



## New Frontiers: The Latest Legal Developments in Workplace Bias Protections

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Presented by **Miller Law Group**

**millers**  
*Live*

# What Are We Talking About Today?

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Protected Class



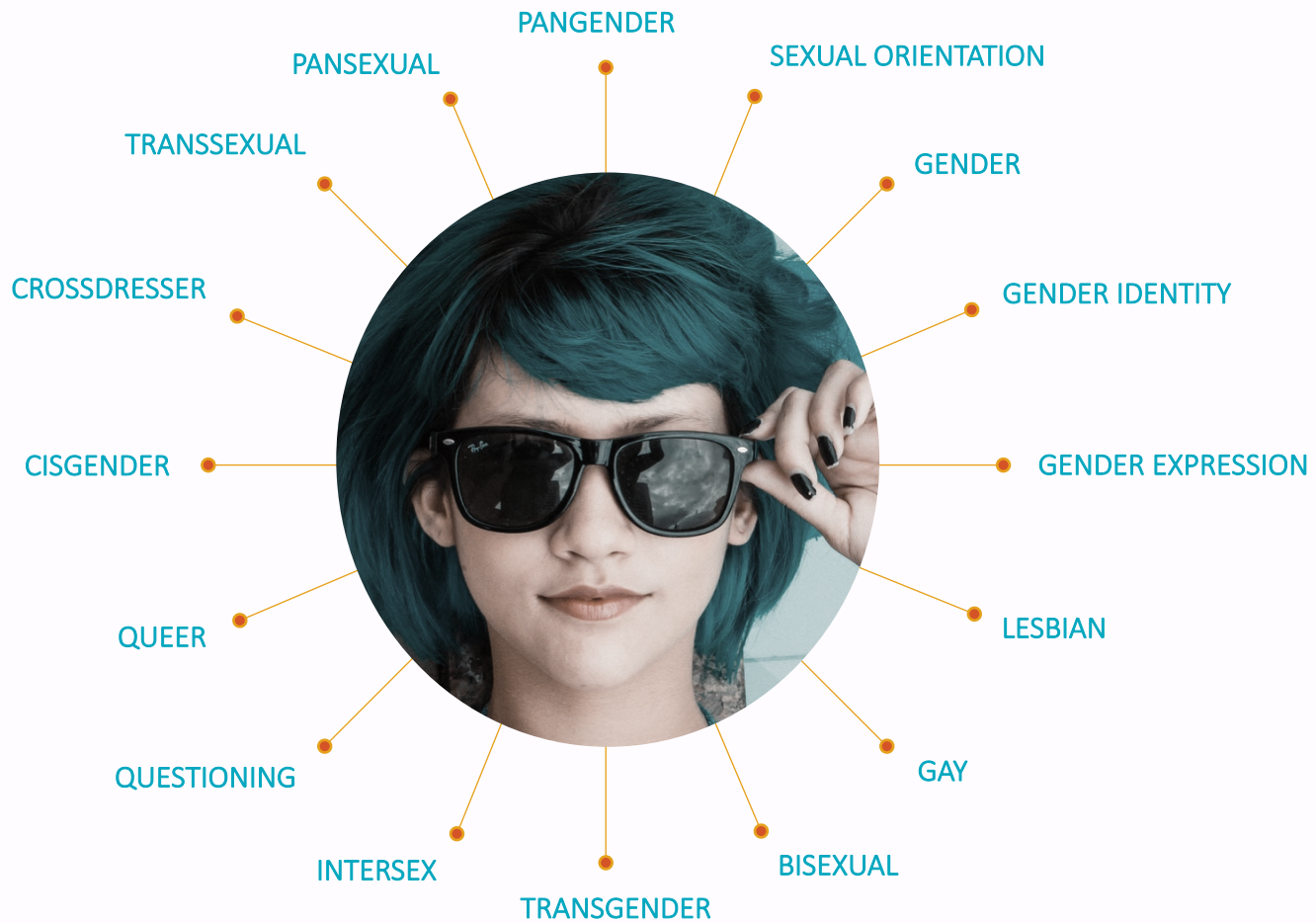
Appearance



Lifestyle



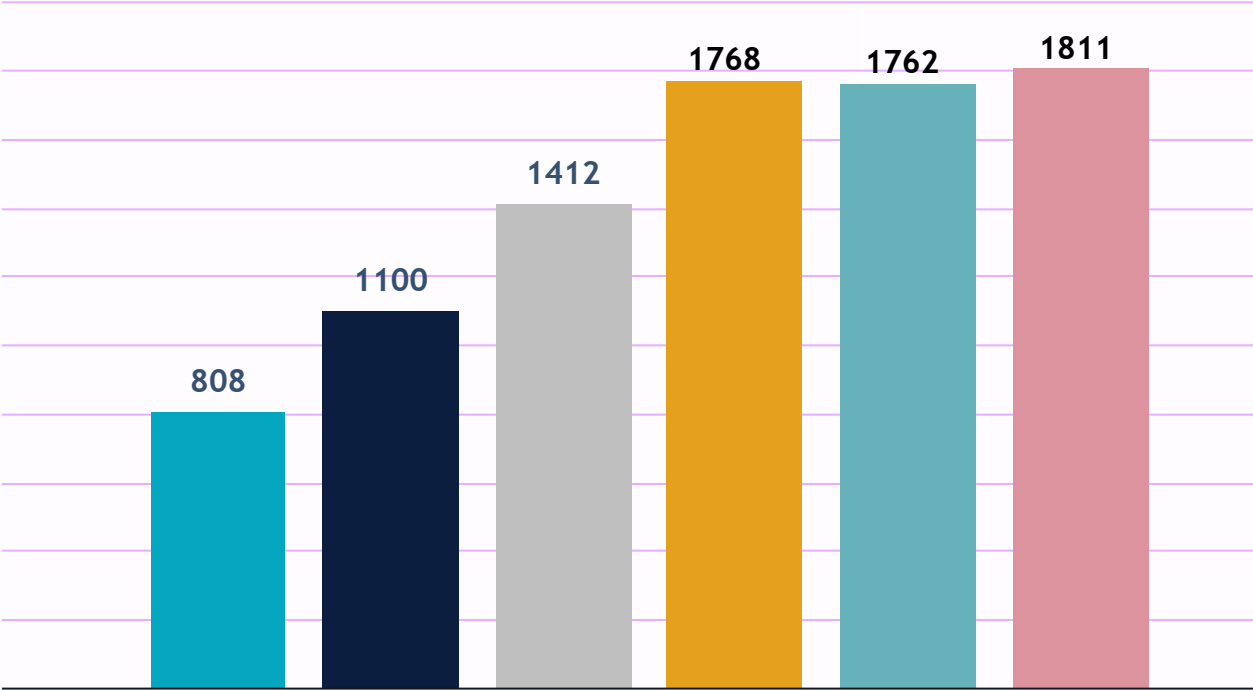
## Gender Identity & Expression



# EEOC Statistics



■ 2013 ■ 2014 ■ 2015 ■ 2016 ■ 2017 ■ 2018



**LGBT Charges**



***Obergefell v. Hodges***

135 S.Ct. 2584 (2015)

***Roberts v.***

***United Parcel Service***

115 F.Supp.3d 344 (E.D.N.Y. 2015)

***Barrett v.***

***Fontbonne Academy***

33 Mass.L.Rep. 287

2015 Mass. Super. LEXIS 149 (2015)





***EEOC v. R.G. & G.R.***

***Harris Funeral Homes, Inc.***

100 F.Supp.3d 594 (E.D. Mich. April 23, 2015)

***Dawson v. H&H Electric***

E.D.Ark. No. 4:14CV00583,  
2015 U.S. Dist. LEXIS 122723 (Sept. 15, 2015)

***Chavez v. Credit Nation Auto Sales LLC***

11th Cir. No. 14-14596,  
2016 U.S. App. LEXIS 598 (Jan. 14, 2016)

***Glenn v. Brumby***

2016 WL 1089743 (D. Ariz. 2016)

***Robinson v. Dignity Health***

2016 WL 7102832 (N.D. Cal. Dec. 6, 2016)

# Restroom Access

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*Lusardi v. McHugh*, EEOC Appeal No. 0120133395  
(April 1, 2015)

*DFEH v. American Pacific Corp.*, Cal.Super.Ct. No.  
34-2013-00151153 (2014)







Revise EEOC and harassment policies



Review dress and appearance codes



Use care with restroom issues for transgender employees



Use an employee's preferred name and pronoun



Conduct sensitivity training for managers and co-workers



Maintain privacy and confidentiality



Work with employees to create workplace transition plans



Manage co-worker and customer concerns



Consider changing sex-specific self-identifying designations in information systems to be more inclusive and comprehensive




# Gender Stereotyping

**“Over-generalizations about the characteristics of an entire group based on gender”**



# How Does it Impact the Workplace?



**Virtually all of us operate  
with some implicit gender  
biases.**



***Lewis v. Heartland Inns of America LLC***  
591 F.3d 1033 (8th Cir. 2010)

***EEOC v. Boh Brothers Construction Co., L.L.C.***  
731 F. 3d 444 (5th Cir. 2013)

# SCOTUS Poised to Decide:

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- Is sexual orientation discrimination protected under Title VII?
  - *Altitude Express, Inc. v. Zarda*, 139 S.Ct. 1599 (2019)
  - *Bostock v. Clayton County, Georgia*, 2016 WL 9753356 (N.D. Georgia, Nov. 3, 2016) (*R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, 139 S.Ct. 1599 (2019))
- Does Title VII prohibit discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*?
  - *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, 139 S.Ct. 1599 (2019)

A woman wearing a black hijab and a black and white striped shirt is shown from the chest up. She has a thoughtful expression, with her right hand raised to her chin. The background is blurred, suggesting an outdoor setting. A teal-bordered box with a dark teal background is overlaid on the lower left, containing the text 'Religion & Accommodation'.

## Religion & Accommodation

# Religious Discrimination Basics

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No discrimination based on religion

Reasonable accommodations for religious beliefs and practices



# The *Abercrombie* Decision

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Motivation is key.

Knowledge is irrelevant.





# ***EEOC v. Red Robin Gourmet Burgers***

W.D. Wash. No. 2:04-cv-1291

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**Can dress codes and other  
workplace policies forbid / require  
covering tattoos?**



## Jewelry & Piercings

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***Cloutier v. Costco***

390 F.3d 126 (1st Cir. 2004)

***Hedum v. Starbucks***

546 F.Supp.2d 1017 (D.Or. 2008)



# Dreadlocks, Beards & Braids

***EEOC v. Catastrophe Management Solutions***  
(11<sup>th</sup> Cir. Dec. 13, 2016) 2016 WL 7210059)

***EEOC v. McDonald's Restaurants of California***  
(E.D. Cal. No. 1:13-cv-02065AWI-SAB)

***EEOC v. Mims Distributing***  
(E.D.N.C. No. 5:14-cv-00538)



# Handling Accommodations



Inform employees of religious accommodation policy



Train managers to recognize religious accommodation requests

Be proactive



Individually assess each request



Avoid assumptions/stereotypes about what is a religious belief or practice



Avoid assumptions about what is an appropriate accommodation



Allow religious expression to same extent that other types of personal expression are allowed



Consult EEOC's suggestions for best practices:

[http://www.eeoc.gov/policy/docs/best\\_practices\\_religion.html](http://www.eeoc.gov/policy/docs/best_practices_religion.html)



# Appearance Policies

“TATTOOS. Yes! We want customers to focus on you, not your body art. Tattoos are allowed, but not on your face or throat. Treat tattoos as you treat speech—you can’t swear, make hateful comments or lewd jokes in the workplace, neither can your tattoos.”

“PIERCINGS. When it comes to earrings, it’s small or moderately sized and no more than two per ear. Yes to ear gauges, ideally no bigger than 10mm and a small nose stud is allowed (no septum or rings). No other visible pierced jewelry or body adornments.”

- Starbucks



“Dress appropriately.”

- General Motors



# Appearance Policy Best Practices

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Train supervisors and co-workers to be tolerant regarding appearance that may not comport with their stereotypic or other notion of what is appropriate.

Avoid imposing appearance standards that do not implicate actual job performance or the effective operation of the business.

Consider accommodations -- including but not limited to a policy exception -- when requested or when the need for accommodation may be apparent.

Less may be more.



## National Origin

# New California Regulations

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Went into effect July 1, 2018

Expand the definition of “national origin” to include the following:

- Physical, cultural or linguistic characteristics associated with a national origin group
- Marriage to or associate with persons of a national origin group
- Tribal affiliation
- Membership in or associations with an organization identified with or seeking to promote the interests of a national origin group
- Attendance or participation in schools, churches, temples, mosques, or other religious institutions general used by persons of a national origin group; and
- Name that is associated with a national origin group



# New Regulations: what's prohibited?

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Absent a business necessity:

- Language restrictions, including an English only policy,
- Discrimination based on English proficiency.
- Discrimination because of an accent

To establish business necessity, employer must show: (1) the policy is necessary to the safe and efficient operation of the business; (2) it effectively fulfills the business purpose it is supposed to serve; and (3) there is no alternative practice that would serve the business purpose.

## New Regulations: Additional Protections

### Immigration Status:

An employer may not discriminate against an employee due to immigration status unless the employer shows by “clear and convincing” evidence that its actions were necessary to comply with federal immigration laws.

### Height and Weight Restrictions:

may be unlawful if they disproportionately affect members of one national origin group absent business necessity.

### Harassment:

threats of deportation, comments about immigration status, mockery of an accent, and other derogatory statements, even if uttered only once, may be sufficient to create a hostile work environment.

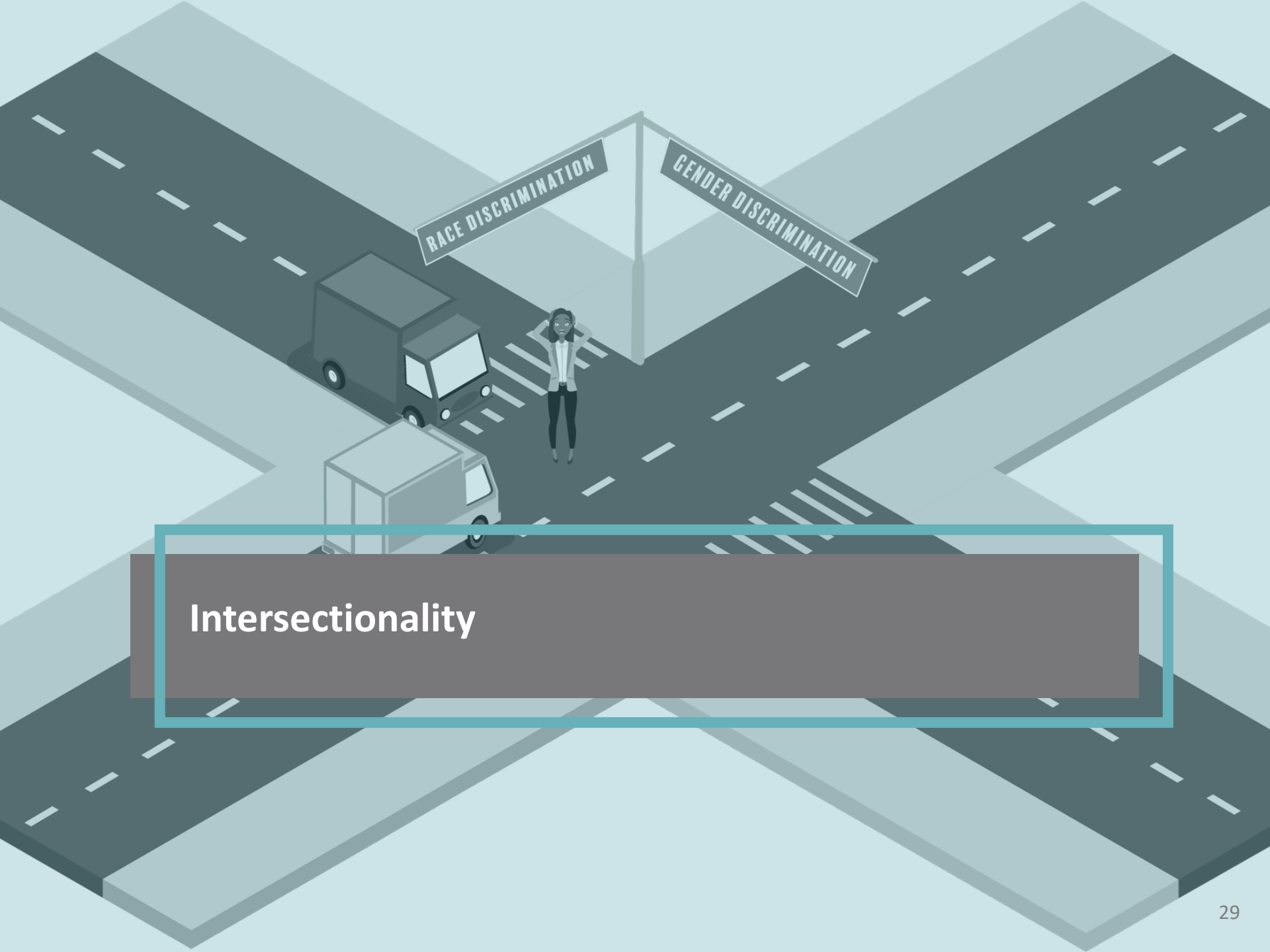


## Harassment Training

# Harassment Training Requirements

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- By January 1, 2020, SB 1343 requires employers in California provide two hours of sexual harassment and abusive conduct training to supervisors *and* one hour of training to non-supervisor employees.
- The training must be provided within six months of hiring and repeated every two years.
- Applies to California employers with five or more employees located *anywhere*.
- The definition of “employee” includes full-time, part-time, and temporary employees
- The California Department of Fair Employment and Housing (DFEH) has said all employees must be trained in the 2019 calendar year to comply with the January 1, 2020, deadline — meaning that all employees who trained in 2018 or before must retrain in 2019



## Intersectionality

# Intersectionality Theory - Overview

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**“Demarginalizing the Intersection of  
Race and Sex: A Black Feminist  
Critique of Antidiscrimination  
Doctrine, Feminist Theory and  
Antiracist Politics.”**

-Kimberle Crenshaw, 1989





# Intersectionality Theory - Overview

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Intersectional discrimination claims are different than multiple basis claims.



Intersectional people experience both combined and unique discrimination.



Consider intersectionality in disparate impact, promotional and pay equity analyses.

Thank

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You *in*

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