SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2025-2026 Regular Session

SB 303 (Smallwood-Cuevas)
Version: February 10, 2025
Hearing Date: April 22, 2025
Fiscal: No
Urgency: No
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SUBJECT

Evidence: privileges and exclusions

DIGEST

This bill establishes a privilege to prevent disclosure of information regarding a public employee's bias obtained through bias mitigation or elimination efforts and makes evidence of bias mitigation or elimination efforts confidential and inadmissible for any purpose in civil actions.

EXECUTIVE SUMMARY

California law requires employers to prevent discrimination in the workplace. Especially in light of the federal crackdown on diversity, equity, and inclusion efforts across the country, the need to address the root causes of discrimination and bias is of heightened importance. One measure being increasingly taken is bias mitigation and anti-discrimination programs in workplaces.

However, a concern has arisen that information regarding individuals' bias derived from training and education programs, including the testing of unconscious bias, can be used against employees and employers alike. This can create a chilling effect in both the adoption of such programs and participation in them. Inspired by guidance from the United States Equal Employment Opportunity Commission, this bill creates a broad privilege for public entities and employees to refuse to disclose, and to prevent others from disclosing information pertaining to the employee's bias that was obtained through or as a result of bias mitigation or elimination efforts. The bill further makes any evidence of bias mitigation or elimination efforts confidential and inadmissible in civil proceedings.

This bill is sponsored by the County of Los Angeles Board of Supervisors. No timely support was received. The bill is opposed by various industry associations and organizations representing the plaintiff's bar, including the California Chamber of

Commerce and the California Employment Lawyers Association. Should this bill make it out of this Committee, it will next be heard in the Senate Public Safety Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) States that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code §§ 350, 351.)

2) Defines "relevant evidence" as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code § 210.)

3) Authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.)

4) Provides, through the Civil Discovery Act, procedures by which parties to a civil action conduct and obtain "discovery." (Code Civ. Proc. § 2016.010 et seq.)

5) Governs the admissibility of evidence in court proceedings and generally provides a privilege to refuse to testify or otherwise disclose confidential communications made in the course of certain relationships. (Evid. Code §§ 954, 966, 980, 994, 1014, 1033, 1034, 1035.8, 1037.5, 1038.)

6) Provides that the right of a person to claim specified privileges is waived with respect to a protected communication if the holder of the privilege has disclosed a significant part of that communication or consented to disclosure, without coercion. Existing law provides that a disclosure does not constitute a waiver where it was reasonably necessary to accomplish the purposes for which the lawyer, lawyer referral service, physician, psychotherapist, sexual assault counselor, domestic violence counselor, or human trafficking caseworker was consulted. (Evid. Code § 912(a), (d).)

This bill:

1) As used in this article, "bias mitigation or elimination efforts" means training and education provided by a public employer that asks employees to understand, recognize, or acknowledge the influence of conscious and unconscious bias and implements strategies to mitigate the impact of such bias.

Those strategies can include testing for bias, analyzing bias tests, conducting bias training, and tracking bias mitigation and elimination.

2) Grants a public entity, whether or not a party, a privilege to refuse to disclose, and to prevent another from disclosing, information pertaining to a public employee's bias that was obtained through or as a result of bias mitigation or elimination efforts, including either of the following:
    a) An assessment, admission, or acknowledgment of bias held by a public employee.
    b) A specific strategy developed to address a public employee's bias.

3) Grants a public employee, whether or not a party, a privilege to refuse to disclose, and to prevent another from disclosing, information pertaining to the employee's bias that was obtained through or as a result of bias mitigation or elimination efforts, including either of the following:
    a) An assessment, admission, or acknowledgment of bias held by the public employee.
    b) A specific strategy developed to address the public employee's bias.

4) Clarifies that it does not grant a privilege in criminal proceedings.

5) Provides that evidence of bias mitigation or elimination efforts relating to a public employee, including the results of those efforts and any specific strategies developed to address the public employee's bias conducted by or on behalf of a public entity, is confidential and shall be inadmissible for any purpose. This does not exclude the discovery or use of relevant evidence in a criminal action.

COMMENTS

1. Evidentiary privileges and admissibility

Generally, all relevant evidence is admissible. "Relevant evidence" is defined as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

An evidentiary privilege permits an otherwise competent witness to refuse to testify and/or prevent another from testifying. Privileges are policy exclusions, unrelated to the reliability of the information involved, which are granted because it is considered more important to keep that information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding. For example, to protect the lawyer-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship. (Comments to Evid. Code § 910.) Whereas privileges of a witness under the Federal Rules of Evidence

are governed by the principles of common law as interpreted by United States district courts in light of "reason and experience," the only privileges that are recognized in California are those statutory privileges expressly codified in the Evidence Code. (*See* Fed. Rules of Evid., Rule 501; Evid. Code § 911.)

To date, California has codified numerous evidentiary privileges, recognizing the need to protect the confidentiality of certain communications. Among those are the: lawyer-client privilege, lawyer referral service-client privilege, spousal privilege, confidential marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, clergyman-penitent privilege, sexual assault counselor-victim privilege, domestic violence counselor-victim privilege, and human trafficking caseworker-victim privilege. Yet other statutory privileges protect official information acquired in confidence by a public employee and the identity of informants, protect persons from having to reveal their votes in public elections, and protect against disclosure of trade secrets. (Evid. Code § 930 et seq.)

2. Preventing disclosure to prevent disincentivizing anti-discrimination programs

According to the author: "The Public Workplace Bias Mitigation and Employee Protection Act (SB 303) would protect public employees who participate in bias mitigation programs by ensuring that their training, assessments, and strategies that address their identified implicit bias cannot be disclosed or used against them in civil lawsuits."

Bias mitigation and anti-discrimination training is used by employers, and other entities, to address some of the root causes of the unfair treatment of persons in protected classes. These programs often involve strategies to encourage employees to identify their own biases, conscious or not, and to develop strategies to mitigate the impact of them.

For instance, implicit bias training, also known as unconscious bias training or anti-bias training, focuses on helping employees recognize their own unconscious prejudices and stereotypes. These biases are automatic and unintentional, but they can still influence judgments, decisions, and behaviors.

However, fear that information regarding such strategies and biases may be used against employees or employers creates a chilling effect on their adoption. Employees may approach training with extreme caution or disengage completely if they fear their results could be used against them legally. This undermines the primary purpose of such training: honest self-reflection and growth. Organizations invest in bias training to improve workplace culture and reduce discrimination. Making certain information admissible in cases against them could also discourage companies from conducting such training at all.

This bill addresses this issue in the public employment context by preventing disclosure of information related to "bias mitigation or elimination efforts." Those efforts are defined as training and education provided by a public employer that asks employees to understand, recognize, or acknowledge the influence of conscious and unconscious bias and implements strategies to mitigate the impact of such bias. Those strategies can include testing for bias, analyzing bias tests, conducting bias training, and tracking bias mitigation and elimination.

This bill provides public entities and public employees a privilege to refuse to disclose, and to prevent another from disclosing, information pertaining to the employee's bias that was obtained through or as a result of bias mitigation or elimination efforts, including assessments, admissions, or acknowledgments of bias held by the public employee and specific strategies developed to address the public employee's bias.

The bill goes even further by amending the Evidence Code to make any evidence of bias mitigation or elimination efforts relating to a public employee, including the results of those efforts and any specific strategies developed to address the public employee's bias conducted by or on behalf of a public entity, confidential and inadmissible for any purpose. These protections only apply in the civil context, and explicitly do not apply to criminal proceedings.

Writing in an oppose unless amended position, the California Employment Lawyers Association and the Consumer Attorneys jointly argue the provisions of the bill would result in unintended consequences and therefore urges the author to consider a series of amendments:

> While we understand the laudable goal of this bill is to encourage more anti-bias training for our public entities, we are concerned with significant unintended consequences. Importantly, this privilege could be used to shield bad actors and insulate public entities from necessary scrutiny and liability when they are not taking proper steps to address and prevent discriminatory and harassing conduct.
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> We would propose the following amendments to help mitigate these concerns:
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> > 1. **The prohibition on admissibility must also apply to the public entity.** Otherwise, the bill is unfairly, and potentially unconstitutionally, one-sided. Having a category of evidence that just one party can admit, but the other part cannot assess or even have access to raises a fundamental due process issue.
> >
> > 2. **The bill should not apply to allegations of retaliation.** For example, a public employee could say in an anti-bias training that

they have bias against Asian people. Their manager is Asian and fires or takes retaliatory action against the employee because of their admission of bias. Or a public employee may disclose during an anti-bias training information related to discrimination that occurred in the workplace and is then retaliated against for that disclosure. ("The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." Rope v. Auto-Chlor System of Washington, Inc. (2013) 220 Cal.App.4th 635, 652.)

3. **The bill must not protect conduct that could in and of itself constitute discriminatory or harassing conduct**. For example, some of our attorneys have examples of cases where an employee who did not take the bias training seriously, used the opportunity to make overtly offensive remarks during the course of the training.

4. **The bill must not apply to evidence that could support a claim that the public employer did not to take all reasonable steps to prevent or remedy discrimination or harassment.** For example, an employee may have had an incident involving discrimination or harassment and he is asked to take a bias mitigation training. However, he never actually takes the training or the training shows limited progress. If there is another incident of discriminatory or harassing conduct, the failure to ensure that the employee took the bias mitigation training or was acting in good faith in the bias mitigation training is evidence that the employer failed to take reasonable steps to prevent or remedy discrimination. That evidence could be excluded, however, because the employer could assert that it is "evidence of a public employee's assessment, testing, admission or acknowledgment of personal bias that was solicited or required as part of a bias mitigation training."

Although removing barriers to comprehensive bias elimination and mitigation efforts is a strong policy aim, the breadth of these exclusions could withhold crucial evidence in civil proceedings, including discrimination or harassment cases in the workplace. The author has agreed to amendments that more narrowly tailor the evidentiary protections to ensure no unintended consequences that may actually undermine the goal of addressing discrimination and bias in the workplace. The amendments replace the contents of the bill with a more focused exclusion of evidence regarding a public employee's "personal bias" gained from assessments, testing, admissions, or

acknowledgements that was solicited or required as part of a bias mitigation training. "Personal bias" refers to a person's thought process, attitude, or belief in favor of or against one thing, person, or group compared with another, usually in a way that is considered to be partial. The amendments will explicitly state that the bill does not prevent a plaintiff, complainant, or public employer from introducing evidence of a public employee's admission, acknowledgement, or commission of an act or conduct of harassment, discrimination, or retaliation. Given that there remains cogent concerns about the one-sided nature of the evidentiary rule and that unintended consequences may still result, the author has also committed to continuing to work with stakeholders and this Committee on further refining the scope.

The Los Angeles County Board of Supervisors, the sponsor of the bill, writes:

> SB 303 will enable public employees to participate in essential bias training and self-assessment without fear of legal repercussions. By protecting these efforts, the legislation fosters a more open and honest approach to addressing bias, ultimately enhancing public trust in government institutions. By ensuring that participation in these initiatives cannot be used against employees in civil proceedings, SB 303 eliminates a significant barrier to genuine self-reflection and proactive engagement.

3. Industry opposition

A coalition of industry groups, including the California Retailers Association, writes in opposition:

> It appears that SB 303 was written to avoid personal embarrassment or potential future litigation over a particular type of training record—bias training—when a whole range of other similar records would not be privileged and could be used in subsequent litigation.
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> For example: a police officer's bias training records would be inadmissible, but personnel records related to repeatedly failing gun safety training would be admissible. For a public truck driver, records related to any training about not driving under the influence of alcohol would be admissible, but records related to bias training would not be. Obviously, in both these examples, liability or embarrassment could flow from the discussed records – for a truck driver who is sued for driving drunk, records of prior instances and repeated re-training on driving under the influence would be relevant and potentially significant in the case ... and might lead to liability for both the driver and their employer, to the extent the employer was aware of the bad conduct and continued to retain the driver. But similarly, employment records related to bias training might be relevant in a case where, for example, one employee is

terminated for repeatedly using racial slurs against another employee – then sues the employer to challenge the termination.

SUPPORT

Los Angeles County Board of Supervisors (sponsor)

OPPOSITION

Associated General Contractors of California
Associated General Contractors San Diego
California Chamber of Commerce
California Employment Lawyers Association
California Retailers Association
Consumer Attorneys of California

RELATED LEGISLATION

Pending Legislation: AB 1109 (Kalra, 2025) creates a new evidentiary privilege for communications between union agents and represented employees and extends certain current evidentiary rules relating to existing privileged communications to the union agent-represented employee communications. AB 1109 is currently on the Assembly Floor.

Prior Legislation: None known.

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