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## CALIFORNIA LEGISLATIVE SUMMARY

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The deadline to introduce new bills during the 2019-2020 California legislative session has expired, and 4,828 bills were introduced overall, including many significant employment bills. As in 2019, “worker classification” issues flowing from the California Supreme Court’s *Dynamex* decision will continue to dominate the legislative agenda, notwithstanding the enactment of AB 5 codifying and expanding *Dynamex*’s ABC Test. Indeed, there were approximately 35 bills introduced by both parties, and even AB 5’s author, proposing various amendments to AB 5. These proposals ranged from AB 5’s author’s suggested “recasting” and expanding AB 5 (AB 1850), to an outright repeal of AB 5 (AB 1928), to a constitutional amendment rescinding the ABC Test (ACA 19), and to a proposed “third classification” for gig workers (SB 1039). For good measure, there were also approximately 30 bills proposing new industry or occupation specific exemptions from AB 5.

There were also a number of other significant employment bills proposed on other subjects, including bills to:

- Amend the Fair Employment and Housing Act (FEHA) to protect medicinal marijuana patients (AB 2355) and employees enrolled in drug rehabilitation programs (AB 882);
- Nullify the so-called “same decision” defense in discrimination cases and require employers to retain for five years records related to employee complaints (AB 2947);
- Expand the California Family Rights Act (CFRA) to apply to almost all employers and to include new bases for leave (AB 2992 and Governor Gavin Newsom’s “Budget Trailer”);
- Require employers provide bereavement leave (AB 2999);
- Expand the Labor Code’s protections for crime victims and their family members (AB 2992);
- Enable employees to use paid sick leave for “mental health days” (AB 1844);
- Enact “predictive scheduling” requirements for certain industries (SB 85);
- Require large employers to submit annual “pay data reports” to the Department of Fair Employment and Housing (SB 973);
- Amend the Private Attorneys General Act (PAGA) to require more detailed pre-suit notices (AB 2530) and to cap employer liability where no actual injury occurred (SB 1129);
- Enact new requirements related to workplace wellness programs (AB 648); and
- Require human resource professionals to report child abuse (AB 1963).

There were also a number of so-called “spot bills” (i.e., placeholders likely to be materially and substantively amended) on various topics, including PAGA, FEHA discrimination, workers compensation, wage and hour issues, and worker classification.

Looking ahead, these bills will soon be assigned to various committees and be subjected to key initial votes prior to the April 24<sup>th</sup> deadline for policy committees to approve any bills having a fiscal impact.

In the interim, below is an overview, arranged largely by subject matter, of the key employment bills the California Legislature is now considering

## NEW LAWS

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### Harassment/Discrimination/Retaliation

#### **FEHA Accommodation Protections for Medicinal Cannabis Users (AB 2355)**

While California in 1996 enacted the Compassionate Use Act to authorize medicinal marijuana and in 2016 enacted the Adult Use of Marijuana Act to permit recreational marijuana usage, it has not yet followed the lead of sixteen other states enacting laws protecting medical cannabis patients against employment discrimination or requiring reasonable accommodation. This law would partially change that by stating the Legislature's intent to make it unlawful for an employer to discriminate against a person based upon their status as a qualified patient or a person with an identification card entitled to the protections of the Compassionate Use Act, or the use of cannabis for medical purposes.

Accordingly, it would amend the Fair Employment and Housing Act (FEHA) and make it an unlawful employment practice to discriminate against (including not hiring) a person because of their status as a qualified patient, or as a person with an identification card (as specified) for purposes of medical cannabis, subject to certain exceptions.

Such "qualified patients" (as defined) who use medical cannabis while employed would also be the same rights to reasonable accommodation and the interactive process as are provided to workers prescribed legal drugs, subject to certain express requirements. These include that an attending physician licensed to practice in California recommends the use of medical cannabis in accordance with the Medical Board of California's guidelines. The employee would need to notify the employer of the physician's recommendation at which point the employer may require the employee to show or obtain a state medical cannabis identification card, and if the employee fails to do so within a reasonable period, the employer would not be required to comply with these accommodation/interactive process requirements. An employer would also be entitled to require an applicant or employee seeking a reasonable accommodation to produce a cannabis dosage or treating regimen recommended by their attending physician.

Anticipating the potential conflict with federal law, it would also specifically provide that employers would not be prohibited from refusing to hire or discharging a "qualified patient or person with an identification card" if hiring the individual or failing to discharge the employee

would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations, including the Department of Transportation regulations or the Drug-Free Workplace Act of 1988. This bill would also exempt employers from these new cannabis protections, including reasonable accommodation, if the employer requires all employees and job applicants to be drug and alcohol free for legitimate safety reasons as required by federal and state laws and who are required to conduct applicant and ongoing testing of employees by those laws or regulations.

It would also make clear that employers would be authorized to take disciplinary action, including termination or refusing an accommodation, against an employee who is impaired on the employer's property or place of work or during work hours because of cannabis usage. An employer would also be expressly authorized to use impairment testing before or during work in addition to other measures to determine if an individual is impaired.

A similar bill (AB 2069) stalled in 2018.

### **FEHA Protections for Drug Rehabilitation Programs (AB 882)**

While Labor Code section 1025 presently requires employers with 25 or more employees to reasonably accommodate an employee who voluntarily enters an alcohol or drug rehabilitation program, this bill would include additional discrimination protections in the Fair Employment and Housing Act, which applies to employers with five or more employees. Specifically, it would amend the definitions of "physical disability" and "mental disability" for purposes of FEHA's discrimination protections to include a person who has completed, or is the process of completing a rehabilitation program to end illegal drug use. These definitions would also include someone erroneously regarded as engaging in illegal drug use. However, these changes would not preclude an employer from adopting or administering reasonable policies or procedures, including drug testing, designed to ensure that the individual who has completed or is completing a drug rehabilitation program is no longer engaging in the illegal use of drugs.

The bill's author states it is intend to align California law with the federal Americans with Disabilities Act, and to incorporate FEHA regulations suggesting past drug addiction can be a disability.

**Status:** Passed the Assembly Labor and Employment committee on a party-line vote and is pending in the Appropriations Committee.

### **FEHA Burden of Proof and Complaint Retention Requirements (AB 2947)**

This bill would add new Government Code section 12940.5 to specify that an intentional FEHA violation occurs if any of the enumerated protected characteristics were a motivating factor in the employment action or decision, even if other factors may also have motivated the action or

decision. This change is presumably intended to amend or overrule the so-called “same decision” defense whereby an employer argues these other factors would have resulted in the same decision, even if a protected characteristic also played a role.

While Government Code section 12946 generally imposes a two-year records retention requirement for enumerated personnel records, proposed new Government Code section 12950.5 would require employers to maintain for five years records of employee complaints of harassment, discrimination or “any other violation of this article” [Government Code section 12940, *et seq.*]. “Employee complaint” would be defined as a complaint filed through the employer’s internal complaint process, and the five year period would start “after the last day of employment of the complainant or any alleged perpetrator named in the complaint, whichever is later.

The DFEH would have the authority to seek an order requirement the employer to comply.

### **Employer Responsibility for Harassment by Contractors (AB 2043)**

An emerging trend in California is to have client employers and labor contractors share responsibility and civil liability for certain violations (e.g., failure to pay wages or secure workers’ compensation coverage) or for actions taken by the contractor’s employees. Another trend has been to expand the circumstances under FEHA for which employers may be liable for their harassment of others (e.g., interns, volunteers) or the harassment of their employees by others (e.g., non-employees). Continuing both trends, this bill would amend FEHA to specify when an employer may be responsible for the harassment by a contracted employee of the employer’s employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract in the workplace.

The bill’s author states it is intended to assist subcontracted employees, who may not even be aware they are working for someone other than their employer due to the subcontracting agency, pursue legal redress for harassment. It is also intended to address perceived ambiguities as to liability for harassment in the staffing context, including whether a client employer can be responsible for harassment by a contracted worker, and as to which entity would have responsibility for addressing any harassment.

Accordingly, this bill would amend FEHA to hold “client employers” liable for harassment by a “contracted supervisor” harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract in the workplace. A “contracted employer” would be defined as a private employer “regardless of its form” that obtains worker to perform labor within the usual course of business from a contractor, but would not include business entities with fewer than 25 workers, including those hired directly and those obtained by a contractor, or a business entity with five or fewer workers supplied by a contractor. A

“contracted supervisor” would be defined as a “person providing services pursuant to a contract who supervises one or more employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract.”

Similar provisions were contained in AB 170 but these particular provisions were deleted by amendment in 2019.

### **Presumption of Non-Discrimination for Certain Employment Testing (SB 1241)**

To encourage the use of employment testing believed to reduce bias and discrimination, this bill would amend FEHA to create a presumption of non-discrimination if the testing meets specified criteria enumerated in proposed new Government Code section 12954.2. These criteria include that the testing is job related and meets a business necessity (as defined), and that the test or procedure utilizes pretested assessment technology that, upon use, resulted in an increase in the hiring or promotion of a protected class compared to prior workforce composition. Employers would also need to conduct an annual examination of the pretested assessment technology to determine whether the technology had a disparate impact.

To qualify for this presumption, employers would also need to retain records of the testing or procedure and submit them to the DFEH upon request.

### **Harassment Training for Minors in Entertainment Industry (AB 3175)**

This industry-specific bill would require that before an entertainment work permit is issued to minors, the parents of minors aged 14 to 17 years must complete sexual harassment training provided by the DFEH or other legally-compliant training and convey this information to the minor.

### **Industry-specific Mandatory Training Regarding Employment Laws (AB 3313)**

This bill would mandate both initial and then biennial training regarding federal, state and local employment laws for employees working in industries governed by the California Community Care Facilities Act, the California Residential Care Facilities for the Elderly Act and the California Child Day Care Facilities Act. While the particular requirements may vary for each industry, the bill generally contemplates an initial three-hour training course followed by two-hours biennially regarding wage and hour issues, whistleblower protections, workers’ compensation requirements and workplace safety.

### **Leaves of Absence/Time off/Accommodation Requirements**

#### **Paid Sick Leave for Behavioral Conditions (AB 1844)**

This bill would amend Labor Code section 246.5 to expand California's Paid Sick Leave requirements and allow employees to use paid sick leave for behavioral health conditions of the employee of their family member (in addition to the current ability to use for health conditions). This bill follows the lead of several other states (e.g., Rhode Island and Oregon) that allow employees to essentially take "mental health days" in addition to for physical sickness.

#### **"Kin Care" Amendments (AB 2017)**

This bill would amend California's so-called "kin care" statute (Labor Code section 233) to preclude an employer from designating a sick day taken by the employee to care for themselves as a kin care day, unless the employee authorizes such a designation. However, it will not preclude the employer from charging a sick day when the employee takes off a sick day for themselves, pursuant to employer policy if the policy regarding sick day usage is applied uniformly. The author states it is intended to ensure the employee, not the employer, gets to designate how sick leave is credited and to preclude situations where an employer charges a sick day against kin care purposes, thus lessening the amount of kin care usage available for later purposes.

#### **Bereavement Leave (AB 2999)**

This bill would authorize employees who have been employed for sixty or more days with an employer to take up to ten days of bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild or domestic partner (as these terms are defined either in this or other specified Labor Code sections). The days of bereavement leave would not need to be consecutive, but would need to be completed within three months of the date of the person's death. The bereavement leave would be unpaid (unless the employer has an existing bereavement leave policy), but an employee may use otherwise accrued or available vacation, personal leave, or compensatory time off.

If requested by the employer, an employee would need to provide within 30 days of the first day of the leave documentation of the person's death, including a death certificate, a published obituary or written verification of death, burial or memorial service.

An employee who believes they have been discriminated or retaliated against an employee for exercising their bereavement leave rights would be entitled to file either a complaint with the Labor Commissioner or a civil complaint. A prevailing employee would be entitled to recover damages, as well as attorneys' fees and costs.

This new bereavement leave requirement would not apply to employees covered by a collective bargaining agreement including specified provisions.

## **Paid Family Leave Changes in Proposed Budget**

Governor Newsom's recently proposed budget includes several "trailers," including one to significantly amend the California Family Rights Act, and the Pregnancy Disability Leave Law. As a result of these proposed expansions, the recently-enacted New Parental Leave Act (NPLA) would be repealed as its provisions would be incorporated elsewhere.

For instance, while the current Pregnancy Disability Leave Law (PDL, Government Code section 12945) currently applies to employers with five or more employees, these amendments would expand the PDL to apply to employers with one or more employees (essentially all employers).

Similarly, while the California's Family Rights Act (CFRA, Government Code section 12945.2) currently applies to employers with 50 or more employees, these amendments would extend CFRA to employers with one or more employees in the state. Because this new threshold would essentially apply to almost all employers, there would also no longer be a requirement for an employer have 50 employees within 75 miles of the employee's worksite to entitle the employee to a CFRA leave.

It would also expand the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken to provide care. For instance, while "family care and medical leave" presently includes the serious health condition of a child, spouse or parent of an employee, this bill would expand this list to include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner" who has a serious health condition. The bill would make corresponding changes including these individuals for whom the employer may request medical certification to support the employee's request for leave to care for a serious health condition. Similarly, it would make corresponding changes to include these additional family members for whom the employee shall not use sick leave in connection with those individual's serious health condition, unless mutually agreed to by the employer and the employee.

The definition of "child" would also expand to also include a child of a domestic partner or a person to whom the employee stands in loco parentis. Similarly, the bill would also enable employees to take leave for the birth or the placement of a child in connection with the adoption or foster care of a child if an employee has identified the child as their designated person.

These amendments would define grandparent as "a parent of the employee's parent", and would define "grandchild as a "child of the employee's child." The definition of parent would be expanded to include "parent-in-law" which, in turn, would be defined as "the parent of a spouse or domestic partner." Sibling would be defined as "a person related to another person by blood, adoption, or affinity through a common legal or biological parent."

The definition of "family care and medical leave" would also be expanded to include "qualifying exigencies" related to the covered active duty or call to covered active duty of an employee's

spouse, domestic partner, child or parent in the United States Armed Forces (as defined elsewhere).

As a result of these expansions to the PDL and CFRA, the recently enacted New Parental Leave Act (NPLA, Government Code section 12956.6 [requiring family-related leave for employers with 20 or more employees]), would be repealed in its entirety.

This trailer includes many of the changes proposed by SB 135, which stalled in 2019.

### **CFRA Expansions and Other Leave Time Proposals (AB 2992)**

While CFRA presently only applies to employers with 50 or more employees and has an exception unless there are 50 employees within 75 miles of the employee's worksite, this bill would replace these requirements and also expand the basis for CFRA leave generally. Specifically, rather than providing 12 weeks of leave if the employer has 50 employees, this bill would amend CFRA to provide "family care and medical leave" regardless of employer size, with the amount of leave depending on how many employees work within 75 miles of the employee's worksite. For instance, an employee would be entitled to two workweeks of leave if there are between one and 19 employees within 75 miles, to six workweeks if there are between 20 and 49 employees within 75 miles, and 12 workweeks if there are more than 50 employees within 75 miles of the employee's worksite. It would also expressly delete the current language precluding CFRA leave if there are fewer than 50 employees within 75 miles of the employee's worksite.

While CFRA presently allows leave to care for the serious health condition of a parent, child or a spouse, these amendments would expand family care and medical leave for the serious health condition of "a parent, spouse, or child of the employee, or to care for a person living in the employee's household with a relationship to the employee that is substantially similar to that of a spouse or a child."

While CFRA presently does not expressly allow bereavement leave, these amendments would allow leave to grieve the death of the employee's child, spouse, sibling, or a person who, at the time of their death, lived in the employee's household and had a relationship similar to that of a child or spouse.

While CFRA presently defines a child as someone under 18 years of age, these amendments would expand that definition to a person under 25 years of age. For purposes of the new bereavement leave (discussed above), the definition of child would include any person regardless of age or dependency status. "Sibling: would be defined as "a biological, foster or adoptive sibling, a stepsibling, or a half-sibling."

For bereavement leave purposes, the employer would be entitled to request documentation of the person's death, including a death certificate, a published obituary, or a written verification of

death, burial or memorial services.

This bill would also modify and expand the Labor Code protections allowing time off for victims of certain crimes. For instance, Labor Code section 230 presently prohibits discrimination against victims of domestic violence, sexual assault or stalking for taking time off to obtain relief (e.g., temporary restraining orders, etc.). This bill would expand this protection to protect the victims and “the immediate family or household member” who take time off to obtain relief or to provide assistance to such family or household members seeking relief.

While section 230 presently protects victims of three specific crimes (domestic violence, sexual assault or stalking), these amendments would have a broader definition of “victim” to also include other crimes causing physical injury, or emotional with the threat of physical injury, a crime that caused death, or any other person who meets the definition of victim in Government Code section 13951 (e.g., terrorism).

“Immediate family or household member” would also be specifically defined to include (provided they did not commit the crime or abuse) a spouse, parent, a child (as defined), a person living in the same household, a person who had previously lived in the same household for at least two years and in a relationship similar to a parent, sibling, child or spouse, another family member who witnessed the crime or abuse, or the primary caretaker of a minor victim.

Notably, while an employee may presently use accrued time off for leave under Labor Code section 230, this bill would also entitle the employee to six workweeks leave in a 12-month period to obtain relief to ensure the health, safety or welfare of the victim or victim’s immediate family member or household member. This leave would be paid or unpaid – depending on the employer’s discretion – and may run concurrently to any time allowed for the same purpose under the FMLA or CFRA.

Presently, Labor Code section 230 precludes the employer from taking any action against an employee for an unscheduled absence for these purposes if the employee provides a certification to the employer. This bill provides this certification may be a written statement signed by the employee or a person acting on the employee’s behalf that the absence is for a purpose authorized under this section. The employer would still have the right to request additional certification, including a police report, a court order, or documentation from certain enumerated professionals, including a licensed medical professional, domestic violence counsel, or a victim advocate responding to the victimization, “or any other form of documentation that reasonably verifies that the crime or abuse occurred.”

Further, while Labor Code section 230.1 presently only prohibits employers with 25 or more employees from discriminating against victims of sexual assault, domestic violence or stalking who take time off to obtain medical attention, this bill expand this protection to all employers,

regardless of size. It would also expand these leave provisions to include attending the funeral (or equivalent), or making arrangements necessitated by the death, or grieving the death of an employee's immediate family member or household member who is deceased as a result of crime or abuse. It would also make corresponding changes as those discussed above to section 230 regarding the definition of victim and household member, and regarding the provision of up to six workweeks leave in a 12-month period.

Lastly, it would amend the Unemployment Insurance Code to provide that an employee will have voluntarily left their prior employer for good cause (and thus, eligible for benefits) to obtain relief, or to help for, themselves or family/household members that meet the expanded definition of victim discussed above.

### **“Qualifying Exigency” Changes for Paid Family Leave Purposes (AB 2399)**

California's Paid Family Leave program currently provides wage replacement benefits for employees who take time off for certain specified purposes, including a “qualifying exigency” related to specified family members' covered active duty in the United States Armed Forces. This bill would revise the definitions of “care recipient,” “care provider” and “family care leave” for purposes of the qualifying exigency provisions. It would also define the term “military member,” including for purposes of these revised definitions relating to qualifying exigencies. It would also make conforming changes related to the documentation requirements of a qualifying exigency.

This has been introduced as a Committee Bill suggesting it has bipartisan support and no recorded opposition.

### **Independent Contractors/Worker Classification**

#### **Additional “AB 5” Clarifications (AB 1850)**

Drafted by AB 5's author, AB 1850 currently proposes to “recast and reorganize” the statutory provisions of new Labor Code section 2750.3. It likely will be amended shortly to include additional exemptions, including for musicians and freelance journalists.

#### **Proposed Repeal of AB 5 (AB 1928)**

This bill would essentially repeal AB 5 and *Dynamex's* “ABC Test” in its entirety and instead require the so-called *Borello* test be used for determining whether someone is an employee or an independent contractor.

#### **Flexible Work Options as a Constitutional Amendment (ACA 19)**

Known as the Right to Earn a Living Act, this bill would amend the California Constitution in several respects. First, it would provide that determinations of whether a person is an employee

or an independent contractor shall be governed by the prior *Borello* test, presumably instead of the so-called ABC Test or the recently-enacted AB 5.

Second, it would reiterate the right of individuals to choose a business or profession “free from arbitrary or excessive government interference,” and would limit government regulations relating to businesses and professional “to those that are demonstrably necessary and narrowly tailored to fulfill legitimate public health, safety or welfare objectives.”

Third, it would prevent laws that restrict an employer’s ability to allow employees to work flexible work schedules, so long as both parties understand that work performed in excess of 10 hours in a day or in excess of 40 hours in a week would be paid at overtime rates.

### **“Third” Classification for Gig Workers Contemplated (SB 1039)**

Entitled “The Independent Worker Rights Act of 2020,” this bill would state the Legislature’s intent to develop a modern policy framework for independent workers (primarily “gig employees”) who voluntarily choose it by creating a third classification of workers requiring basic rights and protections, including minimum wages, workers insurance coverage, discrimination protections and paid medical leave. In effect, this framework would recognize the binary system for classifying workers as either employees or independent contractors is outdated and inapplicable in the gig economy and would essentially develop a third model retaining both some basic employee rights while encouraging flexibility.

### **Small Business Exemption from AB 5 (AB 1925)**

This bill would exempt “small businesses” from AB 5 and *Dynamex’s* “ABC Test” and instead apply the prior so-called *Borello* standard for determining whether someone is an employee or an independent contractor. To qualify for this proposed “small business” exemption, the business must meet all of the following requirements: (1) it is independently owned and operated; (2) it is not dominant in its field of operation; (3) it has fewer than 100 employees; and (4) it has average gross receipts of fifteen million dollars or less over the previous three years.

### **Exemptions from AB 5 for Newspaper Carriers and Freelance Journalists (SB 867, SB 868 and AB2796)**

These bills would amend AB 5’s provisions applicable to newspaper carriers/distributors and freelance journalists. Specifically, while AB 5 provided a one-year exemption (until January 1, 2021) from the “ABC Test” for newspaper distributors and newspaper carriers (as defined), SB 867 would make this exemption apply indefinitely.

Secondly, while AB 5 presently exempts freelance journalists who submit no more than 35 submissions per year to the “putative employer,” SB 868 would remove that cap and exempt

freelance journalists (as defined) from the ABC Test regardless of the number of content submissions per year.

In both instances, however, the so-called *Borello* test would govern whether the individual or entity was an independent contractor or an employee.

#### **Exemption from AB 5 for Court Reporters/Translators (SB 875)**

This bill would exempt from AB 5 and the ABC Test specified individuals working as court reporters and translators who are free from direction or control both under the contract for the performance of the work and in fact. “Court reporters” and “translators” would be further defined in the statute, including the applicable criteria needed to qualify for this exemption, in which case the so-called *Borello* test would apply to determine if these professional services providers qualify as independent contractors or employees.

#### **Exemption from AB 5 for Musicians (SB 881)**

This bill would exempt from AB 5 and the ABC Test individuals providing services as a musician or music city professional, except where a collective bargaining agreement applies.

#### **Franchisee Exemption from AB 5 (SB 967/AB 2489)**

This bill preclude AB 5 and *Dynamex’s* “ABC Test” from being applied in the franchisee-franchisor relationship. Instead, a franchisee would not be deemed a franchisor’s employee and will be considered an independent contractor unless a court determines the franchisor exercises actual control over the franchisee or the franchisee’s employees beyond what a franchisor customarily exercises to control its trademarks, service marks, or trade dress.

#### **Expanded “Contracting Business” Exception to AB 5 (AB 3281)**

Presently, AB 5 exempts business-to-business contracting relationships that meet specified requirements, including that a business is a “contracting business” that meets 12 enumerated requirements. This bill would include an alternative definition of “contracting business” to mean it is required to file an IRS Schedule C form, remits to the Franchise Tax Board an annual tax pursuant to Revenue and Taxation Code section 17935.

#### **Additional Industry-Specific Exemptions from AB 5**

A large number of Senate and/or Assembly bills (and sometimes both on same subject matter) have been introduced to exempt additional occupations from AB 5. These include proposed exemptions for referees or umpires for independent youth sports organizations (AB 3185/SB 963), health facilities [as defined] (SB 965/AB 2794)) licensed pharmacists (SB 966/AB 2457), transportation network companies (SB 990/AB 2497), physical therapists (AB 2458), modified

exemption for barbers and cosmetologists (AB 2465), transport network employees (AB 2822), certified shorthand reporters (AB 3136) licensed marriage and family therapists (AB 2793) and additional land surveyors/landscape architects/geologists or geophysicists (AB2823).

Still another bill (SB 975/AB2572) would exempt licensed timber operators, professional foresters, licensed geologists, geophysicists, land surveyors, contractors, engineers, and pest control operators, when these persons are working on forested landscapes.

## **Wage and Hour**

### **Annual Pay Data Reports (SB 973)**

Evincing the ongoing feud between California and the federal government, this bill would essentially enact the proposed Obama administration regulations for revised EEO-1 reporting that the Trump Administration challenged in 2017. The bill's author states it is intended to force large California employers to undertake self-audits of their pay structures and then report these results to enable the state to monitor the overall progress toward achieving pay equity.

Accordingly, beginning March 31, 2021, and annually thereafter by this same deadline, private employers with 100 or more employees that are required to submit an annual EEO-1 will be required to submit "pay data reports" for the prior calendar year (i.e., the "Reporting Year") to the Department of Fair Employment and Housing (DFEH), who can also then share this report with the Division of Labor Standards Enforcement (DLSE) upon request. The pay data report would need to include very specific information enumerated in proposed new Government Code section 12999, including the number of employees by race, ethnicity, and sex in the following job categories: (a) executive or senior level officials and managers; (b) first or mid-level officials and managers; (c) professionals; (d) technicians; (e) sales workers; (f) administrative support workers; (g) craft workers; (h) operatives; (i) laborers and helpers; and (j) service workers.

Employers would also need to identify the number of employees, identified by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. For this particular purpose, the employer shall calculate the employee's earnings as shown on the IRS Form W-2 for each "snapshot" (i.e., during a single pay period of the employer's choice between October 1<sup>st</sup> and December 31<sup>st</sup> of the Reporting Year) and for the entire Reporting Year, regardless of whether the employee worked the entire calendar year.

For employers with multiple establishments, the employer shall submit a report for each establishment and a consolidated report that includes all employees.

This bill would permit, but not require, employers to include a section providing any "clarifying remarks" regarding any of the information provided. Employers required to file an EEO-1 report

with the EEOC or other federal agency containing the same information may comply with this new reporting requirement by submitting the EEO-1 to the DFEH provided it contains the same or substantially similar data required by this bill.

The bill would require the department to maintain these pay data reports for at least 10 years. However, it would be unlawful for any DFEH officer or employee to publicize any “individually identifiable information” obtained through these reports prior to the initiation of any Equal Pay Act or FEHA claim. “Individually identifiable information” would be defined as “data submitted pursuant to this section that is associated with a specific person or business.”

Similarly, individually identifiable information submitted to the DFEH through these reports would be considered confidential information and not subject to the California Public Records Act. However, the DFEH would be able to develop and publish annually aggregate reports based on the information provided so long as these aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

If the DFEH does not receive the required report, it may seek an order requiring employer compliance and shall be entitled to recover its enforcement costs (i.e., likely attorneys’ fees).

This bill would also authorize the DFEH to “receive, investigate, conciliate, mediate and prosecute complaints” alleging equal pay violations under Labor Code section 1197.5. However, the DFEH would be required to coordinate with the DLSE and the DIR to ensure only one department is investigating or taking enforcement actions in response to the same operative set of facts.

Very similar bills were introduced by the same author in 2018 (SB 1284) and 2019 (SB 171) but stalled in the Assembly after passing the Senate.

### **Additional “Cure” Options for Itemized Wage Statement Violations and a PAGA Cap (SB 1129)**

Labor Code section 226 specifically enumerates nine requirements for itemized wage statements, with Labor Code section 226.3 and the Private Attorneys General Act (Labor Code section 2699, *et seq.* [PAGA]) authorizing civil penalties on either an individual or class action basis. Responding to concerns plaintiff’s attorneys are obtaining seven-figure settlements based upon fairly technical violations, this bill would provide employers additional options to cure such violations and to cap potential exposure where no actual injury occurred.

Specifically, before filing suit for an employer’s alleged failure to identify the applicable pay period of the wage statement, the employee’s name or the name and address of the employer, an employee would need to provide advance notice of such violations. The employer would then have 65 days to “cure” the violation (i.e., provide fully compliant itemized wages statements), in which case the employee would not be able to file suit under Labor Code section 226.3 or PAGA. Notably, while PAGA presently requires employers provide three years of compliant wage

statements to “cure,” this bill would shorten this to only one year of compliant wage statements. However, this cure option would not be available if the employer has failed to initially provide a wage statement altogether.

Another oft-cited concern about PAGA is that its penalty provisions (i.e., \$100 penalty per employee per pay period, with subsequent violations involving a \$200 penalty) can be disproportionate to the violation, particularly if there is no underlying actual injury. Accordingly, this bill would amend PAGA to limit the aggregate total penalty to \$5,000 if the aggrieved employees do not suffer actual economic or physical harm. For purposes of this particular limitation, “violation” means “each type of alleged violation, without reference to the number of employees involved or the number of pay periods during which the alleged violation occurred.”

### **Private Attorney General Act Notice Requirements (AB 2530)**

While Labor Code section 2699.3 presently requires that an aggrieved employee provide pre-suit notice under either or both subsections (a) or (c) regarding the alleged violations, it does not presently require the notice to specify which violations are being alleged under which subsection. This is potentially significant since only subsection (c) contains an opportunity for employers to cure these alleged violations, so the lack of specification may preclude an employer from knowing about this cure opportunity. Accordingly, this bill would require aggrieved employees to specifically identify in their pre-suit notice which violations are being asserted under which subsection, and as to those with a potential cure period, to specifically notify the employer such a cure period exists.

### **Expanded Statute of Limitations and Attorneys’ Fees Recovery for Labor Code Violations (AB 1947)**

This bill would amend two Labor Code provisions to make it easier or more enticing for plaintiffs to file retaliation claims. First, it would amend Labor Code section 98.7 to extend from six months to one year the period for a person to file a retaliation complaint with the Labor Commissioner.

Second, it would amend California’s whistleblower statute (Labor Code section 1102.5) to allow a judge to award reasonable attorneys’ fees to a prevailing plaintiff. Notably, in continuance of a recent trend, this amendment would specifically only identify a plaintiff as being able to recover, presumably to preclude a prevailing defendant to recover even if the claims were frivolous.

**Status:** Similar bills (AB 2946 and AB 403) failed passage in the Assembly in 2018 and 2019.

### **Scheduling Predictability Requirements for Certain Industries (SB 850)**

Entitled the Fair Scheduling Act of 2020, this bill would require grocery stores, restaurants and retail store establishments (as defined) s to provide employees advance notice of their schedules,

and would require employers to provide “modification pay” for any changes made with less than seven days’ notice. Specifically, new Labor Code section 510.5 would require employers to provide non-exempt employees at least seven days’ notice of the first day on the work schedule which, in turn, would be required to list all scheduled shifts for all employees for at least 21 consecutive calendar days. Employers would be permitted to create separate work schedules for each department as long as all hours have a designated beginning and ending time. This scheduling requirement, and the modification pay requirements below, would not prohibit employees from requesting additional or fewer hours of work.

Employers would also be required to provide “modification pay” per shift for each previously scheduled shift that the employer cancels or moves to another date or time or for any previously unscheduled shift that the employer requires an employee to work. Specifically, the employer would be required to provide one hour of pay at the employee’s regular rate of pay if the employer provides less than seven days but more than 24 hours’ notice of any change. If less than 24 hours’ notice is provided, the employer shall provide “modification pay” equal to or greater than half of that shift’s scheduled hours at the employee’s regular rate, but not less than two hours or more than four hours.

For each on-call shift that the employee is required to be available but is not called in, the employer would be required to provide modification pay equal to or greater than half of that shift’s scheduled hours. Modification pay shall not apply to any changes in meal, rest or recovery periods, and will not apply to any shifts for which the employee is compensated with reporting time pay per an Industrial Welfare Commission wage order.

Proposed subsection (c)(5)(B) defines “modification pay” as an employee’s hourly wage. However, for employees who in the preceding 90 days had different hourly rates, was paid by commission or piece rate or was a nonexempt salaried employee, the modification pay is calculated by dividing the employee’s total wages, not including overtime premium pay, by the total hours worked in the full pay periods of the prior 90 days of employment.

However, an employer would not be deemed to have violated these notice provisions if the changes occur because: (1) operations cannot begin or continue due to threats or civil agency order; (2) operations cannot begin or continue due to disruption in water or electrical supply; (3) operations cannot begin or continue due to acts of God or natural disaster; (4) another previously scheduled employee failed to show up or became ill; (5) another previously scheduled employee was disciplined/terminated; (6) two employees have mutually agreed to trade shifts; or (7) the employer requires the employee to work overtime.

Employers would also be required to post a poster containing specified information, including information about these deadlines and an employee’s modification pay rights, and require the Labor Commissioner to develop this poster. Employers would also be required to retain for three

years records documenting the hours worked and modification pay awarded, and allow the Labor Commissioner or an employee to inspect these records.

It would also preclude an employer from retaliating or discriminating against any employee for filing a complaint or alleging a violation of these requirements, and would create a rebuttable presumption of retaliation if any adverse employment action occurred within 30 days of an employee's complaint, opposition, or cooperation in an investigation.

This bill would also authorize the Labor Commissioner to enforce these requirements, including to investigate, mitigate, and order relief for violations. It would also authorize the Labor Commissioner to impose statutorily-enumerated administrative fines, and would authorize the Labor Commissioner or any aggrieved employee to recover specified civil penalties, as well as attorneys' fees, costs, and interest.

This bill appears loosely modeled on San Francisco's Retail Workers' Bill of Rights, which took effect in 2015, and is similar to SB 878 which stalled in 2016. However, while the San Francisco Ordinance only applies to larger employers (e.g., those with at least 500 employees and 10 locations in California), SB 878 appears to apply to all covered employers (as defined) regardless of size.

#### **DIR Cooperation with the Department of Labor (SB 900)**

While Labor Code section 50.6 presently authorizes the Department of Industrial Relations to assist and cooperate with the federal Wage and Hour Division and the federal Children's Bureau in enforcing the federal Fair Labor Standards Act, this bill would recast those provisions and delete the express authorization to assist and cooperate with the Children's Bureau.

#### **Human Resources/Workplace Policies**

##### **Amendments Regarding Settlement Agreement Provisions for Future Employment (AB 2143)**

In 2019, California enacted AB 749 to generally prohibit settlement agreement provisions limiting an "aggrieved employee's" ability to work for the settling employer. This bill would amend these prohibitions in two respects. First, it would require the aggrieved employee to have filed the initial complaint "in good faith." Second, while the current prohibition against "no rehire" provisions contains an exception if the employer has made a good faith determination the aggrieved employee engaged in sexual harassment or sexual assault, this bill would expand this exception to include "or any criminal conduct" but also require this good faith determination of the alleged disqualifying conduct be made before the aggrieved employee filed a complaint.

##### **Wellness Program Requirements (AB 648)**

Entitled the Wellness Program Protection Act, this bill would enact various prohibitions and

requirements for health care service plans, insurers and employers. As to employers, this bill would enact new Labor Code section 436 to prohibit employers from requiring employees to participate in a wellness program as a condition of employment, or from retaliating against an employee either because the employee elected not to participate in the wellness program, or based on data collected through the wellness program about the employee.

An employer would also be prohibited from sharing personal information or data collected through a wellness program, and would be required to comply with state and federal privacy laws for any information collected through a wellness program.

The employer would also be required to post on its internet website a written explanation about the wellness program, including a description of the data collection process and which data will be collected, and the employee's rights concerning the wellness program under state and federal law. The employer would also be limited to collecting, disseminating and using only the employee's personal information reasonably necessary to operate the wellness program, and will be required to destroy any personal information received if the employee terminates their participation or upon the conclusion of a wellness program. However, these restrictions on collecting and the requirement to destroy would not apply to certain instances (as defined) involving publicly available information or de-identified and aggregated information used for certain purposes.

The employee would also have the right to obtain a copy of their records, including any personal information collected by the employer pertaining to a wellness program, in a format accessible to the employee, and to challenge the completeness and accuracy of any records.

These provisions would apply, to the extent applicable, to any entity the employer contracts with to administer or operate a wellness program on the employer's behalf.

Employees would have the ability to file a complaint with the Labor Commissioner within six months after any violations, and persons who violate these provisions would be guilty of an infraction.

These provisions would not apply to certain wellness programs administered by licensed health care professionals, and would not limit or restrict the disclosure of personal information by an employer if otherwise required by law.

### **Human Resources Required to Report Child Abuse (AB 1963)**

The Penal Code's Child Abuse and Recovery Act requires statutorily-enumerated "mandated reporters" to report whenever they, in their professional capacity or within the scope of their employment, observe a child they know or reasonably suspects has been the victim of child abuse or neglect. If a mandated reporter fails to report a known or reasonably suspected case of child

abuse or neglect, they fact misdemeanor liability, including statutory penalties and potentially jail time.

This bill would amend Penal Code section 11165.7 to expand the list of mandated reporters to include human resources professionals if they work for a business that employs minors, and persons whose duties require direct contact with and supervision of minors in the performance of the minors' duties in the workplace.

## **Labor/Union Issues**

### **Benefits during Strike Disputes (AB 3240)**

This bill would add new Labor Code section 2803.7 to prevent employers with 25 or more employees from terminating, reducing or modifying the employer's contribution to the employee's health care coverage for the duration of the employee's participation in a labor strike.

While Unemployment Insurance Code section 1259 presently provides that an individual is not ineligible for unemployment insurance benefits for refusing to work during a strike, lockout or labor dispute, this bill would also provide they remain eligible for unemployment insurance benefits even if receiving "strike pay" (i.e., payments from a union's strike fund).

### **Unemployment Insurance Benefits during Trade Disputes (AB 1066)**

While Unemployment Insurance Code section 1262 presently provides that an employee is ineligible for unemployment insurance benefits if they left work due to a trade dispute, this bill would clarify that this limitation would not apply if the individual was locked out by the employer. Moreover, while presently employees generally remain ineligible during the entire trade dispute, this bill would restore eligibility after the first four weeks of absence due to a trade dispute, and would provide that the otherwise applicable one-week waiting period would not apply on top of this four week delay.

**Status:** Passed the Assembly and has passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

## **Miscellaneous**

### **Notice Requirements for Federal H-2A Visa Farm Workers (SB 1102)**

The federal H-2A program provides a temporary federal visa to farm works admitted into the United States for work in the agricultural industry, including in California. While the federal H-2A workers are covered by many federal, state and local labor laws and are provided a "job order" summarizing some applicable federal laws, this bill attempts to address concerns this job order

does not identify key worker protections under California law.

Accordingly, new Labor Code section 2810.6 bill would require all of California's H-2A's visa employers provide to all H-2A farm workers on their first day of work a written notice of basic California labor rights. The California Labor Commissioner would be required to develop by January 2, 2021, a template, in English and Spanish, that H-2A employers may use to comply with these notice requirements, and the Labor Commissioner will have the discretion to decide whether this template will be included as part of the notices presently required under Labor Code section 2810.5. This template would summarize many California labor rights, including the right to meal and rest periods, overtime, prohibited deductions, sexual harassment requirements and anti-retaliation protections.

#### **Worker Protections for Direct Patient Care Providers Regarding Technology (AB 2604)**

This bill would provide that "technology" (as defined) shall not preclude a worker providing direct patient care from exercising independent clinical judgment regarding patient care, and shall not replace the worker's role in delivering patient care. It would also prohibit employer retaliation against patient care workers who request to override health information technology and clinical practice guidelines, and allow employees to file a complaint with the Labor Commissioner.

It would also require employers to notify all workers who provide direct patient care (and their union representatives, if applicable) before implementing new information technology that may materially affect the workers or their patients, and require employers to provide adequate training on such new technology.

#### **Expanded Unemployment Insurance Benefits for Family Members of In-Home Supportive Services (AB 1993)**

While Unemployment Insurance Code section 631 presently excludes from coverage most family members working for another family member, this amendment would include services performed by an individual in the employ of their parent, child or spouse if that individual is providing services through the In-Home Supportive Services program.

#### **"Critical Incident Stress Management" Treatment for Emergency Ambulance Employees (AB 2131)**

While California law presently requires private emergency ambulance providers provide up to 10 employer-paid mental health treatments per year through an employee assistance program, this bill would require the providers to also provide emergency ambulance employees mental health treatment for critical incident stress management (as defined) or post-traumatic stress disorder.

### **Prevailing Wage Definition of “Locality” (AB 2231)**

This bill would modify Labor Code section 1724’s definition of “locality in which public work is performed” to be mean the county in which the public work is done, thus eliminating a currently existing distinction within this definition.

### **Licensing and Training Requirements for Adult Entertainment Performers (AB 2389)**

Citing AB 5’s reclassification of many adult entertainment workers to employees, this bill would preclude persons from working in this industry without complying with new licensing and training requirements.

## **Public Sector**

### **Paid Absences for School Employees (SB 796)**

Presently, if a certificated or classified school employee exhausts available sick leave and continues to be absent from duties because of illness for an additional five months, during those months the employee is entitled to receive either 50% of their regular salary, or the difference between their salary and the substitute teacher retained for that period. This bill would instead entitle the school employee to receive their full salary during those five months.

### **School Employee Pay during Natural Disasters or Evacuation Orders (AB 805)**

This bill would prohibit school districts from requiring certificated or classified employees to use sick, vacation or other paid leave if the school is forced to close because of a natural disaster or an evacuation order, or if the employee is unable to report to work because they reside in an area affected by a natural disaster or an evacuation order.

### **Rights of Petition for UC Employees (AB 1926)**

This bill would prohibit the University of California from requiring that union employees or their representatives waive the right to petition the government or the voters as part of a collective bargaining agreement.

### **Expanded Whistleblower Protections (AB 1961)**

This bill would amend the California Whistleblower Protection Act (Government Code section 8547.2) to expand the definition of protected disclosures to include complaints made to a member of the Legislature, or to the Legislature as a whole, or to any subdivision of the Legislature.

**“Spot Bills” to Watch**

A number of so-called “spot bills” have been introduced promising only technical, non-substantive changes but may be materially amended later including: SB 972 (FEHA discrimination); AB 2200 (Labor Commissioner powers), , SB 1001 (Confidentiality of Medical Information Act); AB 2294 (workers’ compensation); AB 2317 (employer obligation waivers); SB 1010 (privacy); SB 806 (worker classification); AB 2397 (unemployment/disability insurance); AB 2479 (wages), AB 2750 (worker classification), AB 2758 (alternative workweek schedules), SB 1159 (wages), SB 1236 (worker classification), AB 2850 (wages), AB 2930 (wages), AB 2864 (workers compensation); AB 3056 (workers compensation), AB 3120 (workers compensation leaves of absence), AB 3295 (workers compensation apportionment), SB 1399 (workers compensation definitions), AB 2905 (internship incentives); AB 2915 (farm labor contractors sexual harassment training), AB 2941 (itemized wage statements), AB 3053 (OSHA), SB 1426 (OSHA retaliation), AB 3075 (employer literary assistance), AB 3096 (DLSE powers), SB 1433 (DIR powers), AB 3187 (overtime), AB 3241 (unemployment insurance), AB 3265 (state employee whistleblower protections), SB 1257 (domestic work employees) SB 1368 (Labor Code retaliation protections), SB 1452 (PAGA).