

California's Intersectional Bias Law Is A 'Game Changer'

By **Amanda Ottaway**

Law360 (October 15, 2024, 6:14 PM EDT) -- California Gov. Gavin Newsom recently signed a bill making the Golden State the first to enshrine intersectionality in its anti-discrimination laws, a move experts said will have a tangible impact on how cases are litigated.



Civil rights scholar Kimberlé Crenshaw coined and popularized the term "intersectionality" in the 1980s to explain how people's social identities — including race, gender, class, religion and other characteristics — can overlap. (Icon Sportswire via AP/Erica Denhoff)

Senate Bill 1137, **which Newsom signed Sept. 27** and will take effect Jan. 1, 2025, amends anti-discrimination laws pertaining to employment, housing, public accommodations and education to clarify that those laws also prohibit discrimination based on the intersection, or combination, of two or more protected characteristics including race, gender and religion.

Darci Burrell, a founding partner at worker-side Burrell Kagin Law, said the new law is a big deal for attorneys. Previously, when representing for example a Black woman who'd faced discrimination because of that identity, Burrell had to bring two separate claims — race bias and gender bias.

Being able to plead that the crux of the problem is not exclusively a person's race or her gender, but actually the intersection of the two characteristics is a "game changer," she said.

"To some extent, we've been doing this all along, and trying to figure out how to convince a jury about those subtleties is, to some degree, not new," Burrell said. "But I think part of the challenge has been that

you couldn't really explicitly call it out, and now you can. The challenges of proof are kind of the same, but the ability to call it for what it is is different."

Burrell said she took a seminar at law school in the early '90s taught by civil rights scholar Kimberlé Crenshaw, who coined the term "intersectionality" in the 1980s to explain how people's social identities — including race, gender, class, religion and other characteristics — can overlap.

But even though the concept has been **around for a while**, the law will come with a learning curve for both courts and juries, lawyers said.

"This opens up a whole new way to plead cases," said worker-side lawyer Rebecca Kagin, also a partner at Burrell Kagin. "So it's a very different landscape."

Here are three things lawyers practicing in California expect will change once the law is in effect.

A Novel Kind of Claim

Kagin recently settled a case she filed on behalf of Black female custodians, primarily arguing sex-based bias. But she thinks that lawsuit would have been a prime candidate for an intersectional bias claim, because that's how the discrimination actually manifested.

"Now that we have the intersectionality law, an attorney will be assessing whether that claim makes sense from the beginning," she said. "It allows us to open up our mind to thinking about that claim as we look at the intake."

And the ability to explicitly plead intersectional discrimination opens up a door that's a much more accurate reflection of reality than plaintiffs' lawyers could articulate in their complaints previously, they said.

Until the law is a little more developed, plaintiff-side attorneys said they'd likely err on the safe side and, if they're bringing an intersectional bias claim on the basis of religion and sex, for example, they would also bring additional separate claims for religious bias and sex bias.

Then in trying to show how intersectional discrimination played out in their clients' lives, attorneys could point to comparators, they suggested.

"You show that the Black men are being promoted, the Black women aren't," Kagin said. "So it's intersectional."

Having such a claim available to workers also leaves the management side less able to cherry-pick its own comparators in its defense, said Wendy Musell, who has her own worker-side firm in the Bay Area.

The law "should make it harder for defendants to point to ... in the case of an Asian woman, 'Well, we treat white women better, we treat Asian men better, so you don't have a case,'" she said.

The ability to bring an intersectional claim "discourages those types of defenses, which really don't address the issue of discrimination or harassment at issue."

A New Summary Judgment Landscape

Lawyers on both sides said it's crucial that parties and judges are on the same page, and this legislation will help with that. But they predicted not everyone would catch on right away.

"You are going to have judges who don't understand it," Burrell said.

The clarity the law provides is key, though, said Shardé Skahan, of management-side firm Seyfarth Shaw. Even though the law will help workers build their cases against her clients, she said she still thinks it'll be a good thing, because employers want to know what the rules are.

"It's helpful to give employers clarity, eventually, about how courts are going to address these issues," she said. "Since [intersectionality] wasn't enshrined in the law, there was some inconsistency with how the cases might be handled, depending on which court you were before."

Skahan and her plaintiff-side counterparts said they'll be watching closely to see how the law develops, particularly at the summary judgment stage. But the landscape may be a little rocky at first, "while courts try to get on the same page about how this is going to influence these claims moving forward," Skahan said.

Musell, who also said the new law provides "much-needed clarity," predicted that fewer workers' cases will be thrown out on summary judgment. Courts that don't understand intersectionality often deal "with one protected class at a time, as opposed to the entire person and the person's experience," she said.

Burrell said one way lawyers can help judges get their heads around the concept is by providing examples of intersectional discrimination.

Musell also predicted that intersectional bias claims will be key for equal pay and promotion cases, and that those could be good examples for educating courts and juries.

The pay gap "becomes much wider when you take into account both sex and race," she said.

Another way to demonstrate intersectional discrimination is by referencing case law, experts said. Several pointed to a touchstone 1994 ruling from the Ninth Circuit in the case [Lam v. University of Hawaii](#) .

In that case, a panel flipped a finding of summary judgment in order to revive a professor's race, sex and national origin claims. Maivan Clech Lam alleged she was spurned for the role of a program director because she's an Asian woman of Vietnamese descent.

In its opinion, the Ninth Circuit said the lower court "seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against Asian women became a simple matter, performing two separate tasks: looking for racism 'alone' and looking for sexism 'alone.'"

Musell said this way of parsing claims is something she's seen a lot in her practice.

"Defendants, of course, are putting forth that narrative, but the courts bite," she said. "And so I think this provides much clarity for the courts to say, 'No, I need to analyze this, not with mathematical precision as the Ninth Circuit had put it, but rather looking at the whole picture.'"

Juries Get More to Consider

Another juncture at which the intersectional bias law will be key is at the jury instruction stage, experts said.

Burrell, who explained that plaintiff-side employment lawyers have been explaining intersectional bias to juries and judges "all along" but previously weren't able to assign it a specific cause of action, emphasized the importance of now being able to officially give it a name on a verdict form.

"There's power in being able to say that not only that that's why you think what's happened has happened, but also that the jury can explicitly find that that's what's happened" is huge, she said.

Explaining to a jury how intersectional bias plays out in a real workplace is something Burrell said turn over to experts who can help explain stereotyping, because she said it can sometimes be subtle.

Musell said she sees stereotypes based on the intersection between race and sex play out, particularly against women of color at work.

"In real life, you'll see examples where women of color, particularly African American women, are more sexualized, or Asian women are more sexualized than white women," she said.

While over the course of a trial a jury may hear of different kinds of discrimination and how the alleged mistreatment played out more broadly, they've previously been limited in what they can consider when it comes time to render a decision.

"The whole trial is about telling them the story and providing them evidence that supports your story," Burrell said. But when they're sent to the deliberation room, "they also have these specific questions they have to answer on the verdict form," she said.

A lawyer can explain to jurors that the different kinds of discrimination overlap, but "once they're in the jury room, that's not how it's presented to them, it's not how they have to answer the questions on the jury verdict," Burrell said.

The new law changes that, Kagin said.

"It's a whole new way of looking at people. It helps us look at people for who they are," Kagin said. "It gives us attorneys a tool."

--Additional reporting by Anne Cullen and Hailey Konnath. Editing by Amy Rowe.