

California moves toward outlawing caste discrimination

By Dan Eaton

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On May 11, the California State Senate overwhelmingly passed SB 403, a measure which, if enacted, will make California the first state to ban discrimination in workplaces, schools, and elsewhere based on caste. SB 403 would, among other things, insert caste after race in the list of protected classifications covered by the California Fair Employment & Housing Act (FEHA).

Caste, defined

In her 2020 book “Caste: The Origins of Our Discontent,” former New York Times national correspondent Isabel Wilkerson said caste operates as “the granting or withholding of respect, status, honor, attention, privileges, resources, benefit of the doubt, and human kindness to someone on the basis of their perceived rank or standing in the hierarchy.”

Caste, as such, is an unfamiliar framework in the United States. Wilkerson argued: “In the American caste system, the signal of rank is what we call race, the division of humans on the basis of their appearance. ... Race, in the United States, is the unseen force of caste. Caste is the bones, race the skin. Race is what we can see, the physical traits that have been given arbitrary meaning and become shorthand for who a person is. Caste is the powerful infrastructure that holds each group in its place.”

In the Senate-passed measure, caste is defined as “a system of social stratification on the basis of inherited status. ‘A system of social stratification on the basis of inherited status’ may be characterized by factors that may include, but are not limited to, inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation, and discrimination; and social exclusion on the basis of perceived status.”

An employee claiming caste discrimination would have to establish (1) the existence of a caste, as defined; (2) the employer “perceived” the employee to have a particular status within that caste; and (3) the employer discriminated against the employee because of the employee’s perceived caste status.

The measure would ban discrimination against employees perceived to be in the dominant caste and a historically disfavored caste alike.



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Why sponsors claim new protected classification needed

According to a legislative analysis, the measure is “in response to increasing reports that caste-based discrimination is occurring in California. According to the author and sponsors of the bill, caste-based discrimination is occurring in businesses, workplaces, housing, and schools, particularly in communities with high populations of individuals from South Asian diasporic communities. While caste-based discrimination is already implicitly covered under the protected categories of race and color, ethnicity, national origin, and ancestry,” this bill “clearly signal[s]” to employers and others that caste discrimination is prohibited in California.

Some South Asian advocates oppose measure

Many South Asian organizations contend SB 403 would increase discrimination against members of their community. They argue the caste that may have marked them in their homeland is irrelevant in the United States, which does not recognize such distinctions. Opponents are worried members of the disfavored caste will identify themselves as caste-oppressed to avoid being labeled caste-oppressors.

Unclear how measure would apply to non-South Asians

It is hard to see what a separate claim of caste discrimination in employment will add to a claim of race discrimination or even national origin discrimination asserted by those not of South Asian descent. If the classification is not interpreted to be limited to South Asians and subsumed within race, there is a risk courts will treat the prohibition on caste discrimination as a prohibition on class discrimination, its nearest unlisted classification. That would be a mistake.

As Wilkerson wrote: “It is the fixed nature of caste that distinguishes it from class, a term to which it is often compared. Class is an altogether separate measure of one’s standing in a society, marked by level of education, income, and occupation, as well as the attendant characteristics, such as accent, taste, and manners that flow from socioeconomic status. These can be acquired through hard work and ingenuity or lost through poor decisions or calamity. If you can act your way out of it, then it is class, not caste.”

The introduction of caste discrimination into American employment law will lead to a uniquely American recasting of the concept of caste itself.

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