



Beyond checkboxes

A STRATEGIC APPROACH TO INTERSECTIONALITY IN EMPLOYMENT LAW

Employment discrimination doesn't always stem from one protected characteristic. When multiple identities intersect – such as race, gender, sexual orientation, or disability – the resulting bias can take forms that traditional legal frameworks have long failed to recognize.

With the passage of Senate Bill 1137 (SB 1137), effective January 1, 2025, California became the first state to formally recognize intersectional discrimination within its civil rights statutes. SB 1137 affirms that bias frequently arises from the combination of protected characteristics – not from any single trait alone.

Plaintiff-side employment attorneys are now in a stronger position under SB 1137 to champion intersectional claims that can revitalize outdated legal frameworks while advancing these claims strategically. The following framework is a helpful guide for navigating the changing legal landscape. It offers practical strategies to help you identify, present, and handle these complex claims effectively, ensuring they have a meaningful impact.

Understanding intersectionality: From legal theory to legal tool

Professor Kimberlé Williams Crenshaw introduced the term *intersectionality* in her 1989 essay, *Demarginalizing the Intersection of Race and Sex*. A pioneering legal scholar and leading architect of Critical Race Theory (CRT), Crenshaw used the concept to reveal how antidiscrimination law systematically failed Black women. She explained that courts, bound by rigid frameworks, forced claims into either race-based or sex-based categories – ignoring the compounded discrimination faced by those whose identities spanned both.

Crenshaw highlighted a recurring legal injustice: If an employer hired Black men and white women, judges often concluded that no discrimination

occurred – erasing the unique bias targeting Black women at the intersection of race and sex. Her now-famous traffic intersection metaphor illustrated how individuals positioned at these crossroads are vulnerable to overlapping forces of oppression, which cannot be understood – or remedied – through single-axis analysis.

Though Crenshaw's focus was on Black women, her framework exposed a broader flaw in legal reasoning – one that affects anyone whose multiple marginalized identities combine to create distinct forms of harm. Over time, intersectionality became a critical lens for understanding how racism, sexism, homophobia, transphobia, ableism, and other forms of bias interact in ways that traditional legal categories fail to capture.

With the passage of SB 1137, California law has caught up to what Crenshaw identified decades ago: Discrimination must be evaluated holistically. The statute codifies this principle, requiring courts to recognize that bias often arises from the intersection of protected characteristics – not from any single trait alone.

Recognizing intersectional claims in practice

For decades, intersectional claims were treated as novel theories rather than legal claims with a well-established foundation. But that began to shift with a series of pivotal federal decisions – most notably, the Ninth Circuit's decision in *Lam v. University of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994), and earlier rulings by the Fifth and Tenth Circuits.

In *Lam*, Professor Maivân Clech Lâm, a Vietnamese woman with impressive academic credentials, twice applied for a directorship position at the University of Hawai'i's law school and was passed over. The university argued that because other Asian candidates and other women were considered, there could be no discrimination. The Ninth Circuit

disagreed. It recognized that when a plaintiff alleges discrimination based on both race and sex, the analysis must consider the intersection of those traits, not treat them separately. To support this reasoning, the court specifically cited *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025 (5th Cir. 1980). In *Jefferies*, the Fifth Circuit acknowledged that Black women may face discrimination that is qualitatively different from that experienced by either white women or Black men, and held that such claims must be evaluated as distinct from single-axis claims.

The *Lam* court also cited *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987), in which the Tenth Circuit emphasized that discrimination claims based on the intersection of race and gender must not be fragmented into independent claims. Instead, the analysis must be holistic, examining how those traits may interact in unique ways to produce harm.

SB 1137 codifies these judicial principles into California's civil rights framework – formalizing what courts in *Lam*, *Jefferies*, and *Hicks* recognized decades ago: that discrimination often emerges from the convergence of identities and cannot be adequately addressed through fragmented analysis.

For attorneys, this isn't just a shift in legal doctrine – it's a shift in perspective. Recognizing intersectional discrimination requires attention to how structural biases operate when multiple identities interact, often in ways that evade traditional categorization.

Consider a Black woman whose assertiveness in leadership meetings is routinely criticized as “abrasive,” while her white female and Black male peers are praised for similar conduct. The issue isn't simply race or gender bias – it's how stereotypes specific to Black women inform perceptions of professionalism and temperament, echoing the concerns raised in *Jefferies*.

Or take an Asian American woman in a corporate environment where she is consistently passed over for client-facing roles – not because of explicit exclusion, but due to assumptions that she is “better suited for behind-the-scenes work.” This reflects intersecting biases about race and gender – where cultural stereotypes around deference and quietness shape advancement opportunities – paralleling the analysis in *Lam*.

A Latina trans woman may be included in formal diversity initiatives, yet systematically excluded from informal mentorship channels critical to promotion. Her experience cannot be understood through gender identity or ethnicity alone, but through how those identities intersect to trigger layered exclusion – precisely the type of compounded harm courts addressed in *Hicks*.

Even more subtly, an older, disabled Black employee may face shifting performance expectations – where flexibility granted to younger or white colleagues disappears when implicit biases about competence, age, ability, and race converge.

In each of these scenarios, the adverse treatment is not reducible to a single protected characteristic. The interaction of identities shapes workplace dynamics, decision-making, and exclusion.

Applying the reasoning from *Lam*, *Jefferies*, and *Hicks* means interrogating not just *what* happened, but why it happened in the way it did – and to whom. It requires asking whether the same conduct, performance, or request would have been perceived differently if the client did not embody multiple marginalized identities.

By approaching cases through this lens, attorneys can craft narratives that reflect the realities of intersectional discrimination – aligned with both SB 1137’s statutory mandate and decades of evolving judicial recognition. The law continues to develop, but the responsibility to frame these claims accurately begins long before stepping into court.

Building the case: Investigation and intake

Effective advocacy in intersectional discrimination cases begins well before drafting a complaint – it starts at intake, where the nuances of overlapping identities first surface. Clients rarely articulate their experiences in legal terms, let alone identify them as “intersectional discrimination.” Instead, they recount being sidelined for promotions, micromanaged, excluded from key projects, or subjected to inconsistent standards. The attorney’s role is to listen for patterns – recognizing when these adverse actions stem not from a single trait, but from how multiple identities interact to shape workplace perceptions.

A thoughtful intake requires moving past routine checklists of race, gender, disability, or sexual orientation in isolation. Attorneys must explore how these identities interact to create distinct disadvantages:

- Has your client observed that colleagues who share only part of their identity – such as white women, Black men, or non-disabled LGBTQ+ employees – were treated more favorably?
- Have they encountered conflicting or compounded stereotypes (e.g., being described as both “too passive” and “too aggressive”) that suggest overlapping biases?
- Are workplace expectations, feedback, or disciplinary actions applied differently based on how multiple traits are perceived together?

This approach aligns with SB 1137’s directive to reject dissecting identities into silos and instead view the totality of a client’s lived experience.

Gathering intersectional evidence

Intersectional discrimination is rarely explicit. Employers rarely express such bias overtly; it’s embedded in patterns, language, and inconsistent practices.

Key areas to investigate include:

- Comparative evidence: Look beyond broad demographic statistics. Focus on whether employees who share only one of

your client’s identities advanced, received accommodations, or avoided discipline under similar circumstances. These contrasts can highlight how the intersection of identities triggered disparate treatment.

- Coded language: Internal emails, meeting notes, and performance reviews frequently utilize subjective terms such as “professionalism,” “attitude,” “communication style,” or noting an individual is “not a fit.” These terms frequently mask biases tied to intersecting stereotypes.
- Shifting standards and evaluations: Identify whether your client faced inconsistent expectations, heightened scrutiny, or vague criticisms – hallmarks of implicit bias amplified by intersecting identities.
- Public messaging vs. workplace reality: Employers may promote diversity through external campaigns or ERG initiatives while marginalizing employees with multiple marginalized identities. Discovery revealing exclusion from mentorships, high-visibility projects, or informal networks can expose performative inclusion.
- Policy enforcement: Examine whether workplace policies – such as dress codes, grooming standards, or behavioral expectations – were selectively applied. For example, was a Black, nonbinary employee disciplined for “unprofessional” attire while similar expressions by white LGBTQ+ colleagues were overlooked?

The objective is to construct a coherent narrative from these disparate elements – demonstrating that what may appear as neutral or individualized decisions were, in fact, shaped by systemic biases operating at the intersection of identities.

Framing intersectionality in pleadings and briefs

Drafting intersectional discrimination claims requires more than listing protected characteristics; it demands telling a story that captures how those identities interacted to shape the adverse treatment of your client. The

challenge is to avoid fragmenting your client's experience into isolated categories while simultaneously ensuring the court clearly understands how the defendant's bias was based on overlapping protected characteristics.

For example:

- A Black woman repeatedly labeled "too aggressive" or "unapproachable," while Black men were seen as assertive and white women as collaborative, demonstrates bias arising from compounded stereotypes – not race or gender in isolation.
- A Middle Eastern Muslim woman denied client-facing roles due to concerns about "cultural fit" and "communication style," despite the employer promoting non-Muslim women and Middle Eastern men, reflects how ethnicity, religion, and gender intersected to limit advancement.
- A Latino gay man excluded from informal networking events and leadership opportunities, where heterosexual Latino men and white gay men were included, illustrates how sexual orientation and ethnicity combined to trigger exclusion – despite surface-level diversity elsewhere in the organization.

Highlight patterns and pretext

Pleadings should emphasize *patterns* – shifting standards, inconsistent enforcement, vague critiques like "not a fit," or evolving justifications for adverse actions. These are hallmarks of intersectional bias and signal pretext.

Consider language such as:

"Plaintiff was subjected to disparate treatment because of the intersection of [traits], as reflected by [specific conduct or comments], which were not directed at employees who shared only one of these characteristics."

Support this legal framing with citations to *Lam*, *Jefferies*, and/or *Hicks*, as well as the legislative findings of SB 1137, which explicitly affirm that California courts must recognize and assess discrimination based on the intersection of two or more protected traits.

Comparator evidence challenges

Identifying comparators in intersectional cases presents unique challenges. Clients holding multiple marginalized identities often lack direct counterparts in the workplace. Attorneys should be prepared to argue that the absence of a "perfect" comparator does not defeat a claim. Instead, focus on patterns – how employees who share some, but not all, of the client's identities were treated more favorably. Courts have recognized that comparator evidence need not be identical, particularly where intersectional bias creates a distinct class of one.

Framing intersectionality for the court

Given that some courts may be less familiar with intersectionality, attorneys should be prepared to educate strategically. Use clear, direct language that frames intersectionality as a well-established legal principle – codified by SB 1137 and reinforced by precedent in *Lam*, *Jefferies*, and *Hicks*. Depending on the complexity of the facts and the likely level of judicial understanding, attorneys may need to provide additional context to ensure the court fully grasps how overlapping identities shaped the discriminatory conduct at issue.

The goal is to present intersectionality not as an abstract theory, but as a practical, enforceable standard grounded in law – tailoring the depth of explanation to the circumstances of the case and the decision-maker's familiarity with these concepts.

Anticipate and undermine common defenses

Proactively plead facts that expose:

- Inconsistent application of performance standards.
- Shifting justifications tied to different aspects of identity.
- Patterns of exclusion hidden behind superficial diversity initiatives.

By framing intersectional claims deliberately from the outset, attorneys not only strengthen their cases against early

challenges but also compel courts to address the full scope of discriminatory conduct. This requires anticipating judicial hesitation and using persuasive, accessible language throughout pleadings, briefs, and motions – ensuring intersectionality is understood not as theory, but as an enforceable basis for liability.

Discovery strategies to expose intersectional bias

Discovery is where intersectional discrimination reveals itself – not through blatant acts, but through patterns hidden within policies, practices, and pretext. Because these claims rely on circumstantial evidence, a precise and strategic discovery plan is key to exposing how overlapping identities led to discriminatory decisions.

Intersectional bias doesn't announce itself. It hides behind neutral-sounding policies, subjective evaluations, and shifting justifications. That's why discovery must go beyond the obvious. It's not just how women were treated, but how a Muslim woman who wears a hijab was treated. Not just how employees with disabilities were accommodated, but how an older Black man with a disability was scrutinized. And not whether LGBTQ+ employees were welcomed in theory, but whether a gay Latino man was excluded from leadership opportunities and professional relationships.

Define your theory of harm from the outset. Every interrogatory, document request, and deposition should be designed to show that the discrimination didn't arise from a single characteristic, but from how multiple identities converged to shape workplace decisions.

Interrogatories and requests for production

Tailor written discovery to uncover:

- Demographic and employment data broken down by combinations of traits (race + gender, age + disability, etc.).
- Promotion, compensation, and disciplinary records analyzed through an intersectional lens.

- Internal complaints, grievances, and evaluations referencing coded language – terms like “fit,” “attitude,” or “leadership presence” often signal bias tied to intersecting stereotypes.
- Diversity audits, climate surveys, or exit interviews where responses reveal disparities or unaddressed concerns related to employees with multiple marginalized identities.
- Communications referencing your client, where seemingly benign comments may reflect intersectional bias – especially subjective critiques tied to demeanor, professionalism, or “culture fit.”

Deposition strategy

Use depositions to expose:

- How decision-makers assessed your client relative to employees sharing only some of their identities.
- Whether the company tracks outcomes or addresses challenges faced by employees at identity intersections.
- Shifting justifications for adverse actions – depending on which aspect of identity is being discussed.
- Gaps in training or awareness about intersectionality, undermining any defense based on proactive diversity efforts.

A well-placed question about how the company defines and addresses compound discrimination can reveal institutional blind spots that support both liability and damages.

Using discovery to uncover “rainbow washing”

“Rainbow washing” refers to a practice where companies outwardly support LGBTQ+ rights – often through marketing campaigns, sponsorships, or Pride Month displays – without making any meaningful changes to their internal policies or workplace culture. While these public gestures may give the impression of inclusivity, they often mask a lack of real support for LGBTQ+ employees, especially those who also hold other marginalized identities, such as people of color or disabled individuals. This superficial branding can create a

misleading public image that diverges sharply from employees’ lived experiences.

If your client’s claim includes performative inclusion or “rainbow washing,” discovery should probe into the following:

- Public-facing diversity statements or Pride Month campaigns.
- Internal efforts (or lack thereof) to support employees who hold intersecting identities.
- Contradictions between the company’s external image and internal handling of complaints involving LGBTQ+ employees of color, disabled women, or other employees with overlapping protected identities.
- Records of complaints or disputes that contradict the company’s external image.

Demonstrating this disconnect can reinforce claims of pretext and show that the employer’s commitment to diversity is superficial – strengthening arguments for both liability and enhanced damages.

Expert support and testimony

Expert testimony can play a critical role in helping judges and juries understand how overlapping identities shape workplace experiences. Social science experts can contextualize how stereotypes function differently when multiple marginalized traits intersect – for example, how assertiveness may be viewed negatively in Black women but not in White women or Black men. Psychological experts can also speak to the compounded emotional toll of intersecting forms of discrimination.

Good expert witnesses in intersectional claims can include professors and researchers with academic expertise in race, gender, disability, LGBTQ+ issues, or workplace equity. Mental health professionals with experience treating individuals impacted by discrimination are also valuable, particularly when the claim includes emotional distress or long-term psychological harm.

Select experts who not only understand intersectionality conceptually

but can also explain its real-world effects in accessible, concrete terms. Their declarations or testimony can be instrumental in translating your client’s lived experience into persuasive, fact-based legal arguments. Even a concise expert declaration can bolster the legitimacy of your case, reinforce your damages arguments, and educate the court about the realities of compound bias.

Trial strategy: Framing intersectionality for the jury

In intersectional discrimination cases, success at trial requires proving that bias arose from how multiple aspects of your client’s identity were perceived together – and ensuring the jury understands that this form of discrimination is actionable under California law.

Jurors may instinctively try to analyze each characteristic in isolation – considering whether race, gender, or disability alone explains the treatment. Your role is to reframe that thinking early, guiding them to recognize that it was the interaction of identities that shaped the adverse actions.

In voir dire, focus on identifying jurors who struggle with the concept that workplace bias can result from several traits combined to influence perceptions and decisions. Thoughtful questioning here not only uncovers biases but introduces the jury to the lens through which they’ll view the evidence.

Opening statements should avoid theory and instead focus on how decision-makers responded to your client’s whole identity. Frame your client’s story around how decision-makers responded to who they were as a whole person, not as separate categories. Use familiar workplace dynamics – shifting expectations, subjective critiques, exclusion – to illustrate how perceptions were shaped by intersecting identities.

Throughout witness examinations, let testimony reveal patterns: inconsistent standards, coded language, or rationales that only make sense when viewed

through the context of your client's full identity. If using expert testimony, ensure that it's practical – explaining how these dynamics operate in real workplaces, supported by research, but grounded in everyday experience.

By closing, jurors should understand the patterns of bias revealed throughout the trial. Your task is to connect that understanding to the law. Remind them that California, through SB 1137, directs them to assess whether discrimination arose from the way protected characteristics were perceived in combination – not separately.

A well-executed trial strategy weaves intersectionality into every phase – ensuring the jury not only recognizes the pattern of treatment but understands that the law compels accountability for it.

Long-term impact

SB 1137 represents more than a legislative update – it is a cultural signal that California law is evolving to reflect lived realities. For plaintiff-side attorneys, this shift reinforces our role not only as advocates for individual clients but as agents of systemic accountability. Every case brought under SB 1137 has the potential to set precedent, uncover institutional bias, and pressure employers to adopt truly inclusive practices – not just performative policies.

The law provides long-overdue clarity that intersectional discrimination is not theoretical – it is real, it is recognized, and it is actionable. For employment attorneys, the tools to

bring these claims have never been more defined or necessary. By building intersectional frameworks into our intake, discovery, pleadings, and trials, we not only serve our clients – we help reshape the legal landscape to reflect the complexity and dignity of the people we represent.

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