

Sexual Harassment Law After #MeToo: Looking to California as a Model

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ABSTRACT. There has been significant progress in protecting employees from sexual harassment over the past twenty years. Courts have recognized that sexual harassment is perpetrated by and against people of all sexes and genders, takes sexual and nonsexual forms, and is often motivated by bias and hostility, not sexual desire. Yet sexual harassment persists and remains largely unreported. The #MeToo and #TimesUp movements have motivated people to speak out about sexual harassment, but many of those now choosing to speak remain vulnerable to retaliation. This Essay provides the perspective of an attorney whose practice focuses on plaintiff-side employment law in California. It explores the ways that state laws can offer greater protections to employees, using California as a model. It then reflects on some of the shortcomings of current state and federal law. Finally, it discusses some of the proposed legislation that, inspired by the #MeToo and #TimesUp movements, seeks to prevent harassment and to protect employees who come forward.

INTRODUCTION

Twenty years after the publication of Vicki Schultz's *Reconceptualizing Sexual Harassment*,¹ there is finally broad recognition by courts that harassment is perpetrated by and against people of all sexes and genders, takes both sexual and nonsexual forms, and is often motivated by bias and hostility, not sexual desire. Yet sexual harassment persists and remains largely unreported. The #MeToo and #TimesUp movements have motivated more people to speak out about sexual harassment, but many of those now choosing to speak remain vulnerable to

1. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

retaliation. This Essay provides the perspective of an attorney whose practice focuses on plaintiff-side employment law in California. It explores the ways that state laws can offer greater protections to employees, using California as a model. It then reflects on some of the shortcomings of current state and federal law. Finally, it discusses some of the proposed legislation that, inspired by the #Me-Too and #TimesUp movements, seeks to prevent harassment and to protect employees who come forward.

I. CHANGING PERSPECTIVES ON SEXUAL HARASSMENT LAW

In the fourteen years I have practiced as an employee-rights attorney in California, I have seen both a broadening in the types of sexual harassment cases that courts recognize and changes in the way that employers handle such cases.

Twenty years ago, the U.S. Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment was actionable under Title VII.² Before *Oncale*, many courts viewed sexual harassment in very narrow terms: it was sexualized conduct that men directed at women. Indeed, Schultz's groundbreaking article, *Reconceptualizing Sexual Harassment*, argued that by focusing on sexualized behaviors, many courts were ignoring conduct that was nonsexualized but nevertheless sex based.³ In doing so, courts failed to recognize how men used harassment to undermine women's competence and to drive them out of their jobs.⁴

In *Oncale*, the Court confirmed that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."⁵ Instead, the Court said, Title VII's prohibition on sexual harassment "must extend to sexual harassment of *any kind* that meets the statutory requirements," including, for example, harassment "motivated by general hostility to the presence of women in the workplace."⁶

Today, courts recognize that a wide variety of conduct can create a hostile work environment. Sexual harassment is perpetrated by and against people of

2. 523 U.S. 75, 79-80 (1998).

3. See Schultz, *supra* note 1, at 1713-38.

4. *Id.* at 1755-74.

5. *Oncale*, 523 U.S. at 80.

6. *Id.* (emphasis added).

all sexes and genders.⁷ It takes all kinds of forms—sexual and nonsexual.⁸ It is often motivated by bias and hostility, not sexual desire.⁹ And sexual harassment can be perpetrated by a variety of individuals, from supervisors, to coworkers, to subordinates, and even third parties such as customers.¹⁰

In my practice, I have seen firsthand the broadening and development of sexual harassment law. A recent client’s situation—modified slightly to remove identifying information—is illustrative of conduct that has come to be recognized as unlawful sexual harassment over the past twenty years. This case highlights the influence of the unfolding #MeToo and #TimesUp movements on employer responses to sexual harassment complaints.

Laura worked as a designer for an advertising agency, reporting directly to its creative director, Paul. Her team was comprised mostly of women. Paul, a gay man, regularly expressed misogynistic views about women. He used sexist slurs, mocked women’s appearances if he did not consider them beautiful or thin enough, and he denigrated their work. Laura felt sick to her stomach every time she had to interact with Paul. But as the primary earner for her family, she was too afraid of retaliation to speak up. She simply could not afford to lose her job. All of the other women working there appeared to quietly tolerate the abuse, and upper management was aware of Paul’s conduct but did nothing to stop it.

Over several months, Laura found that the stress and discomfort from being around Paul were affecting other aspects of her life. She did not have much of an appetite and lost about ten pounds. She suffered from insomnia for the first time in her life. She found herself snapping at her husband and children. And she dreaded going to work each morning. She went to her doctor, who diagnosed her with anxiety and put her on a medical leave for a few weeks. It was then that she decided to consult with counsel to see if what Paul was doing was illegal and if there was a way for her to get out of this predicament.

After she retained me, I sent a letter to the company, describing Paul’s conduct and their legal exposure. The company, in turn, provided the letter to their

7. See *id.* In 2004, I explored non-desire-based, female-on-female sexual harassment and the workplace conditions that encourage it. See Ramit Mizrahi, Note, “Hostility to the Presence of Women:” *Why Women Undermine Each Other in the Workplace and the Consequences for Title VII*, 113 *YALE L.J.* 1579 (2004).

8. See Schultz, *supra* note 1, at 1713-38; Chai R. Feldblum & Victoria A. Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*, EQUAL EMP. OPPORTUNITY COMMISSION 8-10 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/FF5M-EP6H>].

9. See Feldblum & Lipnic, *supra* note 8; cf. CAL. GOV’T CODE § 12940(j)(4)(C) (West 2018) (“[H]arassment’ 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.”).

10. See CAL. CODE REGS. tit. 2, § 11034(f)(2)(C) (2017).

outside counsel. Outside counsel immediately recognized the problem and agreed that a negotiated exit from the company was in everyone's best interest. Laura, with severance in hand (and a confidentiality agreement that contained a mutual nondisparagement provision), left to find her next job. I do not know whether Paul ever suffered any consequences for his actions.

The following year, Laura found another job at a similar company. Days into her new role, she was shocked to discover that her new supervisor, Rick, was not much of an improvement over Paul. He, too, was overtly hostile toward his female subordinates. He belittled and demeaned them and made sexist comments about women in general. Once again, Laura was filled with dread.

But, in the time between when Laura left her prior job and started the new one, the #MeToo and #TimesUp movements had taken hold. This time, inspired by the movements, Laura decided that she would not suffer in silence. Over the course of a couple of weeks, she made sure to note down all the sexist comments and hostile behaviors that Rick directed at the women in the office. Laura then went to human resources at her new job and made a formal complaint, sharing these examples and listing out the names of the witnesses who were present each time.

The human resources department acted swiftly. It suspended Rick, conducted a thorough investigation, and despite his critical role at the company, ultimately terminated him. Laura felt empowered and vindicated, and the other women, who had tolerated Rick's behavior for years, expressed their gratitude.

Twenty years ago, many courts would not have recognized Paul or Rick's behaviors as creating a hostile work environment that would be actionable as sexual harassment.¹¹ Neither man was acting out of sexual desire, and most of their comments were not of a sexual nature. Today, however, there is no dispute that such conduct, if proven, would be actionable.

Despite the law's protections, however, sexual harassment persists. Fifty-eight percent of women surveyed by the Equal Employment Opportunity Commission have experienced sex-based harassment.¹² Workplaces at greater risk for sexual harassment include those with "high-value" employees, significant power disparities, younger employees, or homogenous workforces. They also include

11. See Schultz, *supra* note 1, at 1720. Schultz argued that many courts were focusing on the sexualized behaviors in hostile work environment claims and were failing to recognize nonsexualized but sex-based forms of harassment. *Id.* at 1713-38. She revealed how men use harassment—both sexualized and nonsexual—as a tool to undermine women's competence, drive them out of male-dominated jobs, and keep them in their place in female-dominated jobs. *Id.* at 1755-74. Thus, she argued, courts should center their analysis on the competence-undermining impact of harassment in order to reconnect sexual harassment law to its original mission of fighting sex discrimination. *Id.* at 1769-75.

12. Feldblum & Lipnic, *supra* note 8, at 9-10 & n.21.

workplaces where employees do not conform to gendered norms, or focus on customer service or client satisfaction, and workplaces that encourage drinking, or are isolated and decentralized.¹³

My own experiences bear this out. I have represented clients in all of these situations, including clients who were sexually harassed by company owners and managers (who had free rein to do as they saw fit without anyone to hold them accountable), clients who were among only a few women in male-dominated environments (across the salary spectrum – from surgeons to warehouse workers), clients who worked in companies where “bro culture” prevailed and drinking was encouraged, and clients whose supervisors were allowed to get away with nonsexual abuse because it was not seen as “sexual harassment.”

Compounding this dismal reality, most of this sexual harassment goes unreported. For example, one study found that gender-harassing conduct was almost never reported; unwanted physical touching formally reported only 8% of the time; and sexually coercive behavior reported by only 30% of women who experienced it.¹⁴ When harassment is reported, the consequences can be dire: an estimated 75% of employees who speak out against workplace mistreatment faced some form of retaliation.¹⁵ Reporting “at best does not make things worse and at worst leads to retaliation, minimization of complaints, and additional injury to the reporter.”¹⁶ I have seen retaliation that ranges from the overt – termination – to the more subtle and difficult-to-prove. It has taken the form of increased scrutiny, withdrawal of support, lower ratings on performance reviews, changes in assignments, changes in work schedules, and subtle aggressions that can undermine a person’s security and success. Given the likelihood of retaliation, it is no surprise that most people who are sexually harassed believe that the safest course of action is inaction.

Most sexual harassment cases that come my way have a retaliation component. Potential clients often contact me after trying to resolve the matter in their workplaces internally, only to have the situation deteriorate. The remainder do

13. *Id.* at 25-29.

14. *Id.* at 16.

15. *Id.* This remains true despite Title VII’s legal protections. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that Title VII’s antiretaliation provision protects against conduct that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination” (internal quotations omitted)).

16. *Select Task Force Meeting of June 15, 2015 – Workplace Harassment: Examining the Scope of the Problem and Potential Solutions – Written Testimony of Mindy Bergman, Associate Professor of Psychology, Texas A&M University*, EQUAL OPPORTUNITY EMP. COMMISSION (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm [https://perma.cc/52XY-2ZFM] [hereinafter *Bergman Testimony*].

not have faith in their employer's internal reporting processes, are too afraid to go through it on their own, or feel that the situation is irreparable and want out.

Once again, however, change is afoot. Even one year ago, Laura's complaint at her new company may not have received the same response. This is especially true because of Rick's high-level role at the company. Rarely have I seen companies terminate someone as high-ranking and valuable as Rick for such conduct. However, the #MeToo and #TimesUp movements have galvanized the public, leading people to speak out who would not have done so before, while motivating many employers to respond lest they face the consequences of inaction.¹⁷ These movements have created space and an appetite for the expansion of employee rights and protections.

III. STATE LAWS CAN OFFER GREATER PROTECTIONS

In protecting workers against discrimination and harassment, federal civil rights laws such as Title VII of the Civil Rights Act of 1964 serve as a floor of protection, not a ceiling.¹⁸ California, with its Fair Employment and Housing Act (FEHA), serves as an excellent model of the wider coverage and broader protections that state laws can provide to employees.

California first passed the predecessor to the FEHA in 1959.¹⁹ It prohibited discrimination in employment based on race, religion, color, national origin, and ancestry.²⁰ Over the years, the FEHA has been expanded to protect employees from other forms of discrimination and harassment, including mistreatment based on age, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, and military and veteran status.²¹ The FEHA expressly prohibits

17. See, e.g., Sindhu Sundar, *How #MeToo Is Changing Internal Investigations*, LAW360 (Jan. 28, 2018, 9:17 PM EST), http://www.cov.com/-/media/files/corporate/publications/2018/01/how_metroo_is_changing_internal_investigations.pdf [https://perma.cc/PGM7-AWP9].

18. See 42 U.S.C. § 2000e-7 (2012) ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.").

19. See Ann M. Noel & Phyllis W. Cheng, *Through Struggle to the Stars: A History of California's Fair Housing Law*, 27 CAL. REAL PROP. J. 3, 3-4 (2009). It was then called the Fair Employment Practices Act. *Id.*

20. *Id.* at 4.

21. See CAL. GOV'T CODE § 12940(a) (West 2018). In 2003, the California legislature amended the FEHA to include gender in its definition of "sex." See *id.*; 2003 Cal. Stat. 1685. It incorporated by reference then-Penal Code section 422.76, which defined gender as "the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of

harassment based on protected categories, including sexual harassment, and has done so for decades.²²

Federal civil rights law operates differently. Unlike the FEHA, Title VII does not expressly address sexual harassment or any other type of workplace harassment. Rather, courts have interpreted Title VII's prohibition on discriminating against any individual with respect to the "terms, conditions, or privileges of employment,"²³ as including harassment that is sufficiently severe or pervasive to alter the conditions of employment.²⁴

The Supreme Court has laid out the elements necessary for a plaintiff to prevail on a claim for hostile work environment sexual harassment under Title VII:

- 1) He or she was a member of a protected group;²⁵
- 2) He or she was subjected to unwelcome behavior;²⁶
- 3) This behavior was "because of . . . sex";²⁷
- 4) The harassing conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'";²⁸ and
- 5) The employer should bear responsibility for the harassing conduct.²⁹

the victim's identity, appearance, or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with the victim's sex at birth." 2003 Cal. Stat. 1689. In 2011, the California Legislature amended the FEHA again to specifically name as protected categories "gender," "gender identity," and "gender expression." See 2011 Cal. Legis. Serv. Ch. 719 (West).

22. CAL. GOV'T CODE § 12940(j) (West 2018).

23. 42 U.S.C. § 2000e-2(a)(1) (2012).

24. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 57 (1986). *Vinson* was the first Supreme Court decision to address sexual harassment. The Court explained that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* at 64 (quoting *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Court pointed to the "substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

25. This element simply requires that the plaintiff be a member of a group protected by Title VII—that the plaintiff is a woman (or a man) is enough to satisfy this requirement. See, e.g., *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (citing *Vinson*, 477 U.S. at 66-67).

26. *Vinson*, 477 U.S. at 68.

27. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (internal quotation marks omitted).

28. *Id.* at 78; *Vinson*, 477 U.S. at 67.

29. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (identifying the circumstances under which an employer may be held vicariously liable for the acts of a supervisory employee whose

California courts have adopted the same standards under the FEHA.³⁰

While Title VII and the FEHA's sexual harassment provisions have much in common, the FEHA provides protections and benefits that Title VII does not, including coverage of more employees, expanded liability for harassment, greater remedies, and mandated training. I discuss each of these below.

A. Protections for More Working Individuals

The FEHA's harassment prohibitions apply to all employers; there is no minimum number of employees required.³¹ The law's broad scope has a significant impact. In California, over eighty percent of businesses employ fewer than nine employees.³² More than fifteen percent of California's workforce works for such small employers and is therefore not protected by Title VII.³³ The FEHA's protection ensures that no employer, regardless of size, can harass an employee with impunity. In addition, the FEHA's protections against sexual harassment apply not only to an employee or job applicant but also to "an unpaid intern or volunteer, or a person providing services pursuant to a contract."³⁴ In contrast, Title VII applies only to employers with fifteen or more employees and does not protect independent contractors or unpaid volunteers.³⁵

sexual harassment of subordinate employees has created a hostile work environment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same).

30. *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 220 (Cal. 2006) (citing *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842 (Ct. App. 1989)).
31. CAL. GOV'T CODE § 12940(j)(4)(A) (West 2018). All other types of claims under the FEHA can be brought only against employers with five or more employees. *Id.* § 12926(d).
32. *California Establishments by Size Class: Second Quarter 2017*, CAL. EMP. DEV. DEP'T, http://www.labormarketinfo.edd.ca.gov/file/indsize/Chart_SOB2017_2.pdf [https://perma.cc/9JVR-NTR2].
33. *See id.*
34. CAL. GOV'T CODE § 12940(j)(1) (West 2018). "Person providing services pursuant to a contract" is interpreted broadly to cover independent contractors. *Id.* § 12940(j)(5). Nationally, there are an estimated 500,000 to 1 million unpaid interns working each year. Derek Thompson, *Work Is Work: Why Free Internships Are Immoral*, ATLANTIC (May 14, 2012), <https://www.theatlantic.com/business/archive/2012/05/work-is-work-why-free-internships-are-immoral/257130> [https://perma.cc/P7E2-396H].
35. 42 U.S.C. § 2000e(b) (2012); *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943, 944 (9th Cir. 2010); *see also* Keiko Rose, *Volunteer Protection Under Title VII: Is Remuneration Required?*, 2014 U. CHI. LEGAL F. 605 (2014), <https://chicagounbound.uchicago.edu/uclf/vol2014/iss1/12> [https://perma.cc/YFN5-FH79] (discussing Title VII's potential coverage of volunteers). Note that a separate California law—the Unruh Civil Rights Act—also prohibits sexual harassment in a broader variety of professional contexts. CAL. CIV. CODE § 51.9 (West 2018). It applies where there is a business, service, or professional relationship between the parties that is difficult to terminate, including relationships with physicians, psychotherapists, attorneys,

B. Expanded Liability for Harassment

Under the FEHA, if a supervisor commits sexual harassment, the employer is strictly liable – regardless of whether the employer knew about the conduct.³⁶ In contrast, under Title VII, if there has been no tangible employment action by a supervisor (such as termination, demotion, or pay cut), an employer can raise an affirmative defense if it establishes “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁷ Strict liability under the FEHA for supervisor harassment makes one fewer impediment to a plaintiff succeeding in her case.

Under the FEHA, an employer must take immediate and corrective action if it learns of harassment and must take all reasonable steps to prevent harassment *ex ante*.³⁸ Failure to prevent harassment is a separate cause of action distinct from the claim of harassment itself. Such a failure serves as a basis for broader discovery to uncover what a company and its leadership knew (including with respect to prior complaints), how it responded (including whether it investigated and/or took corrective action), and what else could have been but was not done to prevent harassment.

The FEHA also provides for individual liability against harassers, while Title VII does not.³⁹ A significant benefit of this is that plaintiffs can remain in state court because individual harassers are almost always state residents who would defeat diversity, preventing removal to federal court. I discuss the benefits of remaining in state court in Part IV.E below.

social workers, bankers, trustees, landlords, property managers, teachers, and other similar relationships. *Id.*

36. CAL. CODE REGS. tit. 2, § 11034(f)(2)(C)(1) (2017); *see* CAL. GOV'T CODE § 12940(j)(1). The employer is also liable for sexual harassment by non-employees and employees who are not supervisors or agents if it “knows or should have known of this conduct and fails to take immediate and corrective action.” *Id.*
37. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (establishing standards for vicarious liability for sexual harassment); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (same).
38. CAL. GOV'T CODE § 12940(k) (West 2018).
39. *Id.* § 12940(j)(3); CAL. CODE REGS. tit. 2, § 11034(f)(2)(C)(4).

C. Greater Remedies

The FEHA does not have any caps on compensatory or punitive damages, except what is constitutionally permissible, whereas Title VII limits such damages to a combined total of between \$50,000 for the smallest employers to \$300,000 for the largest employers.⁴⁰ Seven-figure verdicts and settlements are not uncommon in FEHA cases, and even higher verdicts are awarded.

The FEHA's lack of a cap on damages is an important tool given the role of punitive damages in deterring unlawful behavior.⁴¹ Consider two record-breaking California verdicts: *Chopourian v. Catholic Healthcare West*, a sexual harassment and retaliation case that went to trial in 2012, in which the jury awarded the plaintiff \$3,720,488 in economic damages, \$39,000,000 in noneconomic damages, and \$125,000,000 in punitive damages;⁴² and *Juarez v. AutoZone Stores, Inc.*, a pregnancy discrimination, harassment, and retaliation case that went to trial in 2014, in which the jury awarded \$872,709.52 in compensatory damages and \$185,000,000 in punitive damages.⁴³

In addition, while both Title VII and the FEHA provide that prevailing plaintiffs be awarded their attorneys' fees, California state courts are expected to award fee enhancements (also called multipliers) to take into account factors such as the difficulty of the case, the attorneys' skills, and the contingent nature of the fee award.⁴⁴ In contingency cases, absent circumstances that would render a fee award unjust, a fee enhancement must be used.⁴⁵ The rationale is that "[a] lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases."⁴⁶ By contrast, under Title VII, fee enhancements are disfavored.⁴⁷ Given that attorneys have usually invested hundreds of hours of time

40. 42 U.S.C. § 1981a(b)(3) (2012).

41. See *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n* 743 P.2d 1323, 1342 (Cal. 1987) (explaining that "[p]otential liability for punitive damages is a substantial incentive for employers to eliminate, or refrain from committing, unlawful employment practices" and that "the possibility of punitive damages may enhance the willingness of persons charged with violations to offer fair settlements . . .").

42. No. 2:09-CV-02972-KJM-KJN, 2012 WL 2003564 (E.D. Cal. Feb. 28, 2012).

43. No. 08-CV-00417-WVG, 2014 WL 7017660htt (S.D. Cal. Nov. 17, 2014).

44. *Ketchum v. Moses*, 17 P.3d 735, 741-42 (Cal. 2001).

45. *Horsford v. Bd. of Trustees of Cal. State Univ.*, 33 Cal. Rptr. 3d 644, 672 (Ct. App. 2005).

46. *Ketchum*, 17 P.3d at 742 (quoting John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 480 (1981)).

47. See, e.g., *Blum v. Stenson*, 465 U.S. 886, 899 (1984); see also Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV.

into a FEHA case by the time a trial is completed, a multiplier can increase the fee award by hundreds of thousands of dollars – further incentive for employers to abstain from illegal conduct and to promptly settle meritorious cases.

D. Mandated Training

The FEHA requires that employers with fifty or more employees provide two hours of sexual harassment training and education to supervisory employees within six months of their assumption of a supervisory position, and once every two years thereafter.⁴⁸ This training, which must be conducted by subject-matter experts, must include information and practical guidance regarding state and federal sexual harassment law, ways to prevent and correct harassment, and the remedies available to those who experience sexual harassment.⁴⁹ It also must cover harassment based on gender identity, gender expression, and sexual orientation.⁵⁰

E. The Ability to Remain in State Court

By asserting a claim under the FEHA rather than under Title VII, a plaintiff can remain in state court so long as she can defeat diversity. There are many advantages to remaining in state court.⁵¹ A significant advantage is that at the outset of a case, parties are allowed one peremptory challenge to disqualify a judge without showing cause, allowing some control over who presides over their case.⁵²

Employee plaintiffs in state court also have greater discovery rights. They have no limits on the number or length of depositions,⁵³ the ability to use form interrogatories, including those tailored to employment cases,⁵⁴ and the ability

1943, 1948-49 (1998) (“*Blum* was the first in a series of decisions which have all but rejected the use of multipliers.”).

48. CAL. GOV’T CODE § 12950.1 (West 2018). However, failure to comply with this requirement does not in and of itself result in liability to an employer in a sexual harassment action. *Id.* at § 12950.1(e).

49. *Id.* § 12950.1.

50. *Id.*

51. See Sarah B. Schlehr & Christa L. Riggins, *Why Employment Discrimination Cases Usually Belong in State Court*, *ADVOCATE* (June 2015).

52. CAL. CIV. PROC. CODE § 170.6 (West 2018).

53. *Id.* § 2025.290.

54. See *Form Interrogatories—Employment Law*, *JUD. COUNS. OF CAL.*, <http://www.courts.ca.gov/documents/discoo2.pdf> [<https://perma.cc/P49V-VPNE>].

to serve as many special interrogatories as needed (over the default limit of thirty-five) with a simple declaration of necessity.⁵⁵

Plaintiffs also have more time to oppose motions for summary judgment. The Federal Rules of Civil Procedure allow a motion for summary judgment to be filed fourteen days before the hearing, with the opposition due seven days before the hearing, giving the plaintiff only a week to oppose the motion.⁵⁶ In contrast, in California state court, notice of a summary judgment motion and supporting papers must be served on all other parties at least seventy-five days before the hearing date (which itself must be held no later than thirty days before the date of trial), while the opposing papers must be filed fourteen days before the hearing.⁵⁷ The discovery cutoff in state court is thirty days before trial,⁵⁸ such that a plaintiff has about two months to conduct further discovery to aid in opposing the motion.

All told, plaintiffs benefit tremendously from trying their cases in California state courts. State court juries are generally considered more diverse and plaintiff-friendly because they are selected from “sources inclusive of a representative cross-section of the population of the area served by the court,” including from the Department of Motor Vehicles’ list of licensed drivers, the list of registered voters, telephone directories, and utility lists.⁵⁹ Attorneys are permitted to directly question jurors during voir dire without unreasonable or arbitrary time limitations and are permitted to submit written jury questionnaires.⁶⁰ Finally, the single most important reason to remain in state court: a plaintiff in state court need only convince three-fourths of jurors about the merits of the case, as opposed to needing to convince a unanimous jury in federal court.⁶¹

Because the protections and remedies under the FEHA are greater than those under federal law, and because there are advantages to remaining in state court, California employment lawyers usually assert FEHA claims on behalf of their clients.⁶²

55. CAL. CIV. PROC. CODE § 2030.040 (West 2018).

56. FED. R. CIV. P. 6(c).

57. CAL. CIV. PROC. CODE § 437c (West 2018).

58. *Id.* § 2024.020.

59. *Id.* § 197; Schlehr & Riggins, *supra* note 51.

60. CAL. CIV. PROC. CODE § 222.5 (West 2018).

61. *See id.* § 613.

62. *See* Schlehr & Riggins, *supra* note 51.

IV. LEGAL SHORTCOMINGS

Even with the expansive protections of the FEHA, sexual harassment persists, and employees are still afraid to express their opposition to sexual harassment. I believe there are two primary reasons for this. First, companies often fail to take significant corrective action when the alleged harasser is someone of value to an organization. Such a move, even if legally required and the right thing to do, can come at a great cost for the organization. Thus, companies may turn a blind eye to harassment and even shelter harassers, exposing the complaining employees to retaliation. Second, given the prevalence of retaliation, many employees have good reason not to formally complain—or even informally express discomfort—about harassing conduct. It can be difficult for an employee to establish that a supervisor’s harassing conduct was offensive to her when she, out of self-preservation, never voiced her discomfort or may have appeared to be a willing participant or indifferent bystander.

A. Companies Act to Protect Harassers Who Are Valuable

I have observed that companies are often swift to act when the accused harasser is someone fungible. They usually recognize their legal exposure and make the wise business decision to take immediate corrective action as is required by law. The same cannot be expected when the accused harasser holds a role that is key to the company—say a high-level executive, a large revenue generator, a renowned professor, or someone whose knowledge, connections, or skills cannot easily be replaced.⁶³

One may ask, for example, why Fox News continued to support Bill O’Reilly despite known sexual harassment settlement payouts totaling approximately \$45 million over the years.⁶⁴ It was a calculated economic decision: the dollar amount of O’Reilly’s settlements pales in comparison to the revenue he generated as Fox News’s top asset.⁶⁵ The *New York Times* reported that, from 2014 through 2016,

63. See Feldblum & Lipnic, *supra* note 8, at 16.

64. Emily Steel & Michael S. Schmidt, *Bill O’Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), <https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html> [<https://perma.cc/PA4H-CVJY>] (reporting that publicly known settlements involving Mr. O’Reilly have totaled \$45 million, and that Fox News renewed his contract well aware of these settlements).

65. Emily Steel & Michael S. Schmidt, *Bill O’Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [<https://perma.cc/3EZK-Q6BV>].

O'Reilly's show, *The O'Reilly Factor*, generated more than \$446 million in advertising revenues.⁶⁶ It was only when advertisers started dropping his show that Fox News took action.⁶⁷ This is part of the power of the #MeToo and #TimesUp movements: employers understand that negative publicity resulting from a failure to take action against a sexual harasser can have a devastating impact on their bottom lines.

Companies that knowingly employ and protect serial harassers have gone to great lengths to prevent such publicity. They have benefitted from the ability to require a confidentiality or nondisclosure provision as a condition of employment or of settlement of harassment claims. These nondisclosure agreements not only protect an accused harasser from public censure in one instance but also undermine the likelihood that future cases of harassment will succeed. Subsequent victims lose the benefit of learning about the prior harassment. This, in turn, means that they lose the ability to identify these other women to help corroborate their claims. While some of this information may eventually be uncovered when litigation is underway, an attorney will approach a case very differently from the outset if she knows that there are other witnesses who can corroborate a harassment claim. She may choose not to take on a case without such corroboration or may encourage the harassed employee to settle the case early out of a fear that a jury or arbitrator may conclude that the case is one of "he said, she said."⁶⁸ In addition, evidence that an employer repeatedly shielded a serial harasser, or condoned harassment in general, serves as a basis for punitive damages. When this conduct is covered up and shielded from disclosure, it limits

66. *Id.*

67. Karl Russell, *Bill O'Reilly's Show Lost More Than Half Its Advertisers in a Week*, N.Y. TIMES, (Apr. 11, 2017), <https://www.nytimes.com/interactive/2017/04/11/business/oreilly-advertisers.html> [<https://perma.cc/VLG8-JDRE>] (reporting that two-thirds of *The O'Reilly Factor*'s advertisers left the show after news first broke of O'Reilly's settlements).

68. Though I use it here to characterize others' potential reactions, I am of the strong belief that the phrase "he said, she said" should be purged from our lexicon. This phrase first became popular in the early 1990s, with its first common usage referring to Professor Anita Hill's allegations of sexual harassment by then-Supreme Court nominee Clarence Thomas. See William Safire, *On Language; He-Said, She-Said*, N.Y. TIMES (Apr. 12, 1998), <https://www.nytimes.com/1998/04/12/magazine/on-language-he-said-she-said.html> [<https://perma.cc/7C49-C67L>]. The problem with the phrase is that it suggests that when there are two conflicting accounts without other witnesses, the truth is unknowable. In fact, there are many ways to assess the credibility of both witnesses to determine who is more likely to be telling the truth. These include: the person's demeanor when testifying, the consistency of their testimony over time, whether any fact is verifiably false, the quality of their memory, whether they have been untruthful in the past, and their motives to lie. Cf. CAL. EVID. CODE § 780 (West 2018) (listing factors to consider in determining whether a witness is credible).

a plaintiff's ability to prove that punitive damages are warranted, which in turn limits the law's ability to deter such conduct.⁶⁹

Companies sheltering known harassers also benefit from the ability to impose mandatory arbitration agreements. This in turn prevents lawsuits from entering the public record and instead pushes cases into private forums that shroud the process in secrecy.⁷⁰ The use of these private forums makes it more difficult for people who have been subjected to sexual harassment to find other witnesses and victims who could corroborate their accounts.⁷¹ Unfortunately, over half of American employees have been forced to sign mandatory arbitration agreements as a condition of employment.⁷² However, in light of the #MeToo and #TimesUp movements, there is a growing effort to end forced arbitrations in sexual harassment cases.⁷³

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69. Congress sought to address these issues in the new tax law by denying tax deductions for settlement payments in sexual harassment cases where there is a nondisclosure agreement. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13307, 131 Stat. 2054.; Robert Wood, *Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein*, N.Y. STATE BAR ASS'N J. 11 (Feb. 2018), http://www.woodllp.com/Publications/Articles/pdf/Tax_Write-Offs_NYSBA.pdf [<https://perma.cc/3ZSW-88T6>]. However, it is unlikely that this will make a large dent in the prevalence of nondisclosure agreements given that the parties may be able to characterize the settlements in ways that minimize the impact of the new law. See Wood, *supra*.
70. For example, the American Arbitration Association's employment rules provide that "[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 23 (2009), <https://www.adr.org/sites/default/files/Employment%20Rules.pdf> [<https://perma.cc/9793-JWYZ>]. The JAMS employment rules provide that it and the arbitrator "shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision." *JAMS Employment Arbitration Rules & Procedures*, JAMS (2014), <https://www.jamsadr.com/rules-employment-arbitration> [<https://perma.cc/F8PC-PE8Z>].
71. Much has been written about how arbitration stacks the deck against employees in general. See, e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (finding that employee win rates and award amounts are substantially lower in arbitration than in employment litigation trials).
72. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration> [<https://perma.cc/72TT-S4YZ>].
73. The Ending Forced Arbitration of Sexual Harassment Act of 2017 was introduced in the Senate and House of Representatives on December 6, 2017. H.R. 4570, 115th Cong. (2017); S. 2203, 115th Cong. (2017). In February 2018, fifty-six attorneys general signed an open letter to Congress calling for an end to forced arbitration in sexual harassment cases. Debra Cassens Weiss, *Give Victims of Workplace Sexual Harassment Access to Courts*, 56 *US Attorneys General Tell Congress*, ABA J. (Feb. 13, 2018, 10:22 AM), http://www.abajournal.com/news/article/give_victims_of_workplace_sexual_harassment_access_to_courts_56_us_attorney [<https://perma.cc/2YMN-52VA>]. Some companies have, in the aftermath of the #MeToo and

In 2002, the California Legislature sought to provide more transparency and greater accountability with respect to arbitration by adding section 1281.96 to the California Arbitration Act.⁷⁴ Section 1281.96 requires that private arbitration companies publish, at least quarterly, cumulative reports compiling information over the past five years regarding their consumer arbitrations.⁷⁵ The reports must be “directly accessible from a conspicuously displayed link” and in a searchable format.⁷⁶ While the identities of the complainants remain confidential, a potential plaintiff can use this information to find out whether the employer has been sued before and can potentially contact prior complainants’ counsel to see if additional information can be discovered. Unfortunately, nondisclosure agreements may make such informal investigation less fruitful, but a plaintiff has the ability to overcome that impediment through the use of a subpoena to compel testimony at a deposition.

If a company stands behind a “superstar” employee, or simply gives him a slap on the wrist, the harassed employee may have limited recourse if she wants to keep her job. If she reports to the harasser, there may be nowhere that she can be moved while maintaining comparable duties, responsibilities, and pay, and she may instead simply end up reporting to the same person, but now with a target on her back. Further, allowing harassment by high-value employees to persist exposes even those who are removed from those individual’s supervision to further harassment by permitting a culture of harassment to permeate.⁷⁷ As Psychology Professor Mindy Bergman explained in her testimony before the EEOC:

#TimesUp movements, also chosen to drop mandatory arbitration provisions. *See, e.g.*, Stephanie Francis Ward, *Orrick Follows Munger Tolles in Dropping Mandatory Arbitration Agreements: Will More Firms Follow?*, ABA J. (Mar. 28, 2018, 8:00 AM), https://www.abajournal.com/news/article/orrick_follows_munger_tolles_in_dropping_mandatory_arbitration [<https://perma.cc/3TWB-S7XM>]; Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html> [<https://perma.cc/DG2H-TQVY>].

74. CAL. CIV. PROC. CODE §§ 1280-1294.4 (West 2018). The California legislature was troubled by reports that employers that mandated arbitration were benefiting from forcing consumers and employees into private forums where they enjoyed advantages from being a “repeat player.” *See id.*
75. CAL. CIV. PROC. CODE § 1281.96(a) (West 2018). The reports must include eleven categories of information, including the name of the nonconsumer party (if it is a corporation or business), the name of the consumer’s attorney and law firm, the nature of the dispute, the type of disposition of the dispute, and the total number of times that the nonconsumer party has previously been a party in an arbitration administered by the arbitration company. *Id.*
76. CAL. CIV. PROC. CODE § 1281.96(b) (West 2018).
77. *Bergman Testimony*, *supra* note 16.

Workplaces that tolerate harassment have more of it and workplaces that are less tolerant of harassment have less of it. This is a circular problem, because when harassment occurs and organizational leaders do not take it seriously, then the message is that harassment is tolerated, so then it becomes even more OK to harass—and when harassment is taken seriously and shut down, then the message is that harassment is not tolerated.⁷⁸

B. Retaliation Persists

Often, when I am contacted by current employees who are being harassed and just want the bad behavior to stop so that they can do their job in peace, I am hesitant to help. While complaining internally may lead the company to investigate and take corrective action, it is just as likely to lead to retaliation. Will their complaints just make their situation worse? Are they better off trying to live with the conduct until they cannot take it anymore? A retaliatory termination can have a devastating impact on a person's life and career. I have seen it play out when I have tried to help a harassed employee.

Retaliation can take place months or even years later, making it extremely difficult to connect to protected activities. And while retaliation can sometimes be blatant, it often takes subtle forms that may be difficult to prove. For example, an employee can lose the support of the management team, feel socially ostracized, or suffer repercussions that are difficult to pin on their protected activity. Further, a calculating employer with animus can deliberately paper an employee's file, documenting alleged failures or inadequacies in such a way that, by the time the employee is terminated, she appears to be a problem employee who was justly discharged.⁷⁹

The reality is that when subtle or well-calculated retaliation happens, employees have very limited recourse. Most plaintiff-side employment lawyers work on a contingency-fee basis.⁸⁰ To take on a case, a lawyer must be convinced

78. *Id.*

79. Once such retaliation has taken place, I encourage employees to swiftly begin looking for their next job because there is no way to repair the broken working relationship. I also encourage them to protest loudly and clearly. They should make their own record showing that, until they spoke up against harassment or other unlawful conduct, they received positive performance feedback and support from their supervisors, but that everything changed after their complaints. At the least, this can help demonstrate that the entire subsequent paper trail has been part of an orchestrated plan to drive the employee out of the workplace and may motivate an employer to work toward an amicable resolution.

80. The FEHA and Title VII provide for statutory attorneys' fees to a prevailing plaintiff, which means that low-wage workers are not without recourse. However, ability to recover attorneys' fees if the case goes to trial is only one factor in overall valuation of a case. Other factors include

that she can prove the claims and that any recovery would be worthwhile. When there is alleged retaliation that is subtle or appears difficult to prove, unless the harassment claim is a strong one that can stand on its own, the employee will have a difficult time finding competent counsel to represent her. While employees without counsel can file charges or complaints with the EEOC or with its California equivalent, the Department of Fair Employment and Housing (DFEH), in hopes that those agencies will pursue the claim on their behalves, the odds of having a difficult claim substantiated are low. For example, in 2016, the DFEH investigated 4,799 complaints, settled 1,036 complaints, and filed only 31 lawsuits in court.⁸¹

For this reason, while the #MeToo and #TimesUp movements have empowered people to speak out against harassment, I do not believe that those who speak up are much safer today than they were before the movements took hold in situations where a decisionmaker harbors retaliatory animus. This is because, while more employers may be motivated to take corrective action, those who wish to retaliate can still do so in a manner that leaves employees with limited recourse. We owe it to sexual harassment victims—and to the brave colleagues and coworkers who step forward to substantiate their claims at great personal risk—to ensure that those who speak up are protected.

C. Power Imbalances Color Questions of Unwelcomeness and Offense

To establish a cause of action for a hostile work environment, a plaintiff must establish that the harassing behavior was both subjectively and objectively offensive so that the plaintiff did, and a reasonable person would, find it abusive and hostile.⁸² Under the FEHA, elements include that the plaintiff was “subjected to unwanted harassing conduct” because of a protected status, that the conduct was subjectively offensive, and that it was also objectively offensive. That is, a plaintiff must prove that a reasonable woman (or other protected category) in the plaintiff’s circumstances would have considered the work environment to be

the overall strength of the case, the employee’s damages (considering both economic losses and emotional distress), whether punitive damages are warranted, and whether a judgment is collectible. Further, most workers would not be able to afford hiring an employment attorney on an hourly basis.

81. 2016 Annual Report, DEP’T FAIR EMP. & HOUSING 7, 15 (2017), <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2016/09/Department-of-Fair-Employment-and-Housing-2016-Annual-Report.pdf> [<https://perma.cc/M6Y5-4AUN>].
82. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”); see also California Civil Jury Instructions (CACI) No. 2521A (2017).

hostile or abusive, and that the plaintiff considered the work environment to be hostile or abusive.⁸³

Sometimes, however, it is difficult for a plaintiff to demonstrate that the defendant's conduct was unwelcome and subjectively offensive. A plaintiff need not explicitly say that the conduct was unwelcome, but that would certainly help establish that she was offended. Yet when the perpetrator of unwelcome conduct is a plaintiff's supervisor or someone with authority over her, it is difficult to say whether she should dare voice her discomfort and risk retaliation. Acting out of a fear of retaliation, many people who are subjected to unwelcome conduct that offends them choose to "go along to get along." For some, that may mean saying nothing and pretending that they are not upset. For others, it may mean relenting and participating in the conduct, even if they did not initiate it.⁸⁴ They may not speak out until they reach a breaking point.

It is not surprising that harassers most frequently target vulnerable employees. As workplace investigator and trainer Fran Sepler shared in her testimony before the EEOC:

[S]ingle parents, people in the midst of a divorce or separation, people who were developmentally promoted, recent immigrants and people making low wages were more frequently targeted for harassment and bullying than others. What these people have in common is an intense reliance on their wages and a foreboding sense that they cannot afford to lose their job. Fear of reprisal or retaliation, and the subsequent fear of job loss lengthens the incubation period and the harassment continues until the individual's calculus is that they cannot bear the harassment for one more minute – by then the problem has become far less manageable and more traumatic to the target.⁸⁵

Women of color, in particular, are more vulnerable; they face a greater risk of sexual harassment than white women and at a greater risk of racial harassment

83. See California Civil Jury Instructions (CACI) No. 2521B (2017).

84. In *Vinson*, the Supreme Court rejected the argument that because the plaintiff ultimately had a sexual relationship with her supervisor, there was no harassment. The Court stated: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Vinson*, 477 U.S. at 68.

85. *Meeting of the Select Task Force on the Study of Harassment in the Workplace – Written Testimony of Fran Sepler, President, Sepler & Associates*, EQUAL OPPORTUNITY EMP. COMMISSION (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm [<https://perma.cc/2PUQ-MUV5>]. Sepler defined "developmentally promoted" as "employees who were hired for an entry level or administrative job and promoted into roles of greater responsibility without meeting the requirements contained in the position description for the roles they currently hold." *Id.*

than men of color.⁸⁶ Further, “there is a considerable correlation between experiencing sexual harassment and experiencing racial/ethnic harassment.”⁸⁷

V. POSSIBLE SOLUTIONS IN PROPOSED LEGISLATION

Acting on the momentum of the #MeToo and #TimesUp movements, state legislators have leapt into action, hoping to do more to protect employees and others who have been subjected to or opposed sexual harassment.⁸⁸ This legislative term, in the wake of the #MeToo and #TimesUp movements, California legislators have introduced bills that would help those who have been sexually harassed. These include bills that seek to limit confidentiality and nondisparagement provisions, restrict mandatory arbitration, increase recordkeeping and training requirements, create individual liability for retaliation, and extend the statute of limitations for FEHA claims. Below, I discuss how each of these would help create strong incentives for employers to prevent and remedy sexual harassment in the workplace.

A. Limiting Confidentiality Provisions in Settlement Agreements

California already prohibits settlement-agreement provisions that prevent the disclosure of factual information related to claims involving certain types of sexual conduct, including childhood sexual abuse and any act that may be prosecuted as a felony sex offense.⁸⁹ The prohibition was enacted because, “[w]hile confidentiality agreements may help to facilitate settlements of individual claims, they also put the public at risk by hiding sexual predators from law enforcement and the public at large.”⁹⁰

The Stand Together Against Non-Disclosures (STAND) Act, Senate Bill 820—sparked by the revelation that Harvey Weinstein’s predatory behavior toward women was kept secret through the use of confidentiality provisions—

86. *Bergman Testimony*, *supra* note 16.

87. *Id.*

88. For example, New York Senate Bill S7848A, which passed the Senate and Assembly, is a comprehensive bill that seeks to combat sexual harassment in the workplace. S.B. S7848A, 2017-2018 Leg. Sess. (N.Y. 2018). In relevant part, S.B. S7848A limits confidentiality of factual information in settlement agreements, prohibits mandatory arbitration of sexual harassment claims, requires employers to take all reasonable steps to prevent harassment, makes employers liable for sexual harassment by non-employees, and allows for individual liability for sexual harassment. *Id.*

89. CAL. CIV. PROC. CODE § 1002(a) (West 2018).

90. *Confidential Settlement Agreements: Sexual Offenses: Hearing on A.B. 1682 Before the Assembly Comm. on Judiciary*, 2015-2016 Leg., Reg. Sess. 6 (Cal. 2016).

would expand that prohibition. The STAND Act would prohibit such confidentiality provisions in the settlement agreement of any civil actions where the pleadings state a cause of action for: sexual assault; workplace harassment or discrimination based on sex; failure to prevent workplace harassment or discrimination based on sex; sexual harassment in a business, service, or professional relationship; and sex discrimination, harassment, or retaliation by the owner of a housing accommodation.⁹¹ Addressing concerns that a plaintiff may want confidentiality to preserve her own privacy rights, the bill allows employees to request confidentiality.⁹² If enacted, any confidentiality provision in violation of the new law entered into on or after January 1, 2019, will be void as a matter of law and against public policy.⁹³ The STAND Act would make it more difficult and expensive for employers to support and protect serial harassers.

B. Prohibiting Nondisparagement Agreements and Certain Releases of Claims

Senate Bill 1300 seeks to address two practices that employers have used to silence employees and to strip them of their rights: (1) nondisparagement agreements that gag employees from disclosing information about sexual harassment and other unlawful acts (often presented to employees at the outset of their employment as a condition of employment), and (2) releases of claims presented in exchange for a raise, bonus, or as a condition of continued employment.⁹⁴ The Bill prohibits these practices and makes them unenforceable as contrary to public policy. Similarly, Assembly Bill 3080 would make it a violation of the FEHA for an employer to prohibit an employee or contractor from disclosing sexual harassment that the person suffered, witnessed, or discovered in the workplace.⁹⁵

These bills would stop companies from being able to silence witnesses and to force employees to give up their rights so they can keep their jobs. For example, the CEO of a large apparel company routinely forced workers to sign nondisparagement agreements, releases of claims, and forced arbitration clauses, providing them surreptitiously as modeling contracts or routine paperwork to

91. S.B. 820, 2017-2018 Leg., Reg. Sess. (Cal. 2018) [<https://perma.cc/BPS4-QGA5>]; *STAND Act: Ending Protection of Sexual Predators*, CONSUMER ATT'YS CAL. & CAL. WOMEN'S L. CTR., <http://www.caoc.org/docDownload/813180> [<https://perma.cc/YRT4-7J3N>]. The law permits restrictions on disclosure of the amount paid in settlement of the claim.

92. Cal. S.B. 820. It remains to be seen how this will play out. Some plaintiffs may volunteer confidentiality in hopes of negotiating a higher settlement amount.

93. *Id.*

94. See S.B. 1300, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

95. See Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

receive a raise or bonus.⁹⁶ He often gave them to the employees to sign after they were sexually harassed or assaulted, stripping away any legal recourse they had for the conduct they had endured.⁹⁷

C. *Prohibiting Mandatory Arbitration*

Assembly Bill 3080 also seeks to address the harms created by mandatory arbitration provisions, as discussed above. It would prohibit employers from requiring that any applicant or employee waive any right, forum, or procedure with respect to any violation of the FEHA as a condition of employment, continued employment, or receipt of a benefit.⁹⁸ This would include the right to file and pursue a civil action. It would also make actionable any retaliation against an employee for refusing to consent to such an impermissible waiver.⁹⁹ As forced arbitration applies to the majority of employees, has a devastating impact on the value of employees' cases, and also pushes cases into private forums, this Bill, if successful, would significantly affect how employees who have been sexually harassed fare when they move forward with their cases.

D. *Expanding Recordkeeping Requirements*

Even when employees sue for sexual harassment, they may have a difficult time learning about prior complaints of sexual harassment if the employer maintains no records of them. Assembly Bill 1867 seeks to remedy this issue by requiring employers with fifty or more employees to maintain records of employee

96. See Letter from Mariko Yoshihara, Legislative Counsel and Policy Dir. of the Cal. Emp't Lawyers Association & Jessica Stender, Senior Counsel for Workplace Justice & Pub. Policy at Equal Rights Advocates, to Senator Hannah-Beth Jackson (March 23, 2018) (on file with author).

97. *Id.* at 3.

98. Assemb. B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

99. *Id.* This proposal may not stand up to Supreme Court precedent favoring arbitration, however. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts state laws that limit the availability of arbitration). Even so, there may be political will for federal laws that prohibit forced arbitration of sexual harassment claims. The Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); H.R. 4734, 115th Cong. (2017), has seventeen cosponsors in the Senate and fifteen cosponsors in the House of Representatives. See S.2203 - *Ending Forced Arbitration of Sexual Harassment Act of 2017*, CONGRESS, <https://www.congress.gov/bill/115th-congress/senate-bill/2203> [<https://perma.cc/Q2WJ-2YUY>]; H.R.4734 - *Ending Forced Arbitration of Sexual Harassment Act of 2017*, CONGRESS, <https://www.congress.gov/bill/115th-congress/house-bill/4734> [<https://perma.cc/QH7X-X3ES>].

complaints of sexual harassment for ten years from the date of filing.¹⁰⁰ This will heighten the consequences for employers if they fail to prevent and correct sexual harassment because the records will allow employees to find corroborating witnesses and evidence of inadequate corrective action that can serve as a basis for punitive damages.

E. Extending the Statute of Limitations

Many people empowered by the #MeToo and #TimesUp movements have come forward with their own harassment claims, only to learn that their claims are outside of the statute of limitations period.¹⁰¹ For claims under the FEHA, the statute of limitations is short – only a year¹⁰² – as compared to two years for a personal injury claim,¹⁰³ three years for fraud,¹⁰⁴ and four years for a written contract dispute.¹⁰⁵ The Stopping Harassment and Reporting Extension (SHARE) Act, Assembly Bill 1870, which has broad bipartisan support, would extend the statute of limitations to three years.¹⁰⁶ This change will benefit employees silently suffering through harassment because they need their jobs. It will buy them more time to move on, potentially into roles where retaliation for speaking out is less of a concern.¹⁰⁷ It will also benefit those employees who are unfamiliar with their rights, providing them more time to consult counsel.

^{100.} See Assemb. B. 1867, 2017-2018 Leg., Reg. Sess. (Cal. 2018); see also *Stopping Sexual Predators: Records Retention*, CONSUMER ATT'YS CAL., <http://www.caoc.org/docDownload/820440> [<http://perma.cc/DD56-GYWW>] (describing Assemb. B. 1867).

^{101.} See *SHARE Act (Stopping Harassment & Reporting Extension)*, CONSUMER ATT'YS CAL. ET AL., <http://www.caoc.org/docDownload/815911> [<http://perma.cc/BRK4-68FL>] [hereinafter *Share Act*] (“Most low wage workers who suffered harassment or discrimination are not aware of their legal rights and do not know that that they are time barred if they do not file with the DFEH within a year. By the time they realize harassment is against the law, they are usually past the time to file or close to having their statute expire.”).

^{102.} CAL. GOV'T CODE § 12960(d) (West 2018).

^{103.} CAL. CIV. PROC. CODE § 335.1 (West 2018).

^{104.} CAL. CIV. PROC. CODE § 338(d) (West 2018).

^{105.} CAL. CIV. PROC. CODE § 337 (West 2018).

^{106.} See Assemb. B. 1870, 2017-2018 Leg., Reg. Sess. (Cal. 2018); see also *SHARE Act*, *supra* note 101.

^{107.} There are, however, risks in waiting too long, including that documentary evidence disappears, witnesses scatter and become more forgetful, and claims are perceived as stale. Three years strikes the right balance: giving workers enough time to bring their claims forward while allowing employers to have closure with the passage of time.

F. Making Individuals Liable for Retaliation

As discussed above, the fear of retaliation is what inhibits most harassed employees from complaining. Senate Bill 1038 addresses retaliation directly by imposing individual liability against an employee of a FEHA-covered entity who retaliates against another employee for engaging in protected activity. Liability would attach regardless of whether the employer or covered entity knew or should have known about the conduct.¹⁰⁸ This would allow harassed employees to hold their harassers accountable for both harassment and any retaliation they suffer from coming forward. It would also hold liable managers, human resources personnel, and others at the company who subjected harassed employees to further harm instead of remedying the situation. The Bill would also serve to help plaintiffs defeat diversity in order to stay in state court.

Senate Bill 1038 serves as a legislative fix for *Jones v. Lodge at Torrey Pines Partnership*,¹⁰⁹ a 2008 case in which the California Supreme Court held that supervisors could not be individually liable for retaliation under the FEHA, despite clear language of the FEHA's antiretaliation provision applying to "any employer, labor organization, employment agency, or person."¹¹⁰ As Justice Carlos Moreno explained in his dissent in *Jones*, individual liability for harassment but not retaliation incentivizes retaliation: "the supervisor risks no additional liability for retaliating and might avoid liability for harassment as well, if he or she successfully 'discourages' the employee from pursuing a claim."¹¹¹

G. Declaring Legislative Intent Regarding Sexual Harassment Law

Over the years, the elements of a claim for sexual harassment law have been read in a manner that makes it difficult for a plaintiff to prevail. The "severe or pervasive" standard in particular has far too often been used by judges as a basis to grant summary judgment or even to set aside a jury verdict. For example, in *Brooks v. City of San Mateo*, 911 operator Patricia 'Brooks was harassed and assaulted by her supervisor, Steven Selvaggio, who touched her stomach, made comments about her sexiness, physically blocked her from leaving, then forced his hand underneath her sweater and bra and grabbed her bare breast.¹¹² The district court granted summary judgment, which was affirmed on appeal. The

108. See S.B. 1038, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

109. 177 P.3d 232 (Cal. 2008).

110. CAL. GOV'T CODE § 12940(h) (West 2018).

111. *Jones*, 177 P.3d at 245 (Moreno, J., dissenting).

112. 229 F.3d 917, 921 (9th Cir. 2000).

Ninth Circuit, in an opinion by Judge Alex Kozinski, held that Selvaggio's conduct was not "severe" by objective standards:

[W]e cannot say that a reasonable woman in Brooks's position would consider the terms and conditions of her employment altered by Selvaggio's actions. Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job in the long-term, especially given that the city took prompt steps to remove Selvaggio from the workplace.¹¹³

In *Brennan v. Townsend & O'Leary Enterprises, Inc.*, the plaintiff Stephanie Brennan alleged that she was subjected to gender harassment in violation of the FEHA when, among other things, women were repeatedly referred to by sexual epithets, were forced to sit on a manager's lap and subjected to other sexually demeaning conduct, and were prodded about their dating lives.¹¹⁴ Brennan, a successful vice president of advertising, tolerated this conduct for years, until she complained about an email forwarded to her that referred to her as a "big-titted, mindless one."¹¹⁵ After that, members of management stopped speaking to her, stopped attending her meetings, and the owner decided that her performance review was "overgenerous" and expressed his desire to mark her down in areas that her supervisor did not agree with.¹¹⁶ Her efforts to change company culture and her requests for sexual harassment training were ignored and she ultimately felt she had no choice but to quit.¹¹⁷

A jury found for Brennan on her harassment claim, but the trial court granted judgment notwithstanding the verdict, concluding that there was insufficient evidence that the conduct was either "severe or pervasive."¹¹⁸ The court of appeals affirmed, also concluding that the conduct described was neither severe nor pervasive.¹¹⁹

Associate Justice Eileen Moore eloquently dissented, discussing how Brennan "went along to get along" and thrived in her role, but that when "she complained and said enough is enough, as women are permitted to do under the law . . . the atmosphere surrounding her job changed completely Once she complained, she became a marked woman, and had no choice but to find other

¹¹³. *Id.* at 926 (footnote omitted).

¹¹⁴. 132 Cal. Rptr. 3d 292, 295-98 (Ct. App. 2011).

¹¹⁵. *Id.*

¹¹⁶. *Id.* at 298.

¹¹⁷. *Id.*

¹¹⁸. *Id.* at 298-99.

¹¹⁹. *Id.* at 305.

employment.”¹²⁰ In other words, “[w]hen the overtly sex-based acts are combined with the pattern of retaliation that lasted from Brennan’s complaint to her departure, those acts constitute sufficient evidence of a hostile work environment.”¹²¹

Cases like *Brooks* and *Brennan* demonstrate the barriers that some courts have created for sexual harassment plaintiffs. Senate Bill 1300 seeks to declare legislative intent with respect to sexual harassment law, removing these barriers and affirming favorable cases.

First, the Bill would confirm that actionable harassment need not have caused a decline in the employee’s performance, instead defining harassment as conduct that “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.”¹²²

Second, the Bill would confirm that a single incident of harassment can be severe even absent extreme circumstances, rejecting *Brooks*: “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.”¹²³

Third, the Bill would affirm the California Supreme Court’s rejection of the federal “stray remarks doctrine,” which has been used to discount discriminatory statements made outside of the decisionmaking process or by nondecisionmakers:

The existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made di-

120. *Id.* at 313 (Moore, J., dissenting).

121. *Id.* at 316.

122. S.B. 1300, § 2017-2018 Leg., Reg. Sess. § 1(a) (Cal. 2018). In doing so, it affirms the Legislature’s approval of Justice Ruth Bader Ginsburg’s concurrence in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) that

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 25.

123. Cal. S.B. 1300.

rectly in the context of an employment decision or uttered by a nondecisionmaker, may be relevant, circumstantial evidence of discrimination.¹²⁴

Fourth, the Bill asserts that the legal standard for sexual harassment must be consistent across workplaces:

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.¹²⁵

Fifth, the Bill reiterates that summary judgment should rarely be granted in harassment cases, explaining that they “involve issues ‘not determinable on paper.’”¹²⁶

H. Holding Employers Accountable for Failing to Prevent Discrimination or Harassment

Employers have a legal duty to take steps to prevent discrimination and harassment, and to correct any such conduct once they learn of it. However, an employer can only be found liable for the separate cause of action of failing to take reasonable steps to prevent discrimination or harassment if the plaintiff prevails on the underlying discrimination or harassment claim.¹²⁷ Senate Bill 1300 would provide a remedy for a plaintiff subjected to workplace harassment even if the conduct itself did not meet the threshold to be legally actionable (for example, if it did not meet the “severe or pervasive” standard) if “the employer knew that the conduct was unwelcome to the plaintiff, that the conduct would meet the legal standard for harassment or discrimination if it increased in severity or become pervasive, and that the defendant failed to take all reasonable steps to prevent the same or similar conduct from recurring.”¹²⁸

^{124.} *Id.* § 1(c) (affirming *Reid v. Google*, 235 P.3d 988 (Cal. 2010)).

^{125.} *Id.* § 1(d) (rejecting *Kelley v. Conco Cos.*, 126 Cal. Rptr. 3d 651 (Ct. App. 2011)).

^{126.} *Id.* § 1(e) (affirming *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296 (Ct. App. 2009)).

^{127.} See CAL. CODE REGS. tit. 2, § 11023(a)(2) (2018).

^{128.} See S.B. 1300, 2017-2018 Leg., Reg. Sess. (Cal. 2018). Although some may be concerned that this would incentivize employees to bring forward trivial cases, the reality of contingency fee practices is that lawyers would be unlikely to take such cases.

I. *Increasing Training Obligations*

Senate Bill 1300 also seeks to make the antiharassment training that California employers provide more robust.¹²⁹ Currently, employers with fifty or more employees must provide sexual harassment training to supervisors. This Bill would expand that requirement significantly, requiring that all employers with five or more employees provide sexual harassment training to all of their employees.¹³⁰ Second, it would require that employers “provide information to each employee on how and to whom harassment should be reported as well as provide information on how to contact the department to make a complaint regarding a violation of the laws regarding workplace discrimination, harassment, and retaliation.”¹³¹ Third, it would require “bystander intervention training,” which has been recommended as a way to train bystanders to identify potential harassment and to act when they see it. Bystander training also serves to emphasize a company’s commitment to nonretaliation.¹³² Quality sexual harassment training for all employees can be used to set the tone at an organization and to convey a company’s commitment to ensuring that all its employees enjoy a workplace free of harassment and discrimination. Training that makes clear how complaints should be made, that they will be taken seriously, and that the company will take measures to protect complaining employees from retaliation serves to encourage more people to come forward. This protects both the employees and the company itself—as issues are corrected before they escalate.

J. *Creating a Rebuttable Presumption of Unlawful Retaliation for Negative Actions After Complaints of Sexual Harassment*

Assembly Bill 3081 creates a rebuttable presumption that negative actions taken within ninety days of an employee’s participation in advancing a sexual

129. *See id.*

130. *Id.* Assembly Bill 3081 would extend the FEHA’s training requirement to all employers with twenty-five or more employees. *See* Assemb. B. 3081, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

131. *Id.* § 3(e).

132. Feldblum & Lipnic, *supra* note 8, at 57. Other bills include provisions expanding protections from sexual harassment to those in professional relationships with investors, directors, producers, and elected officials. *See, e.g.*, S.B. 224, 2017-2018 Leg., Reg. Sess. (Cal. 2018). Multiple bills target sexual harassment in the California legislature, including: Assembly Bill 403, which imposes criminal and civil liability on a Member of the Legislature or legislative employee who retaliates against an employee for making a protected disclosure, including of sexual harassment, Assemb. B. 403, 2017-2018 Leg., Reg. Sess. (Cal. 2018); and Assembly Bill 1750, which would allow a public entity to recoup settlement funds that it paid to settle a sexual harassment claim against an elected official if an investigation substantiates the claim, Assemb. B. 1750, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

harassment claim are unlawful retaliation.¹³³ However, it does so not by amending the FEHA but by creating a separate cause of action under the California Labor Code; the Bill prohibits an employer from discharging or in any manner discriminating against an employee because of their status as a victim of sexual harassment. The rebuttable presumption is an excellent proposal. At a minimum, this provision would force a ninety-day “cooling off” period where employers would have a strong disincentive from taking negative actions against employees who have complained of harassment.¹³⁴ Yet existing protections against retaliation for making a sexual harassment claim already exist under the FEHA, and the rebuttable presumption as proposed should be applied to claims made under the FEHA, not through a separate cause of action. A similar rebuttable presumption is codified in the California Health and Safety Code to protect whistleblowers who report unsafe patient care and conditions in health facilities.¹³⁵ “”

Alternatively, Legislators could adopt into the FEHA the burden of proof used for claims brought under section 1102.5 of the California Labor Code, California’s general employee whistleblower protection law. Section 1102.5 protects employees who disclose information about what they reasonably believe violates federal, state, or local rules, statutes, regulations or ordinances. These disclosures may be made externally to a government or law enforcement agency or to a public body conducting an investigation, inquiry or hearing, or internally “to a person with authority over the employee, or to another employee who has the authority to investigate, discover, or correct the violation or noncompliance.”¹³⁶

Once an employee who asserts a claim under section 1102.5 demonstrates by a preponderance of the evidence that a protected activity was a contributing factor to a negative action against the employee, “the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by section 1102.5.”¹³⁷ This increases the burden of proof on the defendant, who must now demonstrate by clear and convincing evidence that it would have taken the same action anyway. Because Section 1102.5’s burden-shifting framework does not contain any time

133. See Assemb. B. 3081, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

134. However, this would not offer greater protections in situations where the employer’s retaliation is calculated and the employer is willing to wait until sufficient time passes to take retaliatory action.

135. CAL. HEALTH & SAFETY CODE § 1278.5(d)(1)-(2) (West 2018).

136. CAL. LAB. CODE § 1102.5(a) (West 2018). It also protects employees who refuse to participate in unlawful conduct.

137. CAL. LAB. CODE § 1102.6 (West 2018).

limitations, as would a rebuttable presumption directed only at conduct within a certain time frame, it addresses retaliation regardless of timing.

While complaining about unlawful sexual harassment is a protected activity under both the FEHA and section 1102.5, only the FEHA currently provides for attorneys' fees for a prevailing plaintiff, thus making FEHA claims more valuable. Further, the Department of Fair Employment and Housing has the authority to enforce the FEHA, while the California Labor Commissioner enforces the Labor Code. Given the DFEH's experience enforcing the FEHA, and the extensive body of law that has addressed retaliation under the FEHA, it is important to ensure that the protections for claims brought under the FEHA are as broad as claims brought under other laws that prohibit the same conduct.

VI. FURTHER TARGETING OF RETALIATION

As discussed above, the proposed measures that would prohibit the silencing of victims and the concealment of prior harassment would go a long way in addressing workplace harassment. However, I believe that measures targeting retaliation can have the most positive effect in reducing sexual harassment. We must directly address the risks and consequences of retaliation suffered by employees who protest workplace sexual harassment, and the chilling effect this has on some employees' willingness to come forward with their own stories. Below I make one additional proposal.

To address the fact that employees are often afraid to protest harassment as it occurs because of a fear of retaliation, I propose a rebuttable presumption that harassing conduct was unwelcome and subjectively offensive in the following three circumstances:

- 1) If the harasser is a supervisor with the ability to take negative employment actions;
- 2) If the employee can demonstrate that she was aware of other employees being sexual harassed and that the employer knew about the harassment; or
- 3) If the employee can demonstrate that she was aware of previous retaliation in the workplace against others who complained about harassment or other prohibited conduct.

The presumption would apply if the alleged conduct meets all of the other elements of the claim. That is, the conduct would still need to be objectively offensive and shown to have been initiated by the supervisor, even if the plaintiff testifies that she quietly acquiesced or went along to protect herself. A rebuttable presumption in the first circumstance would deter supervisors from using their positions of power to freely harass employees. The rebuttable presumptions in

the second and third circumstances would account for the reality that many employees are deterred from complaining about their own harassment if they know their employer tolerates harassment or retaliates against complaints. This presumption would further incentivize employers to take corrective action and would address the fact that harassment is more prevalent in those organizations that condone it.

CONCLUSION

We have made significant progress in protecting employees from sexual harassment over the past twenty years. Sexual harassment protections cover a broad range of conduct directed at employees, whether sexual or nonsexual, based on desire or hostility, and directed by and at persons of all genders. The #MeToo and #TimesUp movements have motivated people to speak out about sexual harassment and abuse. However, harassers and the companies that protect them continue to benefit from secrecy in settlement agreements and in arbitration. Retaliation remains a serious concern, particularly when the harassment is committed by a high-ranking person. As more people are empowered to step forward, we must ensure that their voices are not silenced and that they are protected. Proposed legislation out of California represents a promising effort to ensure that we capitalize on these movements and keep their momentum going.

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