ATTORNEY PERSPECTIVES ON WORKPLACE SEXUAL HARASSMENT CLAIMS: LESSONS LEARNED FROM CALIFORNIA IN THE WAKE OF #METOO

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Abstract

When the #MeToo movement began three years ago, we soon learned about the difficult reality facing many survivors of sexual harassment, assault, or discrimination: Even when survivors report misconduct, justice does not always follow. This was evidenced by stories of survivors challenging perpetrators, only to be subjected to further harm or retaliation.

Further complicating a survivor's calculus about whether to come forward was—and is—a legal system that makes it difficult to bring and prove these claims, however meritorious. Fortunately, as public awareness of these barriers has grown, so have legislative efforts to change the laws that make it difficult or impossible for survivors to secure justice. This Article explores which features of California law—both procedural and substantive—make it better suited than federal law for plaintiffs bringing workplace sexual harassment claims.

Drawing from qualitative data from seventy-nine surveys, our research indicates that California's Fair Employment and Housing Act ("FEHA"), the state law governing these claims, is preferable to federal law, Title VII of the Civil Rights Act. The attorneys we surveyed underscore three aspects of California law that make it superior. First, the FEHA does not place a cap on punitive or compensatory damages. Second, the FEHA allows claimants to hold harassers liable separate from the employer. Third, the law holds employers strictly liable if the harasser is the employee's

supervisor. Our research further indicates that attorneys find California courts to offer numerous procedural advantages over federal courts. These procedural advantages include the requirement that a plaintiff in California need only convince three quarters of the jury to prevail, that she has additional time to oppose summary judgment, and that the jury pool is more diverse than in federal court. While the substantive differences between federal and state employment law are relevant solely to attorneys practicing employment law, the procedural differences that make California preferable are instructive for any civil rights or plaintiff's attorney. Our findings also shed light on what policies lawmakers across the U.S. should prioritize as they advance legislation addressing workplace sexual harassment.

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INTRODUCTION

Since 2017, the #MeToo movement has raised awareness about the prevalence of sexual harassment, including in the workplace.[1] Advocates and policymakers have responded in kind, with legislators across the country introducing bills to discourage harassment and better secure justice for those harmed.[2] One mode

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[1] For an overview of workplace sexual harassment generally, *see* RAYMOND F. GREGORY, UNWELCOME AND UNLAWFUL: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE (2004); *see also* Rose L. Siuta & Mindy E. Bergman, *Sexual Harassment in the Workplace*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF BUSINESS AND MANAGEMENT (2019), https://oxfordre.com/business/view/10.1093/acrefore/9780190224851.001.0001/acrefore-9780190224851-e-191 (last visited May 5, 2020).; *see also* James Campbell Quick & M. Ann McFadyen, *Sexual harassment: Have we made any progress?*, 22 J. OF OCCUPATIONAL HEALTH PSYCHOL. 286–298 (2017). For a discussion of how #MeToo has increased awareness about workplace sexual harassment, *see Gendered Power Disparities, Misogynist Violence, and Women's Oppression: The #Metoo Movement Against Workplace Sexual Harassment,* 10 CONTEMPORARY READINGS IN L. AND SOC. JUST. 57–63 (2018).

[2] Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, STATELINE, (July 21, 2018), https://pew.org/2M66sSP; L. CAMILLE HEBERT, *How the "MeToo" Movement is Reshaping Workplace*

of recourse is bringing a civil lawsuit against an employer, but plaintiffs bringing these claims face numerous legal hurdles, both procedural and substantive.[3] Generally, procedural challenges relate to rules of procedure governing a trial,[4] while substantive barriers stem from the law governing the claim and the requirements to prove liability. Soon after the #MeToo Movement began, California-based employment law attorney Ramit Mizrahi published an article detailing how her state set an example for other jurisdictions by providing stronger procedural and substantive legal protections for claimants than those available at the federal level.[5]

Building on Mizrahi's research, we surveyed employment law attorneys from across California, collecting their views on state law, federal law, and how the two compare when it comes to bringing and winning workplace sexual harassment lawsuits. Our findings are based on the first-hand accounts and experiences of seventy-nine

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Harassment Law in the United States (2020), https://papers.ssrn.com/abstract=3518414.

[3] SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017); Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548–602 (2000–2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3–76 (2003); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511–566 (2003–2004); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275–1361 (2011–2012); Theresa M. Beiner, *Let the Jury Decide: The Gap between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791–846 (2001–2002).

[4] For a discussion of how procedural changes may impact substantive rights, *see* JOSEPH A. SEINER, THE SUPREME COURT'S NEW WORKPLACE: PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES (2017).

[5] Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 THE YALE LAW JOURNAL FORUM (2018), https://www.yalelawjournal.org/forum/sexual-harassment-law-after-metoo (last visited Dec 13, 2018).

attorneys who assist clients in bringing these claims. The goal of the survey was to determine which substantive and procedural features of California law make it more-plaintiff friendly than federal law. We also wanted to understand how attorneys choose clients, in part to inform policy proposals aimed at equalizing access to legal representation. Our findings reveal the policy changes lawmakers across the U.S. should prioritize as they work to curb workplace sexual harassment and support individuals bringing these claims.

In what follows, we first provide an overview of data regarding the prevalence of workplace sexual harassment and who experiences it. While the data indicates that workplace sexual harassment is pervasive, it is less clear why and when workers report violations to government agencies or bring claims. Furthermore, the limited data available on the number of claims filed each year suggests that just a small fraction of those who experience workplace sexual harassment seek legal recourse, with even fewer succeeding on their claims.

Next, we describe the methodology and results of our attorney survey, including why plaintiffs' attorneys in California prefer state to federal court when bringing workplace sexual harassment cases. Specifically, survey participants found California courts to offer numerous procedural advantages over federal courts. These include the requirement that a plaintiff in California need only convince three quarters of the jury to prevail, that she has additional time to oppose summary judgment, and that the jury pool is more diverse. The survey results also indicate that California's Fair Employment and Housing Act ("FEHA"), the state law governing these claims, is markedly superior to federal law, Title VII of the Civil Rights Act ("Title VII"). Attorneys we surveyed were most supportive of three aspects of California law. First, the FEHA does not place a cap on punitive or compensatory damages. Second, the FEHA allows claimants to hold harassers liable separate from the employer. Third, the law holds employers strictly liable if the harasser is the employee's supervisor.

In the subsequent section, we discuss how attorneys decide to take a client, as well as legislative proposals that could increase the likelihood of attorneys taking on and successfully bringing these claims. Finally, we consider the implications of our findings, which will help plaintiffs' attorneys practicing employment law and civil rights attorneys generally. By understanding what makes California law and California courts more favorable for plaintiffs, attorneys can work to make similar changes in their civil rights practice areas. While this survey was limited to attorneys in California, the findings will likely prove helpful to other states because they both (1) indicate the crucial role state law can play in filling the gaps left by Title VII, and (2) suggest that plaintiff-friendly procedural rules are also essential to enabling plaintiffs to succeed on their claims.

I. WORKPLACE SEXUAL HARASSMENT: PREVALENCE AND ATTENDANT CLAIMS

The #MeToo movement has inspired countless people who have experienced sexual harassment to share their stories with friends, family, or the public at large.[6] But while public awareness of the issue has increased,[7] commensurate research and data collection has

[6] Emily Shugerman, *Me Too: Why are women sharing stories of sexual assault and how did it start?*, THE INDEPENDENT, October 17, 2017, https://www.independent.co.uk/news/world/americas/me-too-facebook-hashtag-why-when-meaning-sexual-harassment-rape-stories-explained-a8005936.html (last visited Dec 4, 2018). In September 2018, we learned that #MeToo contributed to Dr. Blasey Ford's decision to tell a friend about her alleged assault by now-confirmed Supreme Court Justice Brett Kavanaugh. Julia Sulek, *Christine Blasey Ford feared attacks over Kavanaugh claims*, THE MERCURY NEWS, September 27, 2018, https://www.mercurynews.com/2018/09/17/metoo-spurred-christine-blasey-ford-to-open-up-about-alleged-attack-year-before-kavanaugh-nomination-friends-say/ (last visited Dec 4, 2018).

[7] *Gendered Power Disparities, Misogynist Violence, and Women's Oppression, supra* note 1.

only just begun.[8] In addition to being understudied,[9] actual rates of sexual harassment are difficult to discern for methodological reasons.[10] Underreporting is another barrier, since people who experience harassment may fear retaliation or mistrust the system in place to handle claims.[11] One recent study suggests "that women may hesitate to report sexual harassment because they rightly perceive that doing so could cause them to experience bias."[12] Fortunately, the study also suggests that #MeToo may be helping mitigate this bias. This section reviews the available data on workplace sexual harassment. While additional data collection and research would be valuable, there is adequate evidence to conclude it is pervasive, especially among the most vulnerable workers.

A. Survey data

According to expert testimony provided to the Equal Employment Opportunity Commission ("EEOC"),[13] between 25 and 85 percent of women report having experienced sexual

[8] For a discussion of the available data and gaps, see *infra* at I.A.-C.

[9] For a discussion of the "sparse empirical literature" on sexual harassment of low-income women, see generally Loise Fitzgerald, *Useen: the sexual harassment of low-income women in America*, 39 EQUALITY, DIVERSITY AND INCLUSION 5–16 (2019).

[10] James E. Gruber, *Methodological Problems and Policy Implications in Sexual Harassment Research*, 9 POPULATION RESEARCH AND POLICY REVIEW 235–254 (1990); Chai Feldblum & Victoria Lipnic, *Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace* 8 (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

[11] *See, e.g*. Reporting Sexual Harassment: Toward Accountability and Action, GENDER POLICY REPORT (2018), https://genderpolicyreport.umn.edu/reporting-sexual-harassment-towards-accountability-and-action/ (last visited Apr 9, 2020); Rachel Thomas, *Women in the Workplace 2019* 50 (Oct. 2019), https://www.mckinsey.com/featured-insights/gender-equality/women-in-the-workplace-2019.

[12] Chloe Grace Hart, *The Penalties For Self-Reporting Sexual Harassment*, 33 GENDER & SOC'Y 534–559 (2019).

[13] The EEOC is the federal agency in charge of enforcing laws against workplace discrimination.

harassment in the workplace.[14] This variability is reflected across surveys, including those conducted in the wake of #MeToo.[15] One of the explanations for this wide range is the survey methodology used, including whether the survey asks if an employee "experienced sexual harassment," or if the survey asks about specific behaviors or actions that qualify as sexual harassment (but the employee herself might not consider sexual harassment).[16] The government does not collect industry- and income-specific survey data on rates of workplace sexual harassment. To fill in this gap, we turn to private industry-specific surveys or studies.

Workers employed in the food services industry report high rates of workplace sexual harassment. According to one 2016 survey, 40 percent of women in the fast food industry have experienced unwanted sexual behaviors on the job.[17] Another 2014 survey of restaurant workers across the country found that nearly 80 percent of women and 70 percent of men reported experiencing some form

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[14] Feldblum and Lipnic, *supra* note 10.

[15] THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT, 41 (2018), http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf. (Finding that in 2018, 81 percent of women and 43 percent of men reported experiencing some form of sexual harassment, including verbal sexual harassment, cyber harassment, and unwanted physical touching. Of those surveyed, 38 percent of women and 13 percent of men report experiencing harassment in the workplace.); NIKKI GRAF, *Sexual Harassment at Work in the Era of #MeToo* 15 (2018), http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ (last visited Dec 4, 2018). (Finding that 59 percent of women (and 27 percent of men) have been sexually harassed and, of those women, 69 percent say the harassment happened in a professional work setting. Thus, 41 percent of women report experiencing sexual harassment at work.)

[16] Feldblum and Lipnic, *supra* note 10.

[17] KEY FINDINGS FROM A SURVEY OF WOMEN FAST FOOD WORKERS, 4 (2016), https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf. The most common form of harassment reported was sexual teasing, jokes, remarks, or questions (27 percent) followed by hugging or touching (26 percent).

of sexual harassment from co-workers.[18] Two thirds of women and half of men surveyed had experienced some form of sexual harassment from a restaurant owner, manager, or supervisor.[19] Women working in states where the minimum wage for tipped workers is $2.13 per hour reported rates of sexual harassment twice as high among states with a standard minimum wage paid to all workers.[20]

The prevalence of workplace sexual harassment is also high across other low-wage industries. For example, women farmworkers face staggeringly high rates of harassment, with up to 80 percent of respondents experiencing sexual violence on the job.[21] Similarly, more than one-in-four homecare workers have experienced sexual harassment.[22] A similar study of low-wage union workers in Boston found that one-in-four women had experienced workplace sexual harassment.[23] Finally, an investigative report by *The New York Times* interviewed 100 current

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[18] THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY, 40 (Oct. 7, 2014), https://forwomen.org/wp-content/uploads/2015/09/The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry.pdf. Sixty percent of women and 46 percent of men reported that sexual harassment was an "uncomfortable aspect of work life" while nearly 80 percent of women and 70 percent of men reported experiencing some form of sexual harassment from co-workers.

[19] *Id.*

[20] *Id.*

[21] Sara Kominers, *Working In Fear: Sexual Violence Against Women Farmworkers in the United States* (2015), https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf; Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237–261 (2010).

[22] Ginger C Hanson et al., *Workplace violence against homecare workers and its relationship with workers health outcomes: a cross-sectional study*, 15 BMC PUBLIC HEALTH (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4308913/.

[23] Nancy Krieger et al., *Social hazards on the job: workplace abuse, sexual harassment, and racial discrimination--a study of Black, Latino, and White low-income women and men workers in the United States*, 36 INT'L J. OF HEALTH SERV. 51–85 (2006).

and former employees at a Ford auto plant in Chicago, finding high rates of sexual harassment, as well as frequent reports of retaliation against workers who report the discrimination.[24] The story includes one telling line: "After the #MeToo movement opened a global floodgate of accounts of mistreatment, a former Chicago worker proposed a new campaign: '#WhatAboutUs.'"[25] These surveys and investigations help fill in the gaps in data we have about rates of harassment across industries and income levels.[26]

To be sure, women also experience workplace sexual harassment in higher-wage and highly-professionalized jobs. In 2019, approximately 40 percent of women surveyed who worked in corporate America reported experiencing sexual harassment at least once in the course of their careers.[27] These rates were higher for women who also identified as lesbian or bisexual.[28] Likewise, women in academic sciences, engineering, and medicine experience sexual harassment.[29] In short, surveys indicate that no profession is

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[24] Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, THE NEW YORK TIMES, (December 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html, https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html.

[25] *Id.*

[26] Alana Semuels, *Low-Wage Workers Aren't Getting Justice for Sexual Harassment*, THE ATLANTIC, (Dec. 27, 2017), https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158/; Bernice Yeung, *Under cover of darkness, female janitors face rape and assault*, REVEAL (June 23, 2015), https://www.revealnews.org/article/under-cover-of-darkness-female-janitors-face-rape-and-assault/.

[27] Thomas, *supra* note 11 at 50.

[28] *Id.* at 50.

[29] ENGINEERING NATIONAL ACADEMIES OF SCIENCES, SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE (2018), (available at: https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic) (last visited May 5, 2020); Roxanne Nelson, *Sexual Harassment in Nursing: A Long-Standing, but Rarely Studied Problem*, 118 THE AM. J. OF NURSING 19–20 (2018); Jane van Dis, Laura Stadum & Esther Choo, *Sexual Harassment Is Rampant in Health Care. Here's*

immune, though workers in service-based and seasonal employment industries are most vulnerable.[30]

B. Data from the Equal Employment Opportunity Commission

After considering survey data, we can look at data from the EEOC to find out more about who experiences workplace sexual harassment. EEOC data is not perfect; it only includes information for workers who have chosen to file claims and thus it does not necessarily reflect the actual rates of harassment in those industries. Furthermore, only around half of all claims filed with the EEOC designate an industry,[31] and the industry data available is not disaggregated by gender or income.

The story the EEOC data does paint, however, is informative. For instance, while only seven percent of US women work in the restaurant industry, over one-third of all sexual harassment claims filed with the EEOC come from the restaurant industry.[32] Furthermore, four industries comprise half the claims: accommodation and food services (14.23 percent), retail trade

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How to Stop It., HARVARD BUS. REV., 2018, https://hbr.org/2018/11/sexual-harassment-is-rampant-in-health-care-heres-how-to-stop-it (last visited Apr 10, 2020); *America's Medical Profession Has a Sexual Harassment Problem*, BLOOMBERG, (April 30, 2019), https://www.bloomberg.com/news/features/2019-04-30/america-s-medical-profession-has-a-sexual-harassment-problem (last visited Apr 10, 2020).

[30] These findings are echoed in a recent survey from New York State. Sanjay Pinto, K. C. Wagner & Zoë West, *Stopping Sexual Harassment in the Empire State: Past, Present, and a Possible Future*, RESEARCH STUDIES AND REPORTS (2019), https://digitalcommons.ilr.cornell.edu/reports/69. Age also appears to be a factor, with younger employees being more susceptible to workplace sexual harassment. Emina Herovic, Jennifer A. Scarduzio & Sarah Lueken, *"It Literally Happens Every Day": The Multiple Settings, Multilevel Considerations, and Uncertainty Management of Modern-Day Sexual Harassment*, 83 WESTERN J. OF COMM. 39–57 (2019).

[31] Jocelyn Frye, *Not Just the Rich and Famous* (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/ (last visited Dec 4, 2018).

[32] THE GLASS FLOOR, *supra* note 18.

(13.33 percent), manufacturing (11.72 percent), and health care and social assistance (11.48 percent).[33] Finally, women file approximately 80 percent of all EEOC claims.[34]

C. Where are the charges?

What is more difficult to quantify is the disconnect between the staggering number of women who report experiencing sexual harassment in the workplace and the relatively low number of charges filed with the EEOC or equivalent state agencies.[35] Even if the number of working women who experience actionable workplace sexual harassment is one-in-100—and, as evidenced by survey data discussed above, it may be much higher—that would amount to nearly 750,000 women.[36] In comparison, women filed just 6,251 charges alleging sexual harassment with the EEOC in Fiscal Year (FY) 2019, and men filed 1,262.[37]

The number of women who filed sexual harassment charges through the EEOC declined from 6,657 in 2010 to 5,591 in 2017.[38] To the extent this reflects workers' reservations about reporting violations, survey data tells a similar story. A 2013 poll of 1,000

[33] Frye, *supra* note 31.

[34] *Id.*

[35] To learn more about the relationship between the EEOC and state agencies, see https://www.eeoc.gov/employees/fepa.cfm.

[36] Calculations based on number of employed women in the civilian labor force, seasonally adjusted, October 2018. Table A-1. Employment status of the civilian population by sex and age, U.S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, https://www.bls.gov/news.release/empsit.t01.htm (last visited Dec 4, 2018).

[37] Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010—FY 2018, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited May 5, 2020); Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 - FY 2011, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited May 5, 2020).

[38] See *Charges Alleging Sex-Based Harassment, supra* note 37.

adults found that only 27 percent of workers who had experienced workplace sexual harassment reported it.[39] A 2015 survey of over 2,200 working women had similar findings: of the one-in-three who reported experiencing workplace sexual harassment, only 29 percent reported it.[40] The #MeToo movement is relatively young, but it has raised awareness and may be catalyzing more workers to report violations. While this is just one data point, charges filed with the EEOC alleging sexual harassment increased by nearly 12 percent from FY 2017 to FY 2019.[41] In response to the #MeToo movement, the EEOC also appears to be stepping up its enforcement work through litigation; it filed 41 sexual harassment lawsuits in FY 2018, an increase of 50 percent from the prior year.[42] Between 2016 and 2019, the EEOC also increased the money secured for claimants from $40.7 million to $68.2 million.[43]

In California, the Department of Fair Employment and Housing ("DFEH") reported that they received 345 employee complaints alleging sexual harassment in 2018.[44] The DFEH also issued 5,192 "Right-to-Sue Letters" based on claims of sexual harassment in

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[39] Jillian Berman & Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share Of Workers Suffer, Don't Report*, HUFFINGTON POST, August 27, 2013, https://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html (last visited Dec 4, 2018).

[40] Furthermore, only 15 percent felt the report was handled fairly. Alanna Vagianos, *1 In 3 Women Has Been Sexually Harassed At Work, According To Survey*, HUFFINGTON POST, (Feb. 19, 2015), https://www.huffingtonpost.com/2015/02/19/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814.html.

[41] Press Release: EEOC Releases Preliminary FY 2018 Sexual Harassment Data, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2018), https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm (last visited Dec 4, 2018).

[42] *Id.*

[43] See *Charges Alleging Sex-Based Harassment, supra* note 37.

[44] 2018 Annual Report, Department of Fair Employment and Housing, (2018), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/01/DFEH-AnnualReport-2018.pdf

2018,[45] up from 3,698 in 2017.[46] Employees who request immediate "Right-to-Sue Letters" bypass the DFEH's investigation process and use the letter to file a case in civil court.[47] Any remaining complaints are investigated pursuant to a work-sharing agreement with the EEOC; if a complaint meets the criteria for a federal dual-filing status, it is also tracked in a federal database.

D. Bringing a workplace sexual harassment lawsuit

The statistics above paint a stark picture: millions of workers, mostly women, experience workplace sexual harassment, but most fail to pursue legal remedies. As suggested by employment law attorney Ramit Mizrahi, a closer look at the law may help explain why.[48] Specifically, federal law and federal courts present numerous barriers for plaintiffs bringing these claims.

Under federal law, workplace sexual harassment claims are brought under Title VII of the Civil Rights Act of 1964 ("Title VII").[49] Title VII does not explicitly prohibit sexual harassment; instead, courts and the EEOC have interpreted sexual discrimination to include sexual harassment.[50] Claims of workplace sexual harassment in California are brought under the Fair Employment and Housing Act ("FEHA").[51] The FEHA explicitly prohibits

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[45] *Id.*

[46] KEVIN KISH, *2017 Annual Report* 37 (2018), https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/08/DFEH-AnnualReport-2017.pdf.

[47] Claims brought under Title VII must first be investigated by the EEOC. It is not possible to bypass the investigation process. *Id.*; A GUIDE TO FEDERAL AND CALIFORNIA STATE SEXUAL DISCRIMINATION, HARASSMENT, AND ASSAULT LAWS, (2018), https://www.cwlc.org/wp-content/uploads/2018/09/A-Guide-to-Federal-and-California-State-Sexual-Discrimination-Harassment-and-Assault-Laws-FINAL.pdf (last visited Dec 5, 2018).

[48] Mizrahi, *supra* note 5.

[49] TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000E (1964).

[50] KISH, *supra* note 46, at 8.

[51] The FEHA is a combination of two earlier acts, the Fair Employment Practices Act of 1959 and the Rumford Act of 1963. 2010 FAIR EMPLOYMENT

sexual harassment.[52] Both the FEHA and Title VII allow claims to be brought under two theories – hostile work environment or quid pro quo. Under a hostile work environment theory, an employee may have a claim when sexual harassment "interferes with her work performance or creates an intimidating, hostile, or offensive working environment."[53] The harassment must be "either so severe or pervasive, so as to alter the conditions of the victim's employment and create an abusive environment."[54] Under a quid pro quo theory, sexual harassment occurs when an employer or supervisor provides benefits to the employee conditional on the performance of sexual favors.[55] California courts look to Title VII case law to interpret the FEHA.[56] However, the FEHA provides more expansive worker protections in some respects.[57]

After filing charges with the EEOC and/or state equivalent, the DFEH, and after receiving a right-to-sue letter, workers may pursue their claims in state or federal court. There is no pre-aggregated data on the number or success of workplace sexual harassment claims filed in state or federal court. Furthermore, data on settlement rates is also limited, though what data is available indicates the bulk of employment discrimination cases settle.[58]

AND HOUSING 50 YEARS AFTER FEHA, (2010), https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/2010%20FEHA%20background%20paper.pdf.

[52] KISH, *supra* note 46, at 14.

[53] *Id.* at 14–15.

[54] *Id.* at 9.

[55] *Id*.

[56] Reno v. Baird, 18 Cal.4th 640 (Cal. 1998); CAL GOV'T CODE § 12940(j) .

[57] A GUIDE TO FEDERAL AND CALIFORNIA STATE SEXUAL DISCRIMINATION, HARASSMENT, AND ASSAULT LAWS, *supra* note 47.

[58] Juliano and Schwab, *supra* note 3; Minna Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. AND LEE L. REV. 111 (2007); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, CORNELL L. FAC. PUBLICATIONS (2009), https://scholarship.law.cornell.edu/facpub/203.

II. SURVEY FINDINGS: PROCEDURAL AND SUBSTANTIVE ADVANTAGES OF CALIFORNIA LAW

In order to understand the differences between California and federal fora a for employment discrimination claims, we surveyed attorneys from across the state. In this section, we first review our survey methodology and describe our respondents. We next delve into the legal advantages of bringing a claim under California law, the Fair Employment and Housing Act ("FEHA"), over federal law, Title VII of the Civil Rights Act ("Title VII"). This section concludes by reviewing the procedural advantages of filing in California state court over proceeding in federal court.

A. Methodology

To conduct the survey, we emailed a Google Form to 980 plaintiff-side employment attorneys who (1) were members of the California Employment Lawyers Association ("CELA") and (2) listed "sexual harassment" as one area of practice on their CELA member profile.[59] We sent the survey to these email addresses on November 5, 2018 and again on November 9, 2018. The second email served as a reminder. We received 79 responses.[60] Our survey explored the procedural and legal differences between California and federal sexual harassment claims, and asked respondents to identify which are the most valuable. Specifically,

[59] This information is accessible exclusively to members of CELA, of which one author is a member.

[60] We sent the survey to 980 email addresses. Two emails failed to deliver. Of the 978 people that presumably received our survey, 79 responded, for a total response rate of at least 8%. A response rate of 9% is typical for telephone surveys, and "response rate is an unreliable indicator of bias." See Scott Keeter et al., *What Low Response Rates Mean for Telephone Surveys*, PEW RES. CTR. (May 15, 2017) https://www.pewresearch.org/wpcontent/uploads/2017/05/RDD-Non-response-Full-Report.pdf. While our survey was not conducted by phone, Keeter's findings can help provide useful context for our response rate.

we asked attorneys about the following topics: (1) their decision-making process in taking new clients; (2) the legal advantages of bringing a claim under California law versus federal law; (3) the procedural advantages of filing in California state court versus federal court; (4) the legal strategies they employ in litigation; and (5) their views on proposed state legislation to address workplace sexual harassment.

B. Respondents

The majority of respondents practice in the Bay Area[61] (31 respondents) and Los Angeles (30 respondents), with the rest dispersed across Orange County (five respondents), San Diego (three respondents), Fresno (two respondents), Sacramento (two respondents), Santa Barbara (one respondent), San Bernardino (one respondent), and Yolo County (one respondent).[62]

[61] Bay Area includes the counties of Alameda (nine attorneys), San Francisco (nine attorneys), Contra Costa (six attorneys), San Mateo (three attorneys), Marin (two attorneys), and Santa Clara (one attorney).

[62] The first part of the survey asked respondents for basic information. Specifically, we asked respondents their area of practice, number of years practicing, and city and/or county of practice.

Location of Practice

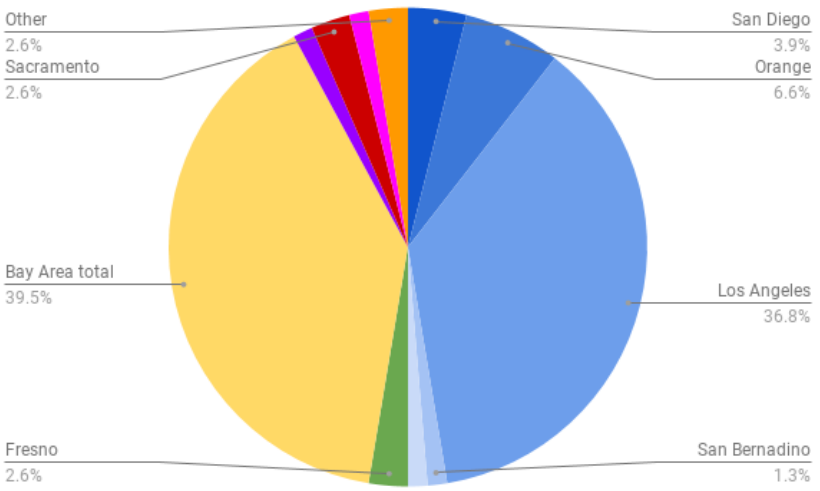

Figure 1

Attorneys surveyed had worked an average of 16.5 years, with a median of 12.5 years. They file an average of 6.85 workplace sexual harassment cases per year, with a median of four. The maximum number of workplace sexual harassment cases filed in a year was 75, while the minimum was zero.[63] Most survey takers spend less

[63] Three survey respondents reported filing zero cases per year. However, we also asked what percentage of the time attorneys spend on workplace sexual harassment cases. Of the three that reported filing no cases, one reported spending five percent of their time and another reported spending twenty percent of their time. The third did not report spending any time. Because the survey was anonymous, we could not ask attorneys to clarify these responses. However, we can think of a few of reasons that explain these seemingly anomalous answers. First, these attorneys may interview potential clients who have experienced workplace sexual harassment, but they rarely decide to take these types case for reasons explained in section III, *supra*. Thus, they spend time on these cases but do not file them. Second, these attorneys could take on clients who have experienced workplace sexual harassment, but they are usually able to resolve the issue without litigation, for example through administrative remedies or prelitigation negotiations. Third, they may have misread the question or erred in answering it.

than 50 percent of their time on workplace sexual harassment cases. Below is chart detailing the percentage of time respondents spend on workplace sexual harassment cases.[64]

Percentage of time spent on workplace sexual harassment cases	Number of attorneys**
0-10%	20
11-25%	25
26-50%	21
51-75%	7
56-100%	2

Table 1

**Four respondents wrote "NA" (Not Applicable), so the total here is 75. Three of these four respondents reported filing at least one workplace sexual harassment case per year. Therefore, they must spend at least some time on these types of cases.[65]

[64] We asked respondents to fill in answers to the following two questions: "How many workplace sexual harassment cases do you estimate you file each year?" and "What percentage of your time do you spend on workplace sexual harassment case?"

[65] There was one respondent who reported not filing any workplace sexual harassment claims each year and also wrote "NA" when asked what percentage of time they spent on workplace sexual harassment cases. However, the attorney had been practicing for 26 years, and the attorney indicated that #MeToo increased the likelihood they would take a workplace sexual harassment claim. The attorney's responses to other questions indicated an understanding of the substantive law behind workplace sexual harassment claims. This led us to believe that the attorney has first-hand knowledge about filing workplace sexual harassment claims despite their responses to questions about the percentage of time spent on workplace sexual harassment claims and the number of these claims filed per year. It is possible that this attorney used to file these claims more often but has since stopped or reduced time spent on these types of cases. Regardless, we thought the attorney's perspective was important to incorporate into our results.

C. Differences in substantive law that make California law more plaintiff-friendly than federal law

Many survey respondents reported that they rarely or never file claims under Title VII. One respondent wrote, "In my 13 years of practice I always filed sexual harassment claims under FEHA, all my colleagues do the same…[I] never filed under Title VII, there was never a need to."[66] Another wrote, "I am an employment lawyer and nearly always sue under FEHA, which is much more favorable to victims of discrimination and harassment."[67] And one attorney with 29 years of experience who works primarily on workplace sexual harassment (ten cases per year, and 75 percent of his or her time) further emphasized the point: "I ONLY bring cases under FEHA…"[68] We asked survey respondents to consider how the FEHA provides greater protection to employees who experience workplace sexual harassment.[69] Attorneys ranked each difference

[66] This quote was given in response to a question asking attorneys to elaborate on their response to a different question. From the responses, we concluded that our survey question was worded poorly, so we omitted the results.

[67] This quote was in response to the question described *supra*, note 66.

[68] This quote was in response to the question described *supra*, note 66.

[69] In a section of the survey called "FEHA vs. Title VII," we asked, "Of the advantages listed below, which do you consider the most valuable or helpful in prosecuting workplace sexual harassment claims?" We created separate questions for each of the six differences between the FEHA and Title VII highlighted in Mizrahi, *supra* note 5. Attorneys ranked each difference as either not important, occasionally helpful, consistently helpful, or indispensable. We did not ask attorneys to explain why these differences were helpful or indispensable. Presumably, they could be helpful in different ways, such as increasing settlement value, creating a bigger threat to defendants at trial, making claims easier to prove, etc.

as not important, occasionally helpful, consistently helpful, or indispensable. Below are the results.

1. Individual liability against harassers

Harassers may be held individually liable under the FEHA, unlike under Title VII. This often permits plaintiffs to avoid removal to federal court,[70] which, as explored below, may reduce the likelihood of success. Respondents indicated that this difference is extremely important, with 77 percent reporting that this difference is either indispensable or consistently helpful. Twenty-one percent said the difference is occasionally helpful and only one attorney reported this difference is not important.

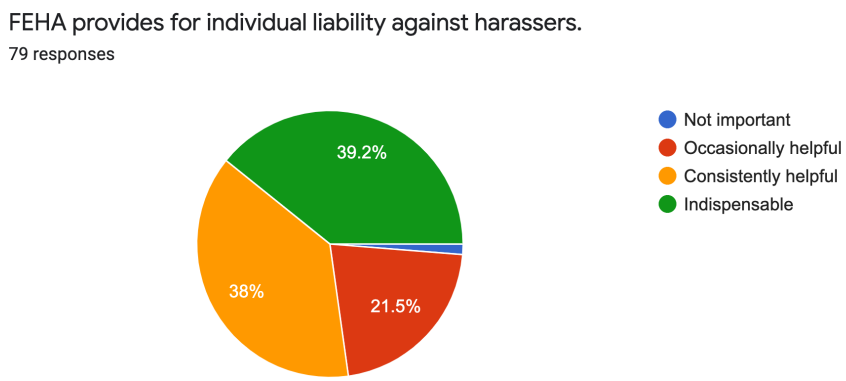

Figure 2

2. No caps on damages

Under Title VII, damages are limited based on the size of the employer. Limits on combined compensatory and punitive damages range from $50,000 for small employers (15-100 employees) to

[70] Allowing plaintiffs to go after individuals may allow them to defeat diversity jurisdiction, if the employer is based in a different state.

$300,000 for large employers (more than 500 employees).[71] There are no limits to compensatory or punitive damages under the FEHA. According to Mizrahi, verdicts and settlements from claims brought under the FEHA can reach into seven figures.[72]

Survey respondents found the FEHA's lack of a cap on compensatory damages extremely valuable. Only five percent reported that unlimited compensatory damages was occasionally helpful; no one said it was not important. In contrast, 68 percent of respondents indicated the difference was indispensable, while 27 percent said it was consistently helpful. Punitive damages also appear to be extremely valuable. Eighty-six percent of respondents said this difference was either indispensable or consistently helpful. Thirteen percent reported the lack of a cap on punitive damages was occasionally helpful, while one respondent indicated it was not important.

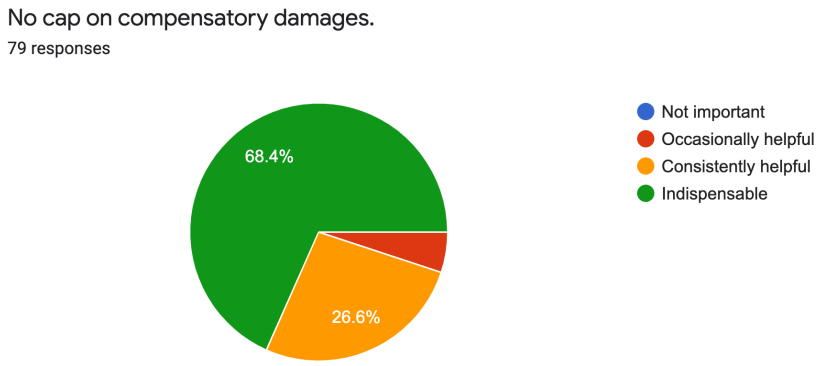

Figure 3

[71] CIVIL RIGHTS ACT OF 1964, 42 U.S.C § 1981A (1964).
[72] Mizrahi, *supra* note 5 at 130.

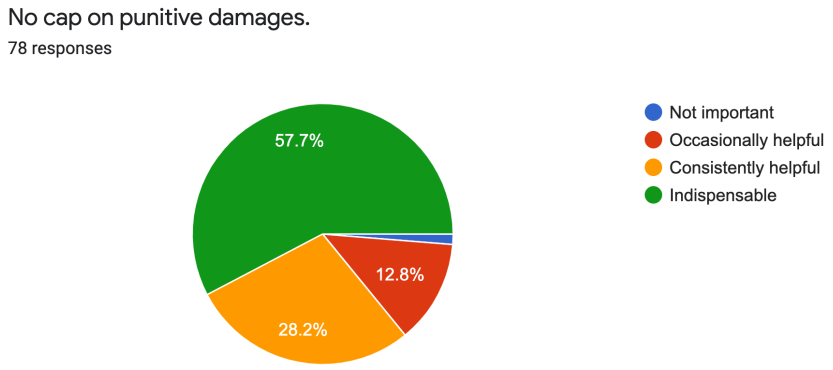

Figure 4

3. No employer affirmative defense

Under Title VII, employers are held vicariously liable for an employee's actions when the harasser is the plaintiff's supervisor and can thus take tangible adverse employment actions against the plaintiff. However, the employer can claim an affirmative defense and escape liability when it can show: "(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonable failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[73] In contrast, under the FEHA employers are strictly liable for harassment whether the employer was aware of the conduct or not.[74] Survey results indicate that strict liability for harassment is key; every survey respondent reported that this difference is at least somewhat helpful. Ninety percent of survey

[73] KISH, *supra* note 46 (*quoting Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998)).

[74] *Id.* at 17; CAL GOV'T CODE, § 12490(k) .

respondents indicated that this difference is either indispensable or extremely helpful. Ten percent said it was occasionally helpful.

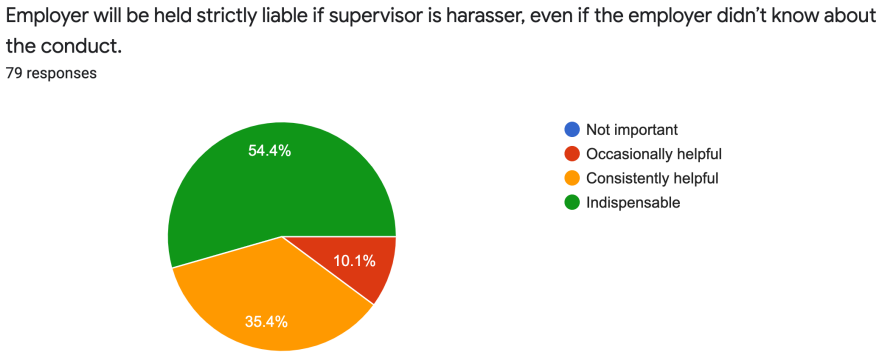

Figure 5

4. Employer's failure to prevent harassment as a separate claim

Under the FEHA, employers are required to "take all reasonable steps necessary to prevent discrimination and harassment from occurring."[75] Noncompliance creates a separate cause of action for failure to prevent harassment. According to Mizrahi, this separate claim creates a broader basis for discovery about the employer's knowledge of and response to the harassment.[76] Title VII does not provide for this separate cause of action. Survey results indicate that this difference is important but not essential. Thirty-eight percent of survey respondents reported this separate claim was either consistently helpful, while only 18 percent reported it was indispensable. Forty-four percent indicated the claim is either not important or only occasionally helpful.

[75] CAL GOV'T CODE, *supra* note 74.
[76] Mizrahi, *supra* note 5 at 129.

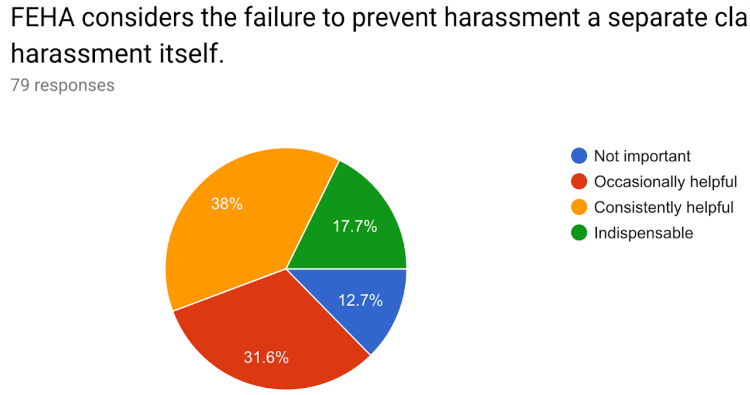

Figure 6

5. No minimum number of employees

Title VII applies only to employers with 15 or more employees.[77] In contrast, the FEHA's harassment protections applies to all employers, while its discrimination and retaliation protections applies to employers with more than five employees.[78] Therefore, the FEHA covers more instances of sexual harassment than Title VII because it reaches employees who work for smaller employers. The majority of attorneys surveyed (54 percent) found that this difference was only occasionally helpful.[79] Forty-two percent thought this difference was either indispensable or

[77] TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *supra* note 49.

[78] Complaint process, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, https://www.dfeh.ca.gov/complaint-process/ (last visited May 5, 2020).

[79] Surprisingly, given the comments we have heard from advocates that the ability to sue smaller companies matters, this did not seem to be a very important substantive advantage for attorneys. It would be interesting to examine how many lawsuits are brought under FEHA against smaller employers.

consistently helpful. A little less than four percent found this difference was not important.

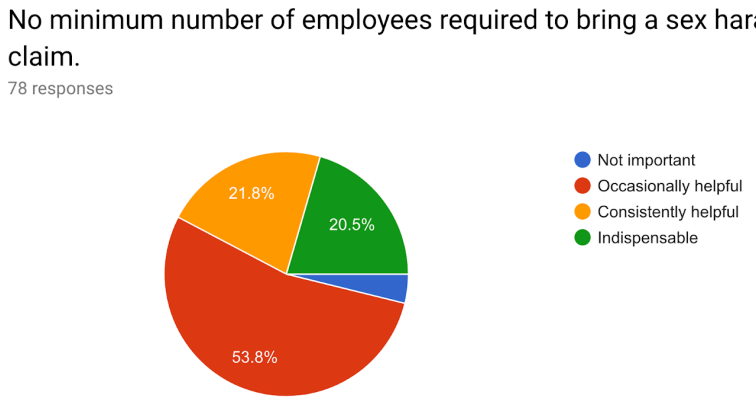

Figure 7

6. Other differences

The survey provided space for respondents to write in other factors that we did not include. Fifteen respondents included additional substantive differences.[80] The two most cited differences were: (1) the ability to bypass an agency investigation, and (2) a longer statute of limitations under the FEHA.[81]

Recall,[82] plaintiffs bringing claims under the FEHA do not have to wait for the DFEH to investigate before filing suit in court. Instead, employees file a complaint and request an immediate Right

[80] Twenty-nine attorneys answered the question. Four responses provided no new information (i.e. "maybe" or "Honestly, I didn't even know about some of these differences because we only deal with FEHA." Ten responses focused on procedural differences, which we asked about in the subsequent part of the survey.)

[81] Several attorneys mentioned that the FEHA is broader in that it covers sexual orientation discrimination, while Title VII does not.

[82] *See supra* at Part I.D.

to Sue notice.[83] DFEH reports show that most people tend to file suit directly without going through a DFEH investigation.[84] In contrast, claims brought under Title VII must first undergo an EEOC investigation.[85] Several attorneys wrote that the ability to bypass an agency investigation is another valuable advantage to filing under the FEHA.

Aside from these advantages provided by the FEHA, filing a claim in California state court is also advantageous for plaintiffs. In the next section, we explore the value in the procedural mechanisms that make California state court more plaintiff-friendly.

D. Procedural advantages of California state courts over federal courts

There are several differences between California state court and federal court that survey respondents perceive make the former more favorable to plaintiffs. We asked survey respondents to consider the value of these differences and rank them as not important, occasionally helpful, consistently helpful, or indispensable.[86] While we asked attorneys specifically about sexual harassment cases, these procedural advantages likely extend to civil rights cases generally. Below are the results.

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[83] Complaint process, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING , https://www.dfeh.ca.gov/complaint-process/ (last visited Dec 4, 2018).

[84] KISH, *supra* note 46.

[85] 42 U.S.C. § 2000(e)(5)-(f)(1)

[86] In a section of the survey called CA vs. Federal Courts, we asked, "Of the advantages listed below, which do you consider the most valuable or helpful in prosecuting workplace sexual harassment claims?" We created separate questions for each of the eight procedural differences between California and federal courts highlighted in Mizrahi, *supra* note 5. Attorneys ranked each difference as either not important, occasionally helpful, consistently helpful, or indispensable. We did not ask attorneys to explain why these differences were helpful or indispensable.

1. Plaintiff-friendly juries and jury processes

One difference between state and federal court jury trials is that plaintiffs need only convince three-fourths of the jurors to prevail in state court. In federal court, plaintiffs must convince every juror to prevail.[87] Survey respondents found this difference extremely valuable, with 65 percent ranking it indispensable. Thirty-one percent of respondents said it was consistently helpful. Less than four percent reported this difference was only occasionally helpful. No one said it was not important.

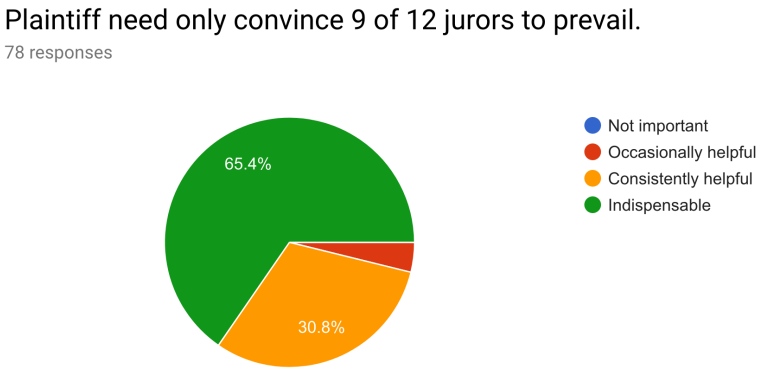

Figure 8

We also asked about the importance of the jury pools themselves, i.e. the makeup and perceived diversity of state versus federal jury pools. The general consensus among surveyed attorneys is that state court juries are more diverse than federal court juries.[88] Over 80 percent of survey respondents find a more diverse jury pool valuable. For example, one commented, "Venues with more diverse jury pools are better because [they are] more in line

[87] FED. CODE OF CIV. PROC., § 613; Mizrahi, *supra* note 5 at 132.

[88] Mizrahi, *supra* note 5; Sarah Schlehr & Christa Riggins, *Why employment-discrimination cases usually belong in state court*, ADVOCATE (June 2015).

with how everyday people live and experience their lives versus a venue with mostly wealthy, college-educated, white jurors."[89]

Legal scholars note that state juries are more diverse because federal jurors are selected from voter registration lists while state jurors are selected from a wider range of sources, including license records from the Department of Motor Vehicles ("DMV").[90] This is true in the Southern and Eastern Districts of California, where federal jurors are selected exclusively from the list of registered voters (except in the Fresno Division, where names from the Fresno DMV are selected at random to augment the list of registered voters).[91] However, in the Central and Northern Districts of California, federal jurors are selected from both voter registration lists and DMV license and state ID registration lists.[92] State court jurors are selected from these same lists.[93] Thus, at least in the Northern and Southern Districts of California, the pools mirror one another. One possible explanation for the difference in perceived jury diversity is that federal juries are selected from an entire district, which includes several counties, while state juries are selected from just one county. This could lead to more diverse state juries in counties with larger urban centers, such as Los Angeles and the Bay Area.

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[89] This comment was in response to a different survey question, "Are there certain places or courthouses within California that are better than others to bring claims? If so, what makes them better?" Additional responses to this question are provides in section II.B.7 *infra*.

[90] Schlehr and Riggins, *supra* note 88.

[91] Jurors, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA , https://www.casd.uscourts.gov/Jurors/SitePages/Home.aspx (last visited Dec 14, 2018); Morrison England, *Juror Management Plan* (2015), http://www.caed.uscourts.gov/caednew/assets/File/GO%20553.pdf.

[92] Phyllis Hamilton, *GENERAL ORDER NO. 6 PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS* (2017); General Order No. 13-13, (2013), https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-13-13.pdf.

[93] Jury Service, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA , http://www.courts.ca.gov/juryservice.htm (last visited May 5, 2020).

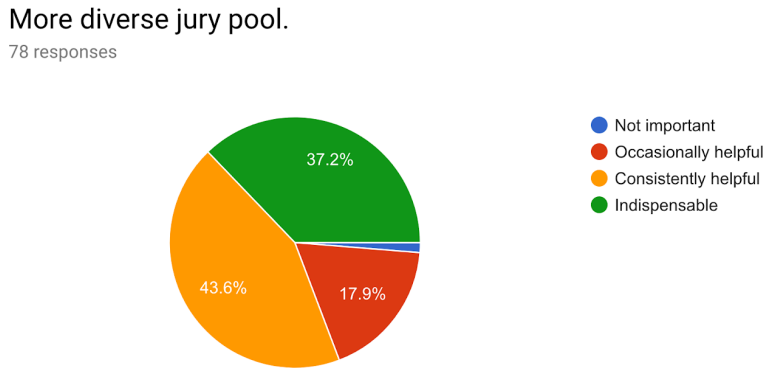

Figure 9

Survey respondents also find fewer limitations in jury selection (i.e. voir dire) valuable. In federal court, some judges do not permit attorneys to directly question potential jurors. Instead, attorneys submit questions to the judge who then asks the potential jurors the questions. This eliminates the possibility of follow-up questions and may make it more difficult for an attorney to evaluate a potential juror's bias.[94] In California, attorneys can directly question potential jurors without "unreasonable or arbitrary time limits" or "an inflexible time limit policy."[95] In fact, the California Code of Civil Procedure explicitly requires that judges provide time for attorneys to ask potential jurors follow-up questions on topics already covered by the judge.[96] It also requires that "the trial judge . . . permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case before the court."[97] Seventy-five percent of survey respondents found the California voir dire process either indispensable or consistently helpful. Only 25 percent found it either occasionally helpful or not important.

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[94] Schlehr and Riggins, *supra* note 88.
[95] CAL. CIV. PROC. Code § 222.5 (West 2018).
[96] *Id.*
[97] *Id.*

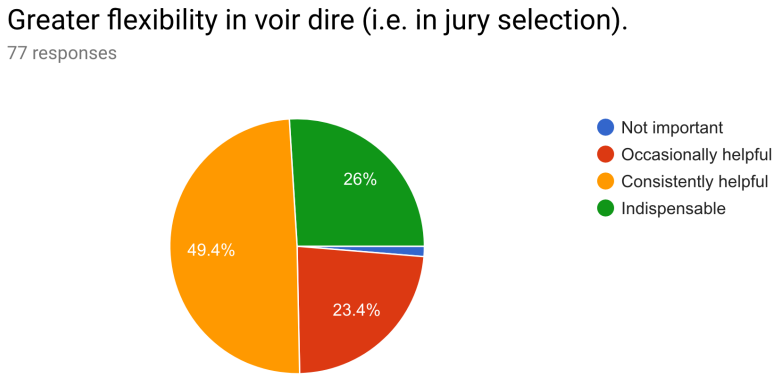

Figure 10

2. Additional time to oppose motions for summary judgment

Plaintiffs have more time to oppose motions for summary judgment in California state court than in federal court. In California, defendants must file motions for summary judgment at least 75 days before the hearing, while plaintiffs must submit opposing papers 14 days before the summary judgment hearing.[98] This provides plaintiffs with around two months to oppose summary judgment motions. In federal court, defendants can file motions for summary judgment just 14 days before the hearing. Plaintiffs must submit opposing papers seven days before the hearing, providing plaintiffs with only one week to oppose motions for summary judgment.[99] A large majority (84 percent) of survey respondents found this additional time either indispensable or consistently helpful. Only 16 percent found it either occasionally helpful or not important.

[98] CAL. CIV. PROC. CODE § 437(c) (West 2018).
[99] Fed. R. Civ. P. 6(c).

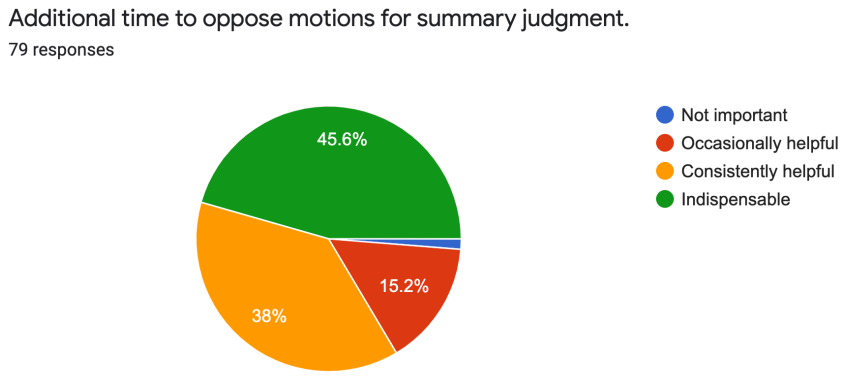

Figure 11

3. Greater discovery rights

California civil procedure provides for broader discovery rights for employee plaintiffs. For example, employee plaintiffs can conduct an unlimited number of depositions that are not subject to the standard seven-hour limit.[100] Furthermore, plaintiffs in state court can surpass the limit of 35 interrogatories simply by declaring necessity.[101] Survey respondents highly value these expanded discovery rights. Thirty-two percent reported this procedural difference as indispensable and 40 percent said it is consistently helpful. Only 28 percent reported the broader discovery rights as either occasionally helpful or not important.

[100] CAL. CIV. PROC. CODE § 2025.290 (West 2018).
[101] CAL. CIV. PROC. CODE § 2030.040 (West 2018).

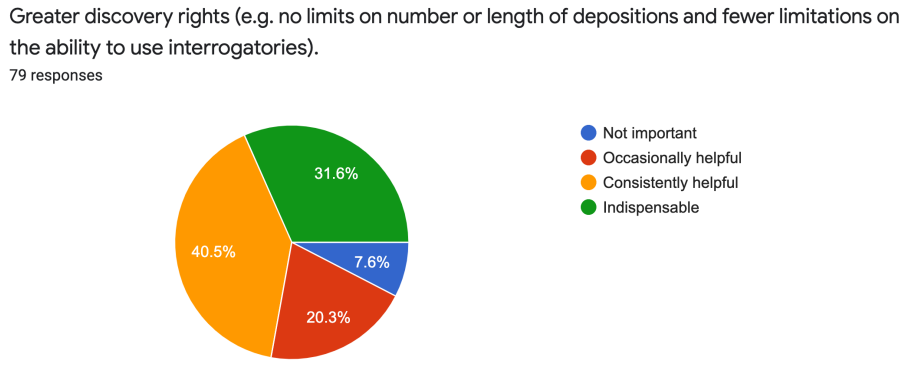

Figure 12

4. CA courts are expected to award fee enhancements

Both Title VII and the FEHA allow for fee-shifting, a procedure that awards the prevailing party reasonable attorneys' fees.[102] However, California state courts are expected to award fee enhancements, or multipliers, unless such an award would be unjust.[103] Fee enhancements increase attorneys' fees by including factors in the calculation "such as the difficulty of the case, the attorneys' skills, and the contingent nature of the fee award."[104] According to Mizrahi, fee enhancements can increase a fee award by hundreds of thousands of dollars because attorneys spend hundreds of hours litigating a FEHA case by the end of trial. The threat of higher attorneys' fees can encourage defendants to more quickly accept favorable settlements for meritorious cases.[105]

Survey respondents found this procedural difference valuable. Over 75 percent of respondents ranked required fee enhancements as either indispensable or consistently helpful. Twenty-three

[102] Mizrahi, *supra* note 5.
[103] *Id.*
[104] *Id.* at 130 (citing Ketchum v. Moses, 17 P.3d 735, 741-42 (Cal. 2001)).
[105] *Id.* at 130.

percent indicated it was occasionally helpful. Only one respondent marked it as not important.

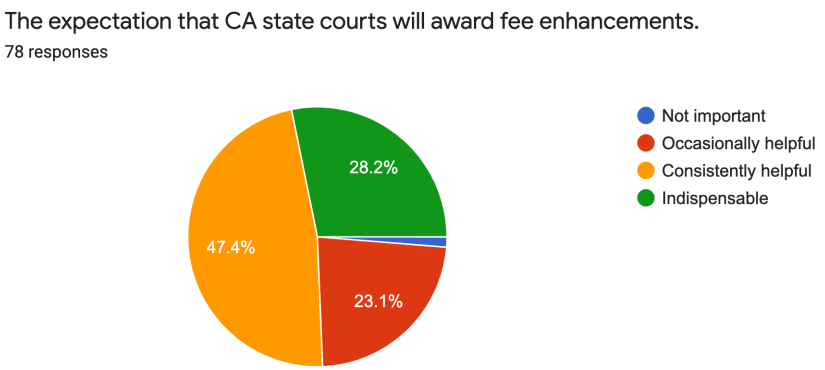

Figure 13

5. One peremptory challenge to disqualify a judge

In federal court attorneys may only disqualify a judge for cause. Attorneys that wish to disqualify a judge must provide an explanation for their belief that a prejudice or bias exists.[106] In California, attorneys may disqualify one judge without cause. According to Mizrahi, this allows "some control over who presides over [the] case."[107] Survey respondents reported that this procedural difference is moderately helpful. Almost half of respondents ranked this difference as occasionally helpful. Forty-seven percent said it was consistently helpful or indispensable. Five percent reported it was not important.

[106] Schlehr and Riggins, *supra* note 88.
[107] Mizrahi, *supra* note 5 at 131.

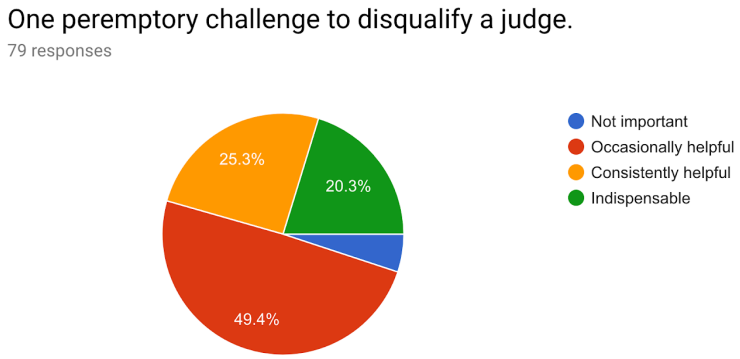

Figure 14

6. Other procedural differences

The survey allowed respondents to write in other differences between state and federal court that we did not list, but they found helpful.[108] Nine attorneys noted that federal court judges tend to grant summary judgment motions for the defendant more often than state court judges. Some respondents claimed this is because federal court judges have heavier dockets and thus face more pressure to resolve cases. Other respondents claimed it is because federal court judges are less plaintiff-friendly. Two claimed that federal court judges think that employment cases are "beneath them." One attorney suggested that the pleading standard in state court is lower than in federal court, meaning more cases move past the pleading stage into discovery when filed in state court.

Four attorneys claimed federal court had certain advantages, including timing; attorneys wrote that it takes longer for cases to be resolved in state court than in federal court. Federal court also allows electronic filing, while state court does not. However, the

[108] Nineteen respondents wrote in answers to this question. Three answers were nonresponsive (i.e. "no" or "maybe). However, nine respondents listed additional helpful procedural advantages in the area designated for additional helpful substantive advantages. In total, we received twenty-five responses listing additional factors that make state court more plaintiff-friendly.

advantages of federal court were still outweighed by the advantages of state court.

7. Location-specific advantages

We also asked attorneys to consider whether there are specific counties or courthouses in California that are more plaintiff-friendly than others.[109] Alameda County was mentioned the most often, with 13 attorneys commenting that it is "good … for plaintiffs." Ten attorneys prefer to file in San Francisco County. Seven prefer Los Angeles County. San Bernardino was referenced three times, and Fresno and Riverside were each mentioned once, though two remarks indicated Riverside was not ideal. The Stanley Mosk Courthouse in downtown Los Angeles was the only courthouse that received specific mention: eight attorneys said they prefer to file claims there, in part because the judges "are excellent" and "more familiar with employment claims." Another common reason motivating each attorney's selection was downtown Los Angeles' liberal, urban, and diverse jury pool. Several respondents claimed these juries award larger verdicts. A handful of respondents mentioned that they prefer counties with smart, friendly judges. Of the three people that prefer San Bernardino, two mentioned judges as the reason behind their choice.

The survey shows that California law provides a better platform and California courts provide a better forum for employees who experience workplace sexual harassment to achieve justice. However, California is not perfect. During the 2018 legislative term, several bills aimed at decreasing barriers to justice for victims of workplace sexual harassment did not pass. In the next section, we review respondents' views on these proposed bills.

[109] Specifically, we asked "Are there certain places or courthouses within California that are better than others to bring claims? If so, what makes them better?" Respondents could fill in as much text as they needed. Fifty-four attorneys responded to this question.

III. SURVEY FINDINGS: PERSPECTIVES ON PRACTICE AND POLICY

In addition to surveying attorneys about their views on procedural rules and substantive law, we also sought to gather more information about both (1) the decision-making process when deciding whether to take a new client and (2) policy proposals at the state level to address workplace sexual harassment. We group these two buckets of information together because the former often informs the latter; policymakers must understand what factors attorneys consider in deciding to take a new client in order to enact policies that will encourage them to provide legal representation. Furthermore, by soliciting and compiling the views of attorneys who regularly work with the FEHA and clients, we hope to provide a more on-the-ground perspective on which proposed policy changes would benefit workers dealing with workplace sexual harassment.

A. #MeToo and the decision to take a new client

A second component of this survey focused on an attorney's decision to take a new client. To that end, we first queried whether #MeToo had increased the likelihood those surveyed would take a workplace sexual harassment case. Over half (51.9 percent) of attorneys said it had, while 48.1 percent said it had not. Of those who said #MeToo had increased the likelihood they would take a case, 39 percent said it was because they received more calls, while over half (53 percent) said it was because they were more likely to be successful once they brought the claim. Of those who said #MeToo had not increased the likelihood they would take a case, 13 percent said they had received more calls since #MeToo, 13 percent said that #MeToo had not changed the legal standard, and 60.5 percent said that #MeToo had not changed their behavior. While we regret not wording this question more clearly to determine whether #MeToo had an impact on employee reporting versus an individual attorney's actual decision to take a case, these findings indicate

#MeToo is changing the legal landscape when it comes to workplace sexual harassment claims.

We next asked survey respondents to indicate whether certain factors impacted their decision to take a new client. First, we asked, "Are there factors you look at in terms of who the defendant is when deciding to take a case?" We then offered a list of four factors and allowed respondents to check all that applied. The options included (1) size of company (number of employees); (2) revenue; (3) type of business (non-profit, for profit, government entity); and (4) industry. The size of the company was the most examined factor, with 84.8 percent of attorneys indicating that they take it into consideration when deciding whether to take a case. The next most examined factor was the type of business (69.6 percent), then the company's revenue (65.8 percent). Less than a third (27.8 percent) of attorneys look at industry in their decision-making process.

We also provided space for respondents to write-in factors they consider in taking a client that we did not include. Ten percent of attorneys indicated they also consider the defendant's past actions in sexual harassment cases, and the same share of respondents examine whether the company has insurance. Five percent consider the company's location, and four percent examine the company's solvency. Other factors mentioned include whether the workplace is unionized, the identity of in-house counsel, the perpetrator's role at the company, the company's reputation for retaliation in the industry, whether there are incorporation records available from the Secretary of State, and whether the employer has "employee practices."

Next, we asked whether "a potential client's inability to pay costs impacts [the attorney's] decision to take a case."[110] Rather than providing a list of responses to choose among, attorneys wrote out their answers. Eight-in-ten (79.7 percent) survey takers

[110] Costs and fees are different. Costs are the out-of-pocket expenses that accumulate throughout the case, such as hiring experts, printing and copying, filing fees, etc. Fees are payment for legal services.

responded that no, they take cases regardless of the potential client's inability to pay. Ten of these respondents elaborated on their responses, explaining that a client's ability to pay was irrelevant because they take cases on contingency and advance costs. The remaining twenty percent of attorneys replied that they sometimes or always take a client's inability to pay costs into account. One commented that this factor was particularly important if there are high expert costs and damages are not substantial. Two other attorneys noted that they only consider a client's inability to pay costs when the case is weak.[111]

Later in the survey, we asked, "Are there any other factors other than those listed above and external to the severity of the harassment that impact the likelihood of you taking the case or its likelihood of success?" We then offered a list of four options, as well as a space for respondents to write in their own answers. The options included (1) whether the employer is a smaller subcontractor who may not be able to pay damages; (2) whether the employee signed an arbitration agreement; (3) whether the employee has been treated for emotional distress; and (4) whether there is a language barrier between you and your client. Over 80 percent of attorneys selected both (1) the employer's status as a subcontractor and (2) the existence of an arbitration agreement as influencing their decision to take a case or perceived likelihood of success. Nearly half (43 percent) of attorneys indicated they consider whether the potential client would recover for emotional distress. The same share of respondents said they factor in whether there was a language barrier.

Over a dozen attorneys also wrote that they consider the availability of corroborating evidence, while eleven mentioned

[111] Our survey also included the following question: "Did her/his inability to pay fees matter less if you knew you'd be able to bring the claim under the FEHA, and thus not face a cap on damages?" The responses indicate that the question was not well worded. Thus, we cannot draw conclusions from the responses to this question and have not included it in the analysis, though you can view the responses on the Google document with all the results.

evaluating the potential client's credibility. Others also consider the severity of the allegations, the potential client's possible felony convictions, and the amount of time that had passed since the harassment. Below is a table that lists the factors respondents included.

Factors considered in deciding whether to take a case[112]	**Number of attorneys**	**Percentage of respondents**
(1) Subcontractor	64	82.28%
(2) Arbitration	63	81.01%
(3) Emotional Distress	34	43.04%
(4) Language Barrier	34	43.04%
Corroborating Evidence	13	16.46%
Credibility of Plaintiff	11	13.29%
Severity of Allegations	3	3.80%
Plaintiff's Felony Convictions	1	1.27%
Time Since Harassment	1	1.27%

Table 2

B. Room for improvement: Attorneys' views on proposed legislation in California

While California courts and law are more favorable to plaintiffs than their federal counterparts, attorneys acknowledged that California could do more to prevent and address workplace sexual harassment. To that end, we asked survey respondents to express their views on bills proposed in 2017, some of which were reintroduced in later sessions under different names. After briefly describing the bills, the survey provided space for respondents to

[112] Respondents were able to check boxes next to factors (1) through (4) and volunteered the remaining five factors.

write in their views on the different proposals. To analyze and distill our findings, we grouped and coded the responses (e.g. favorable responses were coded as "yes," unfavorable responses as "no, do not support," and responses expressing reservations or concerns as "skeptical").

The proposal that elicited the most support was eliminating forced arbitration agreements, which had close to unanimous support from 68 respondents. However, many of those attorneys also cautioned that this idea is likely preempted by federal law. Another popular proposal would require employers to keep records of sexual harassment complaints for five years. A majority of respondents approved of a longer statute of limitations, which would allow plaintiffs to file claims three years after the alleged harassment. The next most popular proposal would permit joint liability for staffing agencies in sexual harassment claims. A proposal to provide hotel workers with panic buttons also garnered strong support from respondents. Respondents were more skeptical of a proposal that would require companies to disclose alleged sexual harassment. Finally, attorneys did not support the proposal to conduct research into permitting localities to enforce the FEHA; they preferred to keep this power within the DFEH.

While these bills were not enacted in the 2017-2018 legislative session, some fared better in subsequent sessions, and under a new governor. In October, 2019, Governor Gavin Newsom signed into law a slew of worker protection bills relating to sexual harassment.[113] Among other changes, these bills addressed forced arbitration and extended the statute of limitations period from one to three years.[114] Thus, while some of the information detailed

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[113] *Governor Newsom Signs Worker Protection Bills Addressing Sexual Harassment, Wages and Health Protections*, CA.GOV, (Oct. 10, 2019), https://www.gov.ca.gov/2019/10/10/governor-newsom-signs-worker-protection-bills-addressing-sexual-harassment-wages-and-health-protections/.

[114] Assem. Bill 51, 2018-2019 Reg. Sess. (2019).

below is moot as applied to California, other states may still find it instructive. We review the findings in detail below, and in order of popularity, from most to least popular.

1. AB 3080: End forced arbitration agreements in employment

AB 3080 aimed to prevent employers from requiring employees to agree to privately arbitrate sexual harassment and wage claims.[115] It was the most popular proposal, with 67 of 68 respondents enthusiastically in support.[116] One comment summarizes the general consensus on this proposal: "YES. This is critical to preserving victims' rights, as CA employees have zero bargaining power to refuse these forced agreements. The arbitration process is hopelessly corrupt in favor of the 'repeat player' employer. Many victim's rights attorneys will not take a case if there is an arbitration agreement, which has increasingly become the norm." However, as mentioned by nine respondents, AB 3080 may be preempted by the Federal Arbitration Act. When then-Governor Brown vetoed the bill, he explicitly mentioned "recent court decisions that invalidate state policies which unduly impede arbitration."[117] Indeed, California passed AB 51[118]—a nearly identical bill to AB 3080—in 2019, only to see it enjoined in federal court.[119]

2. AB 1867: Keep records of sexual harassment complaints

This bill proposed requiring employers with 50 or more employees to keep and maintain records of sexual harassment complaints for at least five years from the date the claims were

[115] Assem. Bill 3080, 2017-2018 Reg. Sess. (2018).

[116] The single outlier response requested a clearer definition of the word "require."

[117] Assem. Bill 3080, 2017-2018 Reg. Sess. (2018).

[118] Assem. Bill 51, 2019-2020 Reg. Sess. (2019).

[119] *Federal Court Preliminarily Enjoins Enforcement of New California Arbitration Law AB 51*, THE NATIONAL LAW REVIEW, Feb. 7, 2020.

filed.[120] Most survey respondents were in favor of this bill, with 48 of 57 respondents (84 percent) in support. Those in support commented that this information would be "useful in discovery" and "critical to a plaintiff proving intent/motive." Sixteen percent of respondents were either skeptical of or against the bill. One respondent warned, "Have fun getting them from their employer."

3. AB 1870: Increase statute of limitations to file discrimination complaints with DFEH

This bill proposed increasing the statute of limitations to three years (instead of the current one year provided) to file complaints of unlawful discrimination with the DFEH.[121] Attorneys were generally in favor of this bill, with 49 of 61 respondents (80 percent) in support and the remainder either skeptical or against. One attorney nicely summed up the general consensus of those in support: "This is indispensable! Many victims of discrimination are so damaged that it takes them more than a year to be able to stand up to it. The current one-year limitation is onerous and unfair." Those who were skeptical or against were "wary of taking cases that are more than a year old due to other issues." In 2019, California enacted AB 9, a bill distinguishable from AB 1870 in name only.[122]

4. AB 3081: Joint liability for staffing agency employers

AB 3081 proposed holding employers jointly liable for harassment suffered by workers hired through staffing agencies. It also proposed creating a rebuttable presumption that adverse employment actions taken within 30 days of an employee's participation in a protected activity (filing a claim) is unlawful retaliation. It did this by creating a separate cause of action under

[120] Assem. Bill 1867, 2017-2018 Reg. Sess. (2018).
[121] Assem. Bill 1870, 2017-2018 Reg. Sess. (2018).
[122] Assem. Bill 9, 2019-2020 Reg. Sess. (2019).

the California Labor Code.[123] Attorneys generally supported this bill, with 36 of 48 respondents (75 percent) in support and just three respondents opposed. Nine attorneys expressed skepticism. One respondent commented, "Agree with the first part -- not sure I like the second part. These matters are highly fact specific, and I would be concerned that there would be a perception that sexual harassment complaints were timed strategically to take advantage of this law. These cases are way too fact specific to lend themselves to one-size-fits-all rules like this."

5. AB 1761: Panic buttons for hotel workers

Primarily, this bill proposed requiring hotels to provide their housekeepers with panic buttons. It also sought to prevent employers from retaliating against employees who use panic buttons, require employers to report crimes and cooperate with investigations, and compel employers to provide employees who have experience assault with reasonable accommodations.[124] Respondents were generally in favor of this bill. Thirty-four of 46 respondents (74 percent) were in support, commenting that the bill would be "hugely important" and "very helpful" because "many victims are hotel housekeepers that [are] taken advantage of by coworkers and superiors." Four respondents were skeptical, and three were against. One respondent commented, "No opinion on this, but seems like putting energy in the wrong places."

6. AB 2571: Required disclosure of alleged sexual harassment

AB 2571 proposed requiring firms receiving public pension fund investments to disclose any allegations of sexual harassment, as well as race and gender pay equity practices. [125] Twenty-six of 39 respondents (66 percent) supported this bill, and 12 respondents

[123] Assem. Bill 3081, 2017-2018 Reg. Sess. (2018).
[124] Assem. Bill 1761, 2017-2018 Reg. Sess. (2018).
[125] Assem. Bill 2571, 2017-2018 Reg. Sess. (2018).

were either skeptical or against. Those in support said, "more transparency is always better," and "access to this information is extremely hard to obtain." One skeptical respondent said, "Mixed bag. Not sure how much this helps, and may discourage firms from accepting public pension investments. Seems like a reporting requirement unlikely to make much difference. Who is going to even review these disclosures? Hate to waste any capital on this, especially in light of the importance of AB 3080 [ending forced arbitration]." Another commented, "I feel like all of these 'disclosure' bills are pointless. What good does the 'disclosure' do? It doesn't change anything on the ground or change company's practices as far as I can tell. I work in San Francisco, and Silicon Valley companies have consistently published their terrible diversity statistics for years. It hasn't shamed them into changing anything as far as I can tell. The stats remain terrible, despite lip service to the contrary."

7. SB 491: Research feasibility of allowing localities to enforce the FEHA

This bill proposed requiring the DFEH to establish an advisory group to determine the feasibility of allowing local government entities to enforce antidiscrimination statutes. The proposal is an attempt to find ways to alleviate high DFEH investigator caseloads which, according to the bill, are expected to increase due to "the federal undermining of workplace antidiscrimination enforcement."[126] In general, attorneys were not convinced this bill would be useful. Less than half of respondents commented on this proposal, and only four supported it. The remaining 28 respondents were either skeptical or not in support. Several attorneys thought it would be more effective to increase funding to the DFEH rather than divert funding to localities. Others commented that it may harm employees in more conservative counties.

[126] Sen. Bill 491, 2017-2018 Reg. Sess. (2017).

IV. IMPLICATIONS AND RECOMMENDATIONS

Our survey results illuminate the substantive and procedural factors attorneys value when bringing a workplace sexual harassment lawsuit in California state courts under California state law. However, we can only draw limited conclusions about the survey results because we only asked attorneys to rank importance, and we did not ask attorneys to explain why each factor was or was not important. Thus, any conclusions that we draw are based on our own inferences and assumptions. Nevertheless, the survey sheds light on what policies advocates and policymakers should prioritize as they work to address workplace sexual harassment.

A. The Importance of Procedure

Respondents indicate that they value California's procedural differences at least as much as substantive differences. To determine whether procedural or substantive differences mattered more, we grouped together the votes for "indispensable" and "consistently helpful" for each factor to determine how "valuable" attorneys perceived each advantage to be.[127] Then, we found the average "value" for the substantive differences and the procedural differences. Substantive factors averaged to be 74.3 percent "valuable," while procedural differences averaged to be 75.6 percent

[127] One goal in highlighting these procedural and substantive differences is to encourage other jurisdictions to make similar changes to their workplace sexual harassment laws and state court procedural rules. Thus, we chose to group together votes that a factor was "indispensable" with votes that a factor was "consistently helpful" because we believe that prioritizing changes that attorneys thought fit into both categories will help plaintiffs succeed. However, this choice means that we lost some information. For example, while the average of both categories together shows that procedural factors matter at least as much as substantive factors, the average for only the "indispensable" votes was higher for substantive factors (43 percent) than it was for procedural factors (36.3 percent). We included a breakdown of the vote – indispensable and consistently helpful – in Figure 15.

"valuable." (Figure 15). Thus, attorneys found that procedure helped them at least as much as substance.

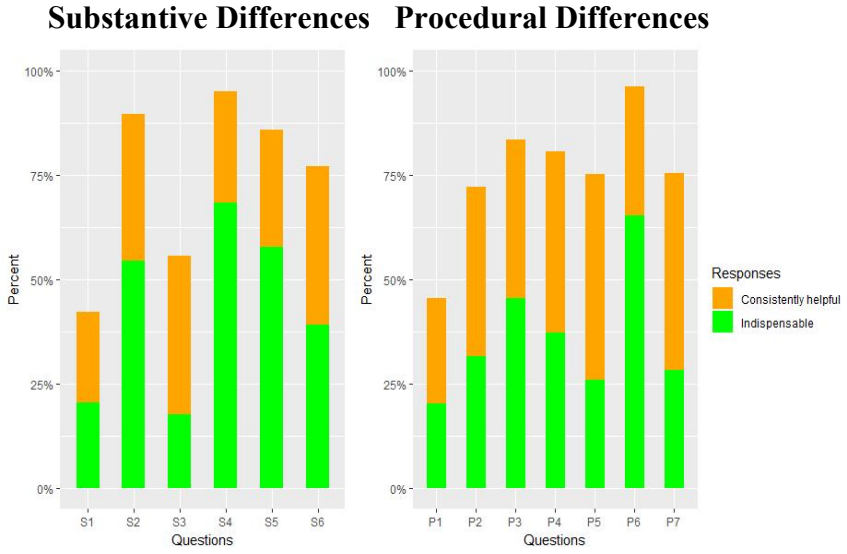

Figure 15

These results suggest that as legislators and advocates craft and consider proposals to increase access to justice for survivors of workplace sexual harassment, they should not limit themselves to changing substantive law. [128] For example, the second most "valuable" procedural factor (83.6 percent voted it was either "indispensable" or "consistently helpful") was California's additional seven weeks to oppose a motion for summary judgment.[129] Increasing the amount of time attorneys have to file

[128] We acknowledge that in some states, the power to change rules is inherent in the courts. Thus, legislators will not be able to change procedural rules. CHRISTOPHER REINHART & GEORGE COPPOLOM, OFFICE OF LEGISLATIVE RESEARCH OF THE STATE OF CT, COURT RULES IN OTHER STATES - LEGISLATIVE APPROVAL (2008).

[129] State offers attorneys different amounts of time to oppose motions for summary judgment. For example, attorneys in Alabama state court have eight days to file an opposition to a motion for summary judgment (AL ST RCP Rule 56), seven days in Hawaii state court (HI R DIST CT RCP Rule 56), and fourteen days in Texas state court, (Tex. R. Civ. P. 166a).

motions may not currently be a priority for policymakers and advocates. However, our survey indicates that more time is a valuable asset for plaintiffs' attorneys in California, so advocates should consider it a priority. Furthermore, an added advantage of enacting procedural changes is that the revised rules will help plaintiffs beyond just the employment law context.

The least valuable procedural difference was one peremptory challenge to remove a judge. However, several attorneys also mentioned that judges in state court were generally more plaintiff-friendly than judges in federal court.[130] Because California state court judges are perceived as more plaintiff-friendly, plaintiffs' attorneys may rarely feel compelled to use their peremptory challenge. This could explain why respondents did not value this procedural tool. However, in jurisdictions with more defendant-friendly judges, one peremptory challenge to remove a judge could be more helpful. And even in plaintiff-friendly California, nearly half (45.6 percent) of respondents thought this tool was valuable. Thus, our survey results should not discourage advocates and policymakers from pursuing this procedural tool as a way to improve access to justice for sexual harassment claimants.

Ninety-six percent of respondents thought that California's rule that plaintiffs need only convince nine out of twelve jurors was valuable, making it the most valuable factor among all options listed, both substantive and procedural. Nonetheless, this factor was important in conjunction with the perceived diversity of California state jury pools generally. Thus, respondents thought that a diverse jury pool in California state court meant they had a greater chance of a favorable verdict from a state court jury than a federal court

[130] In response to various questions on our survey, attorneys explained that state court judges are more plaintiff friendly. For example, one wrote, "Judges tend to be more plaintiff-friendly in California courts because of how they end up on the bench." Another explained, "State court judges have been far more sympathetic to discrimination cases." A third respondent answered, "Less conservative judges in state court (sometimes)."

jury. If a plaintiff happens to have a few plaintiff-unfriendly jurors on the jury, a plaintiff can still win because she only needs to convince nine of the (generally plaintiff-friendly) jurors. In contrast, in a more conservative jurisdiction, jury pools may be less diverse in state court than in federal court since state juries could be drawn from a smaller geographic area.[131] In these jurisdictions, it may be harder to convince even nine jurors to decide for the plaintiff. If true, a non-unanimous jury requirement may not be as valuable in state courts outside California, since plaintiffs may be better off with a more diverse federal court jury.

B. Regional Differences Matter

Because of the substantive and procedural advantages of California law for plaintiffs, our findings indicate that employees injured in California are more likely to secure justice than employees bringing claims in federal court. However, our findings may have broader implications when viewed within a civil rights "ecosystem" framework. In a forthcoming article, Joanna C. Schwartz explores how various aspects of civil rights "ecosystems" impact and interact with each other.[132] Schwartz explains how "[v]ariation in different aspects of a civil rights ecosystem determines the frequency with which claims against governments are brought, the frequency with which those claims are successful, and the magnitude of their success."[133] These variations then create "ecosystem feedback loops that can magnify regional variation."[134]

While Schwartz's analysis focuses on constitutional violations committed by police officers, her article illuminates how regional variation generally can lead to starkly different outcomes. Our survey indicates that people who experience workplace sexual

[131] *See supra*, section II.E.

[132] See Joanna C. Schwartz, *Civil Rights Ecosystems*, 118.1 MICH. L. REV. (forthcoming June 2020).

[133] *Id*. at 1.

[134] *Id*.

harassment in California are more likely to secure justice than their counterparts in states with weaker substantive law and court procedures. Applying Schwartz's ecosystem concept to our results, California may be understood to be a thriving ecosystem. For example, there are at least 980 attorneys in California who bring or are willing to bring workplace sexual harassment claims. California courts also have beneficial procedural rules that help plaintiffs recover, and the FEHA creates more avenues for plaintiff success than does Title VII. Furthermore, California's current Governor is working to create a safer workplace for California workers and employees.[135] According to Schwartz's article, these factors feed off of one other, thus creating positive feedback loops that likely amplify protections for victims, claimants, and plaintiffs in California.

Of course, the *lack* of substantive and procedural protections in other jurisdictions may create negative feedback loops that leave workers in these regions with limited viable legal recourse. For example, if attorneys in other jurisdictions tend to bring cases in federal court because their state's law is less plaintiff-friendly than Title VII, plaintiffs probably lose more often than they do in California. This, in turn, may reduce the total number of attorneys practicing employment law in the area, thereby decreasing the amount of institutional knowledge around bringing workplace sexual harassment claims. Less knowledge leads to fewer successful cases, which leads to even fewer practicing attorneys, and this downward spiral continues. By adopting an ecosystem framework, it is possible to understand how even one or two legal differences can create a negative feedback loop.[136] To interrupt this downward spiral, attorneys and advocates should push for changes that have made California law and courts more plaintiff-friendly

[135] See *supra* section III.

[136] *See* Schwartz, *supra* note 127, sections II.E and III for an in-depth explanation of how various factors in civil rights ecosystems interact and create feedback loops.

than federal law and courts. As the ecosystem model makes clear, small changes may have major implications for accessing and securing justice.

CONCLUSION

The #MeToo movement has brought much-needed attention to a widespread and serious issue, and legislators are beginning to respond in kind. By evaluating how California's substantive and procedural legal protections help survivors of workplace sexual harassment achieve justice, we have provided a roadmap for policymakers in other jurisdictions to follow. This research will also help advocates, attorneys, and legislators prioritize and develop new legislation, including procedural rules that have broader implications for civil rights claims.