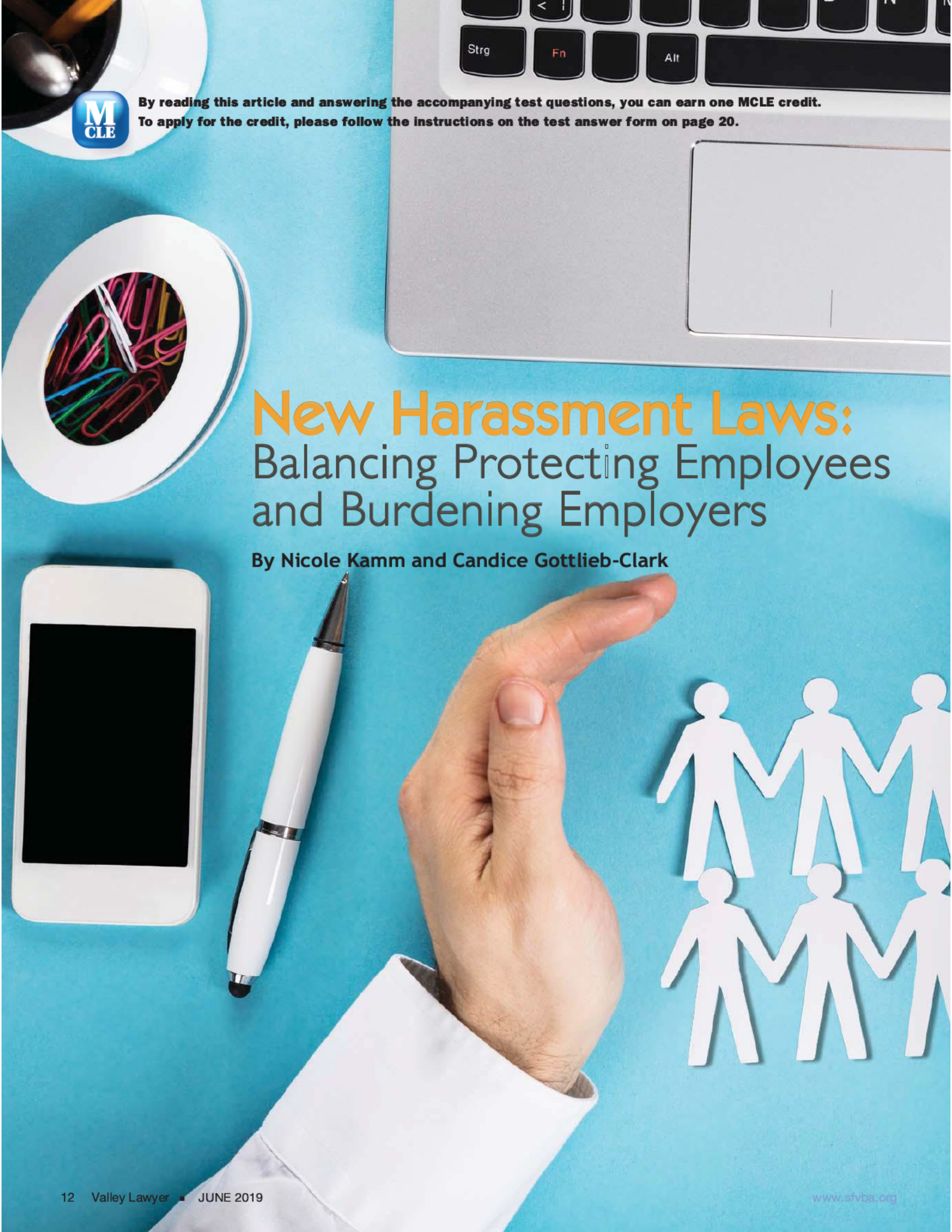

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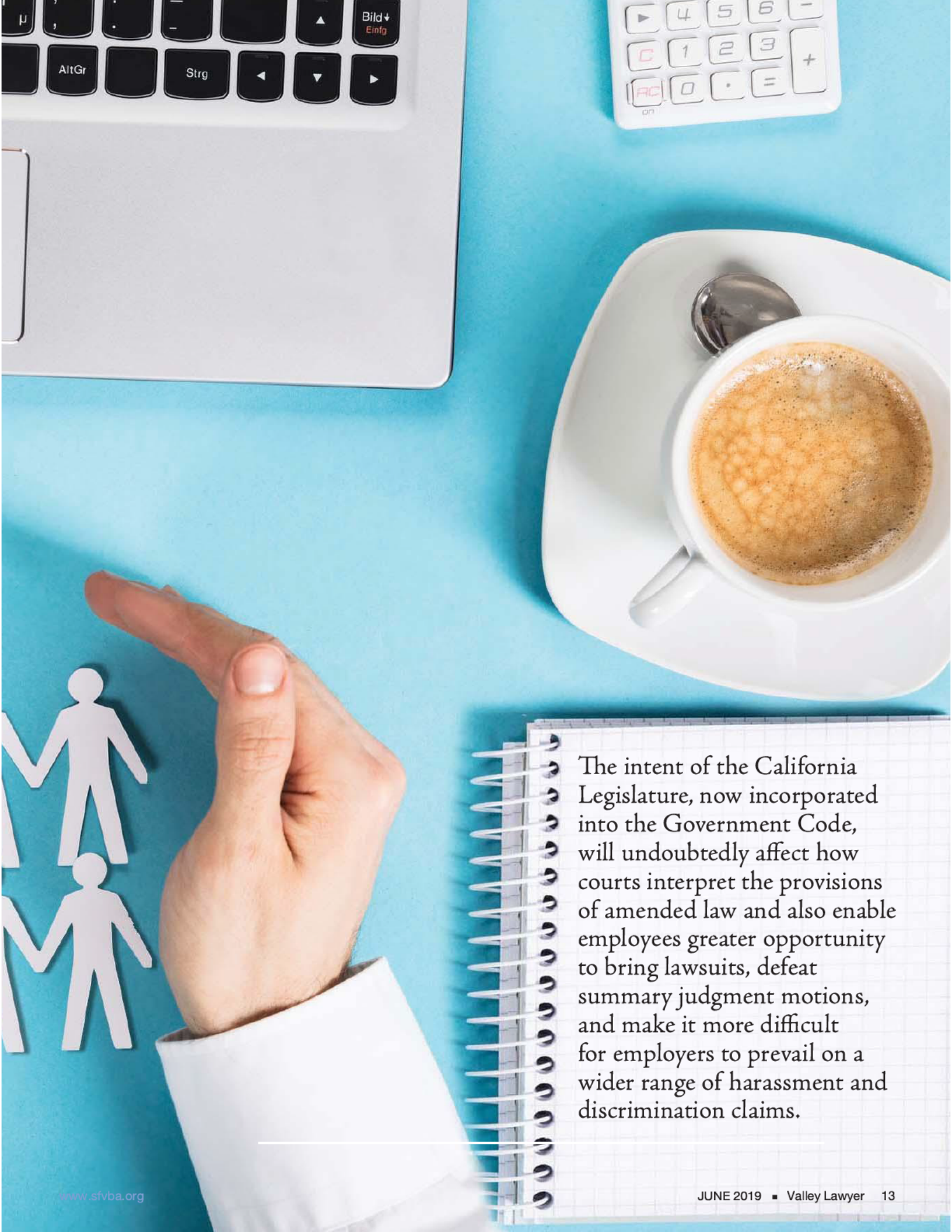
New Harassment Laws: Balancing Protecting Employees and Burdening Employers

By Nicole Kamm and Candice Gottlieb-Clark



The intent of the California Legislature, now incorporated into the Government Code, will undoubtedly affect how courts interpret the provisions of amended law and also enable employees greater opportunity to bring lawsuits, defeat summary judgment motions, and make it more difficult for employers to prevail on a wider range of harassment and discrimination claims.

LARGELY IN RESPONSE TO THE WIDESPREAD *#MeToo* movement, Californians saw the passage of several bills intended to address workplace harassment last fall.

Among the most significant was Senate Bill 1300, which, among other things, mandated several changes in the law with regard to litigating sexual harassment claims under California's Fair Employment and Housing Act (FEHA).

As a result, employers are advised to take note of these changes as they affect how complaints should be addressed, possible defenses an employer may assert, and how often innocent interactions can escalate into legal claims.

Difficult Defense

SB 1300 adds Section 12923 to the existing Government Code. According to the bill's sponsor, State Senator Hannah-Beth Jackson (D-19th District), "The *#MeToo* movement raised awareness of pervasive sexual harassment in our workplaces, and now it's time to act. SB 1300 will close the loopholes in law that have allowed this inappropriate and unacceptable behavior to persist."[1]

Making it more difficult for employers to defend claims, SB 1300 expands the types of conduct that can constitute unlawful harassment under the "severe or pervasive" standard.

First, the bill explicitly rejects the decision of *Brooks v. City of San Mateo*.[2]

In *Brooks*, the court noted actionable harassment or discrimination must be sufficiently "severe or pervasive" to alter an employee's working conditions and create an abusive working environment.[3] The court found that a single incident in which a coworker inappropriately touched the plaintiff over a period of five minutes did not rise to the level of "severe or pervasive" harassment violating Title VII, given that the employer promptly removed the employee from the workplace (and where the plaintiff suffered no physical injuries and did not allege she sought or required hospitalization).[4]

In rejecting *Brooks*, the legislature stated that for purposes of FEHA, as amended, a single incident of harassment may be sufficient to create a hostile work environment "if the conduct unreasonably interferes with the employee's work performance or creates an intimidating, hostile, or offensive work environment."[5]

Further, the bill reaffirms Justice Ruth Bader Ginsburg's 1993 concurrence in *Harris v. Forklift Systems*.[6] In that case, she commented that, "In a workplace harassment suit the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. Rather it suffices to provide 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."[7]

In addition, the legislature affirmed another impactful decision—*Reid v. Google, Inc*.[8]

In that case, the legislature explicitly agreed with *Reid* that even 'stray remarks' (those not directly related to an employment decision or made by a non-decision-maker), while not alone being sufficient to find discrimination, can be deemed relevant, circumstantial evidence of discrimination, considering all the circumstances.[9]

Further, the bill states the legal standard for sexual harassment should not vary by type of workplace, noting that "courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of job duties."

Finally, of significant concern for employers, SB 1300 states harassment cases are rarely appropriate for disposition on summary judgment, affirming the decision in *Nazir v. United Airlines, Inc.*, noting hostile work environment cases involve issues "not determinable on paper."[10]

The legislature's intent, now incorporated into the state's Government Code, will undoubtedly affect how courts interpret the provisions of the amended law.

The new law also will provide employees greater opportunity to bring lawsuits, defeat summary judgment motions, and make it more difficult for employers to prevail on a wider range of harassment and discrimination claims.

Addressing All Forms of Harassment

In addition to the above, which is significant in and of itself, there are other provisions in SB 1300 that impact employers.

Previously, FEHA required employers to take immediate and appropriate steps to prevent and correct sexual harassment by certain non-employees, for example, customers, contractors, vendors, etc. of employees, applicants, unpaid interns or volunteers, or persons providing services under a contract in the workplace. Employers must take these steps if they or their agents or supervisors, know or should have known, of the sexually harassing conduct.

In ruling on these cases, courts consider the extent of the employer's control, as well as any other legal responsibility the employer may have related to the non-employee's conduct.

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SB 1300 amends FEHA to provide that employers must take such reasonable steps for any type of harassment by those non-employees, not just sexual harassment.[11]

In other words, SB 1300 removes the word "sexual" from the language of the statute to clarify that all forms of harassment are covered.

Prohibitions and Denials

In response to what has been viewed as an effort to nullify or work around various anti-harassment and discrimination laws, SB 1300 also prohibits employers from requiring employees, as a condition of employment or continued employment, or in exchange for a bonus or raise, to release all FEHA claims or rights. It also prohibits the signing of a non-disparage agreement or other document purporting to deny the employee the right to disclose information about any unlawful workplace acts, including sexual harassment.[12]

The prohibited "release of a claim or right" includes requiring an individual to sign a statement that the individual does not have a claim or injury against the employer. It also includes the release of a right to file and pursue a civil action or complaint with any state agency, public prosecutor, law enforcement agency, or any court or other governmental entity.[13]

The restriction does not, however, apply to a negotiated settlement to resolve an underlying claim filed in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process, that:

- Is voluntary, deliberate and informed;
- Provides consideration of value to the employee; and
- Is accompanied with a notice to the employee of an opportunity to retain an attorney, or is made when the employee is represented by an attorney.[14]

Limits on Awards of Fees and Costs

Previously, FEHA permitted a court to award prevailing employer defendants their reasonable attorneys' fees and costs, including expert witness fees, at the court's discretion.

SB 1300 amends the law to permit courts to award prevailing employer defendants fees and costs only if the court finds the action "frivolous, unreasonable, or groundless when brought, or the employee continued to litigate after it clearly became so, regardless of any settlement offer."[15]

As a result, employees and their attorneys have greater incentive to file and maintain suits against employers since there is even less likelihood they will be held liable for a prevailing defendant's fees.

Ambiguous or Inconsistent Legislative Intent

Complicating matters further for employers, the statements of legislative intent as detailed in Section 12923 of the Cal. Government Code are stated broadly in favor of protecting employees' rights.

In most cases, the law does not reinforce such legislative pronouncements in this manner—a fact which may well create additional confusion to be settled in the courts.

For example, as discussed above, the legislature rejected the *Brooks* holding of "severe or pervasive" conduct for purposes of the amended FEHA statute, stating that a single incident of harassing conduct may be sufficient to create a hostile work environment if the conduct unreasonably interfered with the employee's work performance or created an intimidating, hostile, or offensive work environment.

However, the legislature did not clarify this standard for conduct constituting actionable harassment under FEHA in the statute, apart from the statement of legislative intent.

While further guidance would have provided employers and employees alike more certainty in determining actionable harassment, the legislature did not include specific language in the statute. Courts may be influenced by legislative intent, but must ultimately decide issues based on the language of the law as written.

This is just one example of the often ambiguous and conflicting legislative intent.

Ultimately, it is employers and employees who must litigate these ambiguities and there are new and re-proposed bills in this area pending in the current term that, for example, extend the statute of limitations to file claims, etc.

Quirky Colleagues or Claim Risks?

Digesting the above, let us explore two workplace scenarios—illustrated with pseudonyms—and the often thin line between what can be considered an "internal" matter, and what may escalate to become a legal claim.

First, the 'Aggressive Sales Manager.'

A pharmaceutical company employs a successful sales manager, Leanne, a key producer exceptional at 'closing the sale'.

However, her aggressive approach to sales is often the same behavior she displays in the workplace and to members of her own team. She demands excellence and often demeans those who don't meet her standards.

While her behavior does not appear to be focused on any protected characteristic or indeed any characteristic other than closing the sale, she certainly ruffles a lot of feathers, and though no formal complaints have been lodged, several of her co-workers (and certainly all members of her team) are aware of her brusque behavior.

One day Carl, a member of Leanne's team, pushes back. He complains that he feels she is singling him out for especially harsh treatment. Leanne points out his poor sales in the prior quarter and tells Carl to "suck it up, buttercup." She reminds him of the excellence she expects from her team,

and the status of his recent sales. She tells Carl if he can't hack it, he can quit.

Out of a sense of pride and with some fear for his job, Carl soldiers on. Weeks later, as nothing changes, Carl decides to take the matter to Human Resources, which promptly investigates and begins to work with Leanne. To her credit, Leanne's behavior improves modestly. However, Carl still feels put upon and quits.

The pharmaceutical company considered the circumstances and weighed its options. In spite of finding (based on their investigation) that the conduct did not rise to the level of unlawful harassment, Carl "felt" singled-out and might claim he was harassed based on a protected characteristic (gender, race, age, etc.).

While the company may ultimately prevail on the merits of a suit by this employee, the costs associated with prolonged litigation included heavy legal fees and/or a costly settlement agreement.

The legal challenge for the company had laid in its long-term pattern of ignoring Leanne's problematic behavior. Had the company been able to show on-going efforts to address the issue, or taken a more deliberate stand on ensuring appropriate employee behavior overall, the circumstances may have been different. Carl would likely have seen the company as caring about its work environment and about its employees. Instead, Carl believed the company cared only about sales and its bottom line.

By the time Carl made his complaint, the company was already 'behind the eight ball.' Leanne's behavior was well-known by both employees and Human Resources. Adding insult to injury, Human Resources worried more about the potential lawsuit than Carl's well-being or the company's overal culture of accepting bad behavior.

As such, Human Resources made minimal effort to engage with Carl in the days following the complaint. This was a lost opportunity to show Carl that the company had a true desire to create change, and quite possibly hammered a nail in the coffin of likely litigation, as it left Carl feeling unappreciated and ignored by the company.

The pharmaceutical company could have minimized the chances of the above scenario playing out as it did.

It could have mandated leadership training for managers that taught specific managerial skills and appropriate leadership behaviors; implemented a team training protocol that informed employees of the expected behaviors throughout the company, the protocols for addressing concerns, and highlighting the company's desire to keep a healthy workplace; instituted a feedback procedure to encourage team members to air grievances or report potentially troublesome behavior without repercussions; and provided Human Resources with training on managing issues of workplace conflict.

Implementing these steps likely would have cost less than defense costs fighting the employee's lawsuit, or additional

employee suits, and a possible settlement or the risk of taking a case through trial.

Second, the 'Sophomoric Leader.'

James, a senior, corporate-level executive with a national biotech firm, found himself wearing a variety of hats. As a company leader and visionary at a fast-growing firm, he was also tasked with managing some projects directly and assisted with research on new leads. Although he was stretched thin among his many responsibilities, he particularly enjoyed the project and research elements.

This "being in the tank," as he called it, allowed James to interact with a team directly and make decisions that forged immediate impact. However, the heavy load he carried uncovered some unproductive and unprofessional behaviors that affected the productivity of the entire team. It seemed that, between making fast decisions and powering through his long list of duties, James had forgotten his primary role as a leader at the company.

In his daily interactions, James engaged in gossip, played favorites, and showed signs of dismissiveness.

One employee in particular, Roy, noticed he was repeatedly passed over for opportunities that he believed he was primed to carry out in favor of an objectively attractive female peer with whom James overtly flirted.

Roy saw this as blatant favoritism and rightfully complained about project roles and concerns of favoritism and harassment to Human Resources, leading to an investigation.

The company immediately felt the weight of Roy's charges. Married to an employment law attorney, Roy felt the discrimination he believed he faced could easily turn litigious. James, on the other hand, defended his actions stating Roy was not selected for certain projects due to some idiosyncratic behaviors he exhibited that could be deemed distracting or unsuitable for client-facing projects. Yet James had never spoken with Roy about his concerns.

The company saw the situation, which started with poor leadership behavior and snowballed into harassment, as too close of a call. In addition to the investigation, the company immediately secured leadership coaching for James, who, management felt, needed to learn patterns for interacting with the team, even when he was wearing a non-corporate hat. James also needed to improve his skills set in both communication and conflict management, so that he could appropriately initiate a difficult conversation.

This further served as a wake-up call for the company. They had to look beyond James to more pervasive gaps in leadership development caused by years of successful growth and promoting from within, but not providing up-and-coming managers with adequate training, development, or mentoring. An investigation led to similar findings as multiple comments reflected concerns of leaders behaving and interacting with staff in an unprofessional manner.

For James and Roy, their workplace relationship and the balance of whether or not Roy felt justified in pursuing legal action, rested on James' ability to have a difficult conversation with Roy—one in which James could explain his reservations and concerns about Roy's "unsuitable" behavior in front of clients.

This face-to-face opportunity while perhaps uncomfortable for James, allowed Roy an opportunity to reflect on his own behavior and learn of the changes he would need to make to further his own success.

Prevention and Compliance

SB 1300's amendment of FEHA increases the costs and risks of litigation for employers.

As a result, employers should amend their policies and practices to ensure they are in compliance and, as always, take prompt and appropriate action to address harassment, discrimination and other claims.

In addition, they must ensure that supervisors, human resource department members, and others to whom such claims are made immediately report claims to the appropriate persons within the company.

The employer must also guarantee that all employees, including new hires, are aware of and understand these rules. Further, employers have additional training obligations under the law.

While SB 1300 addressed costs and risks, Senate Bill 1343 has expanded the harassment prevention training requirement.

According to SB 1343, virtually all California employers must now provide one hour of training to all non-supervisory employees and two hours to supervisory employees, whether they are permanent, temporary, or seasonal workers, by January 1, 2020, and once every two years thereafter.[16]

The training must be provided by a qualified individual and, in addition to other information, is required to cover FEHA and Title VII of the Civil Rights Act of 1964; the definition of harassment; how to prevent harassment generally and based on gender identity, gender expression and sexual orientation; remedies for harassment victims; potential employer and individual exposure and liability; and measures to curb bullying. Different industries may have different training requirements, of which client employers should be aware. California Senate Bill 970, for example, requires hospitality industry employers to provide human trafficking awareness training.

If compliance with the new *#MeToo* legislation is in question, it is imperative to ensure that you and your employer clients have policies and procedures in place that inform and educate employees about unlawful harassment, discrimination and retaliation; educate employees—including managers and supervisors—about proper workplace behavior; can handle a harassment claim, if made to a supervisor or Human

Resources; and provide required trainings if five or more workers are employed.

If not, employers should update policies and procedures as soon as possible, evaluate any prior complaints and how they were handled to improve responsiveness and ensure that all employees are provided with a copy of the employer's written policies and procedures, mandated by FEHA as of April 1, 2016

A well-written company policy should list all protected categories under FEHA; explain that employees are protected from harassing and discriminatory conduct by third parties; outline the employer's complaint and investigative process while also specifying that an employee need not complain to a direct supervisor; explain that confidentiality will be maintained to the fullest extent possible; make clear that a victim will be protected from any form of retaliation; and outline the potential actions that may be taken against an aggressor, among other information.

Preventing Claims of Harassment

Employers can get in front of these potential issues by:

- Ensuring Human Resources and managers have the knowledge, resources, and authority to identify and address issues of poor workplace behaviors;
- Conducting routine internal reviews to ensure they are aware of emerging issues. This effort has an added benefit of demonstrating to employees the company is concerned and serious about resolving any issues;
- Establishing company policies for managing concerns of workplace behavior; and
- Teaching employees how they can be involved and help the company maintain a healthy work environment.

Organizations of all sizes have an opportunity to be proactiv with regard to potential issues of harassment.

The big leap of faith is that business clients must accept tha the expense of careful planning, regular training and monitoring, and consistent engagement needed for supporting both their management and employee professionals is less costly and far less disruptive than litigation.

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[1] *https://sd19.senate.ca.gov/news/2018-08-31-jackson-bill-combat-sexual-harassment-heads-governor.*
[2] *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).
[3] *Id. at 923.*
[4] *Id. at 927.*
[5] Cal. Gov't Code § 12923(b).
[6] *Harris v. Forklift Systems* (1993) 510 U.S. 17.
[7] *https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB1300.*
[8] *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512.
[9] Cal. Gov't Code § 12923(c).
[10] *Nazir v. United Airlines, Inc.* (2009) 178 Cal. App.243.
[11] Cal. Gov't Code § 12940(j)(1).
[12] Cal. Gov't Code § 12964.5(a).
[13] Cal. Gov't Code § 12964.5(a)(1)(B).
[14] Cal. Gov't Code § 12964.5(c).
[15] Cal. Gov't Code § 12965(b).
[16] Cal. Gov't Code § 12950(b).

Test No. 128

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Per California Senate Bill 1300, employers may be liable for all forms of harassment by third parties.
   ❑ True ❑ False

2. Plaintiff employees must show sexual harassment is "severe and pervasive" when bringing claims against employers.
   ❑ True ❑ False

3. Under SB 1300, a hostile work environment is defined as "a workplace in which an employee's tangible productivity has declined because of harassment."
   ❑ True ❑ False

4. An employer may be responsible for the acts of non-employees with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract, if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.
   ❑ True ❑ False

5. The best way for employers to protect a business' reputation is to have all employees sign non-disparagement agreements upon hire.
   ❑ True ❑ False

6. Off-hand derogatory comments made by non-supervisory employees, and not directed at anyone specifically, may be relevant evidence of discrimination.
   ❑ True ❑ False

7. In most cases, employers are likely to prevail on harassment summary judgment motions.
   ❑ True ❑ False

8. A client's mail clerk witnesses a car accident across the street from the client's place of business. Shaking her head in disgust, she tells a male coworker, "Chicks can't drive." This an example of a discriminatory remark that could support a hostile workplace claim.
   ❑ True ❑ False

9. Courts will consider the extent of an employer's control with respect to the conduct of non-employees when reviewing cases of harassment committed by non-employees.
   ❑ True ❑ False

10. It is no longer legal to obtain a plaintiff's release of all Fair Employment and Housing Act (FEHA) claims when negotiating a settlement for sexual harassment claims.
    ❑ True ❑ False

11. Employer defendants may recover attorneys' fees and costs only if the court decides the employee's claims were frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.
    ❑ True ❑ False

12. It is sufficient for employees to know management has an "open door policy" if they feel they are being harassed.
    ❑ True ❑ False

13. Employers with fewer than 25 employees are not required to provide unlawful harassment, discrimination and retaliation prevention training to their workers.
    ❑ True ❑ False

14. Employers may ask employees to sign a waiver of FEHA claims or rights in exchange for a raise or bonus, provided the release is written clearly and signing is voluntary.
    ❑ True ❑ False

15. An abrasive management style, so long as it is not directed at any one employee and not based on one of the protected characteristics under FEHA (race, age religion, gender, etc.), merely requires monitoring by an employer to ensure tensions do not escalate.
    ❑ True ❑ False

16. Proper managerial training regarding conflict resolution and harassment/discrimination prevention is a recommended method of minimizing employment claims and litigation.
    ❑ True ❑ False

17. SB 1300 creates a litigation-friendly environment for plaintiffs, as employers may recover costs of litigation only under very narrow circumstances.
    ❑ True ❑ False

18. Bartenders and cocktail servers will have a difficult time pursuing harassment claims as the nature of their work leaves little defense against unwanted advances.
    ❑ True ❑ False

19. Providing regular harassment and discrimination prevention training, in addition to being required by California law for most employers, demonstrates to employees that management cares about maintaining a productive, healthy work environment.
    ❑ True ❑ False

20. Employers without a harassment, discrimination, and retaliation prevention policy are in violation of California law.
    ❑ True ❑ False

MCLE Answer Sheet No. 128

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:

   San Fernando Valley Bar Association
   20750 Ventura Blvd., Suite 140
   Woodland Hills, CA 91364

METHOD OF PAYMENT:

❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for
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5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.

Name _____
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State/Zip _____
Email _____
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State Bar No. _____

ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False