respond to discrimination in the workplace. These reforms are detailed in this report.

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EXPANDING ACCESS TO JUSTICE

EXTENDING STATUTES OF LIMITATIONS. ***Short statutes of limitations can hamper the ability of individuals to bring harassment complaints, especially given the trauma of assault and other forms of harassment, which can impact the ability of individuals to take prompt legal action.***

2019

CALIFORNIA enacted legislation to extend from one to three years the statute of limitations for filing employment discrimination complaints with the Department of Fair Employment and Housing.[79]

CONNECTICUT enacted legislation to allow employees who have been subjected to discrimination, including harassment, 300 days to submit a complaint to the Connecticut Commission on Human Rights and Opportunities where previously they had only 180 days.[80]

MARYLAND enacted legislation to extend the statute of limitations for filing workplace harassment claims with the Commission on Human Relations from six months to two years, and from two years to three years for filing workplace harassment claims in court.[81]

NEW YORK enacted legislation to extend the statute of limitations for filing workplace sexual harassment complaints with the Division of Human Rights from one to three years.[82]

OREGON enacted legislation to give employees who have experienced discrimination (including harassment) five years, instead of one, to file a complaint with the Bureau of Labor and Industries or a civil suit.[83]

2018

NEW YORK CITY enacted legislation to extend the statute of limitations for filing claims of gender-based harassment with the New York City Commission on Human Rights from one year to within three years after the alleged harassing conduct occurred.[84]

"Extending California's statute of limitations has been "extremely helpful for low-wage workers, who . . . often need to make very difficult decisions: how you pay rent, put food on the table, versus making a complaint. Having the additional time to stabilize their economic situations before they proceed is very important, and I think is one of the greatest positive moves for low-income survivors of harassment." – WENDY MUSELL, LAW OFFICES OF WENDY MUSELL; LEVY VINICK BURRELL HYAMS LLP, CALIFORNIA

ESTABLISHING DISCRIMINATION AND HARASSMENT HELPLINES. ***Survivors and bystanders often do not speak up about workplace harassment because they fear retaliation for reporting and/or it is unclear to whom they should report and what their options are. Workers need multiple, trusted avenues for reporting, including anonymously. Confidential hotlines or helplines that are independent of an employer can play an important role in increasing reporting and stopping harassment.***

2020

NEW JERSEY enacted legislation requiring the Civil Service Commission—an independent body that hears and rules on appeals filed by civil service employees and candidates—to set up a confidential hotline for state employees to report incidents of workplace harassment and discrimination, and to receive information about relevant laws, policies, and procedures, as well as referrals for further assistance and counseling, if requested. The Commission is required to produce an annual report to the public on the number and types of calls received.[85]

2018

ILLINOIS enacted legislation requiring the Department of Human Rights to establish a sexual harassment and discrimination helpline to which individuals in public and private employment can report, including anonymously, and

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receive help with finding resources, including counseling services, and assistance in filing sexual harassment and discrimination complaints with the Department or other applicable agencies. The Department must annually report the number and type of calls received.[86]

ENSURING RIGHTS TO BE FREE FROM HARASSMENT CAN BE ENFORCED. ***Some state laws declare that workplace discrimination, including harassment, is unlawful, but do not provide a meaningful—or any—mechanism for an employee to enforce their right to a discrimination and harassment-free workplace in court. This lack of a meaningful "cause of action" to enforce the law seriously undermines survivors' ability to pursue justice and hold their employers accountable as well as employers' incentive to prevent harassment from occurring to begin with.***

2020

VIRGINIA enacted legislation strengthening its cause of action for employment discrimination, which previously only provided relief for a narrow set of employees working for an employer with more than 5 but less than 15 employees and only when an employee was discriminatorily discharged. Virginia's new law provides a cause of action for all types of discrimination, not just discrimination ending in discharge, and protects employees whose workplace has 15 or more employees, or 5 or more employees in the case of unlawful discharge. The new law also explicitly prohibits discrimination on the basis of sexual orientation or gender identity.[87]

REVISING THE "SEVERE OR PERVASIVE" LIABILITY STANDARD. ***The requirement under federal law and most state laws that harassment be "severe or pervasive" in order to establish a hostile work environment claim has been interpreted by courts in such an unduly restrictive manner that only the most egregious conduct qualifies. These interpretations minimize and ignore the impact of harassment and severely undermine harassment victims' ability to pursue claims, hold employers accountable, and obtain relief for the harm they have suffered. Two states have passed legislation seeking to address and correct these harmful interpretations.***

2019

NEW YORK enacted legislation to explicitly remove the restrictive "severe or pervasive" standard for establishing a hostile work environment claim. Under the new standard, harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's membership in one or more protected categories. The law provides that an employee need not compare their treatment to that of another employee in order to state a claim. Employers can assert a defense to such a claim if they can show that the harassing conduct did not rise above what a reasonable person in the same protected class would consider petty slights or trivial inconveniences.[88]

"The change to California's severe or pervasive standard has been especially important for our low-wage worker clients. Being able to tell them that one incident of harassment can be enough to state a claim and that they do not have to show some heightened standard of harm and instead that they need only show "disruption of emotional tranquility" is very meaningful. I have found that for my transgender clients subjected to workplace harassment based on misuse of name and gender pronouns, these two changes make their claims easier to explain to a factfinder and more in line with how my clients experience the harassment – one incident of misgendering is devastating." — ELIZABETH KRISTEN, LEGAL AID AT WORK, CALIFORNIA

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2018

CALIFORNIA enacted legislation to clarify the "severe or pervasive standard." The law states that a single incident of harassment is sufficient to create a hostile work environment if the harassment has unreasonably interfered with the employee's work performance or created an intimidating, hostile or offensive working environment. Moreover, a victim need not prove that their productivity declined due to the harassment; it is sufficient to prove that the harassment made it more difficult to do the job. Additionally, the new law clarifies that a court must consider the totality of the circumstances in assessing whether a hostile work environment exists and that a discriminatory remark may contribute to this environment even if it is not made by a decision maker or in the context of an employment decision. Courts are to apply these standards to all workplaces, regardless of whether a particular occupation has been historically associated with a higher frequency of sexually related comments and conduct than other occupations.[89]

CLOSING A LOOHPOLE IN EMPLOYER LIABILITY. ***Under federal law and many state laws, employers can avoid liability for a supervisor's harassment of subordinates if the employer can show that it took steps to prevent and address the harassment and that the employee did not take advantage of the employer's available preventative or corrective measures, like reporting the harassment to the employer. In practice, this means that employers are able to evade liability by showing little more than they provide training or have a policy on the books, regardless of quality or efficacy. States have been working to close this judicially created loophole that is blocking harassment victims from obtaining justice.***

2019

NEW YORK enacted legislation to provide that the fact that an individual did not make a complaint to the employer about harassment does not determine whether the employer is liable for the harassment.[90]

ENSURING EMPLOYER LIABILITY FOR SUPERVISOR HARASSMENT. ***The Supreme Court's 2013 decision in* Vance v. Ball State University *limited victims' ability to obtain redress under federal law when they experience sexual harassment by low-level supervisors. That case held that when employees with the authority to direct daily work activities—but not the authority to hire, fire, and take other tangible employment action—harass their subordinates, their employers are no longer vicariously liable for that harassment. The* Vance *decision is grossly out of touch with the realities of the workplace, as supervisors with the authority to direct daily work activities can wield a significant amount of power over their subordinates. Many state courts follow federal law interpretations—and thus the* Vance *case—in interpreting their own state anti-harassment laws. Several states have been working to expand employer accountability for harassment by lower-level supervisors.***

2019

MARYLAND enacted legislation to make employers liable for harassment by individuals who have the power to make decisions regarding employees' employment status or by those who direct, supervise, or evaluate employees. An employer is also liable if its negligence led to the harassment or allowed the harassment to continue.[91]

2018

DELAWARE enacted legislation to hold employers responsible for sexual harassment by supervisors when the sexual harassment negatively impacts the employment status of an employee. A supervisor includes any individual who is empowered by the employer to take an action to change the employment status of an employee or who directs an employee's daily work activities.[92]

REDRESSING HARM TO VICTIMS OF HARASSMENT. ***Compensatory damages can compensate victims of harassment for out-of-pocket expenses and emotional harm caused by harassment, and punitive damages awarded to victims punish employers who acted maliciously or recklessly in engaging in harassment. However, compensatory and punitive damages are capped in harassment and other discrimination cases under federal law and many state laws; in some states, they are not available at all. Limiting these damages means that individuals who have experienced egregious sexual harassment may not be fully compensated for their injuries, and employers are less incentivized to prevent harassment before it happens.***

2020

VIRGINIA enacted legislation allowing victims of employment discrimination to recover uncapped compensatory and punitive damages to address their injury. The law had previously only provided victims up to 12 months of back pay.[93]

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2019

CONNECTICUT enacted legislation permitting a court to award punitive damages to a victim of employment discrimination, overturning a Connecticut Supreme Court ruling disallowing such damage awards. Uncapped compensatory and punitive damages are now available.[94]

NEVADA enacted legislation allowing victims of employment discrimination to be awarded the same remedies as available under federal law, which includes compensatory and punitive damages, capped based on the employer size. Previously Nevada's anti-discrimination law had only allowed victims to recover two years of back pay and benefits and to be reinstated.[95] While this legislation increased the relief available under Nevada law by bringing it into line with the relief available under federal law, the damages available under Title VII are themselves in need of reform and the damage caps need to be removed.

NEW YORK, which previously provided for uncapped compensatory damages in discrimination claims, but did not authorize punitive damages, enacted legislation authorizing punitive damages, without limitation on the amount, for all employment discrimination actions brought against a private employer.[96]

HOTEL WORKERS DEMAND PANIC BUTTONS

Some industries may require unique solutions for addressing sexual harassment and violence responsive to the particular nature of their work. For many years, hotel and hospitality workers across the country have been organizing and demanding that their employers address widespread sexual harassment and violence by customers. For example, after finding that 58% of women hotel workers and 77% of women casino workers surveyed had been sexually harassed by a guest,[97] workers with UNITE HERE Local 1 in Chicago pushed for the passage of the "Hands Off Pants On" ordinance, which was passed in 2017 and requires hotels to provide a panic button to hotel workers assigned to clean or restock guest rooms or restrooms alone and requires hotels to develop a written anti-sexual harassment policy.[98] Since #MeToo went viral, several states, including Washington, Illinois, and New Jersey in 2019, have passed legislation requiring hotels to provide employees panic buttons. Illinois' law also covers employees who work in casinos and Washington's law also applies to janitors and security guards who work in isolated conditions. Illinois' and Washington's laws require employers to adopt an anti-sexual harassment policy and Washington's law also requires employers to provide anti-sex discrimination and harassment training.[99]

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PROMOTING PREVENTION STRATEGIES

While Title VII has been interpreted to provide employers with an incentive to adopt sexual harassment policies and training, it has created a situation where employers effectively are able to shield themselves from liability by having any anti-harassment policy or training, regardless of quality or efficacy. Employer anti-harassment training and policies have been largely ineffective in preventing harassment in the first instance in part because they are not mandatory, and because they are focused on compliance with the law, instead of preventing harassment.

REQUIRING ANTI-HARASSMENT TRAINING. ***Effective training, especially when tailored to the specific workplace and workforce, can reduce workplace harassment. Several jurisdictions have passed legislation requiring training for employees and in some cases mandating the content.***

2020

NEW JERSEY enacted legislation requiring state employees responsible for managing and investigating complaints of harassment and discrimination to receive additional training every three years conducted by the New Jersey Attorney General's Advocacy Institute, or another organization with expertise in response to and prevention of sexual violence, in consultation with the New Jersey Coalition Against Sexual Assault.[100]

VIRGINIA enacted legislation requiring all government contractors with more than 5 employees and a contract over $10,000 to provide annual training on the employer's sexual harassment policy to all supervisors and employees.[101]

2019

CONNECTICUT, which previously only required employers with 50 or more employees to train supervisory employees, enacted legislation to require all employers with three or more employees to provide sexual harassment training to every employee and to require those with fewer than three employees to provide training to supervisory employees. Employers must also provide employees with supplemental training at least every 10 years. The Connecticut Commission on Human Rights and Opportunities is required to create and make available at no cost to employers an online training and education video or other interactive method of training that fulfills these requirements.[102]

ILLINOIS enacted legislation to require the Department of Human Rights to produce a model sexual harassment prevention training program to be made available to employers and to the public online at no cost. The program must include an explanation of sexual harassment; examples of conduct that qualifies as sexual harassment; a summary of relevant state and federal provisions and remedies; and a summary of employers' responsibility in preventing, investigating, and correcting sexual harassment. All private employers in the state must use this model or create their own program that equals or exceeds the model's standards. Employers must provide this training at least once a year to all employees. Illinois also amended its sexual harassment training requirement for public employees to expand it to a "harassment and discrimination" prevention training.[103]

2018

CALIFORNIA, which previously only required employers with 50 or more employees to provide sexual harassment training to supervisory employees once every two years, enacted legislation expanding the requirement so that employers with five or more employees are now required to provide at least two hours of interactive sexual harassment training and education to all supervisory employees, and at least one hour of such training to all nonsupervisory employees in California within six months of their assumption of a position, by January 1, 2021. After January 1, 2021, employers must provide the required training to each employee once every two years.[104] California also enacted legislation that authorizes, but does not require, employers to provide bystander intervention training.[105]

DELAWARE enacted legislation to require employers with 50 or more employees to provide interactive sexual harassment prevention training and education to employees and supervisors within one year of beginning employment and every two years thereafter. Employers are required to provide additional interactive training for supervisors addressing their specific responsibilities to prevent and correct sexual harassment and retaliation.[106]

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LOUISIANA enacted a law requiring each public employee and elected official to receive a minimum of one hour of sexual harassment training each year. Supervisors and employees designated to accept or investigate complaints must receive additional training. Each agency must also maintain public records of each employee and official's compliance with the training requirement.[107]

MARYLAND enacted legislation requiring all state employees to complete at least two hours of in-person or virtual, interactive training on sexual harassment prevention within six months of hire and every two years thereafter. Additional training is required for supervisors.[108]

NEW YORK enacted legislation to require New York's Department of Labor to develop a model sexual harassment prevention training program, and to require all employers to conduct annual interactive training using either the state model or a model that meets state standards.[109]

NEW YORK CITY enacted legislation to require employers with 15 or more employees to conduct annual anti-sexual harassment interactive trainings for all employees, including supervisory and managerial employees. The training must include information concerning bystander intervention and the specific responsibilities of supervisory and managerial employees in addressing and preventing sexual harassment and retaliation.[110] New York City also now requires all city agencies, the offices of Mayor, Borough Presidents, Comptroller, and Public Advocate to conduct annual anti-sexual harassment trainings for all employees.[111]

VERMONT enacted legislation to allow the state Attorney General or the Human Rights Commission to inspect employers for compliance with sexual harassment laws and, if the Attorney General or Commission deems it necessary, require an employer, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both, for a period of up to three years.[112]

REQUIRING STRONG ANTI-HARASSMENT POLICIES. ***Anti-harassment policies are merely encouraged, not required, by federal law. As a result, many employers lack anti-harassment policies, particularly smaller organizations without the resources to engage legal and human resource experts to develop them. In response, several jurisdictions passed legislation requiring public and/or private employers to have anti-harassment policies or directing state agencies to develop model policies for broader use.***

2020

VIRGINIA enacted legislation requiring all government contractors with more than 5 employees and a contract over $10,000 to post their sexual harassment policy in a conspicuous public place and publish it in the employee handbook.[113]

WASHINGTON enacted legislation (SB 6205) requiring employers of long-term care workers to develop and disseminate a written policy on how to handle workplace discrimination and abusive conduct, including sexual harassment or assault. The policy must be available in English and each of the three languages spoken most by long-term care workers and must be reviewed and updated annually. Among other provisions, employers must also implement plans to prevent and protect employees from discrimination and abusive conduct to be developed, monitored, and updated at least every three years by a workplace safety committee of employee-elected members, employer-selected members, and at least one service recipient.

2019

CONNECTICUT enacted legislation to require an employer to either provide its employees, within three months of their start date, with a copy of its sexual harassment policy via email, or to post the policy on their website and provide employees with a link to the Connecticut Commission on Human Rights and Opportunities' sexual harassment website.[114]

NEW YORK enacted legislation requiring employers to provide employees their sexual harassment prevention policy at the time of hire and at every annual training, in English and in the employee's primary language if the commissioner on labor offers model policies in the employee's primary language. The legislation also required the Department of Labor to evaluate the impact of its current model sexual harassment prevention guidance document and sexual harassment prevention policy every four years and update as needed.[115]

OREGON enacted legislation to require all employers to adopt a written policy to reduce and prevent discrimination (including harassment) and sexual assault. The policy must provide, among other things, a process for an employee

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to report discrimination and sexual assault and statements outlining the statute of limitations and the prohibition on NDAs. Additionally, the law requires the Bureau of Labor and Industry to make model procedures and policies available on its website, which employers may use to establish their own policies.[116] Oregon enacted similar requirements for public employers.[117]

2018

ILLINOIS enacted legislation to require companies bidding for state contracts to have a sexual harassment policy.[118]

LOUISIANA enacted a law requiring each state agency to develop and institute a sexual harassment policy that, among other minimum requirements, contains a clear prohibition against retaliation and an effective complaint process that includes taking immediate and appropriate action when a complaint is received and details the process for making a complaint and alternative designees for receiving complaints.[119]

NEW YORK enacted legislation to require its Department of Labor to create and publish a model sexual harassment prevention guidance document and sexual harassment prevention policy that employers may utilize in their adoption of a sexual harassment prevention policy.[120] It also enacted legislation to require bidders on state contracts to certify as part of the bidding process that the bidder has implemented a written policy addressing workplace sexual harassment prevention and provides annual sexual harassment prevention training to all of its employees. If a bidder is unable to make this certification, they must provide a signed statement explaining why.[121]

WASHINGTON enacted legislation to establish a state women's commission to address several issues, including best practices for sexual harassment policies, training, and recommendations for state agencies to update their policies.[122] Additionally, the state equal employment opportunity commission is required to convene a working group to develop model policies and best practices to prevent sexual harassment in the workplace, including training, enforcement, and reporting mechanisms.[123]

REQUIRING NOTICE OF EMPLOYEE RIGHTS. ***No workplace anti-harassment or anti-discrimination law will be truly effective if working people are unaware of the laws and their protections. The stark power imbalances that often exist between an employee and the employer can make it difficult for working people to feel safe enough to speak up about workplace abuses. Requiring employers to post or otherwise share with employees information about their rights can help employees better assert those rights.***

2018

CALIFORNIA,[124] **DELAWARE,**[125] **ILLINOIS,**[126] **NEW YORK CITY,**[127] and **VERMONT**[128] all enacted legislation to require employers to post or otherwise share with employees information about employees' rights to be free from sexual harassment.

LOUISIANA enacted legislation to require establishments that have been licensed by the state to serve or sell alcohol to distribute an informational pamphlet to their employees with information on identifying and responding to sexual harassment and assault.[129]

REQUIRING CLIMATE SURVEYS. ***A climate survey is a tool used to assess an organization's culture by soliciting employee knowledge, perceptions, and attitudes on various issues. Anonymous climate surveys can help management understand the true nature and scope of harassment and discrimination in the workplace, inform important issues to be included in training, and identify problematic behavior that may be addressed before it leads to formal complaints or lawsuits.***

2018

NEW YORK CITY enacted legislation to require all city agencies, as well as the offices of the Mayor, Borough Presidents, Comptroller, and the Public Advocate, to conduct climate surveys to assess the general awareness and knowledge of the city's equal employment opportunity policy, including but not limited to sexual harassment policies and prevention at city agencies. Additionally, the new law requires all New York City agencies and the offices of the Mayor, Borough Presidents, Comptroller, and Public Advocate to assess workplace risk factors associated with sexual harassment.[130]

VERMONT enacted legislation to allow the state Attorney General or the Human Rights Commission to inspect employers for compliance with sexual harassment laws and, if the Attorney General or Commission deems it necessary, require an employer, to provide an annual education and training program to all employees or to conduct an annual, anonymous climate survey, or both, for a period of up to three years.[131]

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THE FIGHT FOR JUSTICE AND ACCOUNTABILITY IS FAR FROM OVER

As the Me Too movement has made clear, the laws and systems in place designed to address harassment have been inadequate. While much progress has been made in the last three years, policymakers must continue to strengthen protections and fill gaps in existing law and policy to better protect working people, promote accountability, and prevent harassment.

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Assembly Bill No. 9

CHAPTER 709

An act to amend Sections 12960 and 12965 of the Government Code, relating to employment.

[Approved by Governor October 10, 2019. Filed with Secretary of State October 10, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 9, Reyes. Employment discrimination: limitation of actions.

Existing law, the California Fair Employment and Housing Act, makes specified employment and housing practices unlawful, including discrimination against or harassment of employees and tenants, among others. Existing law authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a verified complaint with the Department of Fair Employment and Housing within one year from the date upon which the unlawful practice occurred, unless otherwise specified.

This bill would extend the above-described period to 3 years for complaints alleging employment discrimination, as specified. The bill would specify that the operative date of the verified complaint is the date that the intake form was filed with the Labor Commissioner. The bill would make conforming changes in provisions that grant a person allegedly aggrieved by an unlawful practice who first obtains knowledge of the facts of the alleged unlawful practice after the expiration of the limitations period, as specified.

Existing law authorizes the Director of Fair Employment and Housing to bring a civil action in the name of the department on behalf of a person claiming to be aggrieved in the case of failure to eliminate an unlawful practice through conference, conciliation, mediation, or persuasion. Existing law requires the director to bring the civil action within a specified time after the filing of the complaint.

This bill would, for those purposes, define filing a complaint to mean filing an intake form with the department, and would specify that the operative date of the verified complaint relates back to the filing of the form.

This bill would prohibit its provisions from being interpreted to revive lapsed claims.

The people of the State of California do enact as follows:

SECTION 1. Section 12960 of the Government Code is amended to read:

12960. (a) This article governs the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

(b) For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form.

(c) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or the director's authorized representative may in like manner, on that person's own motion, make, sign, and file a complaint.

(d) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(e) A complaint alleging a violation of Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code, shall not be filed pursuant to this article after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred. A complaint alleging any other violation of Article 1 (commencing with Section 12940) of Chapter 6 shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred. However, the filing periods set forth by this section may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration of the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

SEC. 2. Section 12965 of the Government Code is amended to read:

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department on behalf

of the person claiming to be aggrieved. Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation. In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel. The civil action shall be brought in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint. For any complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint. For all other complaints, a civil action shall be brought, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation, mediation, or civil action as well, that determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice. For purposes of this section, filing a complaint means filing a verified complaint.

(b) If a civil action is not brought by the department within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior courts of the State of California shall have jurisdiction of those actions, and

the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

(c) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars ($25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(d) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

(3) This subdivision is intended to codify the holding in Downs v. Department of Water and Power of City of Los Angeles (1997) 58 Cal.App.4th 1093.

(e) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

SEC. 3. This act shall not be interpreted to revive lapsed claims.

O

Assembly Bill No. 51

CHAPTER 711

An act to add Section 12953 to the Government Code, and to add Section 432.6 to the Labor Code, relating to employment.

[Approved by Governor October 10, 2019. Filed with Secretary of State October 10, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 51, Gonzalez. Employment discrimination: enforcement.

Existing law imposes various restrictions on employers with respect to contracts and applications for employment. A violation of those restrictions is a misdemeanor.

Existing law creates the Division of Labor Standards Enforcement, which is under the direction of the Labor Commissioner, and generally commits to the commissioner the authority and responsibility for the enforcement of employment laws.

This bill would prohibit a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit. The bill would also prohibit an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment. The bill would establish a specific exemption from those prohibitions. Because a violation of these prohibitions would be a crime, the bill would impose a state-mandated local program.

FEHA makes specified employment and housing practices unlawful and provides procedures for enforcement by the Department of Fair Employment and Housing. FEHA authorizes a person alleging a violation of specified provisions of the act relating to employment discrimination to submit a verified complaint to the Department of Fair Employment and Housing, and requires the department to take actions to investigate and conciliate that complaint. FEHA authorizes the department to bring a civil action on behalf of the person who submitted the complaint upon the failure to eliminate an unlawful practice under these provisions. FEHA requires the department to issue a right-to-sue notice to a person who submitted the complaint if certain conditions occur, and FEHA requires a person who has been issued a right-to-sue notice to bring an action within one year from when the department issued that notice.

This bill would additionally make violations of the prohibitions described above, relating to the waiver of rights, forums, or procedures, unlawful employment practices under FEHA.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) and the Labor Code.

(b) It is the purpose of this act to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.

SEC. 2. Section 12953 is added to the Government Code, to read:

12953. It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code.

SEC. 3. Section 432.6 is added to the Labor Code, to read:

432.6. (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

(d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney’s fees.

(e) This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization.

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

(g) This section does not apply to postdispute settlement agreements or negotiated severance agreements.

(h) This section applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

(i) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Assembly Bill No. 749

CHAPTER 808

An act to add Chapter 3.6 (commencing with Section 1002.5) to Title 14 of Part 2 of the Code of Civil Procedure, relating to civil actions.

[Approved by Governor October 12, 2019. Filed with Secretary of State October 12, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 749, Mark Stone. Settlement agreements: restraints in trade.

Existing law provides that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is void to the extent that the contract restrains that person.

This bill would prohibit an agreement to settle an employment dispute from containing a provision that prohibits, prevents, or otherwise restricts a settling party that is an aggrieved person, as defined, from working for the employer against which the aggrieved person has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer.

The bill would also clarify that an employer and an aggrieved person are free to agree to end a current employment relationship, or to prohibit or otherwise restrict the aggrieved person from obtaining future employment with the employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault, as defined. The bill would further clarify that an employer is not required to continue to employ or rehire a person if there is a legitimate nondiscriminatory or nonretaliatory reason for terminating or refusing to rehire the person.

The bill would provide that a provision in an agreement entered into on or after January 1, 2020, that violates this prohibition is void as a matter of law and against public policy.

The people of the State of California do enact as follows:

SECTION 1. Chapter 3.6 (commencing with Section 1002.5) is added to Title 14 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 3.6. AGREEMENTS SETTLING EMPLOYMENT DISPUTES

1002.5. (a) An agreement to settle an employment dispute shall not contain a provision prohibiting, preventing, or otherwise restricting a settling party that is an aggrieved person from obtaining future employment with the employer against which the aggrieved person has filed a claim, or any parent company, subsidiary, division, affiliate, or contractor of the employer.

A provision in an agreement entered into on or after January 1, 2020, that violates this section is void as a matter of law and against public policy.

(b) Nothing in subdivision (a) does any of the following:

(1) Preclude the employer and aggrieved person from making an agreement to do either of the following:

(A) End a current employment relationship.

(B) Prohibit or otherwise restrict the settling aggrieved person from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault.

(2) Require an employer to continue to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship or refusing to rehire the person.

(c) For purposes of this section:

(1) "Aggrieved person" means a person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

(2) "Sexual assault" means conduct that would constitute a crime under Section 243.3, 261, 262, 264.1, 286, 287, or 289 of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

(3) "Sexual harassment" has the same meaning as in subdivision (j) of Section 12940 of the Government Code.

O

Assembly Bill No. 2770

CHAPTER 82

An act to amend Section 47 of the Civil Code, relating to privileged communications.

[Approved by Governor July 9, 2018. Filed with Secretary of State July 9, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2770, Irwin. Privileged communications: communications by former employer: sexual harassment.

Existing law provides that libel is a false and unprivileged written publication that injures the reputation and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Existing law makes certain publications and communications privileged and therefore protected from civil action, including certain communications concerning the job performance or qualifications of an applicant for employment that are made without malice by a current or former employer to a prospective employer. Existing law authorizes an employer to answer whether or not the employer would rehire an employee.

This bill would include among those privileged communications complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment and would authorize an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

The people of the State of California do enact as follows:

SECTION 1. Section 47 of the Civil Code is amended to read:

47. A privileged publication or broadcast is one made:

(a) In the proper discharge of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action

shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision applies to and includes a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence and communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment. This subdivision authorizes a current or former employer, or the employer's agent, to answer, without malice, whether or not the employer would rehire a current or former employee and whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

(d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified

charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(2) Nothing in paragraph (1) shall make privileged any communication to a public journal that does any of the following:

(A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

(B) Breaches a court order.

(C) Violates any requirement of confidentiality imposed by law.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

O

Assembly Bill No. 3109

CHAPTER 949

An act to add Section 1670.11 to the Civil Code, relating to contracts.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 3109, Mark Stone. Contracts: waiver of right of petition or free speech.

The California Constitution provides that the people have the right to petition government for redress of grievances and to assemble freely to consult for the common good. The California Constitution provides that every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of this right. Existing law generally regulates formation and enforcement of contracts, including what constitutes an unlawful contract. Under existing law, a contract is unlawful if it is contrary to an express provision of law, contrary to the policy of express law, though not expressly prohibited, or otherwise contrary to good morals. A contract is also void to the extent that it restrains a person from engaging in a lawful profession, trade, or business of any kind.

This bill would make a provision in a contract or settlement agreement void and unenforceable if it waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment.

The people of the State of California do enact as follows:

SECTION 1. Section 1670.11 is added to the Civil Code, to read:

1670.11. Notwithstanding any other law, a provision in a contract or settlement agreement entered into on or after January 1, 2019, that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or alleged sexual harassment on the part of the other party to the contract or settlement agreement, or on the part of the agents or employees of the other party, when the party has been required or requested to attend the proceeding pursuant to a court order, subpoena, or written request from an administrative agency or the legislature, is void and unenforceable.

O

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All Information (Except Text) for S.2342 - Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

117th Congress (2021-2022) | Get alerts

« Back to this bill

Sponsor: Sen. Gillibrand, Kirsten E. [D-NY] (Introduced 07/14/2021)
Committees: Senate - Judiciary
Committee Meetings: 11/04/21 9:00AM 10/28/21 9:00AM
Latest Action: Senate - 11/17/2021 Placed on Senate Legislative Calendar under General Orders. Calendar No. 169. (All Actions)
Tracker: **Introduced** Passed Senate Passed House To President Became Law

There are 2 versions of this bill. View text »

Click the check-box to add or remove the section, click the text link to scroll to that section.
☑ Titles ☑ Actions Overview ☑ All Actions ☑ Cosponsors ☑ Committees ☑ Related Bills ☑ Subjects ☑ Latest Summary ☐ All Summaries

Titles (3)

Short Titles

Short Titles - Senate

Short Title(s) as Reported to Senate

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Short Title(s) as Introduced

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Official Titles

Official Titles - Senate

Official Titles as Introduced

A bill to amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Actions Overview (2)

Date	Actions Overview
11/17/2021	Committee on the Judiciary. Reported by Senator Durbin with an amendment in the nature of a substitute. Without written report.
07/14/2021	Introduced in Senate

All Actions (4)

Date	All Actions
11/17/2021	Placed on Senate Legislative Calendar under General Orders. Calendar No. 169. Action By: Senate

Date	All Actions
11/17/2021	Committee on the Judiciary. Reported by Senator Durbin with an amendment in the nature of a substitute. Without written report.
11/04/2021	Committee on the Judiciary. Ordered to be reported with an amendment in the nature of a substitute favorably.
07/14/2021	Read twice and referred to the Committee on the Judiciary. Action By: Senate

Cosponsors (22)

* = Original cosponsor

Cosponsor	Date Cosponsored
Sen. Graham, Lindsey [R-SC]*	07/14/2021
Sen. Durbin, Richard J. [D-IL]*	07/14/2021
Sen. Whitehouse, Sheldon [D-RI]	10/27/2021
Sen. Blackburn, Marsha [R-TN]	10/27/2021
Sen. Blumenthal, Richard [D-CT]	10/27/2021
Sen. Murkowski, Lisa [R-AK]	11/03/2021
Sen. Feinstein, Dianne [D-CA]	11/04/2021
Sen. Coons, Christopher A. [D-DE]	11/04/2021
Sen. Kennedy, John [R-LA]	11/04/2021
Sen. Leahy, Patrick J. [D-VT]	11/04/2021
Sen. Booker, Cory A. [D-NJ]	11/04/2021
Sen. Padilla, Alex [D-CA]	11/04/2021
Sen. Ossoff, Jon [D-GA]	11/04/2021
Sen. Hawley, Josh [R-MO]	11/04/2021
Sen. Hirono, Mazie K. [D-HI]	11/04/2021
Sen. Grassley, Chuck [R-IA]	11/04/2021
Sen. Capito, Shelley Moore [R-WV]	11/16/2021
Sen. Collins, Susan M. [R-ME]	11/18/2021
Sen. Cortez Masto, Catherine [D-NV]	12/02/2021
Sen. Portman, Rob [R-OH]	12/02/2021
Sen. Tillis, Thomas [R-NC]	12/17/2021
Sen. Wyden, Ron [D-OR]	01/19/2022

Committees (1)

Committees, subcommittees and links to reports associated with this bill are listed here, as well as the nature and date of committee activity and Congressional report number.

Committee / Subcommittee	Date	Activity	Related Documents
Senate Judiciary	07/14/2021	Referred to	
	11/04/2021	Markup by	
	11/17/2021	Reported by	

Related Bills (1)

A related bill may be a companion measure, an identical bill, a procedurally-related measure, or one with text similarities. Bill relationships are identified by the House, the Senate, or CRS, and refer only to same-congress measures.

Bill	Latest Title	Relationships to S.2342	Relationships Identified by	Latest Action
Scroll right to see more data				
H.R.4445	Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021	Identical bill	CRS	11/17/2021 Ordered to be Reported (Amended) by the Yeas and Nays: 27 - 14.

Subjects (1)

Subject — Policy Area:

Law

One Policy Area term, which best describes an entire measure, is assigned to every public bill or resolution.

Latest Summary (0)

A summary is in progress.

Become an original Cosponsor of the "BE HEARD in the Workplace" Act:

Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act

Senators Patty Murray and Mazie K. Hirono

Every worker in our country deserves to be able to do their job each day confident they'll be treated fairly, respectfully, and with dignity. But over the last few years of the #MeToo movement, brave women and men have come forward in increasing numbers to speak up about the painful, all-too-common reality of sexual assault and harassment on the job.

From Hollywood, to Congress, to board rooms, restaurants, manufacturing floors, and farm fields, workers are making clear these experiences won't be swept under the rug any longer. Their stories also show how much work we have left to do to ensure that all workers can do their jobs without fear of harassment.

This is why Senator Murray, Senator Hirono, and Democrats are reintroducing the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act. The BE HEARD Act builds on and strengthens existing civil rights laws by expanding protections for workers, while also safeguarding existing antidiscrimination laws and protections. It draws from the experiences workers have bravely shared and takes ambitious steps to ensure businesses have more resources to prevent harassment, workers have more support when they seek accountability and justice, and those who think they can get away with assault or harassment on the job get a clear message: time is up. The BE HEARD Act will:

- Require workplace harassment prevention strategies including nondiscrimination policies and trainings.
- Provide resources to assist employers in preventing and addressing harassment including model policies and trainings, industry-specific best practices, and model workplace climate surveys.
- Support research and data collection on workplace harassment including a nationwide prevalence survey, study and report on harassment in the federal government, and research on successful prevention strategies.
- Eliminate the tipped minimum wage, which exacerbates harassment.
- Expand workplace protections against harassment of and discrimination against workers at small businesses, independent contractors, interns, fellows, volunteers, and trainees, and clarify protections for LGBTQ workers.
- Restore workplace protections for older Americans, employees harassed by their supervisors, and workers retaliated against for bringing harassment claims.
- Clarify the standard workers must meet to prove harassment claims in court.
- Extend statutes of limitations for workers to file harassment claims with the EEOC.
- Eliminate caps on damages for workers who successfully bring claims of harassment and discrimination.
- Prohibit mandatory arbitration and pre-dispute nondisclosure agreements, and create guardrails for post-dispute nondisclosure agreements.
- Ensure federal contractor compliance with civil rights laws.
- Provide grants for preventing and addressing harassment and employment discrimination, including grants for legal assistance to low-income workers, creating a system for state-level advocacy, and grants to worker centers.

PhD students, postdocs and professors, and looking for patterns, has also proven valuable, as have institution-wide or department-wide surveys about student and staff experiences.

The only validated tool we know of in this area is the Survey of Organizational Research Climate (SOURCE). It assesses seven dimensions, including integrity norms, adviser–advisee relations and departmental expectations. Results correlate with self-reported rates of detrimental research practices: institutions with low scores of integrity norms will also tend to have higher levels of reported fraud and sloppy record keeping[6].

The survey can be done online in 15 minutes, and responses are aggregated to ensure individual confidentiality but still show differences across groups. That can help to identify both pockets of good practice and areas needing improvement. One large institution in the midwestern United States has used results to prompt faculty members within specific departments to talk more with graduate students about authorship, peer review and data management.

As well as being used to compare departments across an institution, the results can be compared against anonymous benchmarking data aggregated by the National Center for Professional and Research Ethics at the University of Illinois at Urbana-Champaign (which C.K.G. runs). Now no one can retort, "well, all departments in our field are that way".

The management literature is clear that one powerful way to bring systemic organizational change is to find 'bright spots' — systems or places in an organization that are working well — study them and seek to spread their successful practices. For that, we need data on where the bright spots are, and the will to act.

The solutions are straightforward, if not necessarily simple. ■

C. K. Gunsalus *is the director and* **Aaron D. Robinson** *a collaborating expert on design and research at the National Center for Professional and Research Ethics at the University of Illinois Urbana-Champaign.*
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ILLUSTRATION BY DAVID PARKINS

Go beyond bias training

Ambiguity in expectations and evaluations harms progress, say **Rodolfo Mendoza-Denton** and colleagues.

One morning in February 1934, the police showed up at J. Robert Oppenheimer's home in Berkeley, California, to ask why he had left his date in a car by herself all night. Oppenheimer explained that he had gone for a stroll, got lost in his thoughts and walked home, forgetting his car and companion.

Newspapers reporting this story for Valentine's Day revelled in tales of the absent-minded professor, an archetype that most of us recognize. Brilliant, but short on social graces, such thinkers are assumed to be too busy pondering the deepest questions of the Universe to be ▶

bothered with the quotidian.

This archetype, however, can also give licence to the neglect of students. Professors are often excused from knowing the requirements and timelines of graduate programmes. Graduate students regularly receive minimal guidance. The underlying supposition is that the path to success will reveal itself if the student 'has what it takes'. Lack of direction is often deemed a litmus test for the brilliance of the student.

In our view, women and under-represented minorities face a double whammy under these conditions. First, ambiguous expectations and guidelines allow bias to influence professors' judgements of student work. Second, environments with unclear or inchoate norms can depress the performance and progress of students in marginalized groups, further perpetuating notions of who qualifies as 'brilliant'.

Interventions designed to address disparities in science focus largely on changing individual attitudes[1]. Our surveys of science, technology, engineering and medicine (STEM) departments at the University of California, Berkeley, suggest another, complementary target: the structure of the training programmes themselves, and the cultures built around them.

AMBIGUITY AND BIAS

Professors are generally in control of deciding which of their students' research is nurtured, funded and eventually published. And, like all individuals, professors' judgements are subject to bias.

Ambiguous cues about trainees' and candidates' performance allow evaluators to incorporate their own, often unconscious, expectations into their assessments. Presented with job applications designed to represent credible but not stellar candidates (would-be research assistants with a published paper and two years of work experience, but low academic achievement), faculty members rated the same work and credentials more positively when it was accompanied by a male name than when associated with a female name[2]. A similar study found that research abstracts were rated as being of higher quality if presented as being authored by men and on topics, such as computer-mediated communication, that tend to be associated with males[3]. By contrast, another study showed that when candidates for a faculty job were presented as equally strong, according to numerical ratings presumably made by other faculty members, traditional gender biases were reversed, at least in this instance[4]. Similar patterns have been seen with respect to race[5]. In one study[5], evaluators showed strong preferences towards white candidates when the candidates' qualifications were ambiguous, but no preference when candidates were unambiguously strong or weak. In short, ambiguity serves as fertile ground for the expression of bias.

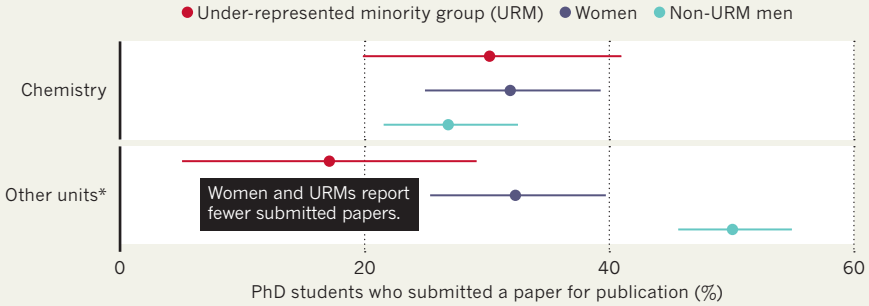
"Structured programmes need not be impersonal or automated."

In addition, it dents the performance of those under evaluation. In one of our studies, about 150 women were asked to wait in one of three rooms arranged to reflect attitudes of their purported evaluator[6]. In one setting, to suggest that the evaluator held sexist views, the decor included a poster of a bikini-clad woman. In a second, the decor featured a volunteering award with a logo promoting equality to suggest that the evaluator advocated gender equality. The third room was ambiguous, with a banner from a university and a certificate for volunteering in the 'Ivy League Undergraduate Division'. (A separate survey confirmed the rooms gave the desired impressions.)

We assessed study participants' concerns about gender-based discrimination with an openly available, previously developed instrument[7]. Concerns did not affect test performance in either the chauvinist or progressive conditions: these groups answered about 8 of 12 moderately difficult analogies correctly. But in the ambiguous room, women who were concerned about being the target of prejudice averaged fewer than 7 correct answers, a strong effect.

NO GAP IN CHEMISTRY

The College of Chemistry stands out from some other units at the University of California, Berkeley, because it shows no difference in submission rates across various groups.



*Division of Mathematical and Physical Sciences and Department of Electrical Engineering and Computer Science.

SOURCE: REF. 8

BRIGHT SPOT

A key requirement for advancement in academia is publication. Almost every step of that process — which project to encourage, how to allocate resources and credit, where and when to submit a manuscript — involves uncertainty. In a survey that R.M.D. conducted with Berkeley psychologist Aaron Fisher and his colleagues across the university's Division of Mathematical and Physical Sciences, the Department of Electrical Engineering and Computer Science and the College of Chemistry[8], graduate students were asked whether they had been an author on a paper submitted for publication in the past year. This reflects scholars' participation in the research enterprise independent of the vagaries of manuscript review and acceptance.

Response rates for men who were not in under-represented minorities and for all students in the engineering and mathematics departments were around 40%. Those for women, people in under-represented groups and the chemistry college were just over 50%. Women and people in under-represented minority groups had fewer submissions than did their white or Asian male counterparts, even when controlling for factors such as time in the programme, advancement to PhD candidacy and teaching responsibilities. To our surprise, however, race and gender did not predict the likelihood of publishing for people in the chemistry college (see 'No gap in chemistry').

Intrigued, we went on to examine 15 years' worth of data from Berkeley's PhD exit survey, which boasts a completion rate of 98%. The survey includes the questions: "Were you encouraged by faculty in your department to publish?" and "did you deliver any papers at national scholarly meetings?". The latter is often a precursor to publication.

Again, we found that, overall, women and under-represented minorities were much more likely than white and Asian men to answer 'no' to both questions across STEM fields. There were no statistically significant differences in the College of Chemistry.

What is happening in the college that seems to be levelling the playing field? Noting that the chemistry programme has been independently recognized for placing women with PhDs into elite faculty positions[9], our team has embarked on a series of interviews with faculty members, alumni and student advisers in this unit to identify some of the factors that could be fuelling the success of women and minority groups there. We are also interviewing people in the mathematics and physics departments, where we see strong disparities.

THREE HALLMARKS

Although preliminary, our data suggest that the chemistry college has the following characteristics.

Setting clear expectations from the start can help all trainees to thrive.

JIM WILSON/NYT/REDUX/EYEVINE

Advancement processes and procedures are clearly defined and systematically applied. For example, every student is expected to regularly present their research to colleagues and peers, including at a departmental seminar in the second year. This sets a public norm for productivity and affords multiple opportunities to learn from peers and near-peers as they themselves meet these expectations.

Student progress is overseen by multiple faculty members. For example, in each broad sub-field of the department, one adviser actively manages students' progress through the early stages of the programme, including helping to match students with research advisers. In addition to the academic and research advisers, each graduate student is entitled to a departmental 'associate adviser' once they pass their qualifying exam. This process ensures that students don't fall through the cracks, and engages multiple faculty members in collegial feedback as the student moves through the programme.

There is department-wide agreement about expectations for advancement. There are written guidelines for when students must choose an adviser, deliver seminars and pass qualifying exams. The expectation to publish is promoted officially. Before a student takes a qualifying exam, for example, advisers fill out a form that includes their assessment of when students will submit a paper, establishing that this is a norm, and prompting discussion.

These three observations suggest that requirements and regulations might not be enough. Rather, the community's knowledge, implementation and even application of standards are crucial to creating a culture in which students know what they need to do, and advisers know what they should encourage. We refer to this as a culture of structure.

RAPPORT AND STRUCTURE

Structured programmes need not be impersonal or automated. The twists and turns of discovery, and of people's lives, demand flexibility and exceptions. Our research suggests that trust between lab heads and lab members is essential — particularly in mentoring relationships that are interracial.

One of us (R.M.D.) and his colleagues published a study earlier this year intended to model interracial mentoring[10]. Some participants were asked to play the part of mentor, giving feedback on a speech for which a trainee had just three minutes to prepare. Trainees were asked to rate the quality of the feedback. In reality, all 'interactions' occurred through a video-chat in which one member of the pair was an actor performing a pre-recorded script.

Before the speech, half of the pairs were assigned an activity in which participants took turns asking and answering questions that escalate in self-disclosure — an exercise known to increase feelings of rapport. The control group took turns reading passages of novels to each other[11].

According to independent coders — who did not know which activity preceded the feedback session — trainees in pairs assigned to the rapport-building task gave better speeches and mentors provided warmer and more helpful feedback than did those in the control group. This held true for both same-race and interracial pairings.

Of course that's just one study, and more research is needed. But if the tenor of manipulated, short-term 'mentoring' can affect performance and feedback, it seems likely that the tenor of a trainee–adviser relationship could, too. In many STEM departments, emotions and feelings are deemed distractions. Our research suggests, instead, that establishing trust could be a key way to boost performance and parity through the ability to value each other.

In sum, our findings suggest fresh ways of interrupting bias in STEM education. Departments should adopt transparent policies and expectations for student progress that are communicated clearly to all. Professors and mentors should take time to build trust and rapport with students.

It is time we laid to rest the 'see you in five years' model, rooted in the specious notion that brilliance will find a way. Brilliance is most reliably nurtured through structure and trust. ■

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Article

Interracial contact at work: Does workplace diversity reduce bias?

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Abstract

Research suggests that anti-Black bias among White Americans is persistent, pervasive, and has powerful negative effects on the lives of both Black and White Americans. Research also suggests that intergroup contact in workplaces can reduce bias. We seek to address two limitations in prior research. First, the workplaces reviewed in prior studies may not be typical. Second, previously observed relationships between workplace contact and bias may stem from selection bias—namely, that White individuals who tend to work with Black individuals are systematically different from those who do not, and those systematic differences explain lower bias levels. To address these issues, we review records (N = 3,359) of White, non-Hispanic, working adults in a nationally representative survey to examine the relationship between workplace contact and racial closeness bias after adjusting for an exhaustive set of potential confounders. Using propensity score matching, we compare individuals who work with Black individuals with their "virtual twins"—individuals who have the same propensity of working with Black individuals but do not. We estimate that having a Black coworker causes a statistically significant reduction in racial closeness bias for White, non-Hispanic adults.

Keywords

affective bias, explicit bias, intergroup contact, racial bias, racial closeness bias, workplace diversity

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> "The single most promising arena of racial integration—at least for adults—is the workplace."
>
> Cynthia Estlund (2003, p. 9)

A broad and growing body of research suggests that intergroup contact can reduce bias (e.g., Pettigrew, Tropp, Wagner, & Chris, 2011). At the same time, polling suggests that many White adults do not experience intergroup contact in their friend groups—as many as 40% of White Americans do not have a single non-White friend (Dunsmuir, 2013). Notably, that figure drops by

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10 percentage points when "workplace acquaintances" are included. Against this backdrop, Estlund (2003) has argued that workplaces represent the most critical source of intergroup contact for many adults, and that, because workplaces encourage common goals and cooperation, contact in workplaces may reduce bias.

However, while some studies have found evidence that intergroup contact in workplaces reduces bias (Pettigrew & Tropp, 2006), prior literature is dated, and the workplaces assessed in prior literature may not be typical. Moreover, research shows that intergroup contact in contexts where individuals feel threatened can *increase* bias (Pettigrew et al., 2011). Workplaces may elicit feelings of threat, and workplace contact could increase bias. Given the gap in available literature, we aim to ascertain whether intergroup contact in a typical workplace decreases bias.

We focus here on "racial closeness bias," a form of explicit bias whereby a person indicates feeling "closer" to members of their own race than to members of other races. We focus on racial closeness bias because, like the biases evaluated in research showing explicit bias is related to circulatory disease death rates (Leitner, Hehman, Ayduk, & Mendoza-Denton, 2016) and racial disparities in school disciplinary actions (Riddle & Sinclair, 2019), it is affective (or measures generalized emotions about a group). Thus, evaluating the causal impact of having a Black coworker on this form of bias will allow more natural bridging to other research. We focus on the biases of White, non-Hispanic individuals because, collectively, they represent a majority of individuals in the United States (U.S. Census Bureau, 2020) and because they are sufficiently represented in available data to ensure rigorous analyses.

Prior Research on Intergroup Contact in Workplaces

Psychologists have long studied mechanisms for reducing bias. Allport (1954) suggested that intergroup contact can, under appropriate conditions, reduce bias. In his seminal work, Allport found that contact best reduces bias when four features are present: (a) equal status of the groups in the situation, (b) common goals, (c) intergroup cooperation, and (d) the support of authorities, laws, or customs. Pettigrew et al. (2011) conducted a meta-analysis to test this intergroup group contact theory, reviewing over 500 studies with over a quarter million subjects. They found that contact was associated with lower bias in 94% of studies, and that contact was associated with larger declines in bias when most of Allport's conditions were present. The meta-analysis also found that contact in situations where the participants felt threatened led to increases in bias. Building on this research, Paluck, Green, and Green (2018) reviewed all 27 intergroup contact studies published at the time of their review that involved random assignment and delayed outcome measures. Consistent with Pettigrew et al. (2011), they found that contact generally appeared to cause lower levels of later bias, but that the strength of contact effects varied substantially.

Estlund (2003) has argued that workplaces often exhibit Allport's contact-effect-enhancing conditions, and that increasing workplace diversity could therefore be an effective strategy for reducing interracial bias. Four studies support Estlund's position. Brophy (1945) found that White merchant seamen who went on more voyages with Black seamen developed genuine bonds and had less bias. Kephart (1957) similarly found that White police officers in Philadelphia who worked with Black colleagues expressed fewer objections to Black individuals joining their previously all-White police districts, to teaming with a Black partner, and to taking orders from qualified Black officers.

In a widely cited study on the topic, Cook (1984) reported results from a controlled experiment testing the effects of contact on bias. He recruited White, "highly prejudiced" women and had them work alongside two confederate coworkers—one Black and one White—as railway operators. At multiple points, the Black confederate described a personal experience with racial discrimination and the White confederate expressed disapproval of the discrimination.

After the experiment, participants in the experimental condition reported more positive attitudes about Black people than they had expressed in baseline surveys, and these gains were larger than those experienced by women in the control condition (who did not work as railway operators). Effects lasted at least several months. Finally, Pettigrew and Tropp (2006) found that contact in workplaces was consistently associated with reductions in bias—and that it was associated with larger reductions in bias than contact in educational, residential, and travel settings (although contact in laboratory and recreational settings was associated with even larger reductions). While the meta-analysis does not provide detailed information about the nature of the workplaces evaluated, a review of identifiable studies suggests that workplaces included those described before (marine ships, railway stations, and police departments) and also included a military base (Butler & Wilson, 1978).

Limitations of Prior Research

While these results are encouraging, the workplaces analyzed in prior studies may systematically differ from the "typical" workplace in ways that enhance the effect of contact on bias. Mariners, police officers, and military personnel may have stronger incentives to get along with their peers than typical workers. Effective cooperation may help protect them from the dangers posed by turbulent seas, armed suspects, and enemy soldiers. Such threats may provide an atypically strong incentive to overcome biases to work productively with colleagues. It seems worth investigating whether contact may not shift bias in the same manner in other workplace contexts that may lack similar incentives for cooperation.

Moreover, while the railway study involved random selection into treatment (exposure to a Black coworker), the other studies did not account for the possibility of treatment selection effects. Generally, selection effects refer to systematic differences between treated and control groups which may drive differences in outcomes. For example, perhaps it is not that certain White Philadelphia police officers became less biased by working with Black partners; instead, some third factor (such as political attitudes or age) may predict both selecting a Black partner and being less biased. One class of selection effects is "reverse directionality"—that those who seek the treatment are predisposed to have different levels on the outcome. For example, it may be that less biased officers tend to seek out Black partners, and more biased officers tend to avoid them. Research on college student friend groups by Sidanius, Levin, van Laar, and Sears (2008) and Binder et al. (2009) lends credence to the possibility of reverse directionality. They found that while a prior measure of college students' intergroup friendships (contact) predicted later bias, a prior measure of bias also predicted a later measure of contact. It is thus unclear whether findings from observational studies on workplace contact reflect selection effects or the impact of contact.

Finally, in the railway study, the "treatment" was not natural intergroup contact with a typical coworker, but exposure to two scripted confederate coworkers where one was Black and one was White. While it is encouraging that these scripted, cross-group interactions appeared to cause stable reductions in bias, it remains unclear whether unscripted, typical intergroup interactions in typical workplaces would yield the same effects.

In summary, prior research has not evaluated contact effects in typical workplaces; all but one of the prior workplace contact studies appear vulnerable to selection bias; and the sole randomized controlled trial on workplace contact involved scripted, rather than natural, intergroup encounters. Extant research thus leaves a hole in our understanding of the relationship between workplace contact and bias. The present research attempts to provide new clarity.

The Present Research

To ascertain if contact in a typical workplace causes reductions in racial bias, we leveraged 12 years of geocoded data from the General Social Survey (GSS). The GSS is a nationally representative survey created and regularly collected by the University of Chicago since 1972. In each

survey year, GSS interviewers ask thousands of adults (18 or older) around the country a battery of questions regarding life experiences, workplace characteristics, and attitudes. By investigating a large subsample of working, White, non-Hispanic adults drawn from this nationally representative dataset, we can assess (a) whether contact with Black individuals in "typical" workplace environments is associated with lower levels of bias and (b) whether any such association persists after adjusting for relevant confounders. Next, so long as we are persuaded that we have a sufficiently robust set of covariates on which to match individuals in our sample, we can attempt to ascertain (c) whether contact *causes* reductions in bias.

Estimating causal effects using cross-sectional data is a complex endeavor and the legitimacy of estimates invariably rests on researcher assumptions. As we discuss more thoroughly in what follows, we assume here that the wide array of variables in the GSS provide sufficient clarity regarding whether and why individuals had a Black coworker to ascertain the causal effect of having one. However, even if one does not agree entirely with this assumption, this research still holds value. Compared to prior observational studies, it provides a cleaner estimate of the relationship between real-world workplace contact and bias.

Relevant Confounders

In order to isolate the relationship between contact and bias, we must first identify potential confounders. By definition, a confounder is a variable that is correlated with both the treatment and the outcome of interest (Agresti, 2018). We adjust for confounders because failure to do so confounds, or confuses, our understanding of the relationship between treatment and outcome. As explained by Brookhart et al. (2006), when building models to predict the relationship between a treatment and an outcome, there are many approaches one might take for determining which potential confounders to include. One approach is to only include confounders if they are statistically significantly related to both the treatment and the outcome. By setting a high bar for including variables in the model (and adjusting for them), this approach risks underadjustment of bias and can return overstated causal estimates.

A more conservative approach is to include as a confounder any variable that is a significant predictor of either the treatment or the outcome, even if it is only marginally related to the other of the two. In this case, that would mean including any variable that is a significant predictor of *either* having a Black coworker or of racial bias. The benefit of this approach is that it adjusts away more bias. The drawback is that it can result in larger standard errors, increasing the risk of a Type II error.

Our goal, and we believe the goal of any researcher using observational, cross-sectional data to estimate contact effects, is to overcome as much potential confoundedness as possible and approximate a causal estimate, even if doing so risks Type II errors. We therefore take, and recommend, the more conservative approach. Based on our analyses of relationships between variables in the GSS, we argue that assessments of the relationship between workplace contact and bias should adjust for each of the 11 confounders depicted in Table 1.

Next, we provide additional justification for the general type of confounder that each variable belongs to. We provide more general justifications in the hopes that doing so will increase the utility of this analysis to other types of contact research.

Other types of contact. Intergroup contact theory suggests that various forms of contact predict lower levels of bias (Pettigrew et al., 2011). Certain forms of contact are also correlated with one another. For example, it is not hard to imagine that workplaces located in diverse neighborhoods are more able to hire diverse workforces. Individuals in those neighborhoods may thus be more likely to experience intergroup contact both in their communities *and* workplaces. As depicted in Table 1, we found evidence for this proposition, $r(3739) = .18$, $p < .001$. Thus, we argue that to

Table 1. Relationships between each confounder and having a Black coworker/racial closeness bias.

	Black coworker		Racial closeness bias	
	r / *F*	*p*	*r* / *F*	*p*
Black neighbor**	$r(3739) = .18$	$< .001$	$r(6049) = -.12$	$< .001$
Conservatism**	$r(3831) = -.04$	.008	$r(6192) = .08$	$< .001$
Age*	$r(3907) = -.05$	$< .001$	$r(6326) = .01$	.275
Education**	$r(3912) = .12$	$< .001$	$r(6335) = -.03$	.022
Female*	$r(3913) = -.02$	.179	$r(6339) = .03$	.009
Family income*	$r(3595) = .05$	.001	$r(5681) = -.02$	.162
Marital status**	$F(4, 3909) = 3.54$	.007	$F(4, 6333) = 4.82$	$< .001$
Social class*	$F(3, 3898) = 6.65$	$< .001$	$F(3, 6312) = 1.51$	.210
Commuting zone**	$F(190, 3724) = 2.73$	$< .001$	$F(192, 6147) = 2.09$	$< .001$
Occupation classification**	$F(24, 3890) = 7.90$	$< .001$	$F(24, 6316) = 1.60$	.033
Year**	$F(6, 3908) = 2.92$	.008	$F(6, 6334) = 4.68$	$< .001$

Note. The *r* / *F* column depicts the Pearson's correlation (*r*) or Fischer test statistic (*F*). In parentheses, the column also depicts the number of degrees of freedom and, in the case of *F* statistics, the number of categories, minus 1. In general, the correlation coefficient (*r*) ranges from −1 to 1, and *F* ranges from 0 to infinity. In both cases, values further from 0 indicate a greater degree of relatedness.

p column depicts the probability of obtaining an *r* or *F* statistic of a given magnitude under the null hypothesis of no relatedness.

**p* values for either Black coworker or racial closeness bias are less than .05. ***p* values for both Black coworker and racial closeness bias are less than .05.

the extent that one hopes to ascertain the relationship between a single form of contact and bias, adjustment for other forms of contact is essential.

Social attitudes. Certain social attitudes, such as political conservatism, are correlated with racial bias. Neal (2017) found that more conservative individuals are less likely to believe racism is a major problem in America. To the extent that views about racism are related to views about Black individuals, these individuals may also be more biased, and we indeed found that conservatism and bias are correlated in the GSS, $r(6192) = .08, p < .001$. We offer here an important cautionary note about "bad controls." When trying to predict the relationship between a "treatment" and an "outcome," a "bad control" is a variable that is *impacted by* (rather than simply predictive of) the "treatment" (Angrist & Pischke, 2015). Such controls should not be included in models, as including them biases assessments of the relationship between treatment and outcome. Here, our "treatment" is contact, and our "outcome" is bias. Many social attitudes are likely correlated with contact and bias. However, many of these attitudes are arguably *measures* of bias, which themselves would be impacted by contact and which, therefore, would be "bad controls." For example, the most relevant social attitude for predicting workplace contact might be an individual's response to the question "How much do want to work with Black individuals?" However, this could arguably be considered a measure of bias, or at least a reflection of it. If our hypothesis is that contact shifts bias, and we believe this measure is also a reflection of bias, then we would expect that contact will also shift responses to this measure, rendering it a "bad control." We strongly recommend against including this and similar "bad controls" in models predicting the relationship between forms of contact and bias. Our inclusion of conservatism here represents our belief, supported by recent research (see e.g., Hatemi & Verhulst, 2015), that political attitudes are largely stable and thus unlikely to change due to workplace contact with Black individuals.

Sociodemographic characteristics. Modern research suggests that certain demographics can predict certain forms of contact. Reviewing data from users of its dating application, OKCupid found that White women were much more likely than White men to have romantic relationships with Black individuals (OKCupid, 2014). In the GSS, meanwhile, we see that contact is statistically significantly related to each of the following: age, $r(3{,}907) = -0.05$, $p < .001$; education, $r(3{,}912) = 0.12$, $p < .001$; family income, $r(3{,}595) = 0.05$, $p < .001$; marital status, $F(4, 3909) = 3.54$, $p = .007$; and social class, $F(3, 3898) = 6.65$, $p < .001$. Sociodemographic characteristics may also predict bias levels. We found, for example, that racial closeness bias is statistically significantly related to education, $r(6{,}335) = -0.03$, $p = .022$; sex, $r(6{,}339) = 0.03$, $p = .009$; and marital status, $F(4, 6333) = 4.82$, $p < .001$. We suggest inclusion of sociodemographic characteristics in models predicting the relationship between contact and bias for two reasons. First, as discussed before, they are frequently predictors of contact and bias and thus are often strong candidates for confounders. Second, and perhaps more importantly, they are stable characteristics which should not be impacted by contact, and thus are unlikely to be "bad controls." Thus, there is minimal, if any, risk that including these variables will engender bias in a model predicting the relationship between contact and bias.

Spatial and temporal characteristics. A great deal of both contact and bias is driven by the characteristics of the places we call home. Underscoring the power of spatial characteristics, Leitner et al. (2016) and Riddle and Sinclair (2019) found substantial variation in county-level anti-Black explicit bias (which they linked to deleterious social phenomena). In the GSS, we find that where a person lives (as defined by their commuting zone, or the multicounty job market they belong to) is a statistically significant predictor of both having a Black coworker, $F(190, 3724) = 2.73$, $p < .001$, and racial bias, $F(192, 6147) = 2.09$, $p < .001$. We thus suggest adjustment for spatial characteristics in models ascertaining the relationship between contact and bias. Just like the place we call home, the *time* we live in exerts a large effect on contact and on bias. We find evidence of this effect in the GSS, with survey year being a statistically significant predictor of having a Black coworker, $F(6, 3908) = 2.92$, $p = .008$, and racial closeness bias, $F(6, 6334) = 4.68$, $p < .001$.

Predictors of the specific form of contact. As noted before, we include as a confounder any variable that significantly predicts either treatment or outcome. Thus, we recommend that any variables that predict a specific form of contact be included and adjusted for in models designed to ascertain the impact of a given form of contact on bias. A prime example from the GSS is occupational classification, which describes the sector an individual works in, and which likely predicts whether or not a person has a Black coworker. For example, the military is known to be remarkably diverse (Barroso, 2019), and White individuals in military-specific occupations would be expected to be more likely to have Black coworkers than individuals in many other sectors. Workplace classification is a statistically significant predictor of having a Black coworker in the GSS, $F(24, 3890) = 7.90$, $p < .001$.

Confounders Included in Models

For the aforementioned reasons, in our model predicting the relationship between workplace contact and bias, we include the following potential confounders, subdivided by confounder type:

- **Other forms of contact**: has a Black neighbor.
- **Social attitudes:** political conservativism.
- **Sociodemographic characteristics:** respondent age, educational attainment, sex, marital status (married, widowed, divorced, separated, never married), social class (lower class, working class, middle class, upper class), and family income.

- **Spatial and temporal characteristics:** residential commuting zone and year of GSS interview.
- **Predictors of contact:** occupation classification.

While these variables do not represent an exhaustive list of every possible variable of each type, together, we believe they account for the core of the confoundedness we hope to adjust for.

Analysis Plan

Our analysis proceeds in three steps. First, we will conduct a bivariate regression of racial closeness bias on having a Black coworker. Next, we will conduct a multivariate regression of racial closeness bias on having a Black coworker and each of the 11 confounders discussed before. We hypothesize that, consistent with contact theory, having a Black coworker will be associated with statistically significantly less pro-White bias, and that the relationship will endure even after adjusting for the potential confounders discussed before.

In the third step, we will use a method known as propensity score matching (PSM) to attempt to ascertain the causal effect of having a Black coworker on racial closeness bias. In order to assess whether contact *causes* lower levels of bias, we need to develop a better understanding of what distinguishes each individual who has a Black coworker from those that do not. Using the GSS's rich data about life experiences, attitudes, and workplace characteristics, we can develop a model that predicts how likely each individual in our data was to have a Black coworker. We can then create pairs of virtual "twins" comprised of one individual who had a Black coworker and another individual who had the same propensity of having a Black coworker but, by dint of luck, did not have one. By seeing the average difference in bias between individuals with a Black coworker and their virtual "twin," we can estimate the impact of having a Black coworker on bias.

Relative to multivariate regression analysis, PSM has two distinct advantages. First, by matching treated individuals with control individuals who are similar on covariates, you create "apples to apples" comparisons that are less sensitive to imbalance issues between treated and control groups. Second, matching-based estimations are less sensitive to functional form assumptions. In other words, in the case of regression, our estimate would be biased if we were to omit even a single relevant interaction term or fail to account for any nonlinear relationships between variables. In contrast, a matching-based estimate is less reliant on getting these functional form aspects of the model right.

Using this "apples to apples" comparative approach, we hypothesize that matched individuals with a Black coworker will have statistically significantly lower levels of bias than similarly situated, matched individuals without a Black coworker.

Mechanics of Propensity Score Matching

PSM, as operationalized here, proceeds in three steps: propensity score generation, matching, and comparison. First, we use logistic regression (logit) to predict the likelihood of receiving treatment (having a Black coworker) based on relevant neighborhood as well as personal and workplace characteristics. Specifically, our logit model includes the confounders described before. We plug each individual's actual scores on covariates into the logit model to predict their unique p score, or probability of having a Black coworker. Second, we match each treated individual to the one control individual (one to one) with the closest p score (their nearest neighbor) to create a matched dataset for "apples to apples" comparison. We do so without replacement, meaning we do not allow a given control case to be matched as a control for multiple treated cases. It is worth noting that matching with replacement may be appropriate in instances where matching without replacement fails to address potential sources of bias from confounders. However, because matching with replacement involves utilizing a single control case as a match for multiple treated cases, it can engender situations where a small number of repeatedly utilized control cases overwhelmingly skew the

data. Fortunately, we find evidence (discussed in the pages that follow) that, in our data, matching without replacement reduces observable sources of bias to negligible levels and is therefore adequate. This type of matching (one to one, nearest neighbor, without replacement) is quite commonly utilized and finds support in a range of published research on PSM (see e.g., Austin, 2011a).

Finally, to glean the effect of treatment, we compare mean bias levels of the treated and control individuals in our matched dataset. And to conduct hypothesis tests, we conduct a two independent samples *t* tests to ascertain whether there is a statistically significant difference between our matched treated and matched control groups in their mean levels of bias.

Assumptions Underlying Propensity Score Matching

The difference-in-means statistic derived from PSM is considered an unbiased estimate of the causal effect of treatment on outcome so long as two conditions are satisfied. First, and most importantly, the logit model predicting treatment must include all confounders. Given the rich set of confounders available in the GSS and described before, we are persuaded that our model approaches this condition. However, as noted before, we are (as all researchers using PSM should be) mindful that some confoundedness lingers. Via these methods and data, we can only at best *approach* a causal estimate. We believe, however, that the confoundedness that remains is marginal enough that our failure to account for it will not meaningfully bias our estimate. The second condition is that the PSM model must have overlap, which is to say that if a treated individual has a given propensity of treatment, there must be at least one control individual with a very similar propensity of treatment who can serve as a comparator, or virtual twin. We demonstrate that this condition is satisfied in Appendix B.

As discussed before, the goal of matching is to achieve balance in covariates. As Table 2 depicts, prior to matching, there is a great deal of imbalance in two numerical variables (has a Black neighbor and education) and moderate imbalance in three others (age, conservatism, and family income). A multivariate regression would fail to account for these imbalances. However, via one-to-one, nearest neighbor, matching without replacement, standardized differences in average values between treated and control cases diminish markedly to negligible levels.

Method

Treatment Measure

The GSS asks respondents to describe their workplaces as "all White," "mostly White," "half White, half Black," "mostly Black," or "all Black." Using responses from this question, we constructed a binary treatment measure indicating whether a given person has Black coworkers (1) or does not have Black coworkers (0).

Outcome Measure

The GSS also asks, on 9-point scales, "In general, how close do you feel to Whites?" and "In general, how close do you feel to Blacks?" Our measure of "pro-White bias" is the difference between scores on these two questions (−8 = *extreme pro-Black bias*, 8 = *extreme pro-White bias*).

Participants

Participants include 3,359 White, non-Hispanic, working adults (age 18 or higher) who participated in General Social Survey (GSS) interviews between 2002 and 2014 and who had scores on each relevant variable. Importantly, there were 12,651 White, non-Hispanic, working adults in the geocoded GSS from 2002 to 2014. However, among these, only 3,887 provided answers to the questions that comprise our treatment and outcome measures. Moreover, because our goal was to isolate the impact of treatment on outcome by creating "apples to apples" comparisons, we also needed to ensure participants had provided

Table 2. Covariate means and standardized differences in treated and control groups for unmatched sample (U) and matched sample (M).

Variable	Sample	Treated	Control	Standardized difference
Has a Black neighbor	U	0.75	0.56	0.40
	M	0.59	0.56	0.05
Age	U	43.74	45.32	0.12
	M	45.45	45.32	0.01
Years of education	U	14.62	13.88	0.28
	M	13.88	13.88	0.00
Conservatism (1–7)	U	4.08	4.26	0.13
	M	4.35	4.26	0.06
Female	U	0.47	0.50	0.05
	M	0.51	0.50	0.02
Family income	U	$45,510	$40,534	0.13
	M	$42,978	$40,534	0.06

Note. Two samples are perfectly balanced if the standardized difference between mean values on all numeric covariates is zero. Standardized differences range from zero to infinity. Standardized differences below .1 are generally considered to be indicators of very good balance.

answers to questions related to the relevant confounder measures described before. Our analysis sample (N = 3,359) represents the subset of White, non-Hispanic, working adults that provided answers to questions related to our treatment, outcome, and confounder measures.

When one starts with a representative sample and experiences this kind of sample attrition, it presents three potential problems: (a) power—too small of a sample size, and thus too large of standard errors to detect any statistically significant relationships between treatment and control that might exist in the population; (b) representativeness—an analysis sample that is systematically different from the larger sample; and (c) bias—an analysis sample that exhibits an uncharacteristically, and therefore deceptively, large relationship between treatment and outcome. Overall, our analysis sample is not underpowered (as we will show in the Results section), and, as explained more fully in Appendix A, our analysis sample appears relatively representative of the larger GSS sample (which, itself, is designed to be representative of the United States). Notably, however, our analysis sample is, on net, meaningfully younger, more educated, less likely to be female, and wealthier than the full sample. In terms of potential bias occasioned by attrition, the relationship between treatment and outcome appears nearly identical in the analysis and full samples, suggesting that the attrition required to conduct covariate adjustment will not introduce unanticipated bias.

Results

Descriptive Findings

As depicted in Figure 1, a large percentage of White individuals in our analysis sample (about 50%) exhibited some degree of pro-White bias, or a score above zero; 48% exhibited "no bias," or a score of zero; and less than 3% exhibited what might be termed "pro-Black bias," or scores lower than zero.

Regression Analyses

As depicted in Table 3, having a Black coworker statistically significantly ($p < .001$) predicted lower levels of pro-White bias in both a bivariate regression (without confounders) and a multivariate regression (including confounders). In the bivariate model, having a Black coworker predicted a bias score 0.57 points lower (N = 3,359, $p < .001$,

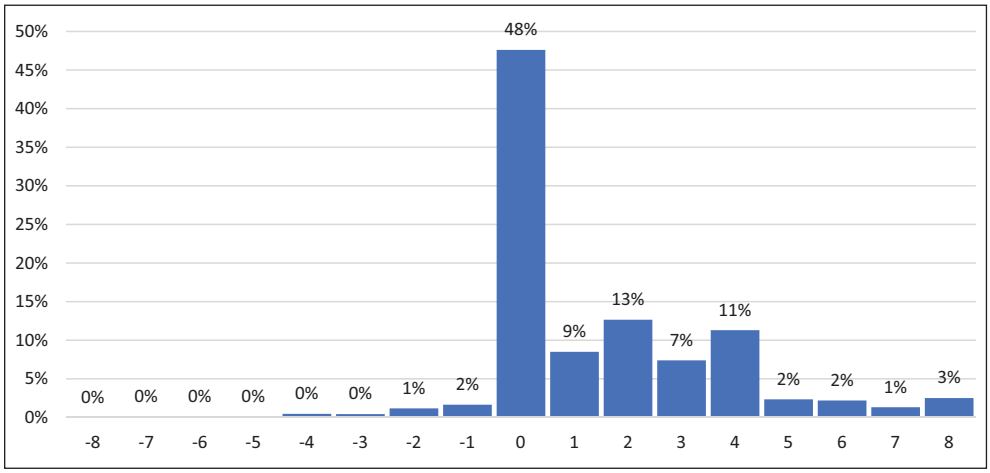

Figure 1. Distribution of pro-White bias scores among individuals in the analysis sample.

Table 3. OLS regressions predicting pro-White bias.

Model	One	Two†
Black coworker	−.57*** (0.08)	−0.34*** (0.09)
Black neighbor		−0.28** (0.09)
Conservatism		0.18*** (0.03)
Age		−0.01 (0.00)
Educational attainment		−0.02 (0.02)
Female		0.10 (0.09)
Marital status: Widowed		0.34 (0.23)
Marital status: Divorced		−0.11 (0.11)
Marital status: Separated		−0.50* (0.25)
Marital status: Never married		−0.02 (0.11)
Social class: Working class		0.22 (0.24)
Social class: Middle class		0.29 (0.24)
Social class: Upper class		0.12 (0.33)
Family income		−0.00 (0.00)
Constant	1.85*** (0.07)	1.36 (0.89)

Note. Coefficients and related standard errors are shown, with the latter within parentheses.
†Fixed effects were included for commuting zones, employment sector category, and year of survey.
***$p < .001$. **$p < .01$. *$p < .05$.

$d = 0.27$), and in the multivariate model, having a Black coworker predicted a bias score 0.34 points lower ($N = 3{,}359$, $p < .001$, $d = 0.16$).

Consistent with Pettigrew and Tropp (2006), these results indicate a negative relationship between workplace contact and bias. But is there a negative causal relationship? The next section discusses an initial attempt at answering this question.

Propensity Score Matching Analysis to Ascertain the Causal Relationship Between Workplace Contact and Bias

The aforementioned multivariate regression is sensitive to two major limitations. First, a multivariate regression of the kind employed cannot ensure "apples to apples" comparisons, which is to say the sample of "treated" individuals (those

with Black coworkers) may differ in material ways from the sample of "control" individuals to which they are compared (those without Black coworkers). In addition, the multivariate regression may be biased to the extent that it fails to account for nonlinear relationships between variables or for interaction effects. Thus, in extreme cases, even when a multivariate regression includes all relevant confounders, it can yield a remarkably biased estimate of the causal effect of treatment (Austin, 2011a).

Propensity Score Matching-Based Causal Estimation

PSM is a curative measure for the issues described before. As noted previously, propensity scores are unbiased so long as they include all confounders and have overlap in propensity score values between treated and control individuals. Among our 2,443 treated individuals (those who had Black coworkers), propensity scores ranged from 0.068 to 0.996. Among the 911 control individuals (those who did not have Black coworkers), propensity scores ranged from 0.026 to 0.976. Thus, even in the most extreme case, treated individuals with propensity scores at the higher end were able to match with control cases with meaningfully similar propensity scores. For example, the treated case with the highest propensity score matched with a control case whose propensity score was less than 0.02 *p*-score units away.

Via PSM, we end up with a sample of 1,822 individuals comprised of 911 pairs of treated individuals with meaningful counterfactual controls ("virtual twins"). As explained before (see Table 2), our matched sample is extremely balanced across numerical predictors, and markedly more balanced than our unmatched sample. This suggests that conducting PSM substantially diminished potential sources of bias. In this new sample, comparing mean outcomes between treated and control individuals, we glean a causal estimate of -0.45 ($p < .001$, $d = 0.21$). As depicted in Appendix C, we also ran a myriad of robustness checks demonstrating that our point estimates are consistently negative when using a range of less common, but also valid, methods for determining matches.

Discussion

The present research attempted to leverage 12 years of geocoded GSS data to ascertain whether working with Black individuals is associated with or causes lower levels of bias among White individuals. We first found that about half of the White, working adult Americans in our sample exhibited some degree of pro-White bias. Using OLS regressions, we found that, controlling for a myriad of confounders, White individuals who had with Black coworkers had statistically significantly ($p < .001$) lower average pro-White bias scores than their counterparts who did not have Black coworkers. Specifically, after adjusting for a range of confounders, those who had Black coworkers had, on average, 0.34 points lower bias scores than those who did not.

We next recruited PSM to estimate the causal effect of working with a Black individual on bias. In our model, having a Black coworker appeared to cause a reduction in bias of about 0.45 points, relative to not having one, and the effect was statistically significant ($p < .001$). As noted repeatedly, while these results are certainly exciting, they should be taken with a grain of salt. Any PSM model is only unbiased so long as it includes all confounders. While we believe we have come meaningfully close to this goal such that we can glean a meaningfully unbiased estimate, we do not believe we have included every possible confounder in our model.

Even given this caveat, prior research had not established that intergroup contact in a "typical" workplace was associated with lower levels of bias. This research suggests it is. Prior research also had not established whether intergroup contact in workplaces causes reductions of bias. This research provides initial support for the notion that interracial contact in workplaces causes statistically significant reductions in bias.

However, even assuming this research has correctly estimated the causal effect of workplace

contact on bias as a reduction of 0.45 points (or thereabouts), what remains unclear is what this reduction in bias portends in terms of other outcomes of interest. For example, could a reduction of 0.45 points, repeated across a sufficient number of individuals, stem the negative association between bias and circulatory death rates for Black individuals and White individuals observed in Leitner et al.'s (2016) research? Future research could attempt to answer this and related questions and help tease out the social meaning of the causal estimate we present here.

In addition, it remains unclear to what extent participants in this study worked in settings that exhibited Allport's contact-effect-enhancing conditions of equal status, common goals, cooperation, and support from authorities. Future research could evaluate whether, as Estlund (2003) claims, workplaces exhibit these factors and whether, as Allport (1954) would predict, workplaces that exhibit more of these factors demonstrate larger contact effects. More generally, future research could ascertain whether contact effects differ by workplace characteristics.

Finally, like any attempt at causal estimation, this research would benefit from attempts to corroborate, or refute, its findings. For example, researchers might use an instrumental variable approach to assess whether phenomena that increase workplace diversity (such as receiving a government-funded workplace diversity grant) catalyze reductions in bias. Or they might look to panel data and use difference-in-difference or event study designs to ascertain whether shifts in workplace contact lead to concomitant or subsequent shifts in bias.

Conclusion: Segregation at Work, and the Work Ahead

As discussed in our introduction, many White American adults do not have Black individuals in their social networks. Thus, barring some other mechanism for intergroup contact, they will not experience this critical debiasing phenomenon. Polling data show that workplaces can be an important source of intergroup contact (Dunsmuir, 2013), and this research suggests that intergroup contact in workplaces can, indeed, reduce bias. These results come at an important moment. Sophisticated spatial research by Ferguson and Koning (2018) suggests that between-workplace segregation (e.g., the number of workplaces that are largely homogenous) has actually increased so much that it is higher today than it was in the 1970s. It is possible that fewer White Americans are experiencing the debiasing effects of workplace contact.

We thus believe that investments in further research regarding workplace contact should be paired with meaningful, strategic efforts to increase workplace contact. For example, governmental, private sector, and philanthropic organizations could fund efforts to widen pipelines for people of color to work in largely White workplaces, or could create incentives for White individuals to work with people of color. These efforts could yield long- and short-term benefits. In the long term, these efforts might provide a clearer, more actionable lens into the power of workplace contact to reduce bias. In the short term, they may help create a more connected society.

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Appendix A

Here we explain analyses conducted to determine that the sample loss occasioned by adding confounders to our model did not result in representativeness issues or bias.

Representativeness issues. To ascertain the representativeness of our analysis sample, we utilize a common method for comparing mean characteristics of samples (see e.g., Austin, Grootendorst, & Anderson, 2007). Table 1A summarizes the results of this analysis, showing, for each numeric variable and for both the full sample and the analysis sample, the number of individuals who provided information on a given measure and the mean values on that measure. It also shows the standardized difference between means on each measure. Standardized differences are generally below 0.1, suggesting that the analysis sample is relatively representative of the overall sample. However, in four cases, standardized differences are above 0.1, indicating that the analysis sample is, on net, meaningfully younger, more educated, less likely to be female, and wealthier than the full sample.

While representativeness concerns are certainly worthy of consideration, it is important to put them in perspective. Most analyses of the relationship between contact and bias involve contact by specific individuals in specific contexts, which, by its very nature, generates unrepresentative results. For example, the widely cited "railway study" by Cook (1984) was limited to 84 White, college-age, female individuals. Our results certainly suffer from representativeness challenges, but ones that are nowhere near as pronounced as one would expect in a typical causal test of the intergroup contact theory.

Bias. We might glean a biased estimate of the relationship between treatment and outcome if the relationship between treatment and outcome were stronger in the analysis sample than in the full sample. In our case, we see very similar relationships between treatment and outcome in our analysis and total samples. In the larger sample, the correlation between treatment and

Table 1A. Mean values on outcome, treatment, and numerical covariates for total GSS sample of White, non-Hispanic, working adults as compared to analysis sample.

Variable	Total responding (total sample)	Mean (total sample)	Mean (analysis sample)	Standardized difference
Feel closer to Whites	6,341	1.45	1.44	0.00
Has a Black coworker	3,915	0.72	0.73	0.01
Has a Black neighbor	9,160	0.67	0.70	0.07
Age	12,618	49.68	44.10	0.36
Years of education	12,638	13.89	14.39	0.18
Conservatism (1–7)	10,353	4.20	4.14	0.04
Female	12,651	0.54	0.48	0.12
Family income	11,301	$38,464	$43,772	0.14

Note. While individuals in the analysis sample are less likely to have a Black coworker than individuals in the total sample, the groups are otherwise largely indistinguishable from one another. Moreover, individuals in both samples are remarkably likely to have a Black coworker, making the two relatively comparable even on this measure.
GSS = General Social Survey.

outcome is $r(3887, p < .001) = -.12$, while in our analysis sample, the correlation is $r(3359, p < .001) = -.12$. To ascertain if these correlation coefficients are meaningfully distinct, we conduct a Fischer *Z*-transformation on both correlation coefficients, take the difference of the two, and conduct a hypothesis test on the null hypothesis that the difference between the two is zero. Using this process, we found that our z-transformed correlation coefficients are, respectively, $z = 0.12$ and $z = 0.12$, the difference between the two is 0.00203, and the two-tailed p value associated with the null hypothesis that this difference is truly zero (i.e., that the two correlations are identical) is 0.99. At any level of statistical significance testing, we cannot reject the null hypothesis that these two correlation coefficients are identical. This suggests that by limiting ourselves to this smaller sample we have not biased our estimates.

Appendix B

A necessary condition for conducting propensity score matching (PSM) is what is known as "common support." In essence, for each treated individual (with their given propensity score), we must be sure we can find at least one control individual with a similar propensity score who can serve as a counterfactual comparator. The most common means to visually demonstrate that this threshold is met is to graph two density functions side by side: one for propensity scores for treated individuals and one for propensity scores among control individuals. This provides a mechanism for identifying propensity score ranges in which one might have treated individuals but no similar comparators. As Figure 1A demonstrates, at each range point at which we have treated individuals, we also have control individuals who can serve as comparators.

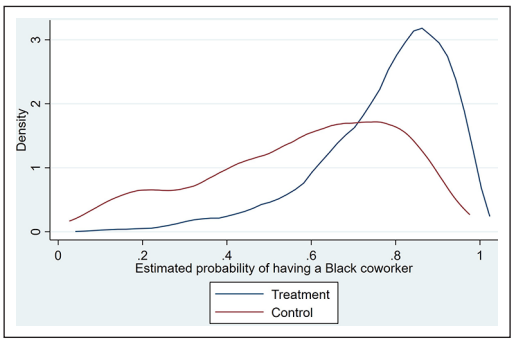

Figure 1A. Kernel density functions for propensity scores of treated and untreated individuals.
Note. Technically, there is an infinitesimal range between 0.9864 and 1 at which there are treated individuals but not control individuals. There are still, however, control individuals with remarkably similar propensity scores who can serve as a comparator.

Appendix C

Matching is a general term referring to a number of approaches for constructing a counterfactual control sample for a given treated (or control) sample. The most common matching approach is "one-to-one, nearest neighbor, no replacement, propensity score matching," which is the method employed in this research. However, other methods exist, and one robustness check is to ascertain if causal estimates vary depending on the matching method used to construct the counterfactual sample. As depicted in Table 2A, the overall result (that interracial contact in workplaces causes reductions in bias) is generally robust to common matching specifications, with 11 out of 11 returning negative point estimates. Moreover, seven returned a statistically significant ($p < .05$) result, and two more yielded a marginally statistically significant ($p < .1$) result.

In addition, we ascertain whether results are sensitive to our choice to execute matching without setting a caliper. A caliper is a propensity score range around which the PSM will allow a match. In our model, we allow each control case to be matched to the nearest treated case regardless of how far away that treated case is. As depicted in Table 3A, we found that our estimate is not sensitive to whether we use a caliper and, if so, what size we utilize. In all cases, the causal estimate is negative and statistically significant ($p < .001$).

Table 2A. Comparison of results from 11 separate matching estimations.

	N	Difference	*t*-statistic	*p* value
Radius: Default Caliper***	3,252	−0.55	−11.85	< .001
Nearest neighbor, no replacement***	1,822	−0.45	−4.26	< .001
Doubly robust regression***	1,822	−0.44	−4.03	< .001
Kernel: Normal**	3,252	−0.36	−3.05	.002
Mahalanobis**	3,359	−0.43	−2.67	.008
Kernel: Uniform*	3,252	−0.31	−2.48	.013
Kernel: Epanechnikov*	3,252	−0.28	−2.14	.032
Kernel: Tricube♦	3,252	−0.26	−1.93	.054
Local linear regression: Normal♦	3,252	−0.24	−1.67	.095
Radius: Caliper = 2 *SD*	3,252	−0.23	−1.56	.119
Nearest neighbor, with replacement	3,252	−0.05	−0.28	.779

Note. Sorted by *t*-statistic value.
♦$p < .1$. *$p < .05$. **$p < .01$. ***$p < .001$.

Table 3A. Comparison of results from one-to-one, nearest neighbor, no replacement matching with various caliper options.

	N	Difference	*t*-statistic	*p*
No caliper***	1,822	−0.45	−4.26	< .001
Caliper = 0.1***	1,677	−0.42	−3.66	< .001
Caliper = 0.01***	1,677	−0.42	−3.75	< .001
Caliper = 0.001***	1,562	−0.41	−3.37	< .001

*$p < .05$. **$p < .01$. ***$p < .001$.

Appendix D

In this section, we provide the STATA code utilized to conduct the anlyses discussed above.

```
*Preparing STATA for big datasets and analyses, loading data, and creating bulk of variables needed for analysis:
set maxvar 30000
set matsize 10000
use "C:\Users\Administrator\Desktop\Articles, Presentations, Applications, Consulting\Contact and Racial Attitudes, GSS, Project Implicit\Data and Analysis\Full GSS 2002-2014 Geocoded.dta"
gen white_non_hispanic = 1 if race == 1 & hispanic == 1
replace white_non_hispanic = 0 if race > 1 | hispanic > 1
gen closer_white = closewht - closeblk
gen black_coworker = 0 if racwork == 1
replace black_coworker = 1 if racwork > 1 & racwork < 6
gen black_neighbor = 1 if raclive == 1
replace black_neighbor = 0 if raclive == 2
gen age_recode = age - 0
gen education_years = educ - 0
gen conservatism = polviews - 0
gen female = sex - 1
gen marital_status = marital - 0
gen family_income = realinc - 0
gen social_class = class - 0
*Here, we wrap Federal Information Processing Standards (FIPS) county codes into commuting zones based on United States Department of Agriculture's 2000 commuting zone and labor market crosswalk (USDA, 2012). We do not include related code as it spans dozens of pages. It is available upon request as a STATA do file.
```

```
*Next, we wrap 2010 Census occupation codes (census.gov) up into occupation classifications based on "Industry and Occupation Code: Lists and Crosswalks" (available at https://www.census.gov/topics/employment/industry-occupation/guidance/code-lists.html). We do not include related code as it also spans many pages. It is available upon request as a STATA do file.
*Now we restrict our sample to White, non-Hispanic, working adults who provided responses to all relevant measures:
keep if closer_white != . & black_coworker != . & black_neighbor != . & age_recode != . & education_years != . & conservatism != . & female != . & marital_status != . & social_class != . & family_income != . & year != . & commuting_zone != . & occupation_classification != . & white_n == 1 & age > 17 & occupation_classification < 9999
*Bivariate and multivariate regressions:
reg closer_white black_coworker
reg closer_white black_coworker black_neighbor conservatism age_recode education_years female i.marital_status i.social_class family_income i.year i.commuting_zone i.occupation_classification
*Running Logit to predict probability of having a Black coworker for White, non-Hispanic working adults:
quietly logit black_coworker black_neighbor age_recode education_years conservatism female i.marital_status i.social_class family_income i.year i.commuting_zone i.occupation_classification
predict prop_treatment
*Checking region of common support:
kdensity prop_treatment if black_coworker==1, addplot(kdensity prop_treatment if black_coworker==0) legend(label(1 "treatment") label (2 "control"))
*Ascertaining region of common support numerically:
summ prop_t if black_c == 0
summ prop_t if black_c == 1
*Estimating average effect of treatment on the treated (ATT):
psmatch2 black_coworker, outcome(closer_white) pscore(prop_treatment) neighbor(1) noreplacement
*Running balance test, and determining improvement on balance occasioned by PSM:
pstest black_neighbor age_recode education_years conservatism female family_income, both
*Robustness checks using a number of other matching methods. First, doubly robust:
reg closer_w black_c black_n age_re education_y conservatism female family_income i.marital_sta i.social_c i.commuting_z i.occupation_c i.year if _weight == 1
*Now matching with replacement:
psmatch2 black_coworker, outcome(closer_white) pscore(prop_treatment) neighbor(1)
*Now, radius with default caliper size:
psmatch2 black_coworker, radius outcome(closer_white) pscore(prop_treatment)
*Radius with caliper = .2 * SD(p score), consistent with Austin (2011b) "Optimal caliper widths for propensity-score matching when estimating differences in means and differences in proportions in observational studies":
psmatch2 black_coworker, radius caliper(.02940574) outcome(closer_white) pscore(prop_treatment)
*Kernel matching via different kinds of kernels:
psmatch2 black_coworker, kernel outcome(closer_white) kerneltype(normal) pscore(prop_treatment)
psmatch2 black_coworker, kernel outcome(closer_white) kerneltype(epan) pscore(prop_treatment)
psmatch2 black_coworker, kernel outcome (closer_white) kerneltype(uniform) pscore(prop _treatment)
psmatch2 black_coworker, kernel outcome(closer_white) kerneltype(tricube) pscore(prop_treatment)
*Local linear regression:
psmatch2 black_coworker, llr outcome(closer_white) kerneltype(normal) pscore(prop_treatment)
*Mahalanobis matching:
psmatch2 black_coworker, mahalanobis(education _years i.social_class black_neighbor female i.marital_status conservatism family_income age_recode i.commuting_zone i.occupation_cla i.year) outcome(closer_white)
*Going back to the original model, determing how influenced the model is by the decision to match every control case to a treated case, regardless of p-score distance. Seeing how results may be affected by caliper decisions:
psmatch2 black_coworker, outcome(closer_white) pscore(prop_treatment) neighbor(1) noreplacement caliper(.1)
```

psmatch2 black_coworker, outcome(closer_white) pscore(prop_treatment) neighbor(1) noreplacement caliper(.01)
psmatch2 black_coworker, outcome(closer_white) pscore(prop_treatment) neighbor(1) noreplacement caliper(.001)
*In all cases, the ATT hovers around −.4 and is statistically sgnificant $p < .001$. Adding a caliper is unnecessary:
*A final note: one could conduct a very similar analysis using the nongeocoded GSS from the same time period, but would have to swap the "commuting zone" variable out for the GSS variable "region," which indicates the region in which the interview took place. This would certainly yield an underadjusted estimate but could serve as a proxy or proof of the methods described herein. When we do so, we find that:
*The bivariate regression, of course, yields the same estimate ($b = -0.57, p < .001$).
*The multivariate regression now yields a slightly larger estimate than before, still statistically significant ($b = -0.43, p < .001$).
*The PSM estimate is ever so slightly smaller, still statistically significant ($b = -0.42, p < .001$).

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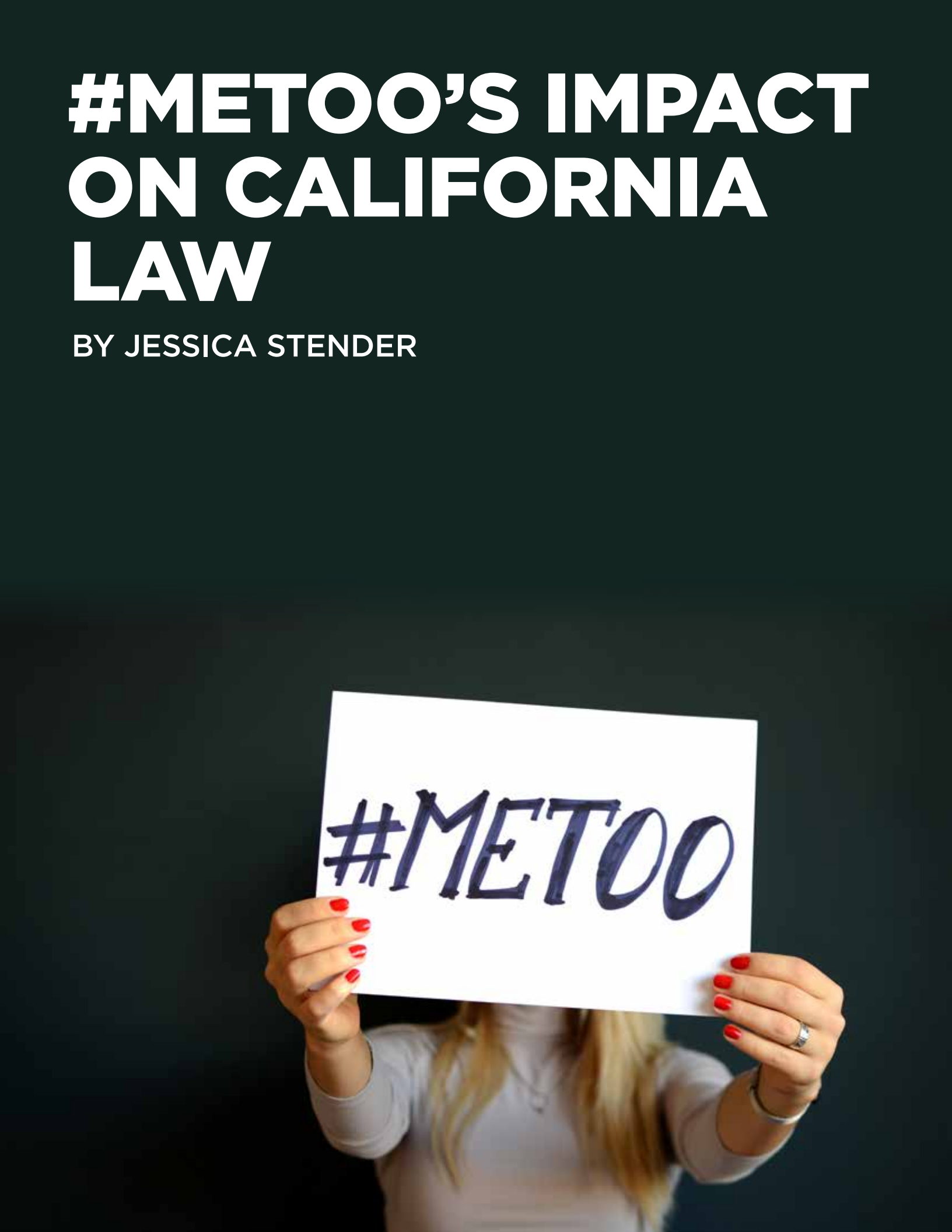
SPRING 2020

#MeToo's Impact on California Law

by Jessica Stender 12

#METOO'S IMPACT ON CALIFORNIA LAW

BY JESSICA STENDER



In 2014, Carmyn Fields, a California Highway Patrol analyst, sued her employer after supervisors failed to take action when she reported her boss had repeatedly sexually harassed her. They finally reached an agreement on a settlement, but with one catch: Carmyn had to agree to never again work for any branch or division of the CHP. Since then, despite having 12 years of job experience, exemplary reviews and a master's degree in public administration, she has been unable to obtain another law enforcement job or other employment with any government agency.

Maria Torres (name changed) settled her sexual harassment claim with a high-end restaurant in San Francisco where she had worked as a dishwasher. As a condition of settlement demanded by her employer, and in order to put the matter behind her, she agreed to never work for the employer again. Several months later, she was denied employment from a different restaurant, which she later learned was under the same ownership as her prior employer, along with several other restaurants in the city.

Several women alleging sexual harassment by the former CEO of American Apparel had their cases thrown out because, in order to receive bonuses and in some cases simply to be paid, they had been forced to sign agreements releasing the CEO and the company from all legal claims. Others at the company did not speak out about harassment they experienced or observed because they feared violating non-disparagement agreements they were required to sign as a condition of hire. The non-disparagement agreements carried significant monetary penalties.

Laws prohibiting sexual harassment have been on the books for years, but stories like these illustrate the legal gaps that have allowed sexual harassment to persist. In some cases, these loopholes have kept employees from coming forward at all, enabling employers to avoid accountability altogether. By encouraging more survivors to speak out, the #MeToo movement has not only helped to expose the pervasiveness of the problem, it has also emphasized the ways our laws must be updated to prevent harassment and to combat the barriers workers face in coming forward.

This has driven unprecedented legislative momentum throughout the country, resulting in the enactment of new laws in at least 15 states since 2017 alone. California, which has often led the country in terms of worker protections, has been at the forefront in passing robust anti-harassment and discrimination protections over the last two years, changing the legal landscape in a variety of ways.

Limiting Secret Settlements & Non-Disparagement Agreements

Non-disclosure and non-disparagement agreements keep workers from speaking out about workplace abuses, thereby shielding employers from accountability and in some cases enabling repeat harassers.

On January 1, 2019, SB 820 (Leyva) took effect, prohibiting confidentiality provisions *as to the underlying facts in any settlement agreement for claims filed in a civil or administrative action* regarding sexual assault not already prohibited by existing law; sexual harassment under the Unruh Civil Rights Act; or harassment or discrimination based on sex, failure to prevent an act of workplace harassment or discrimination based on sex, or retaliation for reporting harassment or discrimination based on sex in employment or housing, as described in the Fair Employment and Housing Act (FEHA). The law provides an exception for provisions that shield the identity of the claimant and all facts that could lead to the discovery of his or her identity *at the request of the claimant*. However, this exception does not apply if a government agency or public official is a party to the settlement agreement. Note: SB 820 does not prohibit a settlement agreement provision precluding disclosure of the amount paid in settlement of a claim. (Emphasis added.)

AB 3109 (Stone) voids and renders unenforceable a contractual provision in a contract or settlement agreement that waives a party's right to testify in an administrative, legislative, or judicial proceeding, subject to court order, subpoena or written request by an administrative agency or the legislature, concerning alleged criminal conduct or alleged sexual harassment on the part of the other party, its agents or employees. The law applies to contracts, including settlement agreements, entered into on or after January 1, 2019.

Also effective January 1, 2019, SB 1300 (Jackson) prohibits employers from requiring employees to sign, as a condition of employment or for an employment-related benefit, a non-disparagement agreement which inhibits the ability of an employee to disclose sexual harassment or other mistreatment in the workplace. Note: The prohibition does not apply to such provisions in negotiated settlement or severance agreements.

Stopping Coercive "Release of Claims" Agreements

SB 1300 also prohibits employers from requiring employees to sign release of claims agreements under FEHA in exchange for a raise or bonus, or as a condition of employment. The law therefore ensures that employers can no longer coerce workers into signing such releases - sometimes unknowingly- in order to get a job, get paid, or in the course of completing routine paperwork. This prohibition does not apply to such release of claims provisions in negotiated settlement or severance agreements.

Legislative Guidance on the "Severe or Pervasive" Standard

SB 1300 also addressed the "severe or pervasive" legal standard applied to sexual harassment claims. The standard requires harassing conduct to be either severe or pervasive in order to be legally actionable as a hostile work environment. SB 1300 provides legislative guidance, based on existing case law, to ensure the standard is applied consistently and appropriately by courts. Citing Justice Ginsburg's concurrence in *Harris v. Forklift Systems*, (1993) 510 U.S. 17, SB 1300 provides that "the plaintiff need not prove that his or her tangible produc-

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tivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." Rejecting the Ninth Circuit's holding in *Brooks v. City of San Mateo*, (9th Cir. 2000) 229 F.3d 917, SB 1300 instructs that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment." The legislature rejected the "stray remarks doctrine," which holds that statements by nondecision makers, or statements by decisionmakers unrelated to the decisional process itself are insufficient by themselves to constitute direct evidence of an employer's discriminatory intent. The rejection is consistent with *Reid v. Google, Inc.*, (2010) 50 Cal.4th 512, affirming that the existence of a hostile work environment depends upon the totality of the circumstances. SB 1300 instructs that the legal standard should not vary by type of workplace, rejecting reasoning to the contrary in cases like *Kelley v. Conco Companies*, (2011) 196 Cal.App.4th 191, which considered the type of behavior generally tolerated in that type of workplace, namely a construction site, in rejecting a finding of sexual harassment. Finally, the legislature instructed that harassment cases are rarely appropriate for disposition on summary judgment, affirming the observation of the court in *Nazir v. United Airlines*, (2009) 178 Cal.App.4th 243, that hostile work environment cases involve issues "not determinable on paper."

Extending the Statute of Limitations

Many workers, especially in low-wage industries, lack information about their rights and the applicable statute of limitations. Moreover, survivors often fail to come forward right away due to the trauma they have experienced. In response, California passed AB 9 (Reyes), effective January 1, 2020, which extends the deadline for filing a claim of employment discrimination or harassment under the FEHA with the Department of Fair Employment and Housing (DFEH), a jurisdictional prerequisite to filing suit for such claims, from one year to three years. Note: the deadline to file in court after receiving a "right to sue" letter from the DFEH remains one year.

Limitations and Protections in Arbitration

Forced arbitration deprives workers of the ability to enforce their rights in court. Academic studies have shown, that forced arbitration results in claim suppression – workers bring fewer claims in the first place, and those who do, prevail less often and obtain lower recovery. This forum is particularly harmful in the context of sexual harassment because both the proceeding and outcome are often shielded from public view, allowing employers to avoid public awareness and scrutiny. Seven states have passed laws limiting forced arbitration including California, which passed AB 51 (Gonzalez) in 2019. The law prohibits employers from requiring, as a condition of employment, continued employment, or the receipt of any employment-related benefit, any applicant or employee to waive any right, forum, or procedure for a violation of FEHA or the Labor Code. AB 51 also prohibits employers from retaliating against individuals for refusing to consent to such a waiver. Note: On January 31, 2020, the District Court for the Eastern District of California issued a preliminary injunction, enjoining the state from enforcing AB 51 with respect to mandatory arbitration agreements to the extent governed by the Federal Arbitration Act. A final decision on the merits of the legal challenge is pending.

SB 707 (Wieckowski) addressed the employer tactic of strategically delaying or refusing to pay arbitration fees to prevent the initiation or continuation of the proceeding by providing procedural options and remedies in such circumstances. As of January 1, 2020, if the arbitration venue requires the drafting party to pay certain fees before the arbitration can proceed and the employer fails to pay the arbitration *initiation fee* within 30 days, it is deemed to be in "material breach," and the employee may withdraw from arbitration and proceed in court or compel arbitration under the contract. If the arbitration requires the drafting party to pay certain fees during the pendency of the arbitration and the employer fails to pay such *ongoing fees* within 30 days of the due date, it is deemed to be in "material breach," and the employee may withdraw from arbitration and proceed in court, seek a court order compelling the employer to pay, or pay the unpaid fees to continue the arbitration and then seek to collect the employer's share of the fees at the end of the proceeding, without regard to any findings on the merits in the underlying arbitration. The law also allows a court or arbitrator to impose sanctions against the drafting party. Finally, SB 707 requires private arbitration companies to collect, publish at least quarterly, and make available to the public on their internet website aggregate demographic data relative to the ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators. Note: SB 707 also applies to arbitrations in the consumer context.

Prohibiting "No Rehire" Provisions

"No rehire" clauses in settlement agreements restrict future employment opportunities for workers settling sexual harassment or other types of employment disputes and can impose a substantial burden on a worker's ability to stay in their chosen occupation simply for asserting their rights. They also chill employees from reporting workplace misconduct for fear of lasting repercussions on their careers. In response, California joined Oregon and Vermont in prohibiting such clauses. AB 749 (Stone) prohibits any provision in a settlement agreement entered into on or after January 1, 2020 "prohibiting, preventing, or otherwise restricting" an "*aggrieved person* from obtaining future employment with the employer against which the aggrieved person has *filed a claim*, or any parent company, subsidiary, division, affiliate, or contractor of the employer." (Emphasis added.) The law defines "aggrieved person" as someone who has filed a claim against their employer "in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process." The law provides an exception, permitting such "no rehire" provisions "if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault." Note: The law does not prohibit an agreement between the settling parties to end the current employment relationship, as long as it does not limit future employment as outlined above.

Expanding Training Requirements

Existing California law, prior to 2019, required employers of 50 or more employees to provide two hours of sexual harassment prevention training to supervisors every two years. SB 1343 (Mitchell) reduced the minimum employee threshold to

5 employees, including temporary and seasonal employees. It also requires covered employers to provide, in addition to the 2 hours of training to supervisors, 1 hour of training to non-supervisory employees every two years. Lastly, it requires the DFEH to develop and post 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace in specified languages. SB 778 was passed the following year to clarify that this training must be provided by January 1, 2021, and thereafter once every two years. It also provides that the training must be given to new nonsupervisory employees within 6 months of hire, and to new supervisory employees within 6 months of the assumption of a supervisory position.

Largely in response to the leadership and advocacy of workers in the janitorial industry, California passed AB 1978 (Gonzalez) in 2016, which requires janitorial employers and contractors to register with the state and provide biennial in-person sexual violence and harassment prevention training to employees and supervisors. AB 547 (Gonzalez, 2019) built on this prior law by requiring janitorial employees to use qualified peer trainers from a list of qualified organizations to be developed by the Department of Industrial Relations to provide the required training for nonsupervisory employees. It also requires that the peer trainers be paid at least twice the state minimum wage per hour.

Protections Outside Employment Relationships

California is one of a handful of states that protect independent contractors, volunteers, and interns - in addition to employees - under our state's workplace anti-harassment and discrimination law, the FEHA. Under the Unruh Civil Rights Act, California law also provides protections for sexual harassment outside of the workplace, where there is a business, service, or professional relationship between the plaintiff and defendant. SB 224 (Jackson), effective January 1, 2019, amended the Unruh Act to clarify that sexual harassment by elected officials, lobbyists, investors, directors, and producers is prohibited. The new law also extended protections to situations in which a defendant holds him or herself out as being able to help the plaintiff establish a business, service, or professional relationship with the defendant or a third party. Finally, SB 224 removed the previous requirement under the Unruh Act that the plaintiff prove that she could not easily terminate the relationship, and provided enforcement jurisdiction to the DFEH.

An important outgrowth of the #MeToo movement is a growing public awareness that sexual harassment is a civil rights issue, and that beyond the trauma it causes, it is part of broader structures of discrimination that prevent those who experience it from achieving equality in the workplace.

Sexual harassment occurs in all industries, occupations and wage levels, but studies show that the highest rates exist in industries with large numbers of low-wage workers, often working in occupations disproportionately held by women, especially women of color. It is therefore critical that we continue strengthening our laws to better protect all workers, but particularly those who are most vulnerable. TL

End Notes

1 See e.g., Cynthia Esßtlund, The Black Hole of Mandatory Arbitration, North Carolina Law Review (2018), The Black Hole of Mandatory Arbitration.

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MCLE Self-Study:

#MeToo Movement Inspires Changes in California's Sexual Harassment Law: SB 1300

By Mariko Yoshihara

Introduction

Just over a year ago, actress Alyssa Milano ignited the powerful #MeToo movement on Twitter, using the hashtag originally created by Tarana Burke in 2006 to raise awareness about sexual violence. Within weeks, the voices and stories of women and people of all genders, saying #MeToo, exposed the rampant and pervasive culture of sexual harassment infecting nearly every industry.

The #MeToo movement galvanized legislatures across the nation to strengthen laws prohibiting sexual harassment. Here in California, the Legislature introduced over two dozen bills to address systemic workplace harassment. By the close of last year's legislative session, 17 of those bills made it to the Governor's desk and 12 were signed into law.[1]

One of the most significant bills enacted last year was SB 1300, a sexual harassment omnibus bill the California Employment Lawyers Association and Equal Rights Advocates co-sponsored. This bill targeted certain gaps in the Fair Employment and Housing Act (FEHA) that—according to the bill sponsors—denied justice to some sexual harassment victims, permitted sexual predators to evade its reaches, and generally allowed workplace sexual harassment to persist. SB 1300 addresses these gaps by enacting several important reforms.

"Severe or Pervasive" Legal Standard

SB 1300 provides statutory guidance on the "severe or pervasive" legal standard for sexual harassment claims, to help ensure courts apply it consistently and fairly to protect sexual harassment victims. In several cases, courts have misconstrued the "severe or pervasive" standard, with the result that workers have been prevented from having their day in court, which of course is contrary to FEHA's remedial purpose. For example, in *Brooks v. City of San Mateo*,[2] the plaintiff, Patricia Brooks, a 911 dispatcher, was responding to a 911 call when her coworker, a senior dispatcher, "placed his hand on her stomach and

— *Inside the Law Review* —

commented on its softness and sexiness." After telling him to stop, he "forced his hand underneath her sweater and bra to fondle her bare breast."[3] The coworker eventually served a jail sentence for sexual assault, but when Brooks' civil sexual harassment claim reached the court, the judge granted summary judgment in favor of the defendant and a jury never heard Brooks' case. The judge ruled the conduct was not severe enough to give rise to a hostile work environment claim. Brooks appealed to the 9th Circuit Court of Appeals, where, in a decision former Judge Alex Kozinski notably authored, the 9th Circuit affirmed the lower court's decision, emphasizing that Brooks suffered only a single incident that took place over a matter of minutes.

SB 1300 corrects this erroneous application of our anti-harassment laws by explicitly rejecting the 9th Circuit's opinion in *Brooks* and prohibiting its use in determining whether conduct is sufficiently severe or pervasive to constitute a FEHA violation. Further, the bill makes clear that "in a workplace harassment suit the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. Rather, it suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."[4]

SB 1300 also helps ensure courts will examine the totality of the circumstances in determining whether harassing conduct was severe or pervasive, advising that a discriminatory remark, even if made outside the context of an employment decision or uttered by a non-decision-maker, may be relevant, circumstantial evidence of discrimination.[5] In addition, the bill clarifies that the legal standard for sexual harassment should not vary by type of workplace, stating that courts should only consider the nature of the workplace when an employee is engaging in or witnessing prurient conduct and commentary is integral to the performance of job duties.

Lastly, SB 1300 declares the Legislature's approval of the unanimous court of appeals decision, *Nazir v. United Airlines, Inc.*,[6] which acknowledged criticism of the summary judgment process in employment litigation, including that it can often be abused, "especially by deep pocket defendants to overwhelm less well-funded litigants." In *Nazir,* the defendant filed 1,056 pages of documents, including "repetitive facts resulting in countless pages of utterly unnecessary—and necessarily unavailing—material."[7] As explained by the court, "many employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be."[8]

Release of Claim and Non-Disparagement Agreements

As we have seen in some recent high profile sexual harassment cases, employers and serial harassers have employed creative legal tactics to try to circumvent our anti-harassment and anti-discrimination laws. For example, in one case involving a CEO of a large apparel company, workers were routinely forced to sign agreements that contained a non-disparagement provision, a release of all claims, and a mandatory arbitration clause. The non-disparagement provision prohibited employees from saying anything disparaging about the CEO or the employer, or else they would be subject to a one million dollar penalty. Fearful of being sued, most workers refrained from speaking out about any kind of misconduct or misbehavior by the CEO, even if the conduct or behavior was unlawful. In addition, the release of all claims stripped workers of any and all legal claims they had against the company, including claims of sexual harassment. And finally, the mandatory arbitration clause ensured that any dispute, including sexual harassment claims, would be decided through private, binding arbitration. The employer surreptitiously included these provisions in routine paperwork, and almost always after an employee was sexually harassed or assaulted.[9]

SB 1300 provisions addressing non-disparagement agreements are designed to prevent employers and serial harassers from contracting around sexual harassment laws by making an agreement unenforceable if it requires an employee to sign a release of all claims or rights under FEHA in exchange for a raise or bonus, or as a condition of employment or continued employment. The bill also prohibits an employer from requiring an employee to sign a non-disparagement agreement or other document that denies employees the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

SB 1300 applies only to agreements required "in exchange for a raise or bonus, or as a condition of employment or continued employment." Negotiated settlement agreements are explicitly exempted under the bill in Government Code § 12964.5(c).

Prohibiting All Forms of Harassment by Third Parties

In 2003, the Legislature enacted AB 76,[10] which clarified that employers may also be liable for unlawful harassment of their employees, applicants, or independent contractors by non-employee third parties.

The bill was introduced in response to the 2002 case, *Salazar v. Diversified Paratransit, Inc.*[11] In

Salazar, a passenger repeatedly got out of his seat, exposed himself to the driver, leered at her, and grabbed at her. Although the passenger's behavior was known to the employer through past incidents and the driver's complaints, the employer kept the driver on the same route. Eventually, the passenger sexually assaulted the driver. Ruling on the question of whether the employer was liable for sexual harassment, the *Salazar* court said no, because at the time, FEHA did not provide for employers' liability for harassment perpetuated by non-employee third parties. AB 76 addressed that omission; however, because of a last-minute amendment, the bill was limited to sexual harassment.[12]

In 2006, the California Supreme Court in *Carter v. California Dep't of Veterans Affairs*[13] noted that Government Code § 12940(j)(1) prevented all forms of harassment by "any person," and the 2003 amendment did not change existing law but merely clarified it in an effort to address *Salazar*. Thus, the 2003 amendment, which was limited to sexual harassment, was inharmonious with the rest of the section prohibiting all forms of harassment by third parties. SB 1300 fixed this incongruency by removing the word "sexual" from the 2003 amendment to § 12940(j)(1), making clear that all forms of harassment are covered. With the current rise in hate crimes and hate speech, this was an especially timely fix.

Clarifying When Defendants Can Recover Fees and Costs

To incentivize the enforcement of our civil rights laws even when a client cannot pay, SB 1300 clarifies that a court must not award a prevailing defendant attorneys' fees and costs in a FEHA action irrespective of a plaintiff's rejection of any settlement offer, unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

FEHA provides for an award of attorneys' fees to a prevailing plaintiff, but a prevailing defendant may recover only if it shows the plaintiff's FEHA claims are "objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so."[14] As the California Supreme Court explained in *Williams v. Chino Valley Independent Fire Dist.,* "our Legislature, like Congress before it, sought 'to encourage persons injured by discrimination to seek judicial relief'" and "[t]he Legislature could well have believed the potential for a cost award in the tens of thousands of dollars would tend to discourage even potentially meritorious suits by plaintiffs with limited financial resources."[15]

Code of Civil Procedure § 998 seemingly contradicts the FEHA: If during civil litigation a defendant makes a settlement offer to the plaintiff, the plaintiff rejects the offer, and the final verdict for the plaintiff is less than what the defendant offered, the court may award all attorneys' fees and costs the defendant incurred from the time the plaintiff rejected defendant's offer.

California courts were split on whether § 998's fee shifting rule applies to FEHA cases. As explained in *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[16] "The most natural reading of these statutes is that the express cost shifting provision in Section 12965(b) overrides Section 998(c). The Legislature incorporated specific cost shifting principles into FEHA. Those provisions govern the award of expert witness fees incurred either prosecuting or defending FEHA claims. This means prevailing defendants cannot obtain expert witness fees in FEHA cases where the claims against them are nonfrivolous."

In accordance with FEHA's clear policy of encouraging victims with valid discrimination claims to vindicate their rights without fear of facing financial hardship if they do not prevail, SB 1300 clarifies that "notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so."

SB 1300 thus comprehensively addresses workplace sexual harassment by closing loopholes in the legal standard for deciding sex harassment claims, fixing incongruences in the law and ensuring its consistent and fair application.

Other #MeToo Laws and What Is Next

Some of the other significant #MeToo bills taking effect this year include SB 820 (Leyva) and AB 3109 (Stone), which limit the use and scope of confidential settlements in sexual harassment cases; SB 224 (Jackson), which makes explicit that sexual harassment by producers, directors, investors, elected officials, and lobbyists is unlawful, and strengthens enforcement protections for these types of harassment claims; and SB 1343 (Mitchell), which requires all employers of five or more employees to provide at least two hours of sexual harassment prevention training to all supervisors and at least one hour of training to all nonsupervisory employees.

Legislators continue to introduce and promote legislation in line with the #MeToo movement. Several of the bills Governor Brown vetoed last year have already been reintroduced in the 2019 legislative session, including AB 51 (Gonzalez), which aims to

prevent employers from forcing workers into private arbitration to resolve their harassment complaints and AB 9 (Reyes), which would give employees who allege discrimination or harassment under FEHA more time to file their claims.

In the coming years, we can expect to see a lot more developments in this area of law as the #MeToo movement continues to push for stronger laws and as new laws are tested in the courts. Ultimately, these new developments hopefully will change workplace culture and lead to safer working environments and justice for sexual harassment survivors.

ENDNOTES

1. AB 403 (Melendez) – Approved; AB 1867 (Reyes) – Vetoed; AB 1870 (Reyes) – Vetoed; AB 2055 (Levine) – Approved; AB 2079 (Gonzalez Fletcher) – Vetoed; AB 2601 (Weber) – Approved; AB 2713 (Rodriguez) – Vetoed; AB 2770 (Irwin) – Approved; AB 3080 (Gonzalez Fletcher) – Vetoed; AB 3081 (Gonzalez Fletcher) – Vetoed; AB 3109 (Stone) – Approved; SB 224 (Jackson) – Approved; SB 419 (Portantino) – Approved; SB 820 (Leyva) – Approved; SB 867 (Committee on Budget and Fiscal Review) – Approved; SB 1300 (Jackson) – Approved; SB 1343 (Mitchell) – Approved.
2. 229 F.3d 917 (2000).
3. *Id.* at 921.
4. *See Harris v. Forklift Sys.*, 510 US 17, 25-26 (1993).
5. *See Reid v. Google, Inc.*, 50 Cal. 4th 512, 538-46 (2010).
6. 178 Cal. App. 4th 243 (2009).
7. *Id.* at 251.
8. *Id.* at 286.
9. *See Lo v. American Apparel, Inc.* (Super. Ct. Los Angeles County, 2011, No. BC 457920); *Nelson v. American Apparel, Inc.* (Oct. 28, 2008, B205937) [nonpub. opn.]; Lauren Weber, *American Apparel Ordered to Pay Over $3 Million in Arbitration,* Wall Street Journal, June 9, 2015, available at: https://www.wsj.com/articles/american-apparel-ordered-to-pay-over-3-million-in-arbitration-1433891690.
10. Corbett, 2003 Cal. Stat. ch 671.
11. 103 Cal. App. 4th 131 (2002). See Assem. Floor Analysis (2003-2004 Reg. Sess.) Sept. 3, 2003.
12. Sen. Amend. to Assem. Bill No. 76 (2003-2004 Reg. Sess.) Aug. 28, 2003.
13. 38 Cal. 4th 914, 930 (2006).
14. Cal. Gov't Code § 12965(b); *Williams v. Chino Valley Independent Fire Dist.*, 61 Cal. 4th 97, 115 (2015).
15. *Williams*, 61 Cal. 4th at 112-13.
16. 18 Cal. App. 5th 1098 (2018).

From the Editors
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Labor & Employment Law Section of the California Lawyers Association

25th ANNUAL PUBLIC SECTOR CONFERENCE

Friday, April 12, 2019

GENERAL INFORMATION
The conference registration fee includes your choice of attendance at the MCLE courses, course materials, continental breakfast, and networking reception. A separate fee will be charged to attend the luncheon program. Sign-up today using the registration form inside this brochure.

SPECIAL ASSISTANCE/QUESTIONS
For special assistance, please call (916) 516-1748. For registration information, please call (916) 516-1757. For information regarding the program, please call (916) 516-1748.

PUBLIC SECTOR CONFERENCE PROGRAM MATERIALS
Conference materials will be available online prior to the conference and provided on a USB drive at the conference. **Wi-Fi will not be available inside the conference rooms.** Should you prefer to reference printed materials during the conference, please feel free to access the online information and print out the materials prior to the conference. If you have an electronic device without a USB port or built-in Wi-Fi, please save the online files to your desktop/device so that you may access the materials during the conference. No printed materials will be provided at the conference.

SCHOLARSHIPS
The Labor and Employment Law Section of the California Lawyers Association is committed to encouraging the representation of persons of color, women, the LGBTQ community, people with disabilities, other underrepresented groups and those who work in the area of public service.

As such, the Labor and Employment Law Section has committed to provide a full scholarship to those persons who have traditionally been underrepresented in our field in order to become familiar with the Labor and Employment Law Section and to encourage their membership and association.

Visit http://bit.ly/public-sector-conf for an application

Scholarships only cover registration fees and not travel expenses. Applications are due by April 1, 2019 to Jinny Kim (jkim@legalaidatwork.org).

25TH PUBLIC SECTOR CONFERENCE PLANNING COMMITTEE
Katherine Thomson, Kevin Hosn, Erich Shiners, Anne Giese, Ari Krantz, Latika Malkani, Arlene Prater, Monica Guizar, Adam Fiss, and Laura Davis.

REGISTRATION FORM

Note: One registrant per form. Photocopies may be used.

Bar Number: _____

Name: _____

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❑ Your name and address may be disclosed. Check here if you do NOT want your information released.

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Present through April 5, 2019.

o **$270** Labor & Employment Law Section Member

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Ticketed Events (Check to purchase)

o Luncheon Keynote _____ x $20 = **$**_____

AMOUNT ENCLOSED OR TO BE CHARGED $_____

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Deadline: In order to pre-register your form and check, payable to the California Lawyers Association, or credit card information, must be received by April 5, 2019.

Mail To: Program Registrations, California Lawyers Association 400 Capitol Mall, Suite 650, Sacramento, CA 95814

Email To: Program Registrations at ProgramRegistrations@CAlawyers.org.In order to email your registration, credit card information is MANDATORY. ***(Photocopies of checks will NOT be accepted.)***

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PROGRAM SCHEDULE

CONTINENTAL BREAKFAST AND REGISTRATION

7:45 a.m. - 8:45 a.m.

CONCURRENT SESSIONS

8:45 a.m. -10:00 a.m.

Putting Humpty Dumpty Back Together Again—the Challenges and Opportunities After Workplace Investigations (1.25 Hours MCLE)
The action plan when an employer receives a complaint of harassment is relatively straightforward. The challenge grows when results must be communicated, behavior modified, and the parties forced to address the conduct that created the "crash". This panel will speak from the perspective of the legal counsel, the executive coach, and the union representative – to identify effective practices to rebound from investigations and rebuild a healthy organization.

SPEAKERS: **Malia Vella, Staff Attorney and Public Policy Coordinator, Teamsters Local 856**
Deborah Maddux, JD, SPHR, Senior Partner, Van Dermyden Maddux
Mary Egan, CEO/Managing Partner, Solutions-MRG

MODERATOR: **Arlene Prater, Partner, Best Best & Krieger LLP**

Keep Calm and Carry On: Post-Janus Case Developments and Legislation (1.25 Hours MCLE)
What's happened to public sector unions since the *Janus* decision? This panel will update you on the variety of lawsuits, new laws, and issues that have generated interest, debate, and decisions.

SPEAKERS: **Scott A. Kronland, Partner, Altshuler Berzon LLP**
Che I. Johnson, Partner, Liebert Cassidy Whitmore
Sheena Farro, Regional Attorney, Public Employment Relations Board

MODERATOR: **Ari Krantz, Board Member, Public Employment Relations Board**

BREAK

10:00 a.m. - 10:10 a.m.

PLENARY SESSION

10:10 a.m. - 11:40 a.m.

In One Year and Out the Other: Year in Review (1.50 Hours MCLE)
Experienced and dynamic speakers will provide an overview of the latest developments over the past year in California public sector labor and employment law. The review will include updates on recent court decisions, new legislation, and administrative agency decisions.

SPEAKERS: **Tim Yeung, Managing Partner, Sloan Sakai Yeung & Wong LLP**
Kerianne Steele, Shareholder, Weinberg, Roger & Rosenfeld

MODERATOR: **Monica Guizar, Weinberg, Roger & Rosenfeld**

KEYNOTE LUNCHEON

11:50 a.m. - 12:50 p.m.

Public Sector Labor Relations in Times of Strife: Challenges and Opportunities (1.00 Hour MCLE)

SPEAKERS: **Catherine Fisk, Barbara Nachtrieb Armstrong Professor of Law, Boalt Hall, University of California, Berkeley**

CONCURRENT SESSIONS

1:00 p.m. - 2:15 p.m.

Prepare to Agree—PERB Informal Conferences and Impasse Mediations (1.25 Hours MCLE)
They say the way to get to Carnegie Hall is practice, practice, practice. The key to success in PERB informal conferences and impasse mediations is to prepare, prepare, prepare. Join our experienced panel for an animated discussion of practical tips, war stories, and friendly advice. Topics will include obtaining settlement authority, dealing with difficult personalities, helping your mediator help you, confidentiality concerns, drafting agreements, and how to get the best outcome for your client.

SPEAKERS: **Loretta van der Pol, Chief, State Mediation and Conciliation Service**
Karl-Fredric J. Seligman, Regional Attorney, Public Employment Relations Board
Anita I. Martinez, Former Chair, Public Employment Relations Board

MODERATOR: **Marie A. Nakamura, Shareholder, Dannis Woliver Kelley**

Key Issues in Public Sector Employment Litigation (1.25 Hours MCLE)
This panel will analyze the nuances unique to public sector employment litigation, including administrative/judicial exhaustion, anti-SLAPP, immunities, punitive damages and more. This panel is appropriate for experienced agency and employee-side attorneys who are primarily engaged in public sector employment litigation or are preparing to be.

SPEAKERS: **David W. Tyra, Shareholder, Kronick, Moskovitz, Tiedemann & Girard**
George Acero, Owner, Acero Law

MODERATOR: **Kevin K. Hosn, California Department of Justice**

BREAK

2:15 p.m. - 2:25 p.m.

PLENARY SESSION

2:25 p.m. - 3:40 p.m.

Bias and the Courtroom: A View from the Bench (1.25 Hours of Recognition and Elimination of Bias in the Legal Profession and Society MCLE)
With the increased recognition of how bias, both explicit and implicit, exists throughout society, we discuss how bias may impact the fundamental fairness of our legal system. Join us for a discussion with esteemed jurists as we discuss the impact of bias in jury selection, the influence of media or social media bias on jurors, reducing implicit bias in decision-making, the impact of a diverse judiciary, and intervention strategies to counter implicit bias.

SPEAKERS: **Hon. Shellyanne W.L. Chang, Judge, Superior Court of Sacramento County**
Hon. Edward M. Chen, United States District Judge, Northern District of California
Hon. Troy L. Nunley, United States District Judge, Eastern District of California

MODERATOR: **Anne Giese, Chief Counsel, SEIU Local 1000**

BREAK

3:40 p.m. - 3:50 p.m.

CONCURRENT SESSIONS

3:50 p.m. - 5:05 p.m.

Arbitration Remedies: Win, Lose or Draw? (1.25 Hours MCLE)
Experienced advocates and arbitrators will discuss how the union can benefit the most from winning an arbitration; how the employer can avoid a problematic remedy; and what happens when the arbitrator remands a remedy issue to the parties.

SPEAKERS: **Andria S. Knapp, Esq., Arbitration and Dispute Resolution**
Susan K. Garea, Shareholder, Beeson, Tayer & Bodine
W. Daniel Clinton, Partner, Hanson Bridgett

MODERATOR: **Katherine J. Thomson, Arbitrator, Mediator, Factfinder**

Sex, Lies, and Diligence: Ethics in a New Era (1.25 Hours of Legal Ethics MCLE)
Not only are today's lawyers presented with ever-changing opportunities for success in advocacy, but we must also navigate recently changed ethical rules. Panelists will address many things an ethical employment lawyer needs to know but may be afraid to ask, with primary focus on the expanded new rules. Panelists will also discuss common missteps, best practices, and the role of attorney well-being in encouraging ethical conduct.

SPEAKERS: **Daniel J. O'Rielly, Partner, O'Rielly & Roche , LLP**
Alison P. Buchanan, Shareholder, Hoge Fenton

MODERATOR: **Latika Malkani, Partner, Siegel LeWitter Malkani**

RECEPTION (APPETIZERS AND NO-HOST BAR)

5:05 p.m. - 6:00 p.m.

Please join us for a networking reception with conference speakers, Executive Committee Members, and fellow labor and employment attorneys and professionals.

Employment Law Case Notes

By Anthony J. Oncidi

Anthony J. Oncidi is a partner in and the Chair of the Labor and Employment Department of Proskauer Rose LLP in Los Angeles, where he exclusively represents employers and management in all areas of employment and labor law. His telephone number is (310) 284-5690 and his email address is aoncidi@proskauer.com. (Tony has authored this column without interruption for every issue of this publication since 1990.)

School Teacher's ADA Claim Against Catholic School Was Not Barred by "Ministerial Exception"

Biel v. St. James School, 911 F.3d 603 (9th Cir. 2018)

Kristen Biel was fired from her fifth grade teaching position at St. James Catholic School after she told the school that she had breast cancer and would need to miss work to undergo chemotherapy. Following her termination, Biel alleged that the school had violated the Americans with Disabilities Act (ADA). The district court dismissed Biel's lawsuit on the ground that it was barred by the First Amendment's "ministerial exception" to generally applicable employment laws such as the ADA. The Ninth Circuit reversed, holding that under the totality of the circumstances test, the ministerial exception did not bar Biel's claims because she did not qualify as a minister of the Catholic Church.

City Attorney Should Not Have Been Disqualified From Representing City

City of San Diego v. Superior Court, 30 Cal. App. 5th 457 (2018)

As part of an internal affairs investigation regarding the unauthorized disclosure of a confidential police report, the San Diego Police Department questioned detective Dana Hoover regarding communications she had had with an attorney who was representing her in an employment-related lawsuit against the city. Although Hoover invoked the attorney-client privilege, the Department directed her to answer the questions or face discipline and/or termination of employment. The trial court concluded that the city violated the attorney-client privilege and that a deputy city attorney violated the California State Bar Rules of Professional Conduct by questioning Hoover about her lawsuit without the permission of her lawyer. The court of appeal held, however, that the trial court erred when it granted Hoover's motion to disqualify the city attorney in view of the fact that none of the information that Hoover disclosed would have a "substantial continuing effect on future judicial proceedings."

Prevailing Employer Should Not Have Been Awarded § 998 Costs

Huerta v. Kava Holdings, Inc., 29 Cal. App. 5th 74 (2018)

Felix Huerta sued Kava Holdings dba Hotel Bel-Air after the hotel terminated him and another restaurant server who was involved in an altercation during work. The trial court granted Kava's motion for nonsuit as to Huerta's claim for retaliation under the Fair Employment and Housing Act (FEHA), and the jury returned a verdict against Huerta on the remaining FEHA claims. The trial court subsequently denied Kava's motion for attorney's fees, expert fees, and costs under Cal. Gov't Code § 12965(b), on the ground that Huerta's action was not frivolous, but granted Kava $50,000 in costs and expert witness fees under Cal. Code Civ. Proc. § 998 based on Huerta's rejection of Kava's pretrial settlement offer. The court of appeal reversed, holding that § 998 does not apply to non-frivolous FEHA actions. (The Court further noted that effective January 1, 2019, § 998 has no application to costs and attorney and expert witness fees in a FEHA action unless the lawsuit is found to be frivolous.)

Employer May Be Liable for Accident Caused by On-Call Employee

Moreno v. Visser Ranch, Inc., 30 Cal. App. 5th 568 (2018)

Ray David Moreno, a passenger riding in a truck that his father (Ernesto Moreno) was driving, was injured when the truck left the roadway, hit an embankment, and rolled over. Ray sued his father, the corporation that employed his father, and an affiliated corporation that owned the vehicle. The employer required Ernesto to be on call twenty-four hours a day, seven days a week, to respond immediately to cell phone calls for repairs and maintenance. The trial court granted summary adjudication in favor of the employer on the respondeat superior claim on the ground that Ernesto, who was returning home late in the evening after attending a family gathering, was not acting in the scope of his employment at the time of the accident. The court of appeal reversed, holding that the trier of fact could find that Ernesto's use of the truck for personal travel after work was dictated by the employer's requirements.

Employer's Rounding Policy Complied With California Law

Donohue v. AMN Servs., LLC, 29 Cal. App. 5th 1068 (2018)

AMN used a computer-based timekeeping system for all nonexempt employees, including plaintiffs/nurse recruiters. The timekeeping system rounded recruiters' punch times (both punch in and punch out) to the nearest 10-minute increment. To establish the proper hourly compensation, AMN converted each 10-minute increment to a decimal (to the nearest hundredth of a minute), totaled the number of hours (to the hundredth of a minute) and multiplied the total hours by the recruiter's hourly rate. AMN's expert labor economist testified that the rounding rule used by AMN was "neutral; in the long run, neither the employer nor the employee benefits from this policy." The trial court ruled that the rounding policy complied with California law, and the court of appeal affirmed. On similar grounds, the court affirmed the trial court's summary adjudication in AMN's favor of plaintiffs' claims for unpaid meal and rest periods, wage statement violations, waiting time penalties, PAGA penalties, violation of the unfair competition law and for unreimbursed business expenses.

Employees Who Voluntarily Used Company Vehicle Are Not Entitled to Travel Time

Hernandez v. Pacific Bell Tel. Co., 29 Cal. App. 5th 131 (2018)

Employees of Pacific Bell who install and repair video and internet services in customers' homes asserted a putative class action against the company for allegedly unpaid compensation for time they spent traveling in an employer-provided vehicle (loaded with equipment and tools) between their homes and a customer's residence under an optional and voluntary Home Dispatch Program (HDP). Pacific Bell argued that commuting in an employer-provided vehicle is compensable under California law only if such commuting is mandated, whereas participation in the HDP was optional and voluntary. The trial court agreed, granting summary judgment in Pacific Bell's favor, and the court of appeal affirmed.

Employees Are Entitled to Additional Compensation for Shortened Meal Periods

Kaanaana v. Barrett Bus. Servs., Inc., 29 Cal. App. 5th 778 (2018)

The employees in this case (belt sorters who worked at two publicly owned and operated recycling facilities under contracts with Los Angeles County Sanitation Districts) alleged the employers' failure to pay the prevailing wage and to provide full 30-minute meal periods. The trial court held that the class members were not performing "public work" within the meaning of the prevailing wage law, but the court of appeal reversed and held the prevailing wage law applies. The court further held that the employees were entitled to one hour of pay at the employee's regular rate for each workday that a full 30-minute meal period was not provided and, in addition, payment of minimum wage for all time worked. Finally, the court held that on remand, the trial court is to consider the amount of civil penalties, waiting time penalties, and attorney's fees owed to the plaintiffs.

Property Inspectors' Putative Class Action Was Properly Denied Certification

McCleery v. Allstate Ins. Co., 30 Cal. App. 5th 223 (2018)

Plaintiffs/property inspectors alleged they were improperly hired as independent contractors by insurance companies and sought payment of unpaid minimum wages, overtime, meal and rest breaks, and employee expense reimbursements, as well as compliance with various other Labor Code provisions. The trial court concluded that plaintiffs' proposed class action would not be superior to individual actions because their expert's survey failed to address all of the information needed for an accurate determination of liability, and the plan that plaintiffs submitted deprived the defendants of the right of cross-examination and the ability to present their affirmative defenses, because the anonymous nature of the expert's survey led to "inaccurate and unverifiable results." The court of appeal agreed and affirmed the trial court's denial of certification of the putative class. *See also Edwards v. Heartland Payment Sys., Inc.,* 29 Cal. App. 5th 725 (2018) (trial court properly denied mandatory and permissive intervention in wage-hour cases settled during mediation).

Wage and Hour Case Notes

By Leonard H. Sansanowicz

Leonard H. Sansanowicz is the principal of Sansanowicz Law Group, P.C. and represents employees in all aspects of employment law. He is a member of the Executive Board of the California Employment Lawyers Association, as well as the Executive Committee of the Labor and Employment Section of the Los Angeles County Bar Association. He can be contacted at: leonard@law-slg.com.

Individuals Acting on Employer's Behalf Personally Liable for PAGA Penalties

Atempa. v Pedrazzani, 27 Cal. App. 5th 809 (2018)

Labor Code § 558(a) provides that an employer "or other person acting on behalf of an employer" who causes a violation of the laws in the 500 series of the Code (which includes statutes pertaining to overtime and meal periods) is subject to a civil penalty. Labor Code § 1197.1(a) similarly provides that an employer "or other person acting either individually or as an officer, agent, or employee of another person" who pays or causes to be paid less than the applicable minimum wage is subject to a civil penalty. The plaintiffs worked for a restaurant owned by a corporation of which the defendant was the owner, president, secretary, and director. Plaintiffs filed a class action for, *inter alia*, failure to pay overtime and the minimum wage, and included a cause of action for civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA). Plaintiffs prevailed at a bench trial and were awarded PAGA penalties against both the restaurant and the defendant, jointly and severally.

The defendant contended he should not be held personally liable simply for being an individual officer of the corporate employer (restaurant), since he was not the plaintiffs' employer. The court of appeal rejected this argument, holding that the plain meaning of the statutes' language established individual liability based on the facts at issue. The *Atempa* court distinguished *Reynolds v. Bement*[1] and *Martinez v Combs*,[2] noting that those two cases focused on who could be held liable for the employer's conduct and how to determine the employer's "identity" for purposes of a private right of action for wages, whereas the statutes in question focus on the actions of individuals and conduct giving rise to civil penalties. The court highlighted that dictum in *Reynolds* suggested there were remedies other than recovering lost wages from corporate officers and directors, such as through civil penalties.[3] In a footnote, the *Atempa* court agreed that the two statutes in question allowed for recovery of flat sums in amounts "sufficient to recover underpaid wages," not as wages *qua* wages but rather as civil penalties. Because the defendant was a person other than the employer who had caused the Labor Code sections regarding overtime and minimum wage to be violated, he was subject to civil penalties, which could be enforced by the plaintiffs through a PAGA action, and to post-judgment interest. The court also held that the alter ego doctrine did not apply.

PAGA Notices Must Contain More Than Bare Pleadings and Must Be Timely Filed

Brown v. Ralphs Grocery Co., 28 Cal. App. 5th 824 (2018)

Labor Code § 2699.3(a)(1) requires an aggrieved employee under PAGA to give written notice of the Labor Code sections alleged to have been violated to both the employer and the Labor and Workforce Development Agency (LWDA), and the notice must describe the facts and theories supporting each violation. Here, the plaintiff's description of the violations was little more than "a string of legal conclusions with no factual allegations or theories of liability to support them,"[4] such as the employees "did not take all meal and rest periods and were not properly compensated for missed meal and rest periods" in violation of Labor Code §§ 226.7 and 512. The court of appeal held that such a notice did not provide enough information for the LWDA to assess how serious the violations were (i.e., whether it should investigate), or for the employer to understand which policies or procedures needed curing. The court did note two exceptions, however. First, in the plaintiff's description of the alleged wage statement violations, "the failure to include the name and address of the legal entity that is the employer," was adequate to describe the violation of Labor Code § 226(a) requirements. Second, the claimed violation of Labor Code § 558, which sets forth a civil penalty for the violation of other Labor Code provisions, was "not the type of provision to be specified in a PAGA notice," since the employee needed to allege an underlying violation in the notice for which § 558 provided the remedy.

The court found that the plaintiff's second PAGA notice, filed seven years after the first and alleging violations of different Labor Code sections than the first notice, was neither timely filed within the one-year statutory period nor saved by other doctrines such as equitable tolling, judicial estoppel, or waiver. However, the appellate court remanded the matter to the trial court to determine whether the later-added Code sections allegedly violated (201, 202, 203, 1174(d), and 1198) related back to the original notice of the § 226(a) violation.

PAGA Representative Plaintiffs May Pursue Claims for Any Labor Code Violation Employer Has Committed; Strict Class Action Procedural Requirements Do Not Apply

Carrington v. Starbucks, 30 Cal. App. 5th 504 (2018)

At trial, the plaintiff prevailed in a PAGA-only action for penalties related to violations of Labor Code §§ 226.7 and 512 (meal periods). Although the plaintiff had only been a barista for four months and individually suffered "at least" two meal period violations, the trial court found they were ascertainable and therefore the plaintiff had an adequate representative claim and the de minimis doctrine should not apply. However, the trial court substantially limited the penalty award the plaintiff sought, noting the violations were "greatly minimal" and the defendant had attempted to comply fully with the legal meal period requirement. Still, the court imposed a $5 civil penalty (instead of $50) for approximately 30,000 violations.

The Fourth District Court of Appeal affirmed the recent decision in *Huff v. Securitas Sec. Servs. USA, Inc.,*[5] in which the Sixth District held that an employee who has suffered at least one Labor Code violation may "pursue penalties for all the Labor Code violations committed by that employer."[6] The *Carrington* court noted that the plaintiff had directly experienced a meal period violation herself and disagreed that the allegations in her complaint and at trial should be construed as narrowly as the defendant urged. Rather, the salient issue was that Starbucks did not provide compliant meal breaks for which it needed to be held accountable.

The appellate court also rejected the defendant's argument that Carrington's experience was too individualized for her to be an adequate representative plaintiff, holding, "Because this was a PAGA action, Carrington was not required to fulfill strict class action procedural requirements."[7] However, the court found the plaintiff presented sufficient evidence showing that "generally applicable corporate policies and procedures resulted in [violations for] numerous employees," and therefore substantial evidence supported the plaintiff's representative claim.

Class Certification Properly Denied, Plaintiff's Adequacy Properly Challenged

Payton v. CSI Elec. Contractors, Inc., 27 Cal. App. 5th 832 (2018)

The Second District Court of Appeal upheld the denial of class certification, finding the plaintiff's rest period claim unworkable because too many individual issues predominated. The appellate court further found that with respect to both classes plaintiff sought to certify, (1) his trial plan was inadequate; and (2) he was not a suitable class representative, because (a) he had prior criminal convictions, and (b) he was pursuing an individual wrongful termination action, which the trial court found would be too distracting to the prosecution of the class claims at trial. Plaintiff also had credibility issues (on his union apprenticeship application, he had failed to disclose a three-month sentence he had served for felony sale of marijuana, and an eight-year sentence he had served for lewd and lascivious acts with a minor under 14).[8] The *Payton* court also held the trial court acted within its discretion in denying leave to find another class representative because the case was nearly four years old and the plaintiff had delayed in seeking leave to amend, to the defendants' prejudice.

Wage Order Provision Exempting Healthcare Workers From Waiver of Second Meal Period Does Not Violate the Labor Code

Gerard v. Orange Coast Mem. Med. Ctr., 6 Cal. 5th 443 (2018)

California has long recognized that its wage and hour laws are "governed by two complimentary and often overlapping sources of authority":[9] the Labor Code and the wage orders promulgated by the Industrial Welfare Commission (IWC). If there is a conflict between the two, the Labor Code prevails, as the IWC's authority derives from the Legislature. In this case, the defendant hospital, pursuant to the applicable wage order, allowed employees working shifts longer than 12 hours to waive their second meal periods, which the plaintiffs did, but then sued, alleging the waiver violated Labor Code § 512.

This case has a well-traveled past highlighting the interplay between the wage orders and the Labor Code. In 1993, the healthcare industry successfully lobbied for a carve-out in the wage order regarding overtime requirements for its workers. The Legislature responded by amending the Labor Code in 1999 and ordering the IWC to reissue regulations consistent with the new statutes. The IWC adopted new wage orders in 2000 (keeping the carve-out), but before they became

effective the Legislature enacted further amendments to the Code seemingly overriding the carve-out.

Gerard was first taken up by the court of appeal in 2015 (*Gerard I*), which invalidated the wage order carve-out. In response, the Legislature amended Labor Code § 516, overruling *Gerard I*, and noting support from both hospitals and healthcare employee unions. Defendant petitioned the supreme court, which granted review and remanded in light of the new legislation. In 2017, the court of appeal concluded (*Gerard II*, previously reviewed in this column) it had erred in *Gerard I* by misconstruing the date the IWC wage order was *adopted* with the date it became *effective* and reversed its decision. Plaintiffs appealed *Gerard II*, and the supreme court again granted review.

Plaintiffs' appeal of *Gerard II* focused on the language in Labor Code § 517(a), which stated that the IWC wage orders adopted by July 1, 2000 needed to be "consistent with this chapter," which the plaintiffs contended meant the moment the initial legislation was enacted in 1999. The high court disagreed, noting that the wage order was adopted before July 1, 2000.

Labor Code § 226.2, Requiring Paid Rest Periods for Piece Rate Workers, Is Not Unconstitutional

Nisei Farmers League v. LWDA, 30 Cal. App. 5th 997 (2019)

Plaintiffs, on behalf of thousands of California employers in the agricultural and construction industries, challenged the constitutional validity of Labor Code § 226.2, which established effective January 2016 that piece rate workers must be paid for rest and recovery periods and "other nonproductive time" separate and apart from any compensation on a piece-rate basis. The new code section also established a "safe harbor" affirmative defense, allowing employers to promptly correct past failures to compensate piece-rate workers for "actual sums due" while being shielded from liability for statutory penalties and damages.

Section 226.2 codified the 2013 decisions of *Gonzalez v. Downtown LA Motors, LP*[10] and *Bluford v. Safeway Inc.*,[11] which both applied the rule from *Armenta v. Osmose, Inc.*,[12] that employees paid on a piece-rate basis are not fairly compensated for time in which they are not being "productive," i.e., earning their piece rate, and therefore must be paid separately for nonproductive time. Per *Bluford*, a piece-rate compensation formula that does not compensate separately for rest periods fails to comply with California's minimum wage.[13] Plaintiffs alleged that their piece-rate system ensured workers earned compensation that "far exceed[s] minimum wage or what they could expect to earn through hourly compensation."

Plaintiffs further alleged that the phrase "other nonproductive time" was unconstitutionally void for vagueness, and that the "safe harbor" provision was so unclear that it was impossible for employers to know how to comply with the terms of the affirmative defense; therefore, it failed to provide adequate due process.

The court of appeal adopted the reasoning of *Gonzalez* and *Bluford*, along with general void for vagueness principles, and found the plaintiffs failed to allege adequate grounds to attack the statute on its face. The appellate court held that the constitution does not require statutes to be as detailed in the definitions of their terms as the plaintiffs contended, so long as they give fair notice to whom they are directed. The court also found that the statute's terms did not impose new requirements on employers retroactively, as the plaintiffs alleged, and affirmed the denial of declaratory relief as a nonjusticiable request for an advisory opinion.

Prevailing Wage Law Is Neither Unconstitutional nor Preempted by the FAAAA

Allied Concrete & Supply Co. v. Baker, 904 F.3d 1053 (9th Cir 2018)

California's prevailing wage law is the minimum wage which workers employed on "public works" (construction or related work, done pursuant to contract, and paid for in part or in whole by public funds) must receive. The Director of the Department of Industrial Relations (Director) publishes prevailing wage rates. Labor Code § 1720.9, which became effective January 2016, clarifies that the prevailing wage applies to drivers of ready-mixed concrete (ready-mix drivers) delivering to public works. Plaintiffs filed suit against the Director and Labor Commissioner, alleging that § 1720.9 violated the Equal Protection Clause of the U.S. Constitution or, in the alternative, was preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The district court granted the plaintiffs' motion for a preliminary injunction, finding that § 1720.9 arbitrarily classified ready-mix drivers differently from other drivers, and that such a distinction was not rationally related to any State interest, however legitimate. The Director and Labor Commissioner appealed.

The Ninth Circuit held that California's prevailing wage laws further several State goals, including worker protection, benefiting the public with superior efficiency of public works projects due to well-paid employees, and allowing union contractors to compete with nonunion contractors. The court further surmised that the Legislature could have rationally concluded that extending prevailing wage law specifically to ready-mix drivers

would further those goals because ready-mix drives are more integrated into the construction process, more skilled than other drivers, and more likely to be unionized and therefore vulnerable to underbidding—any one of which could have passed the rational basis test. The appellate court rejected the plaintiffs' argument that the new law was nothing more than bare economic favoritism by the State.

The Ninth Circuit also affirmed the district court's dismissal of the FAAAA preemption claim, holding that the prevailing wage law was not "related to" prices, routes, and services.[14]

ENDNOTES

1. 36 Cal. 4th 1075 (2005).
2. 49 Cal. 4th 35 (2010).
3. *Reynolds*, 36 Cal. 4th at 1089, 1094.
4. *Alcantar v. Hobart Serv.* (9th Cir. 2015) 800 F.3d 1047.
5. 23 Cal. App. 5th 745 (2018).
6. *Id.* at 751.
7. *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 975.
8. *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal. App. 4th 1286, 1308 (credibility issues can be grounds for rejecting a class representative's adequacy).
9. *Brinker Rest. Corp. v. Superior Court*, (2012) 53 Cal. 4th 1004, 1026.
10. 215 Cal. App. 4th 36 (2013).
11. 216 Cal. App. 4th 864 (2013).
12. 135 Cal. App. 4th 314 (2005).
13. *Bluford*, 216 Cal. App. 4th at 872.
14. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca* (9th Cir. 1998) 152 F.3d 1184, 1189.

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Public Sector Case Notes

By Kerianne Steele and Alejandro Delgado

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UNFAIR PRACTICES

First Court Decision Reviewing PERB's Interpretation of Trial Court Employment Protection and Governance Act of 2000

Superior Court v. PERB (2018) 30 Cal. App. 5th 158

This litigation arose from the Fresno County Superior Court's implementation of new personnel rules and regulations in December 2009. The Service Employees International Union, Local 521 (union) filed an unfair practice charge with the Public Employment Relations Board (PERB) in March 2010 on behalf of represented court employees alleging that portions of the court's personnel rules and regulations violated the Trial Court Employment Protection and Governance Act (Trial Court Act).[1] PERB issued a final decision in February 2017, holding that the court committed unfair practices when it prohibited employees from wearing clothing or adornments bearing writings or images, including but not limited to pins, lanyards, or any other accessories (except for court-approved clothing and/or adornments bearing the court logo) anywhere in the courthouse; and from displaying writings or images not published by the court in work areas that are visible to the public. PERB reasoned that such personnel rules and regulations constituted overly-broad restrictions and infringed on rights protected under the Trial Court Act. PERB further concluded that the court's restrictions on distributing literature were also overly broad as well as ambiguous. PERB applied the "unalleged violation doctrine" in ruling on the distribution of literature allegation because that allegation was not clearly articulated in the PERB complaint. PERB also found that the restriction regarding solicitation was unlawful. PERB ordered the court to rescind the violative portions of the 2009 personnel rules, to cease and desist from interfering with its employees' rights to communicate in the workplace and from denying the union the right to represent employees in the bargaining unit. It further ordered the court to post notices of violation in the workplace.

The court subsequently filed a writ of extraordinary relief with the court of appeal challenging PERB's decision. In this case of first impression, a two-justice majority acknowledged the established tenet of judicial deference to PERB's interpretation of labor laws that are under PERB's jurisdiction, but found in large part PERB's decision was "clearly erroneous." The court of appeal held that the court's interest in presenting the appearance of impartiality supported a "special circumstances" exception to the established right of employees to wear and display clothing and adornments bearing union insignia. The majority also held that the court's ban on solicitation during "working hours" was neither ambiguous nor overbroad, finding that the phrase referred to employees' individual working hours rather than to the work hours of the court. Finally, the majority held that PERB correctly found the court's prohibition on literature distribution "at any time for any purpose in working areas" to be ambiguous and that the ban "reasonably tended to limit the exercise by Court's employees of a protected right" while not being justified by "legitimate employer interests." The court of appeal also approved of PERB's application of the "unalleged violation doctrine" and agreed with PERB that the union satisfied the elements of that doctrine with respect to the distribution of literature allegation.

Justice Donald Franson concurred with the portions of the majority's holding setting aside PERB's finding concerning the court's restriction on solicitation and affirming PERB's finding on the issue of the court's prohibition of literature distribution. However, he issued a strongly-worded dissent on the remaining issues. The dissent concluded that the majority's upholding of the court's "total" ban on wearing or displaying union regalia relied "on a fundamental misconception—namely, that objective members of the courthouse public believe trial court employees who wear or display union items cannot be ethical, fair and impartial in carrying out their duties."[2] Rather, the dissent found that "special circumstances" did not support such a courthouse-wide ban, and that PERB had "correctly

determined [that the court's] bans were overly broad and [that] the court failed to carry its burden of establishing special circumstances."[3]

Both PERB and the union have now filed separate petitions for review with the California Supreme Court. The parties also have an opportunity to request depublication of the court of appeal decision.

PUBLIC EMPLOYMENT RELATIONS BOARD DECISIONS

Employer's Denial of Representation Rights Warranted Discipline to Be Purged From Employee's Record

County of San Joaquin (Sheriff's Dep't), PERB Decision No. 2619-M (2018)

In this case, PERB held that the County of San Joaquin Sheriff's Department violated the Meyers-Milias-Brown Act (MMBA) by denying an employee represented by Service Employees International Union Local 1021 (union) his representation rights.

The employee was employed as a Custody Recreation Supervisor at the San Joaquin County Jail and in that capacity supervised recreational programs. Among the programs supervised by the employee was a Thursday afternoon bingo game for female inmates that was popular and sometimes loud. The employee's supervisor sent an email directing the employee to start holding bingo games in the mornings instead of the afternoon to make time for a new mental health program designed to reduce recidivism. The employee obeyed the directive in part but continued to hold the bingo games during certain afternoons nonetheless, which the employee believed he had discretion to do.

The employee's supervisor then sent two emails to the employee requesting the employee's rationale for not following the directive to reschedule the bingo games. The employee responded to the first email and accepted responsibility for failing to follow the directive; however, a second email from the supervisor included the following: "I want a memo explaining why you failed to follow my directions. I want you to bring it over when you are done."

The employee requested union representation before sending the memorandum. The supervisor responded by stating the employee did not need a union representative and that the employee "should just write the memo so she could get his side of the story and correct his behavior." The supervisor repeated the instruction to send a memorandum and the employee repeated his request for union representation. In response, the supervisor stated, "Well, that's it." Instead of granting the employee's request, an internal affairs investigation commenced to investigate the employee's refusal to write the memo leading to the employee's 10-day suspension for insubordination.

PERB held that the County violated the MMBA by failing to allow the employee union representation and then disciplining the employee. PERB's decision rested on evidence showing that the employee's insistence on a representative triggered the disciplinary process, which inextricably linked the discipline to the employee's protected activity of requesting union representation. As PERB explained, when the employee requested representation, it was incumbent upon the County to either grant the request or terminate the investigation unless there was a clear waiver of the right to representation. Moreover, by beginning an internal affairs investigation that resulted in discipline instead of granting the employee's request, the County punished the employee for his failure to participate in the County's inquiry without representation. For these reasons, PERB found the County violated both the employee's right to be represented and the union's right to represent the employee.

As a remedy, PERB found it appropriate to issue a purge order along with make-whole relief for the County's denial of representational rights. PERB reasoned this extraordinary remedy was appropriate because the facts indicated the County did not consider discipline until the employee invoked his right to representation. As the decision states, "[t]here would have been no internal affairs investigation, and no discipline, absent [the employee's] request for representation."

Union's Right to Information Is Broader Than That Provided by California Public Records Act, and When Employer Refuses to Respond to Union's Request, Employer Has a Duty to Meet and Confer

Sacramento City Unified Sch. Dist., PERB Decision No. 2597 (2018)

PERB held that the Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA) when it failed to bargain in good faith after refusing to respond to SEIU Local 1021's (union's) valid request for information, altered the procedures and standards governing information requests, and frustrated the union's—and PERB's—ability to assure the District's compliance with the law.

In this case, the union sought information relevant to a bargaining unit member who was terminated for placing a piece of tape over a student's mouth. The union learned that a non-bargaining unit member had been disciplined, but not terminated, for similar conduct and requested evidence of those facts, including the settlement agreement that reinstated the non-bargaining unit employee, the charging document, internal reports, police reports, and the name of the District official who

signed the settlement agreement. The District eventually provided the information, albeit in a redacted format and under the California Public Records Act (CPRA) instead of in response to the request for information under the EERA.

PERB found this to be a violation of the EERA. PERB explained that "unions are entrusted with representational duties and granted corresponding rights that permit them to carry out such important functions" and "PERB-administered statutes provide unions with more expansive access to information and records beyond that available under CPRA." A union's representational functions "give it a right to arguably private information such as employee contact information, workplace complaint investigation reports, employee rating sheets, lists summarizing employee retirement elections, names of reassigned employees, and disciplinary records, including, in certain circumstances, unredacted disciplinary records." And unlike the CPRA, a union is also entitled to information that an employer might compile from records, management agents, and other sources, absent a showing that such a compilation would be unduly burdensome.

Also unlike a response to a request under the CPRA, the EERA requires an employer who refuses to respond to an information request to meet and confer with the union in order to negotiate an accommodation for requests that are unduly burdensome, infringe on legitimate interests, or otherwise require clarification. This includes the extent of redactions, if applicable, or the entrustment of the union in its representational capacity to keep the information discrete. Failure to engage in these kinds of negotiations imposes on the union an employer's unilateral decision undermining the two-way negotiation required under the EERA and other applicable statutes, cutting unions out of the process required by law.

No Presumption of Validity for Restrictions on Union Insignia in Patient Care Areas of a Hospital

Regents of the Univ. of Cal. (CNA), PERB Decision No. 2616-H (2018)

In a matter of first impression, PERB declined to adopt the National Labor Relations Board's (NLRB) presumption that hospital prohibitions on union insignia, including buttons or stickers, in patient care areas are valid. Instead, PERB held that the traditional rule in California, that a public entity's ban on union insignia is presumptively invalid except in "special circumstances," also applies to patient care areas.

The PERB Complaint alleged that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) by prohibiting employees at a hospital operated by UC San Diego Health from wearing a union sticker distributed by the California Nurses Association. The sticker read "UCSD Management NEEDS TO LISTEN TO NURSES." PERB reasoned it has long held that employees have a right to wear union insignia and buttons at their workplace, and, in general, restrictions on the right to wear union insignia and other articles displaying messages regarding working conditions are presumptively invalid. Such restrictions, according to the Board, pass muster only if the employer proves "special circumstances" justifying the restrictions. The Board noted, however, that the Administrative Law Judge (ALJ) in the underlying case took guidance from NLRB case law and incorrectly concluded that the presumption of invalidity should give way to a presumption of validity as to the University's prohibition on union insignia in patient care areas.

The Board disagreed and found the University to be in violation of HEERA. It found that the NLRB's prohibition on union insignia in patient care areas was based on reasoning from cases concerning restrictions on union solicitation and distribution of union literature in patient care areas. The Board found that wearing a button or sticker with a message about a union or about working conditions is far less disruptive to the working environment than certain kinds of face-to-face solicitation or literature distribution that may be restricted. The Board found there was no compelling reason why a presumption in favor of prohibitions of solicitation and distribution necessarily also applies to prohibitions of union insignia carrying messages about workplace matters. The Board further reasoned that such a presumption invites a heavy-handed approach that would enable employers to promulgate overbroad one-size-fits-all rules for all union insignia and buttons and all patient care areas.

Having rejected the presumption of validity, the Board further found that the University failed to establish "special circumstances" for its restrictions against the sticker.

Requirement That Employers Provide a Case-Specific Legitimate and Substantial Business Justification for a Directive Not to Discuss an Ongoing Investigation Applies to Peace and Custodial Officers

County of Santa Clara, PERB Decision No. 2613-M (2018)

PERB held that the County of Santa Clara violated MMBA § 3506.5(a) when it ordered a peace officer and President of the Santa Clara County Correctional Peace Officers' Association (Association) not to discuss allegations against him with "any witnesses, potential witnesses, the complainant, or any other employee of the Sheriff's Office other than [his] official representative." The Board further held that the

County also violated MMBA § 3506.5(b) by denying the Association the right to represent the officer.

The Board reasoned that the right afforded to employees under the MMBA to communicate with others about working conditions includes the circumstances underlying and surrounding an investigation into alleged employee misconduct. According to the Board, the County's directive prohibited the officer from communicating with his coworkers about the matter for which he was being investigated, which in turn prevented him from contacting potential witnesses, preparing for his investigatory interview, or giving effective assistance to the Association in its representation of him during the investigation. Additionally, the Board found that the officer's inability to assert his innocence to bargaining unit members could potentially have eroded members' confidence in union leadership, thereby potentially compromising the organizational capacity and effectiveness of the Association.

The fact that the directive did not restrict the officer from discussing the larger category of "union related matters" was unavailing. The Board reasoned that a generalized gag rule harms employee and organizational rights because it prevents communications about a particular "union related matter," which hampers a union's ability to prepare for and render assistance in an investigation that could result in discipline. The Board also found the directive unlawful because it impacted the Association's right to choose its "official representative" in the matter.

The authors wish to thank their colleagues Paul Pfeilschiefter and Benjamin Fuchs for their contributions to this column.

ENDNOTES

1. Cal. Gov't Code §§ 71600, et seq.
2. 30 Cal. App. 5th at 202.
3. *Id*. at 203.

2019 Calendar of Labor & Employment Law Section Educational Seminars

Visit the Section's website at http://calawyers.org/laboremployment for registration information.

Date	Title	Length	Location
Friday, April 12	25th Annual Public Sector Conference	Full Day	Sheraton Grand Sacramento Hotel
Thursday–Friday July 18–19	Wage & Hour Conference and Annual Meeting	Full Days	Los Angeles
Thursday, November 14	Advanced Mediation Conference	Full Day	Los Angeles

NLRA Case Notes

By Colin Wells and Tyler Maffia

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Board Holds Decertification Petitions Can Be Reinstated After Settlement of Unfair Labor Practice Charges Despite Prior ALJ Decision Finding Merit in Such Charges

Cablevision Systems Corp., 367 NLRB No. 59 (Dec. 19, 2018)

In a 3-1 decision, the National Labor Relations Board (Board) reversed the decision of a Regional Director and found that a decertification petition can be reinstated after settlement of unfair labor practice charges, even after an administrative law judge (ALJ) has found merit to those charges. The majority's decision expanded Board precedent under *Truserv Corp.*,[1] which held that when a decertification petition has been blocked by unfair labor practice (ULP) charges, and those charges are subsequently settled without an admission of unlawful conduct by the employer, the petition can be reinstated at the petitioner's request. The Board's decision here held that *Truserv* also applies if the settlement is reached *after* an ALJ has issued a decision finding merit to the charges. Chairman Ring and Members Kaplan and Emanuel wrote for the majority, while Member McFerran dissented.

In 2013, the union here filed a series of ULP charges leading to the issuance of multiple complaints. Before the ALJs had issued their decisions, a decertification petition was filed. The Regional Director dismissed the petition under the blocking charge policy, subject to reinstatement. The ALJs then issued their decisions, finding merit to allegations made against the employer. After the ALJ decisions had issued, the parties reached a settlement which was approved by the Board, and the union withdrew its charges. The petitioner then sought to have the decertification petition reinstated under *Truserv*. The Regional Director denied reinstatement of the petition because the ALJ decisions had found merit to charges levied against the employer and those charges had a causal relationship to the union's loss of support, thereby tainting the petition. The Regional Director found that *Truserv* did not apply because, unlike pre-litigation settlements, the case here contained merit determinations by multiple ALJs.

The Board majority found that the rule from *Truserv* was applicable to these facts because ALJ decisions are not "final decision[s] by the Board that the Employer had committed any unfair labor practices." Rather, as a result of the settlement, the Regional Director approved the union's request to withdraw the charges. According to the Board majority "there is simply no valid basis for refusing to reinstate a petition based on alleged unfair labor practices when, as here, the relevant charges have been withdrawn."

Writing in dissent, Member McFerran noted that although the settlement resolved the issue of liability for the ULP charges, the fact remained that multiple ALJs had credited evidence and found that the employer engaged in widespread misconduct, including "repeated, serious incidents of retaliation . . . and a steady stream of unlawful actions seeking to undermine support for the Union," around the time the petition was filed. She argued that the withdrawal of the charges did not erase the underlying misconduct or change its likely impact on employees. Accordingly, barring a Regional Director from considering an ALJ's findings was "irrational, not to mention administratively wasteful." Member McFerran would have affirmed the Regional Director's decision to dismiss the petition.

Board Reaffirms Longstanding Precedent That Union's Unqualified Threat to Picket a Neutral Employer Is Inherently Coercive

International Bhd. of Elec. Workers, Local 257, 367 NLRB No. 61 (Dec. 27, 2018)

Splitting 2-1, the Board reaffirmed a longstanding rule that picketing notices sent by unions to neutral employers about planned action at the neutral's worksite violate the National Labor Relations Act (Act) if the notice fails to clearly indicate that the picketing would conform to the *Moore Dry Dock* standards and established Board precedent. In so doing, the Board applied the so-called "unqualified-threat" rule and held that the respondent union's

communication at issue violated § 8(b)(4)(ii)(B) of the Act, which prohibits a union from picketing a primary employer at a neutral employer's worksite, or common situs, with the object of coercing the neutral to cease doing business with the primary employer. Chairman Ring and Member Kaplan wrote for the majority, while Member McFerran dissented.

The union represented electrical workers who performed services for the primary employer to the union relationship, and several neutral employers that shared worksites at the Las Vegas Convention Center (LVCC), making the LVCC a common situs. Prior to the planned picketing, the union sent a letter to one of the neutral employers, stating that a strike was imminent and the reason for the strike, and asking for their cooperation. The primary employer subsequently filed the underlying ULP charge against the union.

The ALJ granted the General Counsel's summary judgment motion on a stipulated record, finding that the union's letter violated the Act. On appeal, the majority refused to overturn the ALJ's decision and overrule the unqualified-threat rule, which the General Counsel and union had requested. Citing Congress's intent to protect neutral employers from becoming enmeshed in labor disputes of others, the majority stated that "[a] union's broadly worded and unqualified notice, sent to a neutral employer, that the union intends to picket a worksite the neutral shares with the primary employer is inherently coercive." The majority reasoned that such a picketing threat is ambiguous without any reference to the *Moore Dry Dock* standards because it "enables a union to achieve the proscribed objective of coercing the neutral employer to cease doing business with the primary employer."

Writing in dissent, Member McFerran criticized the majority's adherence to "formalistic rules" in lieu of a more flexible standard, resulting in "an approach [that] contradicts the [Act], ignores the realities of labor relations, and leads to unjust results." Member McFerran argued that a union's failure to provide express assurances to a neutral employer, alone, is insufficient to establish a violation of the Act. She pointed out that for conduct to be inherently coercive, "an action must tend to have a compulsive effect under *any and all* circumstances." (emphasis added). She added, "Instead of taking this opportunity to revise the Board's *Moore Dry Dock*-assurances doctrine in response to the thoughtful criticisms brought by both the courts of appeals and the General Counsel, my colleagues have failed to correct a rule that cannot be reconciled with the statute or with labor relations reality."

Board Orders Special Remedies in Lieu of Election Rerun When Union Failed to Request Reinstatement of Election Petition on Remand

Novelis Corp., 367 NLRB No. 47 (Dec. 7, 2018)

In a unanimous 3-0 decision, the Board imposed special remedies on an employer that violated the Act during a union organizing campaign, but refused to allow a rerun of the election when the union did not request reinstatement of the election petition. In so doing, the Board deleted a prior bargaining order under the *NLRB v. Gissel Packing Co.* standard, which allows, under very specific circumstances, the Board to order bargaining despite a union's loss of an election. The decision was issued by Chairman Ring, and Members McFerran and Kaplan.

The case stems from a union's organizing campaign that began in 2013. The union lost a close election in 2014 and filed objections. Ultimately, the Board found that the employer had violated the Act so severely that it set aside the election results, ordered bargaining under the *Gissel* standard, and dismissed the election petition. Subsequently in 2018, the Second Circuit denied enforcement of the *Gissel* bargaining order and remanded the case back to the Board, requesting it to consider whether a new election was possible more than three years after the employer's violations.

On remand, in accordance with the Second Circuit's order, the Board deleted the *Gissel* bargaining order but refused to reinstate the election petition and order a second election. In its place, the Board imposed special remedies to address the lingering effects of the employer's unfair labor practices. First, the Board ordered the employer to provide the union, on request, the names and contact information of current unit employees. Second, it ordered the employer to give the union access to its bulletin boards for two years. The Board reasoned that these remedies would allow the union to assess whether there was enough support for representation from the current bargaining unit, which had incurred significant turnover since the initial election campaign in 2013 when union cards were initially signed.

Member McFerran wrote in a footnote that she would have reinstated the prior petition and ordered a second election. Her thinking was that the only reason the petition was deleted was because the *Gissel* bargaining order mooted it, but with the *Gissel* order deleted, the petition should be reinstated, whether or not the union actually requested it. Under these circumstances, she would not infer that the union has waived the presumptive remedy of a second election simply by failing to request it.

Board Reaffirms Validity of National Mediation Board's Traditional Test for Determining Jurisdiction Over Non-Carrier Employers

ABM Onsite Services-West, Inc., 367 NLRB No. 35 (Nov. 14, 2018)

In a 3-1 decision, a majority of the National Labor Relations Board (Board) deferred to the National

Mediation Board's (NMB's) jurisdiction over a non-carrier employer based on a return to the NMB's traditional six-factor test. The majority's decision reaffirms the traditional version of the NMB's six-factor test for jurisdiction and brings current Board law in line with NMB advisory opinions. Chairman Ring and Members Kaplan and Emanuel wrote for the majority, while Member McFerran dissented.

The Act expressly excludes employers and employees subject to the Railway Labor Act (RLA). The Board has a longstanding policy granting substantial deference to NMB advisory opinions regarding jurisdiction under the RLA. The NMB applies a two-part test to determine whether a non-carrier employer is subject to the RLA. First, the NMB considers whether the employer's work is traditionally performed by carrier employees. Second, the NMB determines whether the employer is owned or controlled by, or under common control with, a carrier based on an evaluation of six equal factors: (1) the extent of the carrier's control over the manner in which the company conducts its business; (2) the carrier's access to the company's operations and records; (3) the carrier's role in personnel decisions; (4) the degree of carrier supervision of the company's employees; (5) whether company employees are held out to the public as carrier employees; and (6) the extent of carrier control over employee training. If both parts of the test are met, the NMB will assert jurisdiction. However, beginning in 2013, the NMB began to put more emphasis on the carrier's control over personnel decisions, without providing an explanation or justification. Meanwhile, the Board continued to defer to the NMB's advisory opinions regarding jurisdiction.

In 2015, the union in this case petitioned to represent bag jammer technicians (luggage handlers) and dispatchers employed by the employer. Operating under NMB advisory opinions, the Board asserted jurisdiction over the employees and ultimately certified the union as their exclusive bargaining representative. In 2017, the D.C. Circuit denied enforcement of the Board's order and remanded the case. In so doing, the court noted that the Board's assertion of jurisdiction was based on post-2013 NMB advisory opinions, which were premised on the NMB's unexplained departure from the traditional six-factor test. Because neither the NMB nor the Board provided a reasoned justification for departure from the NMB's traditional six-factor test, the court ordered the Board to either offer its own justification or to refer the matter to the NMB to obtain a justification for the change. The Board referred the issue to the NMB, which issued an advisory opinion in 2018 reaffirming its traditional six-factor test (without emphasizing the "carrier's control over personnel decisions" factor), and finding that the bag jammer technicians and dispatchers were subject to the RLA's jurisdiction. The Board majority agreed and dismissed the complaint.

Member McFerran's dissent criticized the majority's decision to defer to the NMB's advisory opinion, arguing that the advisory opinion suffers from the same flaws as those previously rejected by the court. Member McFerran noted that the 2018 NMB advisory opinion was written after the NMB had created two contradictory lines of precedent—one with a six-factor test giving equal weight to each factor, and one focusing on only one of those factors. Yet the advisory opinion reverted to the original line of precedent without justifying *why* it was making that decision. Accordingly, because the NMB had not properly justified its decision to return to the traditional test, it would inappropriate for the Board to defer to that unjustified opinion.

ENDNOTE

1. 349 NLRB 227 (2007).

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Cases Pending Before the California Supreme Court

By Phyllis W. Cheng

Arbitration

OTO, L.L.C. v. Kho, 14 Cal. App. 5th 691 (2017), *review granted*, 225 Cal. Rptr. 3d 796 (2017); S244630/A147564

Petition for review after reversal of order denying petition to compel arbitration. (1) Was the arbitration remedy at issue in this case sufficiently "affordable and accessible" within the meaning of *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) to require the company's employees to forego the right to an administrative Berman hearing on wage claims? (2) Did the employer waive its right to bypass the Berman hearing by waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing? Fully briefed.

Discrimination / Harassment / Retaliation

Wilson v. Cable News Network, Inc., 6 Cal. App. 5th 822 (2016), *review granted*, 214 Cal. Rptr. 3d 290 (2017); S239686/B264944

Petition for review after reversal of order granting special motion to strike. In deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Civil Procedure Code § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive? Fully briefed.

Bonni v. St. Joseph Health Sys., 13 Cal. App. 5th 851 (2017), *review granted*, 224 Cal. Rptr. 3d 684 (2017); S244148/G052367

Petition for review after reversal granting anti-SLAPP motion. Further action in this matter deferred pending consideration and disposition of a related issue in *Wilson v. Cable News Network, Inc.* S239686 (see Cal. Rules of Court rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to Cal. Rules of Court rule 8.520, is deferred pending further order of the court. Holding for lead case.

Public Works

Busker v. Wabtec Corp., 903 F.3d 881 (9th Cir. 2018); S251135/9th Cir. No. 17-55165

Request under Cal. Rules of Court rule 8.548, that the supreme court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Does work installing electrical equipment on locomotives and rail cars (i.e., the "on-board work" for Metrolink's [Positive Train Control (PTC)] project) fall within the definition of "public works" under Labor Code § 1720(a)(1), either (1) as constituting "construction" or "installation" under the statute, or (2) as being integral to other work performed for the PTC project on the wayside (i.e., the "field installation work")? Opening brief due.

Mendoza v. Fonseca McElroy Grinding Co., 2019 U.S. App. LEXIS 1290 (9th Cir. Jan. 15, 2019, No. 17-15221)

Request under Cal. Rules of Court rule 8.548, that the supreme court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Is operating engineers' offsite "mobilization work"—including the transportation to and from a public works site of roadwork grinding equipment—performed "in the execution of [a] contract for public work," (Labor Code § 1772), such that it entitles workers to "not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed" pursuant to Labor Code § 1771?

Retirement / Pensions

Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Employees' Retirement Ass'n, 227 Cal. Rptr. 3d 787 (2018), *review granted*, 230 Cal. Rptr. 3d 681 (2018); S247095/A141913

Petition for review after affirmance in part and reversal in part of judgment. Did statutory amendments to the County Employees' Retirement Law (Government Code §§ 31450 et seq.) made by the Public Employees' Pension Reform Act of 2013 (Government Code §§ 7522 *et seq.*) reduce the scope of the pre-existing definition of pensionable compensation and thereby impair employees' vested rights protected by the contracts clauses of the state and federal Constitutions? Fully briefed.

Cal Fire Local 2881 v. California Public Employees' Retirement Sys., 7 Cal. App. 5th 115 (2016), *review granted*, 216 Cal. Rptr. 3d 119 (2017); S239958/A142793

Petition for review after affirmance of judgment on writ of administrative mandate. (1) Was the option to purchase additional service credits pursuant to Government Code § 20909 (known as "airtime service credits") a vested pension benefit of public employees enrolled in CalPERS? (2) If so, did the Legislature's withdrawal of this right through the enactment of the Public Employees' Pension Reform Act of 2013 (PEPRA) (Government Code §§ 7522.46, 20909(g)), violate the contracts clauses of the federal and state Constitutions? Argued and submitted.

Hipsher v. Los Angeles Cnty. Employees, 24 Cal. App. 5th 740 (2018), *review granted*, 237 Cal. Rptr. 3d 791 (2018); S250244/B276486 & B276486M

Petition for review after affirmance and modification of grant of peremptory writ of mandate. Further action deferred pending consideration and disposition of a related issue in *Alameda Cnty. Deputy Sheriffs' Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, S247095 (see Cal. Rules of Court rule 8.512(d)(2)), or pending further order of the court. Holding for lead case.

Marin Ass'n of Public Employees v. Marin Cnty. Employees' Retirement Ass'n, 2 Cal. App. 5th 674 (2016), *review granted*, 210 Cal. Rptr. 3d 15 (2016); S237460/A139610

Petition for review after affirmance sustaining demurrer without leave to amend. Further action deferred pending the decision of the Court of Appeal, First Appellate District, Division Four, in *Alameda Cnty. Deputy Sheriff's Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, A141913 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to Cal. Rules of Court rule 8.520, is deferred pending further order of the court. Holding for lead case.

McGlynn v. State of Calif., 21 Cal. App. 5th 548 (2018), *review granted*, 234 Cal. Rptr. 3d 710 (2018); S248513/A146855

Petition for review after affirmance sustaining demurrer. Further action deferred pending consideration and disposition of a related issue in *Alameda Cnty. Deputy Sheriffs' Ass'n v. Alameda Cnty. Employees' Retirement Ass'n*, S247095. Holding for lead case.

Tort Liability

Gonzalez v. Mathis, 20 Cal. App. 5th 257 (2018); *review granted*, 232 Cal. Rptr. 3d 731 (2018), S247677/B272344

Petition for review after reversal of judgment. Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor? Fully briefed.

Unemployment Insurance

Skidgel v. CUIAB, 24 Cal. App. 5th 574 (2018), *review granted*, 238 Cal. Rptr. 3d 118 (2018); S250149/A151224.

Petition for review after affirmance of judgment. Are In Home Supportive Services workers (Welfare & Institutions Code §§ 12300 et seq.) who are providers for a spouse or a child eligible for unemployment insurance benefits? Answer brief due.

United Educators of San Francisco v. CUIAB, 247 Cal. App. 4th 1235 (2016), review granted, 211 Cal. Rptr. 3d 97 (2016); S235903/A142858 & A143428

Petition for review after affirmance of judgment for writ of administrative mandate. This case presents issues concerning the entitlement of substitute teachers and other on-call paraprofessional employees to unemployment insurance benefits when they are not called to work during a summer school term or session. Fully briefed.

Wage and Hour

Frlekin v. Apple, Inc., 870 F.3d 867 (9th Cir. 2017); S243805/9th Cir. No. 15-17382

Request under Cal. Rules of Court rule 8.548, that the California Supreme Court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7? Fully briefed.

In re Certified Tire and Service Centers Wage and Hour Cases, 28 Cal. App. 5th 1 (2018), *review granted*, 2019 Cal. LEXIS 162 (2018); S252517/D072265

Petition for review granted after affirmance of judgment. Further action deferred pending consideration and disposition of a related issue in Oman v. Delta Air Lines, Inc., S248726 (see Cal. Rules of Court rule 8.524 (c)), or pending further order of the court. Submission of additional briefing deferred pending further order of the court. Holding for lead case.

Kim v. Reins Int'l. California, Inc., 18 Cal. App. 5th 1052 (2017), *review granted*, 230 Cal. Rptr. 3d 681 (2018); S246911/B278642

Petition for review after affirmance of judgment. Does an employee bringing an action under the Private Attorneys General Act (Labor Code §§ 2698 *et seq.*) lose standing to pursue representative claims as an "aggrieved employee" by dismissing his or her individual claims against the employer? Fully briefed.

Lawson v. Z.B., N.A., 18 Cal. App. 5th 705 (2017), *review granted*, 30 Cal. Rptr. 3d 440 (2018); S246711/D071279

Petition for review after grant of petition for peremptory writ of mandate. Does a representative action under the Private Attorneys General Act of 2004 (Labor Code §§ 2698 *et seq.*) seeking recovery of individualized lost wages as civil penalties under Labor Code § 558 fall within the preemptive scope of the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.)? Fully briefed.

Melendez v. San Francisco Baseball Assocs., 16 Cal. App. 5th 339 (2017), *review granted*, 227 Cal. Rptr. 3d 2 (2018); S245607/A149482

Petition for review after reversal of order denying motion to compel arbitration. Is plaintiffs' statutory wage claim under Labor Code § 201 subject to mandatory arbitration pursuant to section 301 of the Labor Management Relations Act, because it requires the interpretation of a collective bargaining agreement? Fully briefed.

Oman v. Delta Air Lines, Inc., 889 F.3d 1075 (9th Cir. 2018), S248726/9th Cir. No. 17-15124.

Request under Cal. Rules of Court rule 8.548, that the supreme court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Do Labor Code §§ 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time? (2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? See Labor Code §§ 1182.12, 1194; Cal. Code Regs. tit. 8, § 11090(4). (3) Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? *See Gonzales v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013); *Armenta v. Osmose, Inc.* 135 Cal. App. 4th 314 (2005). Reply brief due.

Stoetzl v. State of California, 14 Cal. App. 5th 1256 (2017), *review granted*, 225 Cal. Rptr. 3d 795 (2017); S244751/A142832

Petition for review after court of appeal affirmed in part and reversed in part the judgment in a civil action. This case includes the following issue: Does the definition of "hours worked" found in the Industrial Wage Commission's Wage Order No. 4, as opposed to the definition of that term found in the federal Fair Labor Standards Act, constitute the controlling legal standard for determining the compensability of time that correctional employees spend after signing in for duty and before signing out, but before they arrive at and after they leave their actual work posts within a correctional facility? Fully briefed.

Stewart v. San Luis Ambulance, Inc., 878 F.3d 883 (9th Cir. 2018), S246255/9th Cir. No. 15-56943

Request under Cal. Rules of Court rule 8.548, that the supreme court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. (1) Under the Labor Code and applicable regulations, is an employer of ambulance attendants working twenty-four hour shifts required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period? (2) Under the Labor Code and applicable regulations, may an employer of ambulance attendants working twenty-four hour shifts require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause? If such a clause is required, will a general at-will employment clause satisfy this requirement? (3) Do violations of meal period regulations, which require payment of a "premium wage" for each improper meal period, give rise to claims under Labor Code §§ 203 and 226 when the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations? Supplemental briefs due.

Voris v. Lampert, nonpublished opinion, 2017 Cal. App. Unpub. LEXIS 2163, 2017 WL 1153334 (2017), *review granted*, 2017 Cal. LEXIS 5196; S241812/B265747

Petition for review after affirmance in part and reversal in part of judgment. Is conversion of earned but unpaid wages a valid cause of action? Fully briefed.

Ward v. United Airlines, Inc., 889 F.3d 1068 (9th Cir. 2018), S248702/9th Cir. No. 16-16415; *Vidrio v. United Airlines, Inc.*, 889 F.3d 1068 (9th Cir. 2018) S248702/9th Cir. No. 17-55471

Request under Cal. Rules of Court rule 8.548, that the supreme court decide questions of California law presented in consolidated matters pending in the United States Court of Appeals for the Ninth Circuit. (1) Does Labor Code § 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state? (2) The Industrial Wage Commission Wage Order No. 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). (See Cal. Code Regs., tit. 8, § 11090(1)(E).) Does the RLA exemption in Wage Order No. 9 bar a wage statement claim brought under Labor Code § 226 by an employee who is covered by a CBA? Reply brief due.

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Message From the Chair

By Ramit Mizrahi

Ramit Mizrahi is the founder of Mizrahi Law, APC in Pasadena, where she represents employees exclusively. She focuses on discrimination, harassment, retaliation, and wrongful termination cases. She can be reached at ramit@mizrahilaw.com.

Most days, I love my practice. I delight in trying cases, taking depositions, buckling down to research and brief thorny legal issues, and advocating on behalf of my clients. Good days are ones where I have fruitful conversations, engage my intellect, move my cases along, and feel like I accomplished something. The best days are ones where I help bring peace and closure to my clients, whether by resolving a case in mediation, negotiating a settlement directly, or getting a case to verdict/award.

Yet some days, it seems like I go nonstop at 100 miles an hour, dealing with calls, emails, and a seemingly endless task list with nary a break, yet feel like I have little to show for my efforts. Most of us have experienced days like this.

Below, I share some of the best tools and practices I use to help make my workdays as efficient and productive as possible. Each person's work situation is different, and what may work for a small plaintiff-side practice may not work at a large management-side firm. But my hope is that if you are reading this, you will find at least one tidbit that made it worth your time.

TOOLS

Asana. Asana.com is an invaluable web-based and phone app-based tool for tracking tasks, deadlines, and other obligations. Among other things, it allows you to set up projects (I have one for each client, along with ones for other activities, such as my Section work); set deadlines; assign tasks to individuals on your team; create subtasks; leave comments/notes; and create template projects that can be cloned. Asana sends my team daily reminder emails about our respective tasks as well as email notifications when tasks are assigned, updated, or completed (you can tweak notification settings). Asana gives me the peace of mind that all critical tasks will be completed, and lets me know what those on my team are working on. Asana is free for small businesses (up to 15 users); a premium version allows users to access additional features.

Slack. Slack.com is a souped-up chat app that is a great way to stay connected with your team. You can set up one-on-one chat channels and group chats. It can be a quicker way to communicate than email, and has other useful purposes. It's a good way to know when people are in/out, especially when working remotely. Slack can be accessed through an app or a web browser. It has a free version for small businesses; a premium version allows users to access additional features.

Google Apps for Work. Google's suite of business apps uses two-factor authentication to keep data secure. I use Gmail, Google Calendar, and Google Drive, and find each of these indispensable. When it comes to email, I am a huge proponent of Inbox Zero, so I try not to keep any message in my inbox unless I have yet to review/respond. In Gmail, one of my favorite features is the snooze button, which returns an email to my inbox at a time/date that I designate. I use it to ensure that nothing falls through the cracks; if I would prefer to respond at a later time, am awaiting a response from someone on an important matter, or need to take further action but don't want to add the item to my Asana task list, the return of the email into my inbox prompts me to take action.

Google Drive allows me to sync my files across all of my devices. It has version control (going back about 30 days), so you can pull prior versions if need be. It also makes collaboration simple, as I can determine which files or folders are shared with others on my team. It can be useful in allowing multiple users to see document updates in real time or to simultaneously edit or redline the same document/spreadsheet. The suite costs $5/user/month for 30GB of storage per person, or $10/user/month for unlimited cloud storage.

X1. X1 is a desktop search program that enables you to conduct detailed searches through your computer files. (I believe you can also set it up to search through emails, but I have not used it that way.) How many times have you racked your brain trying to remember the case where you briefed a particular issue? With X1, you can search files by file name, file type, text search through file contents, date, location, and other categories. This means that if you've done something before, you can easily pull it up again without having to figure out when/where you have that file saved. The useful preview panel makes it easy to go through the documents that fit your criteria. I have also used it to do initial searches through document dumps by opposing counsel (it's much faster than Relativity, though you cannot mark documents as responsive, etc.). X1 costs $96 per license, with an optional $19.95 annual fee for support and access to updates.

Line2. Line2 is an excellent phone and fax system that allows business calls to be handled from anywhere in the world with cell or internet reception. It delivers calls and texts to any device, whether a cell phone, land line, or computer/tablet (the latter using their app). Line2 gives you a number of useful tools for call handling. It allows you to set up an auto-attendant with different keypress menu options (to forward calls to different lines, send calls straight to voicemail, give different messages, etc.), screen calls, set procedures for after-hours calls, and handle callers differently depending on whether they are in your contacts list. Line2 also allows you to forward calls to several numbers at a time (say an office line and cell phone, or two employees). It also transcribes voicemail messages. Line2 costs about $150/user/year, and $200/user/year with fax added.

PRACTICES

Time blocking. Once the emails and phone calls start pouring in, it can be hard to find uninterrupted time to focus on larger, more thought-intensive tasks. I am always wildly productive when I can shut off outside distractions. (That's why I love working on planes and trains. Indeed, I'm writing this from 30,000+ feet up in the air at the start of my vacation!) For that reason, I try to set aside at least an hour a day of uninterrupted work time, or more if I have a deadline I am trying to meet.

Go paperless. My office is completely paperless. As a general practice, I ask all opposing counsel in new cases whether they will agree to electronic service, which saves everyone time and money. When any incoming paper mail comes in (pleadings, discovery, letters, bills, and anything but junk mail), it is scanned to a folder titled "Scan Incoming." I get an alert in Slack that mail arrived and has been scanned. When I have time, I go through the Scan Incoming folder, review, process as needed (e.g., instructing my paralegal to add a deadline to Asana and to my Google Calendar), and move documents to the appropriate folders.

Create templates/delegate. For those who don't have access to firm-wide templates, create your own. Over time, having rich templates allows you to have consistency in your work product and to delegate down. Indeed, I have found that my employees have been able to do very high-quality work fairly quickly because they have solid templates to work from. (It also helps to hire smart people!)

Down time. Given our profession, it's easy to be "on" all the time. With smartphones at everyone's fingertips, people are often expected to be readily available at all hours of the day. Many feed into the expectation by frequently checking their phones and filling idle time with a peek at email or social media. (Who hasn't checked their email while waiting in line at the supermarket?) Yet technology takes its toll. High smartphone usage has been linked to significantly higher levels of isolation, depression, and anxiety.[1] There is no sense of rest when one is permanently connected; weekdays and weeknights blur together, as do weekdays and weekends. And for what? Smartphones do not necessarily make us more productive. Indeed, a 2017 study found that the *mere presence* of one's smartphone nearby can adversely affect cognitive functioning.[2] For me, disconnecting from all gadgets is beneficial both personally and professionally. It lets me feel more rested and relaxed. I have also come to realize that many of my best and most creative ideas have hit me when I have been left to my own thoughts, whether while walking, driving, running an errand, even when trying to fall asleep. Disconnecting is easier said than done (please don't make me wait in a long line without my phone!), but it is a very worthwhile endeavor.

CONCLUSION

I've shared my favorites. Now it's your turn! I'd love to hear about the invaluable tools or practices that have made your work easier. Email me at ramit@mizrahilaw.com with your best ideas.

ENDNOTES

1. *See* Erik Peper & Richard Harvey, *Digital addiction: Increased loneliness, anxiety, and depression,* NeuroRegulation 5(1), 3–8 (2018), available at http://dx.doi.org/10.15540/nr.5.1.3.
2. *See* Adrian F. Ward, Kristen Duke, Ayelet Gneezy, and Maarten W. Bos, *Brain Drain: The Mere Presence of One's Own Smartphone Reduces Available Cognitive Capacity,* Journal of the Association for Consumer Research 2017 2:2, 140-154, available at https://www.journals.uchicago.edu/doi/10.1086/691462; Tim Herrera, *Hide Your Phone When You're Trying to Work. Seriously.* N.Y. Times, Dec. 2, 2018, available at https://www.nytimes.com/2018/12/02/smarter-living/be-more-productive-hide-your-phone.html.

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Senate Bill No. 224

CHAPTER 675

An act to add Article 6 (commencing with Section 51925) to Chapter 5.5 of Part 28 of Division 4 of Title 2 of the Education Code, relating to pupil instruction.

[Approved by Governor October 8, 2021. Filed with Secretary of State October 8, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 224, Portantino. Pupil instruction: mental health education.

Existing law requires, during the next revision of the publication "Health Framework for California Public Schools," the Instructional Quality Commission to consider developing, and recommending for adoption by the State Board of Education, a distinct category on mental health instruction to educate pupils about all aspects of mental health. Existing law requires mental health instruction for these purposes to include, but not be limited to, specified elements, including reasonably designed and age-appropriate instruction on the overarching themes and core principles of mental health.

This bill would require each school district, county office of education, state special school, and charter school that offers one or more courses in health education to pupils in middle school or high school to include in those courses instruction in mental health that meets the requirements of the bill, as specified. The bill would require that instruction to include, among other things, reasonably designed instruction on the overarching themes and core principles of mental health. The bill would require that instruction and related materials to, among other things, be appropriate for use with pupils of all races, genders, sexual orientations, and ethnic and cultural backgrounds, pupils with disabilities, and English learners. The bill would require the State Department of Education to develop a plan to expand mental health instruction in California public schools on or before January 1, 2024.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Mental health is critical to overall health, well-being, and academic success.

(2) Mental health challenges affect all age groups, races, ethnicities, and socioeconomic classes.

(3) Millions of Californians, including at least one in five youths, live with mental health challenges. Millions more are affected by the mental health challenges of someone else, such as a close friend or family member.

(4) Mental health education is one of the best ways to increase awareness and the seeking of help, while reducing the stigma associated with mental health challenges. The public education system is the most efficient and effective setting for providing this education to all youth.

(b) For the foregoing reasons, it is the intent of the Legislature in enacting this measure to ensure that all California pupils in grades 1 to 12, inclusive, have the opportunity to benefit from a comprehensive mental health education.

SEC. 2. Article 6 (commencing with Section 51925) is added to Chapter 5.5 of Part 28 of Division 4 of Title 2 of the Education Code, to read:

Article 6. Mandatory Mental Health Education

51925. Each school district, county office of education, state special school, and charter school that offers one or more courses in health education to pupils in middle school or high school shall include in those courses instruction in mental health that meets the requirements of this article. This section shall not be construed to limit a school district, county office of education, state special school, or charter school in offering or requiring instruction in mental health as specified in this article. This instruction shall include all of the following:

(a) Reasonably designed instruction on the overarching themes and core principles of mental health.

(b) Defining signs and symptoms of common mental health challenges. Depending on pupil age and developmental level, this may include defining conditions such as depression, suicidal thoughts and behaviors, schizophrenia, bipolar disorder, eating disorders, and anxiety, including post-traumatic stress disorder.

(c) Elucidating the evidence-based services and supports that effectively help individuals manage mental health challenges.

(d) Promoting mental health wellness and protective factors, which includes positive development, social and cultural connectedness and supportive relationships, resiliency, problem solving skills, coping skills, self-esteem, and a positive school and home environment in which pupils feel comfortable.

(e) The ability to identify warning signs of common mental health problems in order to promote awareness and early intervention so that pupils know to take action before a situation turns into a crisis. This shall include instruction on both of the following:

(1) How to seek and find assistance from professionals and services within the school district that includes, but is not limited to, school counselors with a pupil personnel services credential, school psychologists, and school social workers, and in the community for themselves or others.

(2) Evidence-based and culturally responsive practices that are proven to help overcome mental health challenges.

(f) The connection and importance of mental health to overall health and academic success and to co-occurring conditions, such as chronic physical conditions, chemical dependence, and substance abuse.

(g) Awareness and appreciation about the prevalence of mental health challenges across all populations, races, ethnicities, and socioeconomic statuses, including the impact of race, ethnicity, and culture on the experience and treatment of mental health challenges.

(h) Stigma surrounding mental health challenges and what can be done to overcome stigma, increase awareness, and promote acceptance. This shall include, to the extent possible, classroom presentations of narratives by trained peers and other individuals who have experienced mental health challenges and how they coped with their situations, including how they sought help and acceptance.

51926. Instruction and materials required pursuant to this article shall satisfy all of the following:

(a) Be appropriate for use with pupils of all races, genders, sexual orientations, and ethnic and cultural backgrounds, pupils with disabilities, and English learners.

(b) Be accessible to pupils with disabilities, including, but not limited to, providing a modified curriculum, materials and instruction in alternative formats, and auxiliary aids.

(c) Not reflect or promote bias against any person on the basis of any category protected by Section 220.

(d) Be coordinated with any existing on-campus mental health providers including, but not limited to, providers with a pupil personnel services credential, who may be immediately called upon by pupils for assistance.

51927. (a) This article does not limit a pupil's health and mental health privacy or confidentiality rights.

(b) A pupil receiving instruction pursuant to this article shall not be required to disclose their confidential health or mental health information at any time in the course of receiving that instruction, including, but not limited to, for the purpose of the peer component described in subdivision (h) of Section 51925.

51928. For purposes of this article, the following definitions apply:

(a) "Age appropriate" has the same meaning as defined in Section 51931.

(b) "English learner" has the same meaning as defined in Section 51931.

(c) "Evidence-based" means verified or supported by research conducted in compliance with scientific methods and published in peer-reviewed journals, where appropriate, and recognized as accurate and objective by professional organizations and agencies with expertise in the mental health field.

(d) "Instructors trained in the appropriate courses" means instructors with knowledge of the most recent evidence-based research on mental health.

51929. On or before January 1, 2024, the department shall develop a plan to expand mental health instruction in California public schools.

O

Senate Bill No. 331

CHAPTER 638

An act to amend Section 1001 of the Code of Civil Procedure, and to amend Section 12964.5 of the Government Code, relating to civil actions.

[Approved by Governor October 7, 2021. Filed with Secretary of State October 7, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 331, Leyva. Settlement and nondisparagement agreements.

Existing law prohibits a settlement agreement from preventing the disclosure of factual information regarding specified acts related to a claim filed in a civil action or a complaint filed in an administrative action. These acts include sexual assault, as defined; sexual harassment, as defined; an act of workplace harassment or discrimination based on sex, failure to prevent such an act, or retaliation against a person for reporting such an act; and an act of harassment or discrimination based on sex by the owner of a housing accommodation, as defined, or retaliation against a person for reporting such an act.

This bill would clarify that this prohibition includes provisions which restrict the disclosure of the information described above. For purposes of agreements entered into on or after January 1, 2022, the bill would also expand the prohibition to include acts of workplace harassment or discrimination not based on sex and acts of harassment or discrimination not based on sex by the owner of a housing accommodation.

The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment or discrimination.

This bill would provide that unlawful acts in the workplace for these purposes include any harassment or discrimination and would instead prohibit an employer from requiring an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about those acts. The bill would make it an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of

information about unlawful acts in the workplace. The bill would provide that any provision in violation of that prohibition would be against public policy and unenforceable. The bill would require a nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace to include specified language relating to the employee's right to disclose information about unlawful acts in the workplace.

The people of the State of California do enact as follows:

SECTION 1. Section 1001 of the Code of Civil Procedure is amended to read:

1001. (a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

(1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.

(2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.

(3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.

(4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.

(b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(c) Notwithstanding subdivisions (a) and (b), a provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. This subdivision does not apply if a government agency or public official is a party to the settlement agreement.

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) In determining the factual foundation of a cause of action for civil damages under subdivision (a), a court may consider the pleadings and other papers in the record, or any other findings of the court.

(g) The amendments made to subparagraphs (3) and (4) of subdivision (a) by Senate Bill 331 of the 2021–22 Regular Session apply only to agreements entered into on or after January 1, 2022. All other amendments made to this section by Senate Bill 331 of the 2021-22 Regular Session shall not be construed as substantive changes, but instead as merely clarifying existing law.

SEC. 2. Section 12964.5 of the Government Code is amended to read:

12964.5. (a) (1) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(A) (i) For an employer to require an employee to sign a release of a claim or right under this part.

(ii) As used in this subparagraph, "release of a claim or right" includes requiring an individual to execute a statement that the individual does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(B) (i) For an employer to require an employee to sign a nondisparagement agreement or other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace.

(ii) A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

(2) Any agreement or document in violation of this subdivision is contrary to public policy and shall be unenforceable.

(b) (1) (A) It is an unlawful employment practice for an employer or former employer to include in any agreement related to an employee's separation from employment any provision that prohibits the disclosure of information about unlawful acts in the workplace.

(B) A nondisparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace shall include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or

discrimination or any other conduct that you have reason to believe is unlawful."

(2) Any provision in violation of paragraph (1) is against public policy and shall be unenforceable.

(3) This subdivision does not prohibit the inclusion of a general release or waiver of all claims in an agreement related to an employee's separation from employment, provided that the release or waiver is otherwise lawful and valid.

(4) An employer offering an employee or former employee an agreement related to that employee's separation from employment as provided in this subdivision shall notify the employee that the employee has a right to consult an attorney regarding the agreement and shall provide the employee with a reasonable time period of not less than five business days in which to do so. An employee may sign such an agreement prior to the end of the reasonable time period as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the reasonable time period, or by providing different terms to employees who sign such an agreement prior to the expiration of such time period.

(c) As used in this section, "information about unlawful acts in the workplace" includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

(d) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process.

(2) As used in this section, "negotiated" means that the agreement is voluntary, deliberate, and informed, the agreement provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in a severance agreement.

(f) This section does not prohibit an employer from protecting the employer's trade secrets, proprietary information, or confidential information that does not involve unlawful acts in the workplace.

O

Senate Bill No. 778

CHAPTER 215

An act to amend Section 12950.1 of the Government Code, relating to employment, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 30, 2019. Filed with Secretary of State August 30, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

SB 778, Committee on Labor, Public Employment and Retirement. Employers: sexual harassment training: requirements.

The California Fair Employment and Housing Act makes specified employment practices unlawful, including the harassment of an employee directly by the employer or indirectly by agents of the employer with the employer's knowledge. Under existing law, the Department of Fair Employment and Housing administers these provisions. Existing law, by January 1, 2020, requires an employer with 5 or more employees to provide at least 2 hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least 1 hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within 6 months of their assumption of a position. Existing law also specifies that an employer who has provided this training to an employee after January 1, 2019, is not required to provide sexual harassment training and education by the January 1, 2020, deadline.

This bill would instead require an employer with 5 or more employees to provide the above-described training and education by January 1, 2021, and thereafter once every 2 years. The bill would require new nonsupervisory employees to be provided the training within 6 months of hire and new supervisory employees to be provided the training within 6 months of the assumption of a supervisory position. The bill would also specify that an employer who has provided this training and education in 2019 is not required to provide it again until 2 years thereafter. The bill would make other related changes to those provisions requiring sexual harassment training.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 12950.1 of the Government Code is amended to read:

12950.1. (a) By January 1, 2021, an employer having five or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California. Thereafter, each employer covered by this section shall provide sexual harassment training and education to each employee in California once every two years. New nonsupervisory employees shall be provided training within six months of hire. New supervisory employees shall be provided training within six months of the assumption of a supervisory position. An employer may provide this training in conjunction with other training provided to the employees. The training may be completed by employees individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is met. An employer who has provided this training and education to an employee in 2019 is not required to provide refresher training and education again until two years thereafter. The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. The department shall provide a method for employees who have completed the training to save electronically and print a certificate of completion.

(b) An employer shall also include prevention of abusive conduct as a component of the training and education specified in subdivision (a).

(c) An employer shall also provide training inclusive of harassment based on gender identity, gender expression, and sexual orientation as a component of the training and education specified in subdivision (a). The training and education shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas.

(d) The state shall incorporate the training required by subdivisions (a) to (c), inclusive, into the 80 hours of training provided to all new employees pursuant to subdivision (b) of Section 19995.4, using existing resources.

(e) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(f) If an employer violates this section, the department may seek an order requiring the employer to comply with these requirements.

(g) The training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination. This section shall not be construed to override or supersede statutes, including, but not limited to, Section 1684 of the Labor Code, that meet or exceed the training for nonsupervisory employees required under this section.

(h) (1) Beginning January 1, 2020, for seasonal, temporary, or other employees that are hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer, as defined in Section 201.3 of the Labor Code, to perform services for clients, the training shall be provided by the temporary services employer, not the client.

(2) Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers, as defined in the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801, et seq.), shall be consistent with training for nonsupervisory employees pursuant to paragraph (8) of subdivision (a) of Section 1684 of the Labor Code.

(i) (1) For purposes of this section only, "employer" means any person regularly employing five or more persons or regularly receiving the services of five or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.

(2) For purposes of this section, "abusive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

(j) For purposes of providing training to employees as required by this section, an employer may develop their own training module or may direct employees to view the online training course referenced in subdivision (k) and this shall be deemed to have complied with and satisfied the employers' obligations as set forth in this section and Section 12950.

(k) The Department of Fair Employment and Housing shall develop or obtain two online training courses on the prevention of sexual harassment in the workplace in accordance with the provisions of this section. The

course for nonsupervisory employees shall be one hour in length and the course for supervisory employees shall be two hours in length.

(*l*) The department shall make the online training courses available on its internet website. The online training courses shall contain an interactive feature that requires the viewer to respond to a question periodically in order for the online training courses to continue to play. Any questions resulting from the online training course described in this subdivision shall be directed to the trainee's employer's Human Resources Department or equally qualified professional rather than the department.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to encourage maximum employer compliance by ensuring general awareness of the new requirements governing sexual harassment training, it is necessary for this act to take effect immediately.

O

Senate Bill No. 820

CHAPTER 953

An act to add Section 1001 to the Code of Civil Procedure, relating to civil procedure.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 820, Leyva. Settlement agreements: confidentiality.

Existing law prohibits a provision in a settlement agreement that prevents the disclosure of factual information related to the action in a civil action with a factual foundation establishing a cause of action for civil damages for certain enumerated sexual offenses. Existing law prohibits a court from entering an order in any of these types of civil actions that restricts disclosure of this information, as specified, and it makes a provision in a settlement agreement that prevents the disclosure of factual information related to the action, entered into on or after January 1, 2017, void as a matter of law and against public policy.

This bill would prohibit a provision in a settlement agreement that prevents the disclosure of factual information relating to certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, that are filed in a civil or administrative action. The bill would make a provision in a settlement agreement that prevents the disclosure of factual information related to the claim, as described in the bill, entered into on or after January 1, 2019, void as a matter of law and against public policy. The bill would also provide that a court may consider the pleadings and other papers in the record, or any other findings of the court in determining the factual foundation of the causes of action specified in these provisions. The bill would create an exception, not applicable if a party is a government agency or public official, for a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, if the provision is included within the settlement agreement at the request of the claimant.

The people of the State of California do enact as follows:

SECTION 1. Section 1001 is added to the Code of Civil Procedure, immediately preceding Section 1002, to read:

1001. (a) Notwithstanding any other law, a provision within a settlement agreement that prevents the disclosure of factual information related to a

claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:

(1) An act of sexual assault that is not governed by subdivision (a) of Section 1002.

(2) An act of sexual harassment, as defined in Section 51.9 of the Civil Code.

(3) An act of workplace harassment or discrimination based on sex, or failure to prevent an act of workplace harassment or discrimination based on sex or an act of retaliation against a person for reporting harassment or discrimination based on sex, as described in subdivisions (h), (i), (j), and (k) of Section 12940 of the Government Code.

(4) An act of harassment or discrimination based on sex, or an act of retaliation against a person for reporting harassment or discrimination based on sex, by the owner of a housing accommodation, as described in Section 12955 of the Government Code.

(b) Notwithstanding any other law, in a civil matter described in paragraphs (1) to (4), inclusive, of subdivision (a), a court shall not enter, by stipulation or otherwise, an order that restricts the disclosure of information in a manner that conflicts with subdivision (a).

(c) Notwithstanding subdivision (a) and (b), a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant. This subdivision does not apply if a government agency or public official is a party to the settlement agreement.

(d) Except as authorized by subdivision (c), a provision within a settlement agreement that prevents the disclosure of factual information related to the claim described in subdivision (a) that is entered into on or after January 1, 2019, is void as a matter of law and against public policy.

(e) This section does not prohibit the entry or enforcement of a provision in any agreement that precludes the disclosure of the amount paid in settlement of a claim.

(f) In determining the factual foundation of a cause of action for civil damages under subdivision (a), a court may consider the pleadings and other papers in the record, or any other findings of the court.

O

Senate Bill No. 1300

CHAPTER 955

An act to amend Sections 12940 and 12965 of, and to add Sections 12923, 12950.2, and 12964.5 to, the Government Code, relating to employment.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1300, Jackson. Unlawful employment practices: discrimination and harassment.

The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to engage in harassment of an employee or other specified person. FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

Under FEHA, an employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

This bill would specify that an employer may be responsible for the acts of nonemployees with respect to other harassment activity.

The bill, with certain exceptions, would prohibit an employer, in exchange for a raise or bonus, or as a condition of employment of continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. The bill would provide that an agreement or document in violation of either of those prohibitions is contrary to public policy and unenforceable.

FEHA provides that an employer may be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors,

knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

This bill would instead make the above provision apply with respect to any type of harassment prohibited under FEHA of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace.

FEHA requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years, as specified.

This bill would also authorize an employer to provide bystander intervention training, as specified, to their employees.

FEHA authorizes the court in certain circumstances and in its discretion to award the prevailing party in a civil action reasonable attorney's fees and costs, including expert witness fees.

This bill would provide that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

This bill would declare the intent of the Legislature about the application of FEHA in regard to harassment.

This bill would incorporate additional changes to Section 12940 of the Government Code proposed by SB 1038 to be operative only if this bill and SB 1038 are enacted and this bill is enacted last.

The people of the State of California do enact as follows:

SECTION 1. Section 12923 is added to the Government Code, immediately following Section 12922, to read:

12923. The Legislature hereby declares its intent with regard to application of the laws about harassment contained in this part.

(a) The purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts. The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being. In this regard, the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment

so altered working conditions as to make it more difficult to do the job." (Id. at 26).

(b) A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in Brooks v. City of San Mateo (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.

(c) The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in Reid v. Google, Inc. (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine."

(d) The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.

(e) Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues "not determinable on paper."

SEC. 2. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the 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, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an

employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the 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, or military and veteran status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the 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, or military and veteran status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the 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, or military and veteran status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to 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, or military and veteran status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business

necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of 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, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer’s control and any other legal responsibility that the employer may have with respect to the conduct of

those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(*l*) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or

observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 2.5. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the 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, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the 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, or military and veteran status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the 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, or military and veteran status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the 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, or military and veteran status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to 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, or military and veteran status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring

into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of 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, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(B) An employee of an entity subject to this subdivision who is alleged to have engaged in any harassment prohibited by this section may be held personally liable for any act in violation of subdivision (h).

(4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(*l*) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely and good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 3. Section 12950.2 is added to the Government Code, to read:

12950.2. An employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.

SEC. 4. Section 12964.5 is added to the Government Code, to read:

12964.5. (a) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(1) (A) For an employer to require an employee to sign a release of a claim or right under this part.

(B) As used in this section, "release of claim or right" includes requiring an individual to execute a statement that he or she does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(2) (A) For an employer to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

(B) For purposes of this paragraph, "information about unlawful acts in the workplace" includes, but is not limited to, information pertaining to sexual harassment or any other unlawful or potentially unlawful conduct.

(b) Any agreement or document in violation of this section is contrary to public policy and shall be unenforceable.

(c) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process.

(2) As used in this section, "negotiated" means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

SEC. 5. Section 12965 of the Government Code is amended to read:

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department on behalf of the person claiming to be aggrieved. Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation. In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel. The civil action shall be brought in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint. For any complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint. For all other complaints, a civil action shall be brought, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation, mediation, or civil action as well, that determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) If a civil action is not brought by the department within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

(c) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes

and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars ($25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(d) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

(3) This subdivision is intended to codify the holding in Downs v. Department of Water and Power of City of Los Angeles (1997) 58 Cal.App.4th 1093.

(e) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the

right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

SEC. 6. Section 2.5 of this bill incorporates amendments to Section 12940 of the Government Code proposed by both this bill and Senate Bill 1038. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2019, (2) each bill amends Section 12940 of the Government Code, and (3) this bill is enacted after Senate Bill 1038, in which case Section 2 of this bill shall not become operative.

O

Senate Bill No. 1343

CHAPTER 956

An act to amend Sections 12950 and 12950.1 of the Government Code, relating to employment.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1343, Mitchell. Employers: sexual harassment training: requirements.

The California Fair Employment and Housing Act makes specified employment practices unlawful, including the harassment of an employee directly by the employer or indirectly by agents of the employer with the employer's knowledge. The act requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment, abusive conduct, and harassment based upon gender, as specified, to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years, as specified.

This bill would instead require an employer who employs 5 or more employees, including temporary or seasonal employees, to provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees by January 1, 2020, and once every 2 years thereafter, as specified. The bill would require the Department of Fair Employment and Housing to develop or obtain 1-hour and 2-hour online training courses on the prevention of sexual harassment in the workplace, as specified, and to post the courses on the department's Internet Web site. The bill would also require the department to make existing informational posters and fact sheets, as well as the online training courses regarding sexual harassment prevention, available to employers and to members of the public in specified alternate languages on the department's Internet Web site.

The people of the State of California do enact as follows:

SECTION 1. Section 12950 of the Government Code is amended to read:

12950. In addition to employer responsibilities set forth in subdivisions (j) and (k) of Section 12940 and in rules adopted by the department and the council, every employer shall act to ensure a workplace free of sexual harassment by implementing the following minimum requirements:

(a) (1) The department's poster on discrimination in employment shall include information relating to the illegality of sexual harassment. One copy

of the poster shall be provided by the department to an employer or a member of the public upon request. The poster shall be available at each office of the department, and shall be mailed if the request includes a self-addressed envelope with postage affixed. Each employer shall post the poster in a prominent and accessible location in the workplace.

(2) Post a poster developed by the department regarding transgender rights in a prominent and accessible location in the workplace.

(3) Provide sexual harassment training as required by Section 12950.1.

(b) Each employer shall obtain from the department its information sheet on sexual harassment, which the department shall make available to employers for reproduction and distribution to employees. One copy of the information sheet shall be provided by the department to an employer or a member of the public upon request. The information sheets shall be available at each office of the department, and shall be mailed if the request includes a self-addressed envelope with postage affixed. Each employer shall distribute this information sheet to its employees, unless the employer provides equivalent information to its employees that contains, at a minimum, components on the following:

(1) The illegality of sexual harassment.

(2) The definition of sexual harassment under applicable state and federal law.

(3) A description of sexual harassment, utilizing examples.

(4) The internal complaint process of the employer available to the employee.

(5) The legal remedies and complaint process available through the department.

(6) Directions on how to contact the department.

(7) The protection against retaliation provided by Title 2 of the California Code of Regulations for opposing the practices prohibited by this article or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the department or the council.

(8) A link to, or the Internet Web site address for, the sexual harassment online training courses developed pursuant to Section 12950.1 and located on the Internet Web site of the Department of Fair Employment and Housing.

(c) The information sheet or information required to be distributed to employees pursuant to subdivision (b) shall be delivered in a manner that ensures distribution to each employee, such as including the information sheet or information with an employee's pay.

(d) The Department of Fair Employment and Housing shall make the poster, fact sheet, and online training courses available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean, and any other language that is spoken by a "substantial number of non-English-speaking people," as that phrase is defined in Section 7296.2. The department shall make versions of the online training courses with subtitles in each language and shall orally dub the online training courses into each language other than English. Simplified Chinese shall be sufficient for subtitling purposes.

(e) The department shall make the poster, fact sheet, and online training courses required by this section, and the corresponding translations, available to employers and to the public through its Internet Web site in formats that may be streamed or downloaded.

(f) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the information sheet or information required to be distributed pursuant to this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(g) If an employer violates the requirements of this section, the department may seek an order requiring the employer to comply with these requirements.

SEC. 2. Section 12950.1 of the Government Code is amended to read:

12950.1. (a) By January 1, 2020, an employer having five or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position. An employer may provide this training in conjunction with other training provided to the employees. The training may be completed by employees individually or as part of a group presentation, and may be completed in shorter segments, as long as the applicable hourly total requirement is met. An employer who has provided this training and education to an employee after January 1, 2019, is not required to provide training and education by the January 1, 2020, deadline. After January 1, 2020, each employer covered by this section shall provide sexual harassment training and education to each employee in California once every two years. The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation. The department shall provide a method for employees who have completed the training to save electronically and print a certificate of completion.

(b) An employer shall also include prevention of abusive conduct as a component of the training and education specified in subdivision (a).

(c) An employer shall also provide training inclusive of harassment based on gender identity, gender expression, and sexual orientation as a component of the training and education specified in subdivision (a). The training and education shall include practical examples inclusive of harassment based

on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas.

(d) The state shall incorporate the training required by subdivisions (a) to (c), inclusive, into the 80 hours of training provided to all new employees pursuant to subdivision (b) of Section 19995.4, using existing resources.

(e) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(f) If an employer violates this section, the department may seek an order requiring the employer to comply with these requirements.

(g) The training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination. This section shall not be construed to override or supersede statutes, including, but not limited to, Section 1684 of the Labor Code, that meet or exceed the training for nonsupervisory employees required under this section.

(h) (1) Beginning January 1, 2020, for seasonal and temporary employees, or any employee that is hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer, as defined in Section 201.3 of the Labor Code, to perform services for clients, the training shall be provided by the temporary services employer, not the client.

(2) Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers, as defined in the federal Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801, et seq.), shall be consistent with training for nonsupervisory employees pursuant to paragraph (8) of subdivision (a) of Section 1684 of the Labor Code.

(i) (1) For purposes of this section only, "employer" means any person regularly employing five or more persons or regularly receiving the services of five or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.

(2) For purposes of this section, "abusive conduct" means conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets,

verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.

(j) For purposes of providing training to employees as required by this section, an employer may develop his or her own training module or may direct employees to view the online training course referenced in subdivision (k) and this shall be deemed to have complied with and satisfied the employers' obligations as set forth in this section and Section 12950.

(k) The Department of Fair Employment and Housing shall develop or obtain two online training courses on the prevention of sexual harassment in the workplace in accordance with the provisions of this section. The course for nonsupervisory employees shall be one hour in length and the course for supervisory employees shall be two hours in length.

(*l*) The department shall make the online training courses available on its Internet Web site. The online training courses shall contain an interactive feature that requires the viewer to respond to a question periodically in order for the online training courses to continue to play. Any questions resulting from the online training course described in this subdivision shall be directed to the trainee's employer's Human Resources Department or equally qualified professional rather than the department.

O

CONGRESS.GOV

H.R.963 - FAIR Act

117th Congress (2021-2022) | Get alerts

Sponsor: Rep. Johnson, Henry C. "Hank," Jr. [D-GA-4] (Introduced 02/11/2021)
Committees: House - Judiciary
Latest Action: House - 11/03/2021 Ordered to be Reported (Amended) by the Yeas and Nays: 23 - 14. (All Actions)
Tracker: **Introduced** Passed House Passed Senate To President Became Law

Summary(1) **Text(1)** Actions(6) Titles(3) Amendments(0) Cosponsors(202) Committees(1) Related Bills(1)

There is one version of the bill.

Text available as: XML/HTML (26KB) | XML/HTML (new window) (24KB) | TXT (14KB) | PDF (270KB) (PDF provides a complete and accurate display of this text.) ?

Shown Here:
Introduced in House (02/11/2021)

117TH CONGRESS
1ST SESSION

H. R. 963

To amend title 9 of the United States Code with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 11, 2021

Mr. JOHNSON of Georgia (for himself, Mr. NADLER, Mr. CICILLINE, Mr. CARTWRIGHT, Mr. AGUILAR, Mr. AUCHINCLOSS, Ms. BARRAGÁN, Ms. BASS, Mr. BEYER, Mr. BLUMENAUER, Ms. BLUNT ROCHESTER, Ms. BONAMICI, Mr. BOWMAN, Mr. BRENDAN F. BOYLE of Pennsylvania, Mr. BROWN, Ms. BROWNLEY, Mr. BUTTERFIELD, Mr. CARBAJAL, Mr. CÁRDENAS, Mr. CARSON, Mr. CASTEN, Mr. CASTRO of Texas, Ms. CLARK of Massachusetts, Ms. CLARKE of New York, Mr. COHEN, Mr. CONNOLLY, Mr. COURTNEY, Mr. CRIST, Mr. DANNY K. DAVIS of Illinois, Ms. DEAN, Mr. DEFAZIO, Ms. DEGETTE, Ms. DELAURO, Ms. DELBENE, Mr. DELGADO, Mrs. DEMINGS, Mr. DESAULNIER, Mr. DEUTCH, Mrs. DINGELL, Mr. DOGGETT, Ms. ESCOBAR, Mr. ESPAILLAT, Mr. EVANS, Mrs. FLETCHER, Mr. FOSTER, Ms. LOIS FRANKEL of Florida, Mr. GALLEGO, Mr. GARAMENDI, Mr. GARCÍA of Illinois, Ms. GARCIA of Texas, Mr. GOMEZ, Mr. VICENTE GONZALEZ of Texas, Mr. GREEN of Texas, Mr. GRIJALVA, Mr. HASTINGS, Mrs. HAYES, Mr. HIGGINS of New York, Mr. HUFFMAN, Ms. JACKSON LEE, Ms. JAYAPAL, Mr. JEFFRIES, Ms. JOHNSON of Texas, Mr. JONES, Ms. KAPTUR, Mr. KEATING, Mr. KHANNA, Mr. KILDEE, Mr. KIM of New Jersey, Mrs. KIRKPATRICK, Mr. KRISHNAMOORTHI, Ms. KUSTER, Mr. LANGEVIN, Mr. LARSEN of Washington, Mr. LARSON of Connecticut, Mrs. LAWRENCE, Mr. LAWSON of Florida, Ms. LEE of California, Mr. LEVIN of Michigan, Mr. LEVIN of California, Mr. LIEU, Mr. LOWENTHAL, Mrs. LURIA, Mr. LYNCH, Mr. MALINOWSKI, Mrs. CAROLYN B. MALONEY of New York, Ms. MATSUI, Mrs. MCBATH, Ms. MCCOLLUM, Mr. MCEACHIN, Mr. MCNERNEY, Mr. MEEKS, Ms. MENG, Ms. MOORE of Wisconsin, Mrs. NAPOLITANO, Mr. NEGUSE, Ms. NEWMAN, Ms. NORTON, Mr. O'HALLERAN, Ms. OCASIO-CORTEZ, Mr. PALLONE, Mr. PANETTA, Mr. PAPPAS, Mr. PASCRELL, Mr. PAYNE, Mr. PERLMUTTER, Mr. PETERS, Mr. PHILLIPS, Ms. PINGREE, Mr. POCAN, Ms. PORTER, Ms. PRESSLEY, Mr. PRICE of North Carolina, Mr. QUIGLEY, Mr. RASKIN, Miss RICE of New York, Ms. ROSS, Mr. RUSH, Mr. RYAN, Ms. SÁNCHEZ, Mr. SARBANES, Ms. SCANLON, Ms. SCHAKOWSKY, Mr. SCHIFF, Mr. SCHRADER, Mr. SCOTT of Virginia, Mr. SHERMAN, Mr. SIRES, Mr. SMITH of Washington, Mr. SOTO, Ms. SPANBERGER, Ms. SPEIER, Mr. STANTON, Ms.

Stevens, Ms. Strickland, Mr. Suozzi, Mr. Swalwell, Mr. Takano, Mr. Thompson of Mississippi, Mr. Thompson of California, Ms. Titus, Ms. Tlaib, Mr. Tonko, Mr. Torres of New York, Mrs. Torres of California, Mrs. Trahan, Mr. Trone, Mr. Veasey, Mr. Vela, Ms. Velázquez, Ms. Wasserman Schultz, Mrs. Watson Coleman, Mr. Welch, Ms. Wild, Ms. Williams of Georgia, Mr. Yarmuth, and Ms. Bush) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 9 of the United States Code with respect to arbitration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Forced Arbitration Injustice Repeal Act" or the "FAIR Act".

SEC. 2. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES.

(a) In General.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF EMPLOYMENT, CONSUMER, ANTITRUST, AND CIVIL RIGHTS DISPUTES

"§401. Definitions

"In this chapter—

"(1) the term 'antitrust dispute' means a dispute—

"(A) arising from an alleged violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act) or State antitrust laws; and

"(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(2) the term 'civil rights dispute' means a dispute—

"(A) arising from an alleged violation of—

"(i) the Constitution of the United States or the constitution of a State;

"(ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public

accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and

"(B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

"(3) the term 'consumer dispute' means a dispute between—

"(A) one or more individuals who seek or acquire real or personal property, services (including services related to digital technology), securities or other investments, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law; and

"(B) (i) the seller or provider of such property, services, securities or other investments, money, or credit; or

"(ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit;

"(4) the term 'employment dispute' means a dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law;

"(5) the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement; and

"(6) the term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"§402. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

"(b) APPLICABILITY.—

"(1) IN GENERAL.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

"(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of a worker to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 1 by striking "of seamen," and all that follows through "interstate commerce" and inserting in its place "of individuals, regardless of whether such individuals are designated as employees or independent contractors for other purposes";

(B) in section 2 by inserting "or as otherwise provided in chapter 4" before the period at the end;

(C) in section 208—

(i) in the section heading by striking "**CHAPTER 1; RESIDUAL APPLICATION**" and inserting "**APPLICATION**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(D) in section 307—

(i) in the section heading by striking "**CHAPTER 1; RESIDUAL APPLICATION**" and inserting "**APPLICATION**"; and

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections of chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections of chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters of title 9, United States Code, is amended by adding at the end the following:

- "4. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes 401".

SEC. 4. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises.

KEYNOTE
DAY 1

II

Calendar No. 169

117TH CONGRESS
1ST SESSION

S. 2342

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

IN THE SENATE OF THE UNITED STATES

JULY 14, 2021

Mrs. GILLIBRAND (for herself, Mr. GRAHAM, Mr. DURBIN, Mr. WHITEHOUSE, Mrs. BLACKBURN, Mr. BLUMENTHAL, Ms. MURKOWSKI, Mrs. FEINSTEIN, Mr. COONS, Mr. KENNEDY, Mr. LEAHY, Mr. BOOKER, Mr. PADILLA, Mr. OSSOFF, Mr. HAWLEY, Ms. HIRONO, Mr. GRASSLEY, and Mrs. CAPITO) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 17, 2021

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021''.

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

''CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

''§ 401. Definitions

''In this chapter:

''(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

''(2) PREDISPUTE JOINT-ACTION WAIVER.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to par-

ticipate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

''(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

''(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to the any of the following conduct directed at an individual or a group of individuals:

''(A) Unwelcome sexual advances.

''(B) Unwanted physical contact that is sexual in nature, including assault.

''(C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.

''(D) Conditioning professional, educational, consumer, health care or long-term care benefits on sexual activity.

''(E) Retaliation for rejecting unwanted sexual attention.

"§ 402. No validity or enforceability

"(a) IN GENERAL.—Except as provided in subsection (c), and notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to a sexual assault dispute or a sexual harassment dispute.

"(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

"(c) EXCEPTION FOR COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial

enforcement of a right arising under provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting ''or as otherwise provided in chapter 4'' before the period at the end;

(B) in section 208—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''; and

(C) in section 307—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent

that this chapter is not in conflict with chapter 4.''.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

''208. Application.''.

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

''307. Application.''.

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

''4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401''.

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021''.

SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT.

(a) IN GENERAL.—Title 9 of the United States Code is amended by adding at the end the following:

"CHAPTER 4—ARBITRATION OF DISPUTES INVOLVING SEXUAL ASSAULT AND SEXUAL HARASSMENT

"§ 401. Definitions

"In this chapter:

"(1) PREDISPUTE ARBITRATION AGREEMENT.—The term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement.

"(2) PREDISPUTE JOINT-ACTION WAIVER.—The term 'predispute joint-action waiver' means an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement.

"(3) SEXUAL ASSAULT DISPUTE.—The term 'sexual assault dispute' means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent.

"(4) SEXUAL HARASSMENT DISPUTE.—The term 'sexual harassment dispute' means a dispute relating to any of the following conduct directed at an individual or a group of individuals:

"(A) Unwelcome sexual advances.

"(B) Unwanted physical contact that is sexual in nature, including assault.

"(C) Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.

"(D) Conditioning professional, educational, consumer, health care, or long-term care benefits on sexual activity.

"(E) Retaliation for rejecting unwanted sexual attention.

"§ 402. No validity or enforceability

"(a) IN GENERAL.—Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual assault dispute or sexual harass-

ment dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

"(b) DETERMINATION OF APPLICABILITY.—An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Title 9 of the United States Code is amended—

(A) in section 2, by inserting "or as otherwise provided in chapter 4" before the period at the end;

(B) in section 208—

*(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and*

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4."; and

(C) in section 307—

*(i) in the section heading, by striking "**Chapter 1; residual application**" and inserting "**Application**"; and*

(ii) by adding at the end the following: "This chapter applies to the extent that this chapter is not in conflict with chapter 4.".

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

(B) CHAPTER 3.—The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

"307. Application.".

(3) TABLE OF CHAPTERS.—The table of chapters for title 9, United States Code, is amended by adding at the end the following:

"4. Arbitration of disputes involving sexual assault and sexual harassment ..... 401".

SEC. 3. APPLICABILITY.

This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act.

Calendar No. 169

117TH CONGRESS
1ST SESSION

S. 2342

A BILL

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

NOVEMBER 17, 2021

Reported with an amendment

SB-1300 Unlawful employment practices: discrimination and harassment. (2017-2018)

Date Published: 10/01/2018 09:00 PM

Senate Bill No. 1300

CHAPTER 955

An act to amend Sections 12940 and 12965 of, and to add Sections 12923, 12950.2, and 12964.5 to, the Government Code, relating to employment.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1300, Jackson. Unlawful employment practices: discrimination and harassment.

The California Fair Employment and Housing Act (FEHA) prohibits various actions as unlawful employment practices unless the employer acts based upon a bona fide occupational qualification or applicable security regulations established by the United States or the State of California. In this regard, FEHA makes it an unlawful employment practice for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to engage in harassment of an employee or other specified person. FEHA also makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.

Under FEHA, an employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

This bill would specify that an employer may be responsible for the acts of nonemployees with respect to other harassment activity.

The bill, with certain exceptions, would prohibit an employer, in exchange for a raise or bonus, or as a condition of employment of continued employment, from requiring the execution of a release of a claim or right under FEHA or from requiring an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment. The bill would provide that an agreement or document in violation of either of those prohibitions is contrary to public policy and unenforceable.

FEHA provides that an employer may be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

This bill would instead make the above provision apply with respect to any type of harassment prohibited under FEHA of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a

contract in the workplace.

FEHA requires employers with 50 or more employees to provide at least 2 hours of prescribed training and education regarding sexual harassment to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years, as specified.

This bill would also authorize an employer to provide bystander intervention training, as specified, to their employees.

FEHA authorizes the court in certain circumstances and in its discretion to award the prevailing party in a civil action reasonable attorney's fees and costs, including expert witness fees.

This bill would provide that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

This bill would declare the intent of the Legislature about the application of FEHA in regard to harassment.

This bill would incorporate additional changes to Section 12940 of the Government Code proposed by SB 1038 to be operative only if this bill and SB 1038 are enacted and this bill is enacted last.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 12923 is added to the Government Code, immediately following Section 12922, to read:

12923. The Legislature hereby declares its intent with regard to application of the laws about harassment contained in this part.

(a) The purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts. The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being. In this regard, the Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (Id. at 26).

(b) A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in Brooks v. City of San Mateo (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.

(c) The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination. In that regard, the Legislature affirms the decision in Reid v. Google, Inc. (2010) 50 Cal.4th 512 in its rejection of the "stray remarks doctrine."

(d) The legal standard for sexual harassment should not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.

(e) Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in Nazir v. United Airlines, Inc. (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues "not determinable on paper."

SEC. 2. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the 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, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the 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, or military and veteran status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the 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, or military and veteran status of the person in the election of officers

of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the 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, or military and veteran status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to 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, or military and veteran status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of 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, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant

to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 2.5. Section 12940 of the Government Code is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the 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, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the 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, or military and veteran status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the 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, or military and veteran status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the 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, or military and veteran status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to 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, or military and veteran status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of 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, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(B) An employee of an entity subject to this subdivision who is alleged to have engaged in any harassment prohibited by this section may be held personally liable for any act in violation of subdivision (h).

(4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(l) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely and good faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 3. Section 12950.2 is added to the Government Code, to read:

12950.2. An employer may also provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.

SEC. 4. Section 12964.5 is added to the Government Code, to read:

12964.5. (a) It is an unlawful employment practice for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment, to do either of the following:

(1) (A) For an employer to require an employee to sign a release of a claim or right under this part.

(B) As used in this section, "release of claim or right" includes requiring an individual to execute a statement that he or she does not possess any claim or injury against the employer or other covered entity, and includes the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity.

(2) (A) For an employer to require an employee to sign a nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

(B) For purposes of this paragraph, "information about unlawful acts in the workplace" includes, but is not limited to, information pertaining to sexual harassment or any other unlawful or potentially unlawful conduct.

(b) Any agreement or document in violation of this section is contrary to public policy and shall be unenforceable.

(c) (1) This section does not apply to a negotiated settlement agreement to resolve an underlying claim under this part that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process.

(2) As used in this section, "negotiated" means that the agreement is voluntary, deliberate, and informed, provides consideration of value to the employee, and that the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

SEC. 5. Section 12965 of the Government Code is amended to read:

12965. (a) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation, or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department on behalf of the person claiming to be aggrieved. Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation. In any civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel. The civil action shall be brought in any county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, or in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices. If the defendant is not found in any of these counties, the action may be brought within the county of the defendant's residence or principal office.

For any complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation, or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint. For any complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint. For all other complaints, a civil action shall be brought, if at all, within one year after the filing of a complaint. If the director determines, pursuant to Section 12961, that a complaint investigated as a group or class complaint under Section 12961 is to be treated as a group or class complaint for purposes of conciliation, mediation, or civil action as well, that determination shall be made and shall be communicated in writing within one year after the filing of the complaint to each person, employer, labor organization, employment agency, or public entity alleged in the complaint to have committed an unlawful practice.

(b) If a civil action is not brought by the department within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought, the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint. A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice. The superior courts of the State of California shall have jurisdiction of those actions, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office. A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so. Those actions may not be filed as class actions or may not be maintained as class actions by the person or persons claiming to be aggrieved where those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants. In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

(c) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (b), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars ($25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(d) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the Department of Fair Employment and Housing to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

(3) This subdivision is intended to codify the holding in Downs v. Department of Water and Power of City of Los Angeles (1997) 58 Cal.App.4th 1093.

(e) (1) Notwithstanding subdivision (b), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the Department of Fair Employment and Housing, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Department of Fair Employment and Housing.

(C) After investigation and determination by the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later.

SEC. 6. Section 2.5 of this bill incorporates amendments to Section 12940 of the Government Code proposed by both this bill and Senate Bill 1038. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2019, (2) each bill amends Section 12940 of the Government Code, and (3) this bill is enacted after Senate Bill 1038, in which case Section 2 of this bill shall not become operative.

AB-51 Employment discrimination: enforcement. (2019-2020)

Date Published: 10/11/2019 09:00 PM

Assembly Bill No. 51

CHAPTER 711

An act to add Section 12953 to the Government Code, and to add Section 432.6 to the Labor Code, relating to employment.

[Approved by Governor October 10, 2019. Filed with Secretary of State October 10, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 51, Gonzalez. Employment discrimination: enforcement.

Existing law imposes various restrictions on employers with respect to contracts and applications for employment. A violation of those restrictions is a misdemeanor.

Existing law creates the Division of Labor Standards Enforcement, which is under the direction of the Labor Commissioner, and generally commits to the commissioner the authority and responsibility for the enforcement of employment laws.

This bill would prohibit a person from requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (FEHA) or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit. The bill would also prohibit an employer from threatening, retaliating or discriminating against, or terminating any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of specific statutes governing employment. The bill would establish a specific exemption from those prohibitions. Because a violation of these prohibitions would be a crime, the bill would impose a state-mandated local program.

FEHA makes specified employment and housing practices unlawful and provides procedures for enforcement by the Department of Fair Employment and Housing. FEHA authorizes a person alleging a violation of specified provisions of the act relating to employment discrimination to submit a verified complaint to the Department of Fair Employment and Housing, and requires the department to take actions to investigate and conciliate that complaint. FEHA authorizes the department to bring a civil action on behalf of the person who submitted the complaint upon the failure to eliminate an unlawful practice under these provisions. FEHA requires the department to issue a right-to-sue notice to a person who submitted the complaint if certain conditions occur, and FEHA requires a person who has been issued a right-to-sue notice to bring an action within one year from when the department issued that notice.

This bill would additionally make violations of the prohibitions described above, relating to the waiver of rights, forums, or procedures, unlawful employment practices under FEHA.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. (a) The Legislature finds and declares that it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) and the Labor Code.

(b) It is the purpose of this act to ensure that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion.

SEC. 2. Section 12953 is added to the Government Code, to read:

12953. It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code.

SEC. 3. Section 432.6 is added to the Labor Code, to read:

432.6. (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

(d) In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees.

(e) This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and their employer or any other person as specified by the rules of the self-regulatory organization.

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

(g) This section does not apply to postdispute settlement agreements or negotiated severance agreements.

(h) This section applies to contracts for employment entered into, modified, or extended on or after January 1, 2020.

(i) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a

crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE; NATIONAL RETAIL FEDERATION; CALIFORNIA RETAILERS ASSOCIATION; NATIONAL ASSOCIATION OF SECURITY COMPANIES; HOME CARE ASSOCIATION OF AMERICA; CALIFORNIA ASSOCIATION FOR HEALTH SERVICES AT HOME, *Plaintiffs-Appellees*, v. ROB BONTA*, in his official capacity as the Attorney General of the State of California; LILIA GARCIA-BROWER, in her official capacity as the Labor Commissioner of the State of California; JULIE A. SU, in her official capacity as the Secretary of the California Labor and Workforce Development Agency; KEVIN RICHARD KISH, in his official	No. 20-15291 D.C. No. 2:19-cv-02456-KJM-DB OPINION

* Rob Bonta has been substituted for his predecessor, Xavier Becerra, as California Attorney General under Fed. R. App. P 43(c)(2).

capacity as Director of the California Department of Fair Employment and Housing of the State of California,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted December 7, 2020
San Francisco, California

Filed September 15, 2021

Before: Carlos F. Lucero,** William A. Fletcher, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Lucero;
Dissent by Judge Ikuta

** The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

FOR PUBLICATION

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; CALIFORNIA CHAMBER OF COMMERCE; NATIONAL RETAIL FEDERATION; CALIFORNIA RETAILERS ASSOCIATION; NATIONAL ASSOCIATION OF SECURITY COMPANIES; HOME CARE ASSOCIATION OF AMERICA; CALIFORNIA ASSOCIATION FOR HEALTH SERVICES AT HOME, *Plaintiffs-Appellees*, v. ROB BONTA*, in his official capacity as the Attorney General of the State of California; LILIA GARCIA-BROWER, in her official capacity as the Labor Commissioner of the State of California; JULIE A. SU, in her official capacity as the Secretary of the California Labor and Workforce Development Agency; KEVIN RICHARD KISH, in his official	No. 20-15291 D.C. No. 2:19-cv-02456-KJM-DB OPINION

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Opinion by Judge Lucero;
Dissent by Judge Ikuta

** The Honorable Carlos F. Lucero, United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

SUMMARY***

Federal Arbitration Act / Preemption

The panel reversed, in part, the district court's conclusion that California Assembly Bill 51 is preempted by the Federal Arbitration Act; affirmed the district court's determination that the civil and criminal penalties associated with AB 51 were preempted; vacated the district court's preliminary injunction enjoining AB 51's enforcement; and remanded for further proceedings.

AB 51, which added § 432.6 to the California Labor Code, was enacted with the purpose of ensuring that individuals are not retaliated against for refusing to consent to the waiver of rights and procedures established in the California Fair Employment and Housing Act and the California Labor Code; and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion. Other provisions of the California Code, specifically Labor Code § 433 and Government Code § 12953, render violations of § 432.6 a misdemeanor offense and open an employer to potential civil sanctions. The district court concluded that AB 51 placed agreements to arbitrate on unequal footing with other contracts and also that AB 51 stood as an obstacle to the purposes and objectives of the Federal Arbitration Act ("FAA"). The district court preliminarily enjoined enforcement of § 432.6(a)–(c) as to arbitration agreements covered by the FAA.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that California Labor Code § 432.6 neither conflicted with the language of § 2 of the FAA nor created a contract defense by which executed arbitration agreements could be invalidated or not enforced. A thorough review of the historical context of the FAA, its legislative history, and subsequent Supreme Court jurisprudence demonstrated that Congress was focused on the enforcement and validity of consensual written agreements to arbitrate and did not intend to preempt state laws requiring that agreements to arbitrate be voluntary. The panel held that § 432.6 did not make invalid or unenforceable any agreement to arbitrate, even if such agreement was consummated in violation of the statute. Rather, the panel noted that while mandating that employer-employee arbitration agreements be consensual, § 432.6 specifically provides that nothing in the section was intended to invalidate a written arbitration agreement that was otherwise enforceable under the FAA. The panel determined that § 432.6 applied only in the absence of an agreement to arbitrate and expressly provided for the validity and enforceability of agreements to arbitrate. The panel held that because the district court erred in concluding that § 432.6(a)–(c) were preempted by the FAA, it necessarily abused its discretion in granting Appellees a preliminary injunction.

The panel agreed, however, that the civil and criminal penalties associated with AB 51 stood as an obstacle to the purposes of the FAA and were therefore preempted. The panel held that Section § 432.6 was not preempted by the FAA because it was solely concerned with pre-agreement employer behavior, but because the accompanying enforcement mechanisms sanctioning employers for violating § 432.6 necessarily included punishing employers for entering into an agreement to arbitrate. The panel held

that a state law that incarcerates an employer for six months for entering into an arbitration agreement directly conflicts with § 2 of the FAA. Therefore, the panel held that Government Code § 12953 and Labor Code § 433 were preempted to the extent that they applied to executed arbitration agreements covered by the FAA.

Dissenting, Judge Ikuta stated that AB 51 has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts. She stated that the majority abetted California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it barred only nonconsensual agreements. Judge Ikuta stated that the majority's ruling conflicted with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1425 (2017), which held that the FAA invalidates state laws that impede the formation of arbitration agreements. The majority ruling also created a circuit split with sister circuits, which have held that too-clever-by-half workarounds and covert efforts to block the formation of arbitration agreements are preempted by the FAA just as much as laws that block enforcement of such agreements.

COUNSEL

Chad A. Stegeman (argued), Deputy Attorney General; Michelle M. Mitchell, Supervising Deputy Attorney; Thomas S. Patterson, Senior Assistant Attorney General; Rob Bonta, Attorney General; Office of the Attorney General, San Francisco, California; for Defendants-Appellants.

Andrew J. Pincus (argued), Archis A. Parasharami, and Daniel E. Jones, Mayer Brown LLP, Washington, D.C.; Bruce J. Sarchet and Maurice Baskin, Littler Mendelson PC, Sacramento, California; Donald M. Falk, Mayer Brown LLP, Palo Alto, California; Erika C. Frank, California Chamber of Commerce, Sacramento, California; Steven P. Lehotsky and Jonathan Urick, U.S. Chamber Litigation Center, Washington, D.C.; for Plaintiffs-Appellees.

Cliff Palefsky and Matt Koski, McGuinn Hillsman & Palefsky, San Francisco, California, for Amicus Curiae California Employment Lawyers Association.

OPINION

LUCERO, Circuit Judge:

The Federal Reporter is awash with descriptions of "judicial hostility" to arbitration that spurred enactment of the Federal Arbitration Act (FAA). Evolution of this "hostility" is traced not to the particular desires of individual judges but to two doctrines of English common law: ouster (which made illegal any agreement that lessened a statutory grant of judicial jurisdiction) and revocability (which allowed a party to withdraw consent to arbitrate at any point prior to the arbitrator's ruling). These two doctrines were followed for their "antiquity" rather than their "excellence or reason." *See U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915). By the turn of the twentieth century, litigants, lawyers, and judges all agreed that the two doctrines should be sent hence from American jurisprudence.

This goal was achieved by enactment of the FAA, which intended "to make the contracting party live up to his agreement." H.R. Rep. No. 68-96, at 1 (1924). Following enactment of the FAA, parties could "no longer refuse to perform [their] contract when it [became] disadvantageous," ensuring that an arbitration agreement would be "placed upon the same footing as other contracts, where it belongs." *Id.* In furtherance of this congressional intent, the Court has repeatedly instructed that "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (cleaned up). Just as clearly, the Court has emphasized: "The first principle that underscores all of our arbitration decisions is that arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (cleaned up). "[T]he FAA does

not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

The jurisprudence surrounding the preemptive scope of the FAA has grown on the precedential trellis of these basic principles. Each time the Supreme Court has clarified the preemptive scope of the FAA, it has done so by ruling on the enforceability or validity of executed agreements to arbitrate, explaining that the FAA does not preempt the field of arbitration. Today we are asked to abandon the framework of FAA preemption of state rules that selectively invalidate or refuse to enforce arbitration agreements, ignore the holding of *Volt*, and nullify a California law enacted to codify what the enactors of the FAA took as a given: that arbitration is a matter of contract and agreements to arbitrate must be voluntary and consensual. As we read California Labor Code § 432.6, the state of California has chosen to assure that entry into an arbitration agreement by an employer and employee is mutually consensual and to declare that compelling an unwilling party to arbitrate is an unfair labor practice. We are asked by plaintiffs to hold that the FAA requires parties to arbitrate when but one party desires to do so. Our research leads to nothing in the statutory text of the FAA or Supreme Court precedent that authorizes or justifies such a departure from established jurisprudence, and we decline to so rule. Thus, we must reverse the judgment of the district court.

Yet operation of other provisions within the California code renders a violation of § 432.6 a misdemeanor offense and opens an employer to potential civil sanctions. The imposition of civil and criminal sanctions for the act of executing an arbitration agreement directly conflicts with the FAA and such an imposition of sanctions is indeed

preempted. We therefore affirm the district court as to the application of Labor Code § 433 and Government Code § 12953 to arbitration agreements covered by § 1 of the FAA.

I

A

California Governor Gavin Newsom signed into law California Assembly Bill 51, 2019 Cal. Stats. Ch. 711 (AB 51), on October 10, 2019. Section 1 of AB 51 declares that "it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act . . . and the Labor Code." AB 51. Pursuant to this policy, AB 51 was enacted with the "purpose of . . . ensur[ing] that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion." *Id.* Arbitration is not singled out by AB 51. Rather, AB 51 covers a range of waivers, including non-disparagement clauses and non-disclosure agreements.

AB 51 added § 432.6 to the California Labor Code. That section provides:

> (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section

12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.

. . .

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

Cal. Lab. Code § 432.6. Its placement in Article 3 of the Labor Code brings § 432.6 under Labor Code § 433, which states that "[a]ny person violating this article is guilty of a misdemeanor." This, in turn, makes a violation of § 432.6 "punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both." Cal. Lab. Code § 23.

Finally, AB 51 also added § 12953 to the California Government Code. That section provides: "It is an unlawful employment practice for an employer to violate Section 432.6 of the Labor Code." Cal. Gov't Code § 12953. Other provisions within the Government Code create civil sanctions for "unlawful employment practices," including investigation by the Department of Fair Housing and Employment and potential civil litigation brought either by that Department on behalf of an aggrieved individual or, if the Department declines to initiate litigation, by the individual in a private suit. *See* Cal. Gov't Code §§ 12960–12965.

B

AB 51 was enacted with an effective date of January 1, 2020. Cal. Lab. Code § 432.6(h). On December 9, 2019, Appellees filed a complaint for declaratory and injunctive relief, seeking a declaration that AB 51 was preempted by the FAA and asking the court to preliminarily and permanently enjoin Appellants from enforcing the statute. The same day, Appellees filed a motion for a preliminary injunction. While the injunction motion was pending, Appellees filed a motion for a temporary restraining order, which was granted on December 30, 2019, two days before AB 51 was to take effect.

The trial court conducted a hearing on the motion for a preliminary injunction on January 10, 2020. It granted Appellees' motion for a preliminary injunction via minute order on January 31, 2020 and issued a detailed decision on February 7, 2020. After resolving issues of jurisdiction that are not contested on appeal,[1] the court turned to the merits of Appellees' preliminary injunction motion. Concluding that AB 51 placed agreements to arbitrate on unequal footing with other contracts and also that it stood as an obstacle to the purposes and objectives of the FAA, the trial court found that Appellees were likely to succeed on the merits of their claim. After determining the other injunction factors also favored Appellees, the court preliminarily enjoined Appellants from enforcing § 432.6(a)–(c) as to arbitration agreements covered by the FAA.

II

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "The first factor—likelihood of success on the merits—is the most important factor." *California v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (en

[1] While the issue is not contested on appeal, we have satisfied ourselves of the district court's jurisdiction and our own. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). The trial court correctly determined that it had subject matter jurisdiction under 28 U.S.C. § 1331. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). We, in turn, have jurisdiction to review a grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1).

banc) (quotations omitted). "If a movant fails to establish likelihood of success on the merits, we need not consider the other factors." *Id.* "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020). We review the legal issues underlying the grant de novo "because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018) (quotation omitted).

III

A

The Supremacy Clause states:

> This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. It "provides a rule of decision for determining whether federal or state law applies in a particular situation." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (quotation omitted). If Congress "enacts a law that imposes restrictions or confers rights on private actors" and "a state law confers rights or imposes restrictions that conflict with the federal law," then "the federal law takes precedence and the state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). The Supreme Court has identified three types of preemption: "conflict, express, and field." *Id.* (quotations omitted). Of these, only conflict preemption is relevant to the present

appeal. Express preemption occurs when Congress passes a statute that explicitly preempts state law. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983). Field preemption occurs when "Congress has legislated so comprehensively that it has left no room for supplementary state legislation." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). The Supreme Court has explained that neither express nor field preemption is applicable to the FAA. *See Volt*, 489 U.S. at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

Conflict preemption manifests in two ways: "impossibility" preemption and "obstacle" preemption. Impossibility preemption occurs when "it is impossible . . . to comply with both state and federal requirements" and obstacle preemption occurs when a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 761 (9th Cir. 2015) (quotation omitted).

B

At issue in this appeal is the preemptive scope of 9 U.S.C. § 2, the "primary substantive provision of the [FAA]." *Concepcion*, 563 U.S. at 339 (quotation omitted). It provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

> thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Conflict preemption analysis under the FAA follows the basic structure outlined above, but the sheer volume of FAA preemption jurisprudence has created an FAA-specific gloss to the doctrines of impossibility and obstacle preemption.

To understand how impossibility preemption operates in FAA cases, a brief discussion of the statute's "saving clause" is required. The last clause of § 2 provides that "an agreement in writing" to arbitrate a dispute "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (emphasis added). The saving clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 825 (9th Cir. 2019) (quoting *Concepcion*, 563 U.S. at 339). To fall within the saving clause and avoid preemption, a rule must "put arbitration agreements on an equal plane with other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017).

It is this "equal plane" or "equal footing" principle that guides impossibility preemption under the FAA. If a state-law contract defense treats arbitration agreements less favorably than any other contract—that is, if the defense allows for an agreement to arbitrate to be invalidated or not

enforced in circumstances where another contract would be enforced or deemed valid—that contract defense does not fall within the saving clause. Outside the protective ambit of the saving clause, a contract defense that provides for the invalidation or nonenforcement of an arbitration agreement is in direct conflict with the FAA's mandate; it is thus impossible for the contract defense and the FAA to coexist, and the FAA must prevail. Importantly, the "equal footing principle" applies the same to a contract defense that "discriminat[es] on its face against arbitration" as it does to "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 1426.

If a state rule places arbitration agreements on equal footing with other contracts and thus falls within the saving clause, it may still be preempted by "the ordinary working of conflict pre-emption principles," including obstacle preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000). Under obstacle preemption, a state statute or rule is preempted by the FAA if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). "The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 344 (cleaned up). Rules that selectively interfere with the enforcement of arbitration agreements are therefore preempted by the FAA. A state rule may also stand as an obstacle to the FAA through "subtle methods" that "interfer[e] with fundamental attributes of arbitration." *Lamps Plus*, 139 S. Ct. at 1418 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018)).

With this understanding of preemption under the FAA, we turn to the principal question before us: Is § 432.6 of the California Labor Code preempted by § 2 of the FAA?[2]

C

1

Preemption analysis begins with the text of the two statutes. The FAA and § 432.6 do not conflict because, by its terms, § 2 of the FAA simply does not apply to § 432.6. The California law does not create a contract defense that allows for the invalidation or nonenforcement of an agreement to arbitrate, nor does it discriminate on its face against the enforcement of arbitration agreements. Indeed, the only reference in § 432.6 to executed arbitration agreements covered by the FAA is a provision that protects their enforcement. *See* Cal. Lab. Code § 432.6(f). That § 432.6 cannot be used to invalidate, revoke, or fail to enforce an arbitration agreement removes it from saving clause jurisprudence. Supreme Court and Ninth Circuit caselaw uniformly applies saving clause analysis in instances where a party relies on a contract defense or state rule to invalidate or not enforce an existing agreement to arbitrate. *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1619–20; *Kindred Nursing*, 137 S. Ct. at 1426; *Concepcion*, 563 U.S. at 337–38; *Preston v. Ferrer*, 552 U.S. 346, 349–51, (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683–84 (1996); *Perry v. Thomas*, 482 U.S. 483, 484–86 (1987); *Blair*, 928 F.3d at 823–24; *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430–33 (9th Cir. 2015). Unlike this line

[2] We separately consider the FAA's preemptive effect on Government Code § 12953 and Labor Code § 433, which we conclude do conflict with § 2. *See* section III.D, *infra*.

of cases, the present appeal does not concern a state rule that provides a contract defense through which an agreement to arbitrate may be invalidated. *See Concepcion*, 563 U.S. at 339. Nor does it "prohibit[] outright the arbitration of a particular type of claim." *Id.* at 341. Therefore, it is not "impossible" for § 432.6 and the FAA to coexist. *See Ryan*, 786 F.3d at 761.

Concluding the contrary, the trial court relied largely on *Kindred Nursing* and *Casarotto*. *See Chamber of Com. of United States v. Becerra*, 438 F. Supp. 3d 1078, 1097–98 (E.D. Cal. 2020). It reasoned that by prohibiting an employer from forcing a prospective or current employee to "waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act," *id.* at 1087 (quoting Cal. Lab. Code § 432.6), § 432.6 "embod[ied] . . . a legal rule hinging on the primary characteristic of an arbitration agreement, and placing arbitration agreements in a class apart from any contract." *Id.* at 1098 (quotations omitted) (citing *Kindred Nursing*, 137 S. Ct. at 1427; *Casarotto*, 517 U.S. at 688). This reasoning would be persuasive if either (1) § 432.6 regulated the enforcement or validity of arbitration agreements or (2) *Kindred Nursing* or *Casarotto* held that regulation of pre-agreement conduct was preempted by the FAA. But neither condition is met.

As discussed, § 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute. Rather, while mandating that employer-employee arbitration agreements be consensual, it specifically provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Lab. Code § 432.6(f).

Placing a pre-agreement condition on the waiver of "any right, forum, or procedure" does not undermine the validity or enforceability of an arbitration agreement—its effects are aimed entirely at conduct that takes place prior to the existence of any such agreement. Both *Kindred Nursing* and *Casarotto* analyzed state rules that rendered an executed agreement to arbitrate invalid or unenforceable. Neither preempted a rule that regulated pre-agreement behavior.

Kindred Nursing considered the "clear-statement rule" announced by the Kentucky Supreme Court. 137 S. Ct. at 1426. At issue in that case were two arbitration agreements executed by individuals who were authorized through powers of attorney to act on behalf of others. *Id.* at 1424–25. At least one authorization was broad enough for it to be "impossible to say that entering into an arbitration agreement was not covered." *Id.* at 1426 (quotation omitted and alteration adopted). Despite this, the Kentucky Supreme Court invalidated the arbitration agreements. It explained that "the jury guarantee is the sole right the [Kentucky] Constitution declares 'sacred' and 'inviolate,'" and, as such, "an agent could deprive her principal of an 'adjudication by judge or jury' only if the power of attorney 'expressly so provided.'" *Id.* at 1426 (alteration adopted) (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328–29 (Ky. 2015)). Reversing the Kentucky Supreme Court, *Kindred Nursing* explained that Kentucky's "clear-statement rule" was preempted by the FAA because it "relied on the uniqueness of an agreement to arbitrate as its basis," and "failed to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426, 1426–27 (cleaned up). In so holding, the Court rejected an argument that the FAA does not preempt state rules that govern only the formation of arbitration agreements:

> By its terms, then, the Act cares not only about the "enforce[ment]" of arbitration agreements, but also about their initial "valid[ity]"—that is, about what it takes to enter into them. Or said otherwise: A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made.

Id. at 1428.

It is this passage that the district court and Appellees contend controls the outcome of the present appeal. They focus on the language "what it takes to enter into them" for the proposition that the FAA preempts regulation of pre-agreement behavior. *See Becerra*, 438 F. Supp. 3d at 1096. However, reading this passage in context, the language was not intended to break new jurisprudential ground. The Court itself explained that its conclusion "falls well within the confines of (and goes no further than) present well-established law." 137 S. Ct. at 1429 (quotation and citation omitted). As in all past cases, the court was concerned with "rule[s] selectively finding arbitration contracts invalid because improperly formed." In other words, the Court only addressed pre-agreement behavior to the extent it provided the basis to invalidate *already executed* contracts. It is simply not persuasive to argue, as Appellees do, that the Supreme Court dramatically expanded the preemptive scope of the FAA in seven words of dicta—especially considering this dicta is nestled within language that explicitly references executed arbitration agreements ("the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'" and "[a] rule selectively

finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made," *id.* at 1428). Reading this passage in the broader context of *Kindred Nursing* also has the advantage of better according with the text of the FAA, which mandates that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. In contrast, Appellees' assertion that *Kindred Nursing* recognizes FAA preemption for instances in which there is no agreement to arbitrate at issue would expand the scope of the FAA far beyond its text. Appellees' argument amounts to asserting field preemption, which stands in direct contradiction to the Court's holding in *Volt*. *Volt*, 489 U.S. at 477 ("The FAA . . . does [not] reflect a congressional intent to occupy the entire field of arbitration."). Absent binding precedent demanding a contrary conclusion, we decline to depart from the clear text of the FAA.

For similar reasons, *Casarotto* does not support Appellees' case. *Casarotto* considered a Montana statute that "declare[d] an arbitration clause unenforceable unless notice that the contract is subject to arbitration is typed in underlined capital letters on the first page of the contract." 517 U.S at 683 (quotation omitted and alterations adopted). The Court held that the Montana statute was preempted by the FAA, concluding it "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 687. *Casarotto* is an example of straightforward conflict preemption analysis of a state rule that declared an executed arbitration agreement invalid. It does not support the proposition that the FAA preempts state regulation of pre-

agreement behavior in the absence of an executed arbitration agreement.

California Labor Code § 432.6 neither conflicts with the language of § 2 of the FAA nor creates a contract defense by which executed arbitration agreements may be invalidated or not enforced. Under the "impossibility" preemption framework, § 432.6 is not preempted by the FAA.

2

Even though § 432.6 does not directly conflict with the FAA, it may still be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The first step in the obstacle preemption analysis is to establish what precisely were the purposes and objectives of Congress in enacting the FAA. A thorough review of the historical context of the FAA, its legislative history, and subsequent Supreme Court jurisprudence demonstrates that Congress was focused on the enforcement and validity of consensual written agreements to arbitrate and did not intend to preempt state laws requiring that agreements to arbitrate be voluntary.

Congress passed the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985). Prior to the FAA, "courts considered agreements to arbitrate unenforceable executory contracts" and breaching an agreement to arbitrate generally "resulted in nominal legal damages." Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 Fla. L. Rev. 711, 719 (2015). The refusal to enforce arbitration agreements stemmed from American adoption of the English common law doctrines of ouster and

revocability. *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1225–26 (2013). The former declared illegal any agreement that reduced statutory judicial jurisdiction and the latter allowed a party to withdraw their consent to arbitrate at any time prior to the arbitrator's ruling. *See id.*; *see also Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874) ("[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."). In the decades preceding the passage of the FAA, ouster and revocability had become unloved children of English common law. *See* Horton, *supra*, at 1225–26 ("By the dawn of the twentieth century, the ouster and revocability doctrines were condemned by judges, lawyers, and business groups as anomalous and unjust." (cleaned up)); *see also Meacham v. Jamestown, F. & C.R. Co.*, 211 N.Y. 346, 354 (1914) (Cardozo, J., concurring) ("It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.").

The context of the FAA's passage was thus the widespread opposition to English common law doctrines that mandated that consensual written arbitration agreements were invalid and unenforceable. Securing the validity and enforceability of arbitration agreements was precisely what Congress intended to achieve through the FAA. The House Report accompanying its passage declared: "The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction [of] admiralty, or which may be the subject of litigation in the Federal courts." H.R. Rep. No. 68-96, at 1 (1924). The Senate Report agreed, describing the purpose of the statute as "[t]o make valid and enforceable written provisions or agreements for arbitration

of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." S. Rep. No. 68-536, at 1 (1924). The House Report also makes explicit that the FAA was laser-focused on ensuring that people who agreed to arbitrate a dispute were held to their word:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

H.R. Rep. No. 68-96, at 1.

In the almost-century since it became law, the Supreme Court has expounded on the congressional purpose animating the FAA, explaining that its passage signified "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Court has reiterated this principle time and again over the years, but each time, without fail, it has noted that the FAA enshrined the enforceability and validity of consensual, written agreements to arbitrate disputes. *See Concepcion*, 563 U.S. at 344 ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.") (cleaned up); *see also, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1621; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *Volt*, 489 U.S. at 478; *Dean Witter Reynolds*, 470 U.S. at 219. The

statute, legislative history, and caselaw thus all agree that the purpose of the FAA is to ensure that written, consensual agreements to arbitrate disputes are valid and enforceable as a matter of contract.

In light of Congress' clear purpose to ensure the validity and enforcement of consensual arbitration agreements according to their terms, it is difficult to see how § 432.6, which in no way affects the validity and enforceability of such agreements, could stand as an obstacle to the FAA. Irrespective of AB 51's enforcement mechanisms, an employee may attempt to void an arbitration agreement that he was compelled to enter as a condition of employment on the basis that it was not voluntary. If a court were to find that such a lack of voluntariness is a generally applicable contract defense that does not specifically target agreements to arbitrate, the arbitration agreement may be voided in accordance with saving clause jurisprudence. This specific question is not before us, and we do not answer it.

The district court focused its obstacle preemption analysis on the potential civil and criminal liability AB 51 imposes on employers who include a compulsory arbitration clause as a condition of employment. *See Becerra*, 438 F. Supp. 3d at 1099–1100. Appellees dedicate a substantial portion of their brief to the same concern. As explained more fully below, we agree that the civil and criminal penalties associated with AB 51 stand as an obstacle to the purposes of the FAA and are therefore preempted. Outside of their concerns over potential civil and criminal liability, Appellees' sole remaining argument for obstacle preemption is that § 432.6 interferes with their "federally protected right to enter into arbitration agreements with their workers." Of course, nothing in § 2 grants an employer the right to force arbitration agreements on unwilling employees. The only

"federally protected right" conferred by the FAA is the right to have consensual agreements to arbitrate enforced according to their terms. Because nothing in § 432.6 interferes with this right, it does not stand as an obstacle to the purposes and objectives of the FAA.

D

The dissent expounds on the expansive nature of FAA preemption and details the perceived invidious intent of the California Legislature.[3] Yet for all its colorful language, it does not meaningfully engage with the question at the core of this case: Does the text of the FAA or the precedent interpreting it expand the preemptive scope of the statute to situations in which there is no agreement to arbitrate at issue? As explained above, the answer to this question is "no." That answer undergirds our resolution of this case and undermines the entirety of the dissent's argument.

Attempting to escape the conclusion that this case falls outside of existing precedent[4] delineating the preemptive scope of the FAA, the dissent asserts that we "misread[] the clear import" of *Kindred Nursing*, which it claims "confirmed the rule that the FAA invalidates state laws that

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[3] Contrary to the dissent's implications, it is unremarkable that the California Legislature would be cognizant of relevant federal law and make efforts to draft a statute that avoided preemption. Indeed, one could argue that writing and passing laws that are not preempted is a core duty of a state legislature.

[4] Our dissenting colleague asserts that "we don't need to wait until the next Supreme Court reversal" to hold that AB 51 is preempted by the FAA. To the contrary, basic principles of federalism caution us against expanding the preemptive scope of a federal statute absent explicit instruction from the high court.

impede the formation of arbitration agreements." A review of the cited portion of *Kindred Nursing* reveals no such broad holding. Rather, the Supreme Court is explicit that the FAA preempts a state rule that "selectively find[s] arbitration contracts invalid because improperly formed." *Kindred Nursing*, 137 S. Ct. at 1428. It was not happenstance, as the dissent asserts, that *Kindred Nursing* evaluated a state rule that declared invalid certain *executed* arbitration agreements. Instead, the existence of an agreement to arbitrate was crucial to its holding. It was the very fact that the Kentucky rule invalidated an executed agreement to arbitrate that ran afoul of the FAA's mandate that "an arbitration agreement . . . be treated as 'valid, irrevocable, and enforceable.'" *Id.* (quoting 9 U.S.C. § 2). The dissent is correct to explain that *Kindred Nursing* emphasized that the FAA preempts rules affecting the initial validity of arbitration agreements, but that is not at issue in this case. As explained above, we are presented with a state rule that applies only in the absence of an agreement to arbitrate and that *expressly provides* for the validity and enforceability of agreements to arbitrate. The text of the FAA does not preempt such a rule, and, despite the dissent's attempt to shoehorn its argument into the holding of *Kindred Nursing*, nor does the governing caselaw.

E

The regulation of pre-agreement employer behavior in § 432.6 does not run afoul of the FAA, but the civil and criminal sanctions attached to a violation of that section do. They stand as an obstacle to the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, and are therefore preempted by the FAA.

As mentioned, § 433 of the California Labor Code makes any violation of that article, including § 432.6, a misdemeanor offense. Labor Code § 23 makes any misdemeanor within the Labor Code "punishable by imprisonment in a county jail, not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or both." Cal. Lab. Code § 23. Additionally, AB 51 added § 12953 to the California Government Code, which makes a violation of Labor Code § 432.6 "an unlawful employment practice." This, in turn, subjects an individual or entity who violates § 432.6 to civil sanctions including state investigation and private litigation. *See* Cal. Gov't Code §§ 12960–12965.

Regulation of pre-agreement conduct in § 432.6 differs significantly from these enforcement mechanisms. Section § 432.6 is not preempted by the FAA because it is solely concerned with pre-agreement employer behavior, but the accompanying enforcement mechanisms that sanction employers for violating § 432.6 necessarily include punishing employers for entering into an agreement to arbitrate.[5] A state law that incarcerates an employer for six months for entering into an arbitration agreement "directly conflicts with § 2 of the FAA." *Casarotto*, 517 U.S. at 687. An arbitration agreement cannot simultaneously be "valid" under federal law and grounds for a criminal conviction under state law. The potential civil sanctions provided by Government Code § 12953 are also preempted. We

[5] Section 432.6(a) forbids employers from requiring an arbitration agreement as a condition of employment regardless of whether an arbitration agreement is executed. Similarly, an employer violates § 432.6(b) by threatening to retaliate against an employee for refusing to sign an arbitration agreement, even if the employee subsequently agrees to sign.

conclude that, much like a state may not "prohibit[] outright the arbitration of a particular type of claim," *Kindred Nursing*, 137 S. Ct. at 1426 (quotation omitted), it also may not impose civil or criminal sanctions on individuals or entities for the act of executing an arbitration agreement. Therefore, we hold that Government Code § 12953 and Labor Code § 433 are preempted to the extent that they apply to executed arbitration agreements covered by the FAA.[6]

IV

Appellees have not established that they are likely to succeed on the merits of their complaint for declaratory and injunctive relief, and, therefore, "we need not consider the other [preliminary injunction] factors." *Azar*, 950 F.3d at 1083. Because the district court erred in concluding that § 432.6(a)–(c) were preempted by the FAA it "necessarily abuse[d] its discretion" in granting Appellees a preliminary injunction. *adidas Am.*, 890 F.3d at 753 (quotation omitted). Accordingly, the preliminary injunction is vacated, and the case is remanded for further proceedings consistent with this opinion.

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[6] Appellees assert that enjoining application of § 433 to agreements covered by the FAA would amount to a "judicial rewrite of [California's] statutory scheme." Not so. It is well settled that "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by "for example, . . . enjoin[ing] only the unconstitutional applications of a statute while leaving other applications in force . . . ." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006); *see also Volt*, 489 U.S. at 477 (a state law that violates the FAA is "pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quotation omitted)).

V

We **REVERSE IN PART** the trial court's conclusion that AB 51 is preempted by the FAA, **VACATE** the preliminary injunction, and **REMAND** for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

IKUTA, Circuit Judge, dissenting:

Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA. This time, California has enacted AB 51, which has a disproportionate impact on arbitration agreements by making it a crime for employers to require arbitration provisions in employment contracts. Cal. Lab. Code §§ 432.6(a)–(c), 433; Cal. Gov't Code § 12953. And today the majority abets California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it bars only nonconsensual agreements. The majority's ruling conflicts with the Supreme Court's clear guidance in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1428–29 (2017), and creates a circuit split with the First and Fourth Circuits. Because AB 51 is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent, I dissent.

I

By its terms, the FAA ensures that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the

revocation of any contract." 9 U.S.C. § 2. The FAA preempts any state law that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Supreme Court has long recognized the FAA's broad purpose: it declares "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), and embodies a "national policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). When faced with a principle of "state law, whether of legislative or judicial origin," that burdens arbitration and that "takes its meaning precisely from the fact that a contract to arbitrate is at issue," we must strike it down as preempted by the FAA. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987). And even when a state law generally applies to a range of agreements, the FAA preempts the law if it "interferes with fundamental attributes of arbitration" and obstructs the purpose of the FAA. *Concepcion*, 563 U.S. at 344. As the Supreme Court has explained, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

AB 51 is just such a state law that obstructs the purpose of the FAA. The history of AB 51 reveals it was the culmination of a many-year effort by the California legislature to prevent employers from requiring an arbitration provision as a condition of employment. California has long known that the FAA preempted laws that made arbitration agreements unenforceable, because the

Supreme Court has so often struck down its anti-arbitration legislation or judge-made rules.[1]

In light of these rulings, the California legislature took a different approach to anti-arbitration legislation. In 2015, it passed Assembly Bill 465, which banned employers from requiring arbitration agreements as a condition of employment and rendered unenforceable any offending contract. Text of AB 465, 2015–16 Cal. Leg., Reg. Sess. (2015).[2] California Governor Jerry Brown vetoed this bill on the ground that such a "blanket ban" had been "consistently struck down in other states as violating the Federal Arbitration Act" and noted that the California Supreme Court and United States Supreme Court had invalidated similar legislation. Governor's Veto Message for AB 465, 2015–16 Cal. Leg., Reg. Sess. (2015); *see, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530–31 (2012) (per curiam); *Perry*, 482 U.S. at 484, 489; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). That same year, the Supreme Court overruled a California court's interpretation of an arbitration agreement, because it did not place arbitration contracts "on equal footing with all other

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[1] *See, e.g.*, *Concepcion*, 563 U.S. at 352 (holding that the FAA preempted the California rule that contract provisions disallowing classwide arbitration are unconscionable); *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (holding that the FAA preempted a California law giving a state agency primary jurisdiction over a dispute involving the California Talent Agency Act despite the parties' agreement to arbitrate such disputes); *Perry*, 482 U.S. at 484, 489 (holding that the FAA preempted a state statute permitting litigation of wage collection actions despite the existence of any private agreement to arbitrate).

[2] The relevant legislative history referenced here is publicly available on the California Legislative Information website: https://leginfo.legislature.ca.gov/.

contracts." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58–59 (2015) (quoting *Buckeye*, 546 U.S. at 443). This decision was followed by yet another defeat of state anti-arbitration legislation when a California court held that the FAA preempted another California statute, which had made agreements to arbitrate certain state civil rights claims unenforceable. *See Saheli v. White Mem'l Med. Ctr.*, 21 Cal. App. 5th 308, 323 (2018).

Undeterred, the state legislature tried again in 2018 and passed AB 3080, which prohibited an employer from requiring an employee to waive a judicial forum as a condition of employment. Text of AB 3080, 2017–18 Cal. Leg., Reg. Sess. (2018). Governor Brown exercised his veto power again, explaining that AB 3080 "plainly violates federal law." Governor's Veto Message for AB 3080, 2017–18 Cal. Leg., Reg. Sess. (2018). Governor Brown cited the "clear" direction from the United States Supreme Court in *Imburgia*, 136 S. Ct. at 468, and *Kindred Nursing*, 137 S. Ct. at 1428.

Twice-vetoed but still undeterred, the California Assembly introduced AB 51 in December 2018. This bill, now before us, took the same approach as the vetoed AB 3080: instead of barring enforcement of arbitration agreements offered as a condition of employment, it instead penalized the formation or attempted formation of such agreements. Text of AB 51, 2019–20 Cal. Leg., Reg. Sess. (2019); *see also* Cal. Lab. Code §§ 432.6(a)–(c), 433. While it prohibited an employer from requiring an applicant for employment to enter an arbitration agreement, it provided that an executed arbitration agreement was nevertheless enforceable. *See* Cal. Lab. Code § 432.6(a)–(b), (f).

Accompanying legislative reports reveal the purpose of AB 51 and explain the oddity of penalizing the formation of

arbitration agreements while permitting their enforcement. The California Senate Judiciary Committee report on AB 51 recognized that "there is little doubt that, if enacted, the bill would be challenged in court and there is some chance, under the current composition of the U.S. Supreme Court, that it would be found preempted." Senate Judiciary Committee Report at 7, 2019–20 Cal. Leg., Reg. Sess. (2019). These reports acknowledge candidly that, in light of such anticipated scrutiny, "AB 51 seeks to sidestep the preemption issue." Senate Labor, Public Employment and Retirement Committee Report at 4, 2019–20 Cal. Leg., Reg. Sess. (2019). The reports assured legislators that AB 51 "successfully navigates around" Supreme Court precedent and "avoids preemption by applying only to the condition in which an arbitration agreement is made, as opposed to banning arbitration itself." Senate Judiciary Committee Report at 8; Assembly Labor and Employment Committee Report at 3, 2019–20 Cal. Leg., Reg. Sess. (2019). AB 51's author noted that this contrivance gave the legislature "a reasoned case" that the bill would not be preempted, given that "[t]here has not been a preemption case in the absence of an arbitration agreement." Senate Judiciary Committee Report at 7; Assembly Labor and Employment Committee Report at 3. Another key component of the "reasoned case" for avoiding preemption, according to the legislators, was that AB 51 prevented "forced arbitration," which was not the "result of mutual consent" but was imposed on employees "against their will." Assembly Judiciary Committee Report at 5, 2019–20 Cal. Leg., Reg. Sess. (2019); Senate Judiciary Committee Report at 4. According to the legislators, this rationale was consistent with Supreme Court cases stressing the fundamental rule that arbitration agreements be consensual. Senate Judiciary Committee Report at 8 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010)).

California's new governor, Gavin Newsom, signed the bill into law, even though AB 51 was identical in many respects to vetoed AB 3080. *See id.* at 9.

II

A

As this history suggests, the California legislature developed AB 51 with the focused intent of opposing arbitration and sidestepping the FAA's preemptive sweep by penalizing the formation, or attempted formation, of disfavored arbitration agreements but not interfering with the enforcement of such agreements.

Specifically, under Section 432.6 of the California Labor Code, an employer "shall not, as a condition of employment . . . require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of the California Fair Employment and Housing Act [(FEHA)]" or the California Labor Code, "including the right to file and pursue a civil action or a complaint with . . . any court." Cal. Lab. Code § 432.6(a). Thus, employers may not require employees to sign a standard employment contract that includes an arbitration provision, even if the contract includes a voluntary opt-out clause. *See* Cal. Lab. Code § 432.6(c). Moreover, an employer cannot refuse to hire a prospective employee who declines to enter into an arbitration agreement or otherwise "threaten, retaliate or discriminate against" such an employee. Cal. Lab. Code § 432.6(b). Violating Section 432.6 amounts to an "unlawful employment practice" for which aggrieved employees and the state may bring civil suits against employers. *See* Cal. Gov't Code §§ 12953, 12960. Violating Section 432.6 also constitutes a criminal offense. *See* Cal. Lab. Code § 433. Should the employee sign such

an employment contract, however, the arbitration agreement it contains is perfectly enforceable because Section 432.6(f) provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act." Cal. Lab. Code § 432.6(f).

In short, AB 51 criminalizes offering employees an agreement to arbitrate, even though the arbitration provision itself is lawful and enforceable once the agreement is executed. The question is, does this too-clever-by-half workaround actually escape preemption? The majority says it does, but this is clearly wrong: under Supreme Court precedent, Section 432.6 is entirely preempted by the FAA.

B

Although the Supreme Court has not addressed California's specific legislative gimmick—criminalizing contract formation if it includes an arbitration provision—this is not surprising, given that California designed the gimmick to sidestep any existing Supreme Court precedents. But even so, the Supreme Court has made it clear that the FAA preempts this type of workaround, which is but the latest of the "great variety of devices and formulas" disfavoring arbitration. *See Concepcion*, 563 U.S. at 342 (cleaned up).

As a threshold matter, California's circumvention exemplifies the exact sort of "'hostility to arbitration' that led Congress to enact the FAA." *Kindred Nursing*, 137 S. Ct. at 1428 (quoting *Concepcion*, 563 U.S. at 339); *see also Buckeye*, 546 U.S. at 443. The Supreme Court has made clear that the FAA displaces not only state laws that discriminate on their face against arbitration, but also those that "covertly accomplish[] the same objective," *Kindred*

Nursing, 137 S. Ct. at 1426. Indeed, even if state laws are "generally applicable," the FAA preempts them where "in practice they have a 'disproportionate impact' on arbitration." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) (quoting *Concepcion*, 563 U.S. at 341–342). AB 51 is the poster child for covertly discriminating against arbitration agreements and enacting a scheme that disproportionately burdens arbitration.

More specifically, Supreme Court precedent makes clear that the FAA preempts laws like AB 51 that burden the formation of arbitration agreements. Long ago, the Supreme Court held that the FAA preempted a Montana law making an arbitration clause unenforceable unless it had a specific type of notification on the first page of the contract. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Casarotto*, the state supreme court reasoned—much like California here—that this notice requirement did not "undermine the goals and policies of the FAA" because the "notice requirement did not preclude arbitration agreements altogether" but instead ensured that arbitration agreements had to be entered "knowingly." *Id.* at 685 (quoting *Casarotto v. Lombardi*, 268 Mont. 369, 381 (1994)). The Court rejected this reasoning. *Id.* at 688.

Kindred Nursing has now confirmed the rule that the FAA invalidates state laws that impede the formation of arbitration agreements. In *Kindred Nursing*, the Court struck down the Kentucky Supreme Court's "clear-statement rule" which provided that a person holding a power of attorney for a family member could not enter into an arbitration agreement for that family member, unless the power of attorney gave the person express authority to do so. 137 S. Ct. at 1425–26. The Supreme Court held that this clear-statement rule—which imposed a burden only on contract

formation—violated the FAA, because it "singles out arbitration agreements for disfavored treatment." *Id.* at 1425.

The majority attempts to distinguish *Kindred Nursing* on the ground that it addresses "pre-agreement behavior to the extent it provided the basis to invalidate *already executed* contracts." Majority at 20. This misreads the clear import of the case. In *Kindred Nursing*, the parties opposing arbitration, like the majority here, advanced an argument "based on the distinction between contract formation and contract enforcement." 137 S. Ct. at 1428. According to their argument, Kentucky's clear-statement rule "affects only contract-formation, because it bars agents without explicit authority from entering into arbitration agreements." *Id.* The opponents argued (like the majority here) that "the FAA has no application to contract formation issues" and claimed that the "FAA's statutory framework applies only *after* a court has determined that a valid arbitration agreement was formed." *Id.* (cleaned up). Although the opponents acknowledged that the FAA "requires a State to enforce all arbitration agreements (save on generally applicable grounds) once they have come into being," they claimed (like the majority here) that "States have free rein to decide—irrespective of the FAA's equal-footing principle—whether such contracts are validly created in the first instance." *Id.*

The Court expressly rejected these arguments. *Id.* "By its terms," the Court explained, the FAA "cares not only about the enforcement of arbitration agreements, but also about their initial validity—that is, about what it takes to enter into them." *Id.* (cleaned up). Because the Kentucky rule "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements" and "thus flouted the

FAA's command to place those agreements on an equal footing with all other contracts," the FAA preempted Kentucky's rule. *Id.* at 1429. This common-sense conclusion that state law cannot impede parties' abilities to enter arbitration agreements fit "well within the confines of (and goes no further than) present well-established law." *Id.* (quoting *Imburgia*, 577 U.S. at 58). To hold otherwise, the Court explained, would render the FAA "helpless to prevent even the most blatant discrimination against arbitration." *Id.* In reaching this conclusion, the Court put no weight on the fact that the arbitration agreement at issue in *Kindred Nursing* had already been executed.[3] Rather, *Kindred Nursing*'s bottom line is that a state cannot single out arbitration agreements by imposing special limiting rules at the formation stage. *Id* at 1428–29.

Kindred Nursing's holding that the FAA preempts rules that burden the formation of an arbitration agreement, *see* 137 S. Ct. at 1428–29, applies equally to AB 51, which is intentionally designed to burden and penalize an employer's formation, or attempted formation, of an arbitration agreement with employees. *See* Cal. Lab. Code § 432.6(a)–(c); *see also* Cal. Lab. Code § 433; Cal. Gov't Code § 12953. In upholding AB 51, which "specially impede[s] the ability of [employers] to enter into arbitration agreements" and

[3] The majority's argument that "the existence of an agreement to arbitrate was crucial" to *Kindred Nursing*, Majority at 27, is baseless; instead, the Supreme Court focused on the FAA's applicability to contract formation, including state rules that barred specified individuals from entering into arbitration agreements. *See, e.g.*, 137 S. Ct. at 1428–29 (noting that if the FAA did not apply to rules impeding contract formation, a state would be free to hold that everyone was incompetent to enter into an arbitration agreement, which would render the FAA meaningless). AB 51 is such a rule impeding contract formation, as it criminalizes employers' attempts to enter into an arbitration agreement.

"thus flout[s] the FAA's command to place those agreements on an equal footing with all other contracts," *Kindred Nursing*, 137 S. Ct. at 1429, the majority directly conflicts with the rule stated in *Kindred Nursing*.

In addition to conflicting with *Kindred Nursing*, the majority's ruling today creates a split with two of our sister circuits. Long before *Kindred Nursing* reached its common-sense conclusion, our sister circuits prevented state efforts like California's that attempted to sidestep the FAA while disfavoring arbitration. The First Circuit held that the FAA preempted Massachusetts regulations that prohibited securities firms from requiring clients to agree to arbitration "as a nonnegotiable condition precedent to account relationships." *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1117, 1125 (1st Cir. 1989). Even if this regulation did not invalidate the arbitration agreements themselves, the First Circuit rejected as "too clever by half" the state's attempt to regulate parties' conduct instead of the parties' agreements. *Id.* at 1122–23.[4] Applying well-established preemption principles, *Connolly* reasoned that "[s]tate law need not clash head on with a federal enactment in order to be preempted." *Id.* *Connolly* explained that the threatened loss of a business license for offering clients a standard agreement including an arbitration provision was "an obstacle of greater proportions even than the chance that, in

[4] This held true even though the regulations would lead to enforcement even in the absence of any executed arbitration agreement. The regulations proscribed "[r]equiring . . . that a customer . . . execute" a non-negotiable arbitration provision, prohibited "[r]equesting . . . that a customer . . . execute" an arbitration provision without disclosing that it cannot be non-negotiable, and even prohibited "[r]equesting . . . that a customer . . . execute" an arbitration provision without disclosing its effect. *Connolly*, 883 F.2d at 1125 (quoting 950 Mass. Code Regs. § 12.204(G)(1)(a)–(c) (1988)).

a given dispute, an arbitration agreement might be declared void." *Id.* at 1124. Thus, the regulations were preempted as "at odds with the policy which infuses the FAA." *Id.*

The Fourth Circuit similarly held that the FAA preempted a Virginia law that made it unlawful for automobile manufacturers and distributors to fail to include a particular clause in franchise agreements. *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990). That clause would provide that any contract provision that "denies access to the procedures, forums, or remedies" provided by state law "shall be deemed to be modified to conform to such laws or regulations." *Id.* (quoting Va. Code Ann. § 46.1-550.5:27). As interpreted by the court, the statute forbade "only nonnegotiable arbitration provisions and not negotiable arbitration agreements." *Id.* Analogizing to *Connolly*, the Fourth Circuit held that the statute conflicted with the FAA because it "essentially prohibited nonnegotiable arbitration agreements." *Id.*

AB 51's contrived approach closely tracks the impermissible workarounds disapproved of by the First and Fourth Circuits. *See Connolly*, 883 F.2d at 1122; *Saturn*, 905 F.2d at 724. Without even acknowledging the existence of this conflicting authority, and contrary to our rule that we may not create a direct conflict with other circuits "[a]bsent a strong reason to do so," *see United States v. Cuevas-Lopez*, 934 F.3d 1056, 1067 (9th Cir. 2019) (quoting *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987)), the majority silently creates a circuit split that will require en banc review or Supreme Court intervention to resolve, *see*

Hart v. Massanari, 266 F.3d 1155, 1169, 1171 (9th Cir. 2001); *see also* Fed. R. App. P. 35(b)(1)(A)–(B).[5]

Taking into account these precedents and the broad preemptive scope of the FAA, it is clear that the FAA preempts AB 51, which prohibits employers from entering into arbitration agreements with their employees as a condition of employment. Under *Kindred Nursing*, such a rule is invalid, 137 S. Ct. at 1428–29, and AB 51 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

III

The contrary arguments raised by California and the majority are not persuasive.

A

First, California and the majority claim that AB 51 does not pose an obstacle to the FAA because it is simply a prohibition against so-called "forced arbitration." Under this theory, AB 51 seeks to protect employees from involuntary contracts forced upon them by employers. According to the majority, California enacted AB 51 "to assure that entry into an arbitration agreement by an employer and employee is mutually consensual and to declare that compelling an

[5] Although the majority claims the dissent "does not meaningfully engage" with the core question whether the preemptive scope of the FAA extends "to situations in which there is no agreement to arbitrate at issue," Majority at 26, it is the majority that dodges this core question by ignoring our sister circuits' rulings that the FAA does indeed preempt state laws that impede parties from freely entering into arbitration agreements.

unwilling party to arbitrate is an unfair labor practice." Majority at 8. These guardrails protecting employees from unwanted arbitration provisions do not interfere with the FAA, the majority reasons, because nothing in 9 U.S.C. § 2 "grants an employer the right to force arbitration agreements on unwilling employees." Majority at 25. The majority's reasoning parrots the assurances offered by California legislators that AB 51 is consistent with the Supreme Court's instruction that "consent is the touchstone of arbitration agreements" and that AB 51 merely ensures "employees may *choose* to waive their rights in order to get or keep a job, but they are never *forced* to." Senate Judiciary Committee Report at 8.

There is no merit to this argument, which misunderstands basic principles of California contract law, Supreme Court caselaw regarding consent in arbitration cases, and AB 51 itself. Contrary to the majority, a contract may be "consensual," as that term is used in contract law, even if one party accepts unfavorable terms due to unequal bargaining power.

It is a basic principle of contract law that a contract is not enforceable unless there is mutual, voluntary consent. *See, e.g.*, Cal. Civ. Code §§ 1565, 1567; *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 789 (2019); *Morrill v. Nightingale*, 93 Cal. 452, 455 (1892). It has long been established that parties to a contract are generally deemed to have consented to all the terms of a contract they sign, even if they have not read it. *See, e.g.*, *Marin Storage & Trucking Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049 (2001); *Greve v. Taft Realty Co.*, 101 Cal. App. 343, 351–52 (1929). This is true even if the contract at issue is an adhesion contract, defined by California courts as "a standardized contract, which, imposed and drafted by the

party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it," *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 694 (1961). Despite unequal bargaining power, "a contract of adhesion is fully enforceable according to its terms unless certain other factors are present," such as when a provision "does not fall within the reasonable expectations of the weaker or 'adhering' party" or when a provision "is unduly oppressive or unconscionable." *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 819–20 (1981) (per curiam) (cleaned up). And although adhesion contracts do not fit the "classical model of 'free' contracting by parties of equal or near-equal bargaining strength," they are an "inevitable fact of life for all citizens." *Id.* at 817–818.

Of course, mandatory arbitration provisions in employment contracts of adhesion are not enforceable if the provisions are procedurally and substantively unconscionable, or otherwise unenforceable under generally applicable contract rules. *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111, 125–26 (2019). Unequal bargaining power, "economic pressure," "sharp practices," and "surprise" can help establish procedural unconscionability. *Id.* at 126–29 (cleaned up). Moreover, if a party is forced to sign a contract by threats or physical coercion, for instance, the contract would lack mutual consent and be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Therefore, there is no risk of employers forcing arbitration agreements on unwilling employees, as those terms are understood in California contract law. Majority at 8, 25. AB 51 does nothing to change these basic principles.

In short, under California law, an employee "consents" to an employment contract by entering into it, even if the

contract was a product of unequal bargaining power and even if it contains terms (such as an arbitration provision) that the employee dislikes, so long as the terms are not invalid due to unconscionability or other generally applicable contract principles. An employee's preference for litigating disputes with an employer, without more, does not make an arbitration agreement nonconsensual.

Because the parties to a contract are deemed to consent to its terms, the "basic precept that arbitration 'is a matter of consent, not coercion,'" means only that courts must "ensure that 'private arbitration agreements are enforced according to their terms'" even in the face of state laws imposing different requirements on the contracting parties. *Stolt-Nielsen*, 559 U.S. at 681–682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989)). Thus, this fundamental rule of consent means only that "the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,'" *Volt*, 489 U.S. at 478 (quoting *Southland*, 465 U.S. at 10), and also preempts any similar judge-made rules of contract construction or public policy that seek "ends other than the intent of the parties," such as a rule "preferring interpretations that favor the public interest," *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019). Therefore, contrary to California and the majority, the concept of "consent" in the Supreme Court's arbitration decisions is not violated when there is economic pressure to enter into an agreement with disadvantageous terms, or when the party to the contract with lesser bargaining power is subjectively unhappy with those terms.

This principle applies equally to employment contracts and employment-related lawsuits. In upholding a contract

provision requiring arbitration of Age Discrimination in Employment Act claims, the Supreme Court rejected the argument that the agreement was invalid due to the "unequal bargaining power between employers and employees." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32–33 (1991). The Court stated that "[m]ere inequality in bargaining power" is not sufficient to refuse to enforce an arbitration agreement in the employment context, because "arbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 33 (quoting 9 U.S.C. § 2).

Accordingly, there is no support for California's description of AB 51 as simply an assurance that employees will not be the victims of forced arbitration or be compelled to arbitrate claims against their wills. Majority at 8, 25. For the same reason, there is no support for the majority's view that AB 51 merely takes away an employer's ability "to force arbitration agreements on unwilling employees." Majority at 25. Rather, AB 51 disproportionately targets and burdens employers offering arbitration agreements as a condition of employment, which "does not place arbitration contracts on equal footing with all other contracts" and therefore fails to give "due regard to the federal policy favoring arbitration." *Imburgia*, 577 U.S. at 58 (cleaned up). Therefore, even if AB 51 applies to a handful of other agreements in addition to arbitration agreements, its interference with parties' abilities to agree to arbitration stands as an obstacle to the "'accomplishment and execution of the full purposes and objectives of Congress,'" and "thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344, 352 (quoting *Hines*, 312 U.S. at 67).

B

Second, the majority attempts to rescue its opinion by ruling that AB 51's civil and criminal penalties under Section 12953 of the California Government Code and Section 433 of the California Labor Code "are preempted to the extent that they apply to executed arbitration agreements covered by the FAA." Majority at 29. The majority acknowledges that the FAA preempts any rule that imposes liability for conduct resulting in an executed arbitration agreement. Majority at 28–29. In case the effect of this novel holding is not clear, it means that if the employer offers an arbitration agreement to the prospective employee as a condition of employment, and the prospective employee executes the agreement, the employer may not be held civilly or criminally liable. But if the prospective employee refuses to sign, then the FAA does not preempt civil and criminal liability for the employer under AB 51's provisions. In other words, the majority holds that if the employer successfully "forced" employees "into arbitration against their will," Senate Judiciary Committee Report at 4, the employer is safe, but if the employer's efforts fail, the employer is a criminal.

Despite holding that AB 51 is preempted in part, the majority's unusual bifurcated approach still conflicts with the FAA. Most important, it does not "place arbitration agreements upon the same footing as other contracts." *Southland*, 465 U.S. at 16, n.11 (cleaned up). Until AB 51, neither the California legislature nor any state court has held that a person can be prosecuted for attempting to enter into a legal and enforceable agreement. But that is the import of the majority's ruling today. Because, as the majority acknowledges, an executed arbitration agreement is valid and enforceable (except on grounds that are generally

applicable to all contracts), the employer's conduct proscribed by Section 432.6—offering an employment agreement that requires arbitration—results in a contract that is both lawful and enforceable. But the majority upholds Section 432.6 and its associated sanctions so long as they are not applied to conduct leading to executed arbitration agreements. This holding means that an employer's attempt to enter into an arbitration agreement with employees is unlawful, but a completed attempt is lawful. This tortuous ruling is analogous to holding that a statute can make it unlawful for a dealer to attempt to sell illegal drugs, but if the dealer succeeds in completing the drug transaction, the dealer cannot be prosecuted. Needless to say, such a bizarre approach does not apply to any other contracts in California. As such, it is preempted by the FAA for disfavoring arbitration contracts and obstructing the purpose and objectives of the FAA.

IV

In sum, AB 51's transparent effort to sidestep the FAA in order to disfavor arbitration agreements in employment contracts is meritless. By upholding this maneuver, the majority conflicts with *Kindred Nursing*, which held that the FAA invalidates state laws that impede the formation of arbitration agreements. 137 S. Ct. at 1425. The majority also silently splits from our sister circuits, which have held that too-clever-by-half workarounds and covert efforts to block the formation of arbitration agreements are preempted by the FAA just as much as laws that block enforcement of such agreements. So we don't need to wait until the next Supreme Court reversal to know that we must apply those principles here. The majority's bifurcated, half-hearted, and circuit-splitting approach to invalidating AB 51 makes little sense, except to the extent it aims at abetting California in

disfavoring arbitration. Because the appellants here have demonstrated a likelihood of success on the merits and the district court correctly determined that the remaining preliminary injunction factors supported injunctive relief, I would affirm the district court. I therefore dissent.

CHAIRMAN JERROLD NADLER

Press Releases

House Judiciary Committee Advances the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

Bipartisan, Bicameral Legislation Now Heads to the House Floor

Washington, November 17, 2021

Washington, D.C. - Today, the House Judiciary Committee advanced H.R. 4445, the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, by a bipartisan vote of 27-14.

The legislation, introduced by Congresswoman Cheri Bustos (D-IL), empowers sexual assault and harassment survivors by restoring their access to justice and public accountability under the law. By ending forced arbitration in lawsuits involving these claims, survivors of sexual assault or sexual harassment are given the real choice of whether to go to court or to arbitrate their claim. The Senate Judiciary Committee passed the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* by a voice vote on November 4th.

"Yesterday, four survivors of sexual harassment and sexual assault shared their stories with the Committee about their devastating experiences and the

subsequent arbitration process they were forced to endure as a condition of their employment. Today, the Committee acted on those brave women's stories and passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which ends the unjust—and frankly repulsive— system of forced arbitration for survivors of sexual assault or sexual harassment. This is an important step forward for survivors and for millions of more Americans who have been denied their day in court because of forced arbitration clauses. I am particularly proud that this legislation was passed with bipartisan support, sending a clear message to perpetrators that they will be held accountable. I look forward to getting this bill passed on the House floor and onto President Biden's desk without delay," **said Chairman Nadler.**

"The #MeToo movement has chipped away at the culture of secrecy that protects predators and silences survivors -- but ending mandatory arbitration has the power to bring it all crashing down. Whether on a factory floor, in a shop on Main Street or in a corporate office, 60 million Americans have signed away their right to seek real justice and most don't realize it until they try to get help. But survivors of sexual harassment and discrimination in the workplace deserve to have their voices heard. If we want to end sexual harassment in the workplace, we need to take bold and meaningful action now. That's why today, I'm proud that my legislation with Reps. Griffith, Jayapal and Cicilline has passed out of the House Judiciary Committee. Thank you to Judiciary Committee Chairman Jerrold Nadler for his leadership in bringing this bill before the committee today and getting us one step closer to ending forced arbitration for sexual harassment and assault survivors nationwide," **said Congresswoman Bustos.**

The legislation is supported by a broad coalition of public-interest organizations, including the National Alliance to End Sexual Violence, National Center on Domestic and Sexual Violence, National Coalition Against Domestic Violence, National Partnership for Women and Families, and the Rape, Abuse and Incest National Network.

Background:

Yesterday, the House Judiciary Committee held a hearing entitled, "Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows." At the hearing, fours survivors of sexual assault and sexual harassment shared their harrowing experiences and the deep wounds they continue to carry with them to this day. As they explained, after enduring such horrific trauma at the hands of their perpetrators, they were forced to endure further trauma when they sought to hold their assailants accountable in court and found that their only recourse was a secretive arbitration process that was stacked against them.

Eliza Dushku, Actor/Producer & Graduate Student

"To this day whenever my career-- my life's work-- is referenced, my accomplishments as an actor are ignored, and I've been reduced to being Eliza Dushku who was paid off for 'allegedly'being sexually harassed on a TV series. As I hope you understand, this was not the outcome I desired or ever expected, but because of binding arbitration there will never be real justice for me and for countless other victims of sexual harassment."

Tatiana Spottiswoode,Law Student, Columbia Law School

"Forced arbitration is the reason Chishti is able to carry out this on-going campaign of retaliation against me, my family, and probably other victims. Today as I speak here, I am afraid of the consequences for my family that will arise from my speaking out. I have PTSD. I have nightmares. I used to be a very social person – I no longer am. The person who changed my life forever continues to abuse me because forced arbitration gives him the power to do it in secret."

Andowah Newton, New York, NY

"Bolstered and protected by the forced arbitration agreement they attached to my employment agreement, LVMH reacted to my reports of sexual assault and harassment by launching an intense campaign of retaliation, intimidation, and aggressive psychological warfare against me which continues to this day. Reversing the roles, they 4 have treated me like I am the villain, and the predator like he was the victim worthy of LVMH's protection."

Lora Henry, Canton, OH

"I wanted to stop him. So, I gathered all of the courage that I could stomach and filed a lawsuit. But they filed a motion to dismiss because of that "sign here, here and there'arbitration agreement. They stole my right to a jury."

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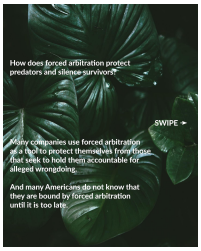

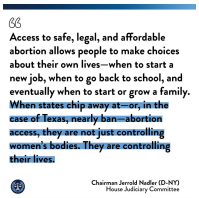

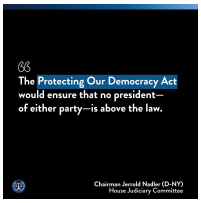

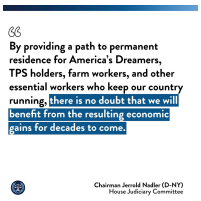

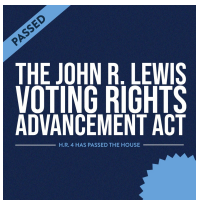

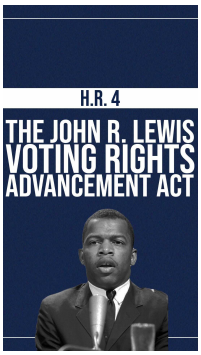

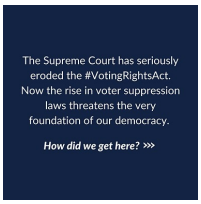

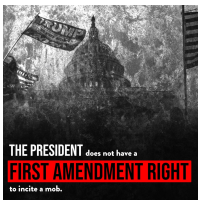

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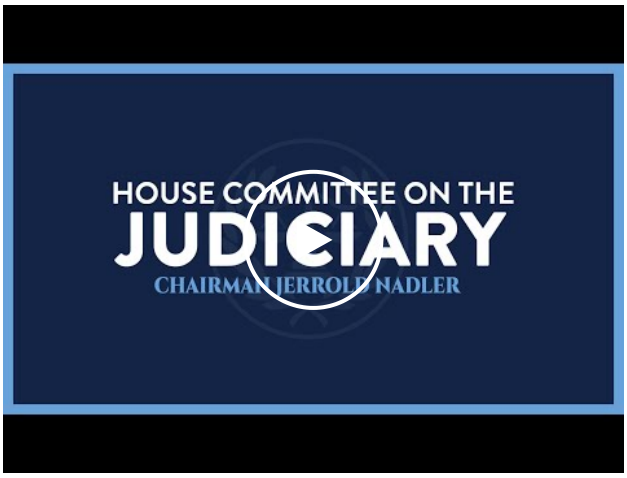

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Relevant California Legislation Covering Non-Disclosure Agreements (NDAs) and Mandatory Arbitration

- **SB 331**, the **"Silenced No More Act"** (Leyva, Stats. 2021, c. 638). expanded Leyva's earlier SB 820 legislation prohibiting non-disclosure agreements (NDAs) from restricting employees in civil or administrative actions from discussing their discrimination or harassment on any protected basis, as of 1/1/22.
- **SB 820**, Senator Connie Leyva (D-Chino) – **Settlement agreements: confidentiality. (Code Civ. Proc. §1001.)** Settlement agreements entered into after 1/1/19 can't prevent the disclosure of facts relating to sexual assault, sexual harassment, or harassment or sex discrimination claims, filed in a civil or administrative action.).
- **SB 1300**, Senator Hannah-Beth Jackson (D-Santa Barbara) – **Unlawful employment practices: discrimination and harassment.** An omnibus bill, which, in relevant part:
    -
    - Adds **Gov. Code § 12964.5** which forbids employers from conditioning employment, continued employment, a raise or bonus on signing an NDA forbidding disclosure of harassment claims, and includes the right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, public prosecutor, law enforcement agency, or any court or other governmental entity about the harassment.
    - Precludes employers from requiring an employee to sign a non-disparagement agreement or other document prohibiting an employee from disclosing information "about unlawful acts in the workplace," including sexual harassment. **(Gov. Code § 12964.5(a)(2)(A)).**
    - Nullifies any such improper "releases" or NDAs as contrary to public policy. **(Gov. Code § 12964.5(b)).** Exempts a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process. **(Gov. Code § 12964.5(c)(1)).** The agreement must be voluntary, deliberate and informed, provides consideration to the employee, and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney. **(Gov. Code § 12964.5(c)(2)).**
- **AB 51,** Gonzalez (D-San Diego) **– Mandatory Arbitration (Lab. Code § 432.6)).** Precludes employers from requiring applicants or current employees to agree as a condition of employment, continued employment or the receipt of any employment-related benefit to waive any right, forum, or procedure related to any violations of the FEHA or the Labor Code, including the right to file a claim with the state or law enforcement agency. The law precludes employers from threatening,

retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refused to consent to the waivers prohibited under this section. It also specifies that any agreement requiring an employee to opt out of a waiver provision or to take any affirmative action to preserve their rights will be considered a condition of employment. The bill applies to any contracts for employment from 1/1/20 onward, but doesn't apply to post-dispute settlement agreements or negotiated severance agreements. It is not intended to affect any agreements otherwise enforceable under the Federal Arbitration Act. It doesn't preclude arbitration agreements for FEHA and Labor Code claims but precludes employers from requiring them as a condition of employment or retaliating against employees who chose not to agree to arbitration.

- Note, in *Chamber of Commerce v. Bonta,* 13 F.4th 766 (9th Cir. 2021), the Ninth Circuit held that Labor Code section 51, which prohibited employers from requiring employees and applicants to waive any right, forum, or procedure established in the California Fair Employment and Housing Act or California Labor Code, as a condition of employment or continued employment, **was not preempted by the Federal Arbitration Act (FAA)!**

November 3rd, 2021

The Honorable Dick Durbin
Chairman
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington DC 20515

The Honorable Chuck Grassley
Ranking Member
Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20515

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary
2141 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
House Committee on the Judiciary
2056 Rayburn House Office Building
Washington, DC 20515

Chairman Durbin, Chairman Nadler, Ranking Member Grassley and Ranking Member Jordan:

We are survivors of sexual harassment or assault and their allies. We write to ask you to end forced arbitration and the silence and abuse it enables. Some of our stories have been shared by others in the media, but our stories will never be heard in a courtroom. Case after case filed by survivors over the last 20 years prove that forced arbitration shields abusers and the institutions that employ them. With this letter, we hope to encourage Congress to put a stop to forced arbitration once and for all by passing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.

S2342: https://www.congress.gov/bill/117th-congress/senate-bill/2342/text?r=3&s=3
HR4445: https://www.congress.gov/bill/117th-congress/house-bill/4445/text?r=1&s=2

Many of the signatories on this letter come from places of privilege and access; we are news anchors, investment bankers, journalists, attorneys, law students and activists, and yet we have no power in the face of forced arbitration. With this letter, we hope to shine a light on this issue, and to remind policy makers that for every one of us, there are millions more survivors in the shadows whose voices have been forever silenced by forced arbitration. Unlike millions of Americans, we can use our platforms to advocate for the passage of this bipartisan, bicameral legislation, which would simply return to survivors the choice of how to pursue accountability against abusers. We believe that survivors deserve the right to tell their own stories and to choose to tell them publicly in a court of law.

Forced arbitration is a secret process in which private companies hand selected by defendants are able to design a system that keeps survivors silent and allows sexual misconduct to go unchecked. What most people don't know when they start a job is that buried in the small print of their employee handbook or in the reams of forms, they are hurriedly asked to sign on their first day of work are words that will forever deprive them of the chance to seek justice if sexually

harassed or assaulted. If a survivor wants to bring a case in a public courtroom, why should an arcane federal law, passed in 1925 (before anyone ever used the phrase "sexual harassment" and intended to apply to business-to-business transactions only), preclude the survivor from bringing the case? The horror of forced arbitration is that when one survivor is silenced, countless others will unknowingly follow down the path of harassment and abuse by accepting employment with companies that protect and often promote sexual predators.

To their credit, a few major U.S. corporations have voluntarily agreed to stop invoking forced arbitration clauses, but those companies are few and far between. Please do not forgo your responsibility as legislators and leave survivors at the mercy of corporations to decide when and if to use forced arbitration when it suits them. Simply put, the practice must stop for ALL survivors. Please stand with survivors and pass The Ending Force Arbitration of Sexual Assault & Sexual Harassment Act.

Respectfully,

Gretchen Carlson, Co-Chair Lift Our Voices, Female Empowerment Advocate, Journalist, Author
Alison Accettola
Karen Sue Allen
Karlito Almeda
Ali Althaus
Jennifer Anderson Alonzi
Stephanie Arble
Michele Atha
Cheryl Auger, Owner of Ban SUP Refill
Tracy Avin, Troop HR
Jade Baker-LeFaive
Janet Becker
Alyssa Bell
Lisa Beebe
Juan Bell
Lisa Benner
Megan Beyer
Melissa Bickerton
Julia Birnbaum
Dacia Bridges
Asonya Brinson
Mary Bonaventure
Debra Bonomi
Gayle Brodie
Ginette Brouard
Saffron Burrows
Jill Bush
Kathleen Butcher
Sheryl Bybee

Julie Bye
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Beverly Canello
Shawn Carey
Cathy Carson
Scarlett Castro-Dixon
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Cigdem Knebel, Skot & Bell Publishing
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Kristie Cheek
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Tracy Cook
Phyllis Comeaux
Miriam Correa
Mary Dahmen
Judyth Daniels
Lisa Davis
Sue Daugherty
Sonia Delgado
Kathleen Deutch
Laurie Dhue, National Recovery Advocate, Former National TV News Anchor
Angela DiLemme
Eirene Donohue
Helen Fahey
Diana Falzone, Journalist
Rosa Faris, Galloway
Diane Fingar
Keaton Fletcher
Linda Frew
Joyce Frohn
Karin Garfin, Former Anchor for New York 1/ Charter Communications
Gretchen Garrigues
Tanuja Gupta, Google Program Manager, Founder of Googlers for Ending Forced Arbitration,
Anne Garcia
Lauren Garner
Mariam Ghaith
Sharita Grant
Geri Grey
Judith Gordon
Kate Grodd
Katherine Gunther
Erin Garcia
Jean Glaraton
Lidia Goldthorn
Kelly Giannetti

Sandra Garza
Gitte Hagensen, ENERVEX, Inc.,
Kelsey Honz
Marisa Hodgdon
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Carol Lacks
Jennifer Lewis
Joelle Leslie Lewis
Kela Lige
Sheri Liguori
Gwen Lewis
Donna Lordandeau
Mita Mallick, Diversity, Equity and Inclusion Executive
Senator Sarah McBride, Delaware State Senator
Allie McGuire, Awareness Ties
Nola Miller
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Maya Morris
Joy March
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Sheila Oliver, Current New Jersey Lt Governor.
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Marie Paylich
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Tiffany Pfeiffer
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Billie Quist
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