2023 CALIFORNIA LEGISLATIVE SUMMARY

June 6, 2023

Like the approaching summer weather, the 2023-2024 Legislative Session in Sacramento is heating up, particularly with the expiration of the crucial June 2nd deadline for bills to pass their chamber of origin. As expected, many significant employment bills overcame this key hurdle, although several additional bills stalled, further winnowing the overall number of employment bills moving forward and providing further insights regarding the relative strengths and weaknesses of these bills.

We have identified the "Top Ten" proposed employment law changes that – if enacted– would have the most significant impact on California employers. These bills would:

1. Increase **paid sick leave** from 24 hours/3 days to 56 hours/7 days (SB 616)
2. Mandate five days of **leave for reproductive loss** (SB 848)
3. Prohibit discrimination on the basis **of family caregiver status** (AB 524)
4. Require creation, implementation, and training re: **workplace violence protection plans** (SB 553)
5. Expand the law against **non-compete agreements** (SB 699 and AB 1076)
6. Significantly expand California's **Worker Adjustment and Retraining Act** (CalWARN) (AB 1356)
7. Require employers to provide notices to remote employees about **disability accommodation rights** before mandating return to in-person work (SB 731)
8. Expand **rehire requirements for displaced workers** beyond COVID-19 context (SB 723)
9. Empower **local governments to enforce various employment laws** (SB 16 and AB 594)
10. Prohibit employer **inquiries about prior cannabis use** (SB 700)

Looking ahead, there will be considerable activity in June as legislators rush both to meet the July 14th deadline to pass key committee votes in the second legislative chamber and prepare for their summer recess. We will update these developments in upcoming newsletters.

In the interim, this newsletter outlines our "Top 10" pending issues, then describes other pending employment bills, organized by subject matter, and also includes an overview of California municipal-level minimum wage increases taking effect July 1, 2023. It also contains updates on federal regulatory changes and "guidance," including regarding artificial intelligence, I-9 form flexibility changes, COVID guidance, and calculating Family Medical Leave Act time off during a holiday.

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TOP TEN PROPOSED EMPLOYMENT LAW CHANGES

1. Paid Sick Leave Increases (SB 616)

This bill would amend California's Paid Sick Leave law (Labor Code section 245 *et seq.*) to (1) increase the number of paid sick leave days by amending Labor Code section 246, effective January 1, 2024; (2) increase

protections for workers covered by collective bargaining agreements; and (3) require unpaid sick leave for railroad employees.

First, citing lessons learned from the recent COVID-19 pandemic, this bill would increase the amount of required sick leave from 24 hours or 3 days up to 56 hours or seven days:

- SB 616 would increase the employer's authorized limitation to seven days or 56 hours and would change the definition of "full amount of leave" to mean seven days or 56 hours. (It would also make corresponding changes to the sick leave accrual rate for individual providers of in-home support services and waiver personal care services).
- SB 616 would require that employees have no less than 56 hours or 7 days of accrued sick time by the 280th calendar day of employment, or in each calendar year or in each 12-month period.
- While employers are not currently required to provide additional paid sick days if they have a paid leave or paid time off policy (usable for the same purposes as paid sick leave) if the employee may earn up to 24 hours or three days off within nine months of employment, SB 616 would increase these amounts to 56 hours or seven days of sick leave or paid time off.
- Further, while employers may presently limit an employee's total accrual of paid sick leave to 48 hours or six days, provided an employee's right to accrue and use paid sick leave is not otherwise limited, SB 616 would increase these accrual thresholds for paid sick leave to 112 hours or 14 days.

Second, the bill would extend certain protections of the Paid Sick Leave Law (including the provision of paid sick days for certain purposes, prohibitions on retaliation, and prohibition on requiring an employee to find a replacement worker for paid sick days) to employees covered by collective bargaining agreements.

Third, in response to a lawsuit in which the Ninth Circuit concluded that California's Paid Sick Leave Law is preempted by federal law with respect to railroad employees, the bill would exclude railroad carriers and their employees (as defined by federal law, 45 U.S.C. § 351(a)) from the general provisions of the Paid Sick Leave Law and would instead require railroad employers to allow their railroad employees to take at least seven days of *unpaid* sick leave annually. This would not supersede any labor agreement that exists as of January 1, 2024 if the agreement provides for any number of days of paid sick leave annually, at least seven days of unpaid sick leave annually, and the use of paid or unpaid sick leave does not result in any points, demerits, or other disciplinary citations under any attendance policy.

Several recent attempts to increase California's Paid Sick Leave law to allow five days/40 hours of paid sick leave have stalled (e.g., AB 555 in 2020 and AB 995 in 221), but this issue has been identified as a legislative priority by organized labor.

Status: Passed the Senate despite some bipartisan opposition and is pending in the Assembly.

2. Reproductive Loss Leave Proposed (SB 848)

In 2022, California enacted a new law (AB 1949, codified at Government Code section 12945.7) allowing employees to take up to five days of bereavement upon the death of a family member. This bill would incorporate much of the same framework in a new Government Code section 12945.6 allowing employees to take "reproductive loss leave." Employers with five or more employees would be required to allow an employee who has been employed for 30 or more days to take up to five days leave following a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, or stillbirth. The law includes detailed definitions of the events giving rise to "reproductive loss leave" and the people to whom the leave is applicable:

Qualifying Event	Definition	Person(s) to Whom Applicable
Miscarriage	A miscarriage.	The person having the miscarriage, that persons' current spouse or domestic partner, or another individual if the person would have been a parent of a child born as a result of the pregnancy.
Unsuccessful Assisted Reproduction	An unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure.	The individual, the individual's current spouse or domestic partner, or another individual, if that individual would have been a parent of a child born as a result of the pregnancy.
Failed Adoption	A failed adoption match where the dissolution or breach of an adoption agreement occurs with the birth mother or legal guardian, or an adoption that is not finalized because it is contested by another party.	a person who would have been a parent of the adoptee if the adoption had been completed.
Failed Surrogacy	The dissolution or breach of a surrogacy agreement, or a failed embryo transfer to the surrogate.	A person who would have been a parent of a child born as a result of the surrogacy.
Stillbirth	A stillbirth	The person who was pregnant, that person's current spouse or domestic partner, or another individual, if that person would have been a parent of a child born as a result of the pregnancy that ended in stillbirth.

As mentioned, this time off is largely modeled upon the recently enacted bereavement leave statute. Accordingly, this time off would be unpaid (unless the employer's policies provide paid leave or the employee chooses to use vacation, personal leave, accrued and available sick leave or compensatory time

off), need not be consecutive, must be completed within three months of the qualifying event and would be considered separate and distinct from any other leaves authorized by the Government Code (e.g., CFRA, bereavement leave, pregnancy disability leave, etc.). However, unlike the bereavement leave statute, this bill does not presently appear to give employers authority to request documentation of the situation creating the need for leave. Employers would be prohibited from retaliating against employees who have taken reproductive loss leave, or provided information or testimony regarding their own or another person's reproductive loss leave in an enforcement action regarding these rights, and would be required to maintain the confidentiality of employees requesting reproductive loss leave.

The bill specifies that if an employee experiences more than one reproductive loss leave event within a 12-month period, the total amount of time taken shall not exceed 20 days within a 12-month period.

Status: Passed the Senate with bipartisan support and is pending in the Assembly.

3. Prohibition of Discrimination on the Basis of Family Caregiver Status (AB 524)

This bill would amend the Fair Employment and Housing Act (FEHA) to preclude discrimination or harassment based upon an employee's "family caregiver status." "Family caregiver status" is defined to mean "a person who contributes to the care of one or more family members." In turn, "family member" would mean spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or any individual previously identified as a "designated person" for purposes of CFRA leave under Government Code section 12945.2. (The bill does not define what it would mean to "contribute to the care of" one of these family members.) The bill would make it an unlawful employment practice to discriminate against or harass an employee on the basis of family caregiver status.

This bill is a narrower version of AB 2182, which stalled in 2022 after passing two committee votes. In an effort to address prior concerns, this version does not impose any explicit obligation on employers to accommodate an employee's family caregiver responsibilities, and it states that nothing in the law shall be interpreted as requiring employers to give employees preferred treatment because of family caregiving status, except as otherwise provided under local, state, or federal law, so long as family caregivers are treated the same as other employees with regard to all employer policies and practices. However, it remains to be seen whether, if this bill is enacted, an employer's failure to grant scheduling requests or remote work requests for employees with family caregiver status might still be interpreted to be prohibited discrimination in the terms, conditions, or privileges of employment.

Status: Passed the Assembly on a party-line vote and is pending in the Senate.

4. Workplace Violence Restraining Orders and Prevention Plans (SB 553)

This bill would take several steps to expand protections against workplace violence. First, the bill would amend the Workplace Violence Safety Act (codified at Code of Civil Procedure section 527.8), effective January 1, 2025. The law currently authorizes employers to seek a temporary restraining order and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been carried out at the

workplace. Starting January 1, 2023, SB 553 would also allow a collective bargaining representative to seek such restraining orders and injunctions, including on behalf of employees who are not represented by the collective bargaining representative if the person serves as a collective bargaining representative for at least one person working for the employer. While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this bill would also specify that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

Second, the bill would amend the California Occupational Safety and Health Act's requirement that an employer establish, implement, and maintain an effective injury prevention program (Labor Code section 6401.7) by requiring that every employer also have a workplace violence prevention plan maintained at all times in all of the employer's facilities. The bill would create Labor Code section 6401.9 to detail the requirements of the workplace violence prevention plan. Notably, this new requirement would apply to any employer with one or more employees and the state and any subdivision of the state. In part, this new section of the Labor Code would effectively extend 2017 workplace violence regulations that currently affect only healthcare settings (8 Cal. Code Regs. § 3342) to *all* employers. CalOSHA is currently working on a Draft Multi-Industry Standard for workplace violence prevention. (Workplace Violence Prevention in General Industry – Advisory Meetings (ca.gov)) If it passes, SB 553 – which goes much farther than the draft standard – would seem to replace that rulemaking effort. However, employers should note that even if SB 553 fails, CalOSHA will presumably continue its work on workplace violence prevention regulations.

SB 553 has lengthy and detailed requirements for the workplace violence prevention plan, including a list of twelve elements (many with subparts) that must be included in the plan, including but not limited to procedures for the employer to accept and respond to reports of workplace violence and to prohibit retaliation against employees who make such a report, assessment procedures to identify and evaluate risk factors, procedures to correct workplace violence hazards in a timely manner, and procedures for post incident response and investigation.

Additionally, the bill would require the employer to record information in a violent incident log about every incident, post incident response, and workplace violence injury investigation required to be performed as part of the workplace violence prevention plan. There is a detailed list of the information that must be included in such a log.

The bill would also require the employer to establish and implement a system to review, at least annually and in conjunction with employees and their collective bargaining representatives, if any, the effectiveness of the workplace violence prevention plan. The employer would also be required to correct any "problems" found during the review and to update the workplace violence prevention plan if necessary.

Next, the bill would require the employer to provide effective training to employees that addresses the workplace violence risks that employees may reasonably anticipate to encounter in their jobs. The employer would be required to have an effective procedure for obtaining the active involvement of

employees and their collective bargaining representatives, if any, in developing the training materials, participating in training sessions, and reviewing and revising the training program. All employees of the employer would be required to receive the training in person, during work time, at the workplace, and in an atmosphere designed to provide an opportunity for interactive questions and answers with a person knowledgeable about the workplace violence prevention pan. The bill includes a list of the specific topics that must be included in the training and specifies that employees must receive the training when the workplace violence prevention plan is first established or when an employee is newly hired and at least annually thereafter, and at any time when new equipment or work practices are introduced or a new or previously unrecognized workplace violence hazard has been identified.

The bill would require records of workplace violence hazard identification, evaluation, and correction to be created and maintained in accordance with specified law for various periods of time, and all records must be made available to employees and their collective bargaining representatives upon request for examination and copying.

Finally, employers would not be allowed to prohibit an employee from, or to take punitive or retaliatory action against an employee for, seeking assistance and intervention from local emergency services or law enforcement when a violent incident occurs.

Status: Passed the Senate despite some bipartisan opposition and is pending in the Assembly.

5. <u>Expansion of Law Against Non-Compete Agreements (SB 699 and AB 1076)</u>

There are two pending bills that would expand California's law against non-compete agreements in different ways. Existing law (Business and Professions Code sections 16600 to 16607) voids every contract that restrains anyone from engaging in a lawful trade or business, with certain specific exceptions. However, there are concerns that despite these rules, many California employers continue to have their employees sign noncompete clauses and pursue frivolous noncompete litigation, which has a chilling effect on employee mobility, suppresses wages, and reduces entrepreneurship and innovation. Thus, both bills would specify that it is a violation of law to require employees to enter into void noncompete agreements and would impose various penalties for such violations. Each law would also make different additional changes to the law. While it is unclear which path – if any – the legislature may take to revise the law against noncompete agreements, it appears there is broad interest in doing so.

- **Expansion of Law Against Non-Compete Agreements (SB 699)**

This bill would expand California's existing law against non-compete agreements in several respects. (Business and Professions Code sections 16600 to 16607).

First, it would add section 16600.5 to the Business and Professions Code to establish that any contract that is void would be unenforceable regardless of where and when the contract was signed. It would expressly prohibit an employer or former employer from attempting to enforce a contract that is void as a restraint on trade regardless of whether the contract was signed, and the employment was maintained outside of California. Although the text of the statute does not explain precisely what this means, the

legislative findings and the author's statements in the bill analysis indicate that the bill is intended to reach two scenarios. First, it appears the bill is intended to cover employees who work for California-based employers, even if they live and work outside California. Second, it appears the bill is intended to cover people who seek employment in California, even if they signed a non-compete agreement while living outside of California and working for a non-California employer. Thus, the bill may be an attempt to prohibit a non-California employer from enforcing a non-compete agreement against a former employee who seeks employment with a California company.

Second, it would clarify that an employer is prohibited from entering into a contract that presents an employee or prospective employee with any void non-compete agreement and would specify that an employer may not attempt to enforce such a contract (in a new section 16608 to the Business and Professions Code). The bill would specify that if an employer enters into an agreement that the employer knows or reasonably should know is prohibited commits a civil violation, and an employee, former employee, or prospective employee could bring a civil action for injunctive relief and/or actual damages, along with attorney's fees and costs.

Status: Unanimously passed the Senate and is pending in the Assembly.

- **Clarification/Expansion of Law Against Non-Competes (AB 1076)**

Like SB 699, this bill seeks to clarify and expand the prohibition on non-compete agreements. First, this bill would codify the holding of *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, that existing law voids the application of any non-compete agreement in the employment context that does not satisfy an exception in the law. This does not change the law but is simply a declaration of existing law.

Second, this bill would make it unlawful to include a noncompete clause in an employment contract or to require an employee to enter into a non-compete agreement, if the agreement does not satisfy an exception set forth in the statute. The bill specifies that a violation would be unfair competition under the Unfair Competition Law (Bus. & Prof. Code section 17200). It would also specify that this broad prohibition applies even in favor of persons who are not parties to the contract but would otherwise be restrained by the noncompete clause.

AB 1076 would also require employers affirmatively notify affected employees about these provisions. Accordingly, by February 14, 2024, the employer would need to notify any employee employed after January 1, 2021 that is subject to a non-compete provision that does not fall within a narrow exemption for enforceability purposes, that the non-compete provision is void. This notice would need to be in writing and via an "individualized communication," suggesting that a general notice to all employees would not suffice.

Status: Unanimously passed the Assembly and is pending in the Senate.

6. <u>Cal-WARN Act Changes (AB 1356)</u>

This bill would make a number of changes to California's version of the Worker Adjustment and Retraining Act (CalWARN, Labor Code section 1400, *et seq.*) including regarding the length of notice required, the

definitions of those affected, and the use of severance agreements. For instance, it would increase from 60 days to 90 days the period for employers to provide required notices regarding a mass layoff, relocation, or termination (as defined in section 1400) before the order takes effect. It would also preclude employers from utilizing compliance with CalWARN in connection with a severance agreement and waiver of an employee's right to claims.

The bill would change the definition of "covered establishment." The current law defines a "covered establishment as any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons. The new bill would revise this definition to remove the reference to "industrial or commercial facility," and simply state that a covered establishment is "place of employment." It would also specify that a "covered establishment" may be a single location or a group of locations, including *any facilities* located in the state of California.

It would also change the definition of "employer" to include a client employer of a labor contractor, and the definition of "employee" to include a person employed by a labor contractor and performing labor with the client employer for at least six months of the 12-month period preceding the date on which notice is required. "Labor Contractor" would mean an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

The bill would also revise the definition of "mass layoff" to include a layoff of 50 or more employees at *or reporting to* a covered establishment. This appears aimed at resolving any confusion as to whether the layoff of remote workers "counts" in determining applicability of the law.

The bill would also expand the remedies and increase the liability for failure to provide the required notices. For instance, in light of the new 90-day notice period, it would make a conforming change to 90 days for the calculation of the employer's liability if the notice is not provided. Second, a proposed new subsection to Labor Code section 1402 appears to require that labor contractor employees are entitled to the same amount of backpay and the value of the cost of any lost benefits, because it specifies that the labor contractor shall remit the payment provided by the client employer in the full amount calculated pursuant to the damages subdivision of Section 1402.

Lastly, it would make several changes regarding the use of severance agreements in the context of a mass layoff, relocation, or termination. First, it would expressly prohibit and render void any general release, waiver of claims or non-disparagement or nondisclosure agreements conditioned on the employer's payment of amounts for which the employer is liable under section 1402. The bill would also specify that any employer who includes such a general release, waiver of claims, or nondisparagement or nondisclosure agreements as a condition of such payments will be subject to a civil penalty up to $500 per violation. Second, employers required to provide notice under section 1401 would be prohibited from offering a separate agreement containing a general release, waiver of claims or non-disparagement or nondisclosure agreement unless it is offered in exchange for consideration in addition to which the employee is already entitled under section 1402 and states in clear and unequivocal language that the

consideration being offered is in addition to anything of value to which the individual already is entitled under Section 1402. Any non-complying agreement would be deemed void and unenforceable.

Status: Passed the Assembly on a party-line vote and is pending in the Senate.

7. Mandatory Notice Before Requiring Remote Employees Return to In-Person Work (SB 731)

This bill is intended to address concerns that the post-pandemic return-to-the-office directives will unduly impact disabled individuals who have benefitted from remote work arrangements, including by ensuring these individuals are aware of their rights to request reasonable accommodations for their disabilities. Accordingly, it would amend the FEHA to require employers to provide employees working remotely pursuant to an agreement or an employer policy with at least 30 days advance notice before recalling those employees to work in person.

This notice will also need to advise the employees of their accommodation rights by specifically including at least the following language: "You have the right to ask your employer to allow you to continue working remotely as an accommodation if you have a disability. Your employer is required to engage in a timely, good faith, interactive process to determine if there are effective reasonable accommodations for your disability, including working remotely. If you are able to perform all of your essential job functions while working remotely, your employer must grant your request unless it would create an undue hardship for your employer, an alternative reasonable accommodation is available, or you do not meet the definition of disability under the law. You can learn more about your rights at https://calcivilrights.ca.gov/accommodation/."

This bill does not presently alter the process by which employers are supposed to respond to such requests or the legal standard for evaluating such accommodation requests.

Status: Unanimously passed the Senate and is pending in the Assembly.

8. Rehiring of Displaced Workers (SB 723)

In April 2021, California enacted SB 93, which created rehire rights for employees in the hospitality and business services industries who had been laid off for reasons related to the COVID-19 pandemic. The bill was codified in a new section 2810.8 of the Labor Code and was set to expire December 31, 2024. This new bill (SB 723) would amend Section 2810.8 to remove the expiration date and remove the requirement that affected employees were laid off due to COVID-19. Thus, under the new bill, covered employees would have a *permanent* right to recall for practically *any* layoff or reduction in force.

As a reminder, Section 2810.8 applies to the following businesses (which are defined in detail in the statute): hotels, private clubs, event centers, airport hospitality operations, airport service providers, and building services. The bill does not change the definition of covered businesses, but would change the definition of "laid-off employee" to mean any employee who was employed by the employer for 6 months or more and whose most recent separation from active employment occurred on or after March 4, 2020, and was a result of a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason.

This bill would not change the substantive requirements of Section 2810.8 with respect to laid-off employees (offering re-hire to laid-off employees pursuant to a specified procedure and giving laid-off employees five business days in which to accept or decline the offer; written notice to laid-off employees if the employer declines to recall the laid-off employee on grounds of lack of qualifications; retaining records; non-retaliation). However, because of the new definition of "laid-off employee," the scope of the statute's rehire obligation would be dramatically increased – it could conceivably cover *any* layoff or reduction in force, and not only those related to COVID-19. Moreover, it would apply indefinitely into the future. And because of the new definition, this bill would require employers to offer rehire to any employee laid off after March 4, 2020, regardless of the date a new position becomes available (even if it is decades after the original layoff).

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

9. <u>Expanded Enforcement Mechanisms for Labor Code and FEHA (SB 16 and AB 594)</u>

There are several pending bills that would empower local governments to directly enforce FEHA and various aspects of the Labor Code in response to concerns about limited capacity for enforcement by the Civil Rights Division (CRD) and Division of Labor Standards Enforcement (DLSE).

- **Local Enforcement of the Fair Employment and Housing Act (SB 16)**

While Government Code section 12993 presently provides that the Civil Rights Division (CRD) is solely responsible for enforcing the FEHA, this bill is intended to address concerns the CRD is underfunded and often unable to enforce the claims received. Accordingly, it would clarify that the FEHA does not limit or restrict efforts by local entities (including cities, counties, and political subdivisions) to enforce state law prohibiting discrimination against classes of persons covered by the FEHA. It would also direct the CRD to promulgate regulations governing local enforcement of the FEHA and to require local jurisdictions to proceed according to these regulations if they choose to pursue local enforcement of the FEHA. These forthcoming regulations would be intended to ensure consistent application of employment discrimination law, protect complainants against inadvertent loss of federal or state legal claims, avoid duplication of investigatory work, and minimize possible loss of federal funding for the CRD. The bill would become operative on January 1, 2025.

Status: Passed the Senate and is pending in the Assembly.

- **Alternative Enforcement of Labor Code Provisions (AB 594)**

Citing claims that employers continue to engage in wage theft and that existing resources are insufficient to protect workers, this bill would provide several alternative Labor Code enforcement mechanisms. First, it would authorize a "public prosecutor" (e.g., a district attorney, city attorney, county counsel, etc.) to pursue civil or criminal actions for certain Labor Code violations or enforce certain Labor Code provisions, and without specific direction from the DLSE. This expanded enforcement authority would *not* extend to the workers' compensation law or occupational health and safety law. The public prosecutor would be limited to redressing violations within their geographic jurisdiction, unless the public prosecutor is in a city with a population in excess of 750,000 or is otherwise authorized to enforce the Labor Code statewide.

(It appears this would allow public prosecutors in Los Angeles, San Diego, San Jose, and San Francisco to attempt to redress Labor Code violations statewide.) Public prosecutors would also be entitled to also recover reasonable attorneys' fees and expert costs, and to seek injunctive relieve to prevent continued Labor Code violations.

Any arbitration agreement between the employer and its employees that purported to limit representative actions or to mandate private arbitration would be deemed inapplicable to the authority of the public prosecutor, the DLSE, or the Department of Justice to enforce the Labor Code. Further, any appeal of a denial of a motion to compel arbitration or other court proceedings shall not stay enforcement actions by the public prosecutor, the DLSE, or the Department of Justice.

Secondly, in 2011, California enacted SB 459 (codified in Labor Code section 226.8), creating a procedure for the Labor and Workforce Development Agency or a court to examine potential willful misclassification of an individual as an independent contractor instead of an employee. This bill would allow the recovery of willful misclassification penalties by the employee as a statutory penalty pursuant to the informal hearing provisions or by the Labor Commissioner as a civil penalty through the issuance of a citation (in a new Labor Code section 226.9). The procedures re: Labor Commissioner citations would be the same as those under Section 1197.1. The bill would authorize an employee to either recover statutory penalties under these provisions or to enforce the penalties under the Private Attorneys General Act (PAGA), but not both for the same violation.

Status: Passed the Assembly and is pending in the Senate.

10. <u>Prohibition on Inquiring about an Applicant's Prior Cannabis Use (SB 700)</u>

In 2022, California enacted a new law (AB 2188, set to take effect January 1, 2024), precluding discrimination based upon an applicant's or employee's use of cannabis off the job and away from the workplace, or based upon a drug-screening test revealing non-psychoactive cannabis metabolites (as opposed to THC revealing active impairment). This bill would further amend new Government Code section 12954 to preclude employers from requesting information from an applicant for employment relating to the applicant's prior use of cannabis, although the bill would not prohibit an employer from inquiring about an applicant's criminal history *if* otherwise permitted by law. Notably, while AB 2188 had stated that its limitations on drug-testing or employment decisions regarding non-workplace usage would not apply in certain circumstances (i.e., in building and construction trades or where required by enumerated federal laws), SB 700 only exempts applicants for positions requiring a background investigation or security clearance from its broad prohibition on inquiries about prior cannabis usage; it would not exempt the building and construction trades from this new rule.

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

ADDITIONAL PENDING BILLS

Harassment/Discrimination/Retaliation

Expansion of Retaliation Protections (SB 497)

This bill would amend multiple Labor Code provisions to expand protections against retaliation and/or increase the statutory penalties available. For instance, it would amend the current retaliation protections in Labor Code section 98.6 (dealing with wage-related complaints) and Labor Code section 1197.5 (Equal Pay Act complaints) to state that any adverse actions taken within 90 days of a complaint will create a rebuttable presumption of retaliation in favor of the employee. Further, while California's general whistleblowing provision (Labor Code section 1102.5) presently authorizes a civil penalty up to $10,000 for each violation, this bill would allow up to $10,000 to be awarded to each employee who was retaliated against for each violation, in addition to any other remedies. In assessing the penalty, the Labor Commissioner would be instructed to consider the nature and seriousness of the violation, including the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace.

Status: Passed the Senate despite some bipartisan opposition and is pending in the Assembly.

Prohibition Against Caste Discrimination (SB 403)

Citing concerns about widespread "caste discrimination" in certain parts of the world that the author believes has spread to work, school, and places of worship in California, this bill would amend numerous California civil rights statutes (including the FEHA and the Unruh Act) to preclude discrimination based on "caste." For FEHA purposes, Government Code section 12926 would define caste as "an individual's perceived position in a system of social stratification on the basis of inherited status." This would be further defined to include factors such as "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."

The bill's author states these protections are intended to apply neutrally and so would preclude discrimination based on caste regardless of whether the targeted individual occupies a perceived "high" or "low" position within the hierarchical system. They would also apply to all caste systems, regardless of the system's origins, and the protections would not require both the discriminator and the victim of discrimination to identify as members of the caste system.

These changes would be deemed declarative of existing law and therefore apply retroactively if enacted, in part because the bill also notes these protections may already be included within other civil rights statutes protections (including FEHA's prohibition on race, ancestry and religious discrimination).

Status: Overwhelmingly passed the Senate and is pending in the Assembly.

Privilege for Communications re: Complaints of Sexual Assault, Harassment, or Discrimination (AB 933)

Civil Code section 47, subdivision (c) presently provides qualified or conditional privilege protection against a defamation claim for a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence, as well as communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment.

AB 933 is motivated by the author's concern that this protection is not broad enough, and should cover any communications made by an individual who has experienced an incident of sexual assault, harassment, or discrimination, regardless of whether they have filed any formal complaint. The bill was prompted, at least in part, by the case of a lobbyist who publicly accused an Assemblymember of sexual assault, and who was later sued for defamation by another Assemblymember.

Accordingly, this bill would add a new section 47.1 to the Civil Code. It would specify that a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination would be privileged under Section 47. The bill specifies that this rule shall apply only to an individual that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination, regardless of whether the complaint was filed. Further, it defines the privileged "communication" as "factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication" including but not limited to sexual assault; sexual harassment under various statutory provisions (including the FEHA and the Unruh Act), discrimination or retaliation for reporting sexual harassment, and cyber sexual bullying under the Education Code, amongst others. Notably, this protection extends beyond communications regarding sexual assault and sexual harassment to cover communications relating to *all* workplace harassment or discrimination, failure to prevent workplace harassment or discrimination, and retaliation for reporting workplace harassment or discrimination.

To further safeguard against defamation claims regarding the types of allegations in this new privilege, AB 933 would also specifically authorize a prevailing defendant (i.e., the speaker accused of making a defamatory statement) to recover their reasonable attorneys' fees and costs plus treble damages for any harm caused as well as potentially punitive damages under Civil Code section 3294.

Status: Passed the Assembly with bi-partisan support and is pending in the Senate.

Veterans' Hiring Preference for Private Employers (SB 73)

While the FEHA presently allows employers to grant a hiring preference in favor of Vietnam War-era veterans and as a defense against sex discrimination claims, this bill (entitled the Voluntary Veterans' Preference Employment Policy Act) would update and expand this exemption for almost all veterans (regardless of when served) and as a defense against all FEHA discrimination claims.

Such a hiring preference would be deemed not to violate any state or local equal employment opportunity law, including the FEHA, if used uniformly and not established for purposes of or having the effect of unlawfully discriminating against any group protected by the FEHA, including against veterans who are

members of any other FEHA-protected classification.

"Veterans" would be defined as any person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and was discharged or released under conditions other than dishonorable.

Employers adopting such a preference policy would need to annually report to the Civil Rights Department (CRD) the number of veterans hired in that reporting year under this policy and any demographic information the department requires. An employer's failure to submit this report would nullify the preference's protections for those hiring decisions.

Employers with a veterans' preference employment policy would be permitted to accept the following as proof of an individual's status as a veteran: (1) a DD Form 214, Member-4; (2) a current and valid driver's license with the word "veteran" printed on its face; or (3) a current and valid identification card with the word "veteran" printed on its face.

The CRD would be required to periodically report on the number of veterans hired under the preference policy and the number of discrimination claims received based on an employer's veterans' preference policy, and the bill would only remain in effect until January 1, 2029.

A similar bill (SB 665) unanimously passed the Legislature in 2021 before being vetoed by Governor Newsom, and similar preference laws have been enacted in nearly 40 states.

Status: Unanimously passed the Senate and is pending in the Assembly.

Leaves of Absence/Time Off/Accommodation Requests

Increased Paid Sick Leave for Healthcare Employees (AB 1359)

While California's paid sick leave requirements are generally enumerated in Labor Code section 245 *et seq.*, this bill would add new Labor Code section 246.6 establishing an entitlement to "health care worker sick leave." Employees of covered health care facilities (as defined) would be entitled to "health care worker sick leave," which means three days or 24 hours of *paid* leave and an *additional* four days of leave per year, which may be unpaid. If a covered health care facility has a paid leave policy or paid time off policy, an employee would be entitled to use any available accrued paid leave during the four additional days of leave. The bill would allow heath care worker sick leave to carry over to the following year unless the full amount of health care worker sick leave is received at the beginning of each year of employment, calendar year, or 12-month period. The bill would prohibit covered health care facilities from limiting an employee's use of accrued health care worker sick leave. The bill would specify that even if an employee is covered by a Collective Bargaining Agreement, the employer would still need to comply with the Paid Sick Leave law and this new health care worker sick leave law. But employers would not be prohibited from providing a more generous paid sick leave or paid time off policy.

An "employee of a covered health facility" is specifically defined to include nineteen different types of clinics, facilities, or worksites (including with cross-references to various Health and Safety Code definitions), so health care employers should review these closely to determine if they apply.

Status: Passed the Assembly with bipartisan support and is pending in the Senate.

Religious and Cultural Observances for State Employees (SB 461)

This bill would amend Government Code section 19853 regarding specified and personal holidays for state employees. While presently a state employee who works on a state holiday may elect to receive eight hours of straight time pay and eight hours of holiday credit, SB 461 would allow the employee to elect to receive eight hours of holiday credit for religious or cultural observance in lieu of personal holiday credit for at least 23 specifically enumerated cultural or heritage celebrations (e.g., Yom Kippur, Diwali, Eid al-Fitr, etc.).

Status: Unanimously passed the Senate and is pending in the Assembly.

Human Resources/Workplace Policies

Prohibiting Mandatory Employee Attendance at Certain Employer-Sponsored Meetings (SB 399)

Entitled the "California Worker Freedom from Employer Intimidation Act," this bill would enact new Labor Code section 1137 to preclude an employer from discharging, discriminating against, retaliating against, or taking adverse action against an employee (or threatening to take any such action) because the employee declines to attend an employer-sponsored meeting or declines to participate in, receive, or listen to any communications with the employer or its agents or representatives, the purpose of which is to which communicate the employer's opinions about religious or political matters.

"Political matters" would be defined as "matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political or **labor organization**." "Religious matters" would be defined as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association."

This bill would not prohibit the following: (1) employers from communicating to employees information the employer is required by law to convey, but only to the extent of that legal requirement; (2) employers from communicating information that is necessary for employees to perform their job duties; or (3) higher education institutions or their agents from meeting with or participating in communications with employees that are part of coursework, any symposia or an academic program at that institution.

This prohibition also would not apply to the following: (1) religious entities (as enumerated) with respect to speech on religious matters to employees who perform work connected with the activities of the religious entity; (2) a political organization or party with respect to communication of the employer's political tenets or purposes; or (3) an educational institution requiring a student or instructor to attend lectures on political or religious matters that are part of the institution's regular coursework.

The Division of Labor Standards Enforcement will be responsible for enforcing this section and responding to employee complaints. However, employees who have been subjected or threatened to be subjected to discharge, discrimination or retaliation or other adverse action for refusing to attend a prohibited employer-sponsored meeting may bring a civil action for damages and punitive damages. In such actions, an employee or their exclusive representative may also petition for injunctive relief. Because the bill creates a new section of the Labor Code, it could also lead to PAGA liability.

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

Changes to Wage Theft Prevention Act Notices (AB 636)

Existing law – the "Wage Theft Prevention Act" (Labor Code section 2810.5) requires employers to provide a written notice to employees at the time of hiring with certain specified information. This bill would require the notice to include information about the existence of a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, that was issued within 30 days before the employee's first day of employment, that may affect their health and safety during employment.

In addition, the bill would require that any notice given to employees admitted under the federal H-2A agricultural visa program must include more detailed information, including information about pay rates, frequency of pay, rest periods, meal breaks, compensation for travel time, and many more topics. The bill contemplates that the Labor Commissioner would provide a template for such disclosures.

Status: Passed the Assembly with some bi-partisan support and is pending in the Senate.

Expansion of Workplace Temporary Restraining Orders (SB 428)

Enacted in 1994 (ABX 68, and codified at Code of Civil Procedure section 527.8), the Workplace Violence Safety Act authorizes employers to seek a temporary restraining order and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been caried out at the workplace. Citing concerns that employers should be able to seek such protections before the conduct escalates to violence, this bill would also allow employers to seek a TRO and injunction on behalf of an employee who has suffered "harassment" *starting January 1, 2025.* For purposes of this bill, "harassment" is defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose," and the "course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress."

While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this bill would also specify that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

To address concerns TRO's or injunctive relief targeting harassment might abridge free speech, particularly in the public employer context, an employer seeking such relief would be required to provide

"clear and convincing" evidence that an employee suffered harassment, that great or irreparable harm would result to an employee, that the course of conduct served no legitimate purpose, and that the order would not impermissibly restrict constitutionally-protected speech or activities (as opposed to simply "reasonable proof" for unlawful violence or threats of violence).

As noted, the bill would be effective January 1, 2023.

Status: Unanimously passed the Senate is pending in the Assembly.

Employer Electronic Notification Requirements of Employee Benefits (AB 1355)

This bill would allow California employers the option to provide certain required documents to employees via email, but only if the recipient has opted into receipt of electronic statements. The bill would separately allow electronic distribution of: (1) required notifications regarding the federal and California earned income tax credit and (2) information about unemployment benefits claims, but only if the employee or unemployed individual affirmatively, and in writing or by electronic acknowledgement, opts in to receipt of electronic statements or materials.

The bill does not specify whether employees must specifically opt into receipt of each type of document, or whether a generic opt-in to receipt of electronic messages would suffice.

The bill would prohibit an employer from discriminating or retaliating against an employee who does not opt into receipt of electronic statements or materials.

The changes made by the bill would remain effective only until January 1, 2029.

Status: Unanimously passed the Assembly and is pending in the Senate.

Limitations on Downloading Social Media Programs on State-Owned Devices (SB 74)

Echoing similar proposals at the federal level to limit state employees from downloading "Tik Tok," this bill would prohibit applications for social media platforms from being downloaded on state-owned or state-issued devices if certain conditions are met. Broadly speaking, these conditions would include that an "entity of concern" or a "country of concern" (as defined) owns, directly or indirectly controls, or holds 10 percent or more of the voting shares of the social medial company that owns the application. The bill would define "counties of concern" as any country identified by the International Traffic in Arms Regulation. It would also exclude state-issued or state-owned electronic devices if used for official state purposes, including communications to the public, cybersecurity research, and law enforcement activities. If passed, the bill will take effect immediately as an urgency statute.

Status: Unanimously passed the Senate and is pending in the Assembly.

Human Trafficking Notice – Pediatric Care Facilities (AB 1740)

Existing law requires specified businesses (including airports, hotels, etc.) to post a notice from the Department of Justice relating to slavery and human trafficking. This bill would extend the posting requirement to facilities that provide pediatric care.

Status: Passed the Assembly and is pending in the Senate.

Wage and Hour

Health Care Worker Minimum Wage (SB 525)

While the current statewide minimum wage is $15.00 an hour, this bill would enact a two-step increase thus creating a special minimum wage for health care workers hour for hours worked in covered health care employment, as defined. Specifically, from June 1, 2024 until June 1, 2025, the minimum wage for covered health care workers would increase to $21.00 per hour, and would increase to no less than $25.00 beginning June 1, 2025. It would further provide that the health care worker minimum wage constitutes the state minimum wage for covered health care employment for all purposes under the Labor Code and the Industrial Welfare Commission Wage Orders and would be enforceable either by the Labor Commissioner or by the covered worker in a civil action.

It would further require that to qualify as exempt from the payment of minimum wage and overtime, an employee paid on a salary basis must earn a monthly salary equivalent of at least 150% of the health care worker minimum wage for full-time employment. This industry-specific minimum wage would also be adjusted annually with the Director of Finance calculating by August 1st the lesser of either 3.5 percent or the changes in the Consumer Price Index. The result of these changes would then be rounded to the nearest ten cents and take effect on the following January 1st.

For purposes of this new minimum wage, "covered health care employment" would be defined as either (1) all work performed on the premises of any health care facility, regardless of the employer's identity; or (2) all paid work providing health care services (as defined) performed for any person that owns, controls, or operates a covered health care facility, regardless of location. It would not include, however, employment as an outside salesperson, any work performed in the public sector where the primary duties performed are not health care services, or delivery work on the health care facility premises where the delivery worker is not an employee of any person that owns, controls, or operates a covered health care facility.

"Health care services" would also be broadly defined to mean "patient care-related services, including nursing, caregiving, services provided by medical residents, interns or fellow, technical and ancillary services, janitorial work, housekeeping, groundskeeping, guard duties, business office clerical work, food services, laundry, medical coding and billing, call center and warehouse work, scheduling, and gift shop work, but only where such services directly or indirectly support patient care." Lastly, "covered health care facility" would be specifically defined to include twenty-one different types of clinics, hospitals, or

facilities, so a potentially affected health care provider should consult this list contained in proposed Labor Code section 1182.14(b)(2).

Status: Passed the Senate despite some bipartisan opposition and is pending in the Assembly.

Compensable Time for Obtaining Food Handling Cards (SB 476)

California's Retail Food Code requires a food handler to obtain a food handler card within 30 days of hire and to maintain a valid food handler card for the duration of their employment as a food handler. This bill would require the employer to pay the employee for any cost associated with the employee obtaining a food handler card, including the time it takes for the employee to complete the training, the cost of the food handler certification program, and the time it takes to complete the certification program. Employers would also be required to relieve the employee of all other work duties while the employee is taking the training course and examination. Employers would also be prohibited from conditioning employment on the applicant or employee having an existing food handler card.

The State Department of Public Health will be required, by January 1, 2025, to publish on its website a list of all certified food handler training programs along with the costs. Local public health organizations would also be required to post a link of this page on their internet website or provide the same list on their internet website.

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

Extension of Joint and Several Liability for Property Services to Public Entities (AB 520)

To address concerns about wage theft in the property service and long-term care industries, in 2015 the California Legislature enacted SB 588 making businesses that contract for services in the property services or long-term care industries jointly and severally liable for certain wage and hour violations by the vendor actually employing the individuals doing the work. This bill would further extend this joint and several liability to public entities that contract for such services in the property service or long-term care industries.

For work awarded on or after January 1, 2024 where property services labor is performed in buildings owned or leased by public entities by individuals who are not employees of that public entity, the public entity will be required to allow representatives from a collective bargaining unit representing property service workers to have access to the workers within that building to provide training regarding, amongst other things, workers' rights, workplace health and safety and sexual harassment. For purposes of this section, "property services" would mean janitorial, security guard, valet parking, landscaping, and gardening services.

***Status*:** Passed the Assembly with bipartisan support and is pending in the Senate.

Payroll Records for Public Works Projects (AB 587)

Existing law requires each contractor and subcontractor on a public works project to keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the contractor or subcontractor in connection with the public work. Existing law specifies that any copy of records made available to a Taft-Hartley trust fund for the purposes of allocating contributions to participants be marked or obliterated only to prevent disclosure of an individual's full social security number, as specified.

This bill would require any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund or joint labor-management committee be provided on forms provided by the Division of Labor Standards Enforcement or contain the same information as in the DLSE forms. The bill would specify that copies of electronic certified payroll records do not satisfy payroll records requests made by Taft-Hartley trust funds and joint labor-management committees.

Status: Unanimously passed the Assembly with bi-partisan support and is pending in the Senate.

Layoffs/Establishment Closures

Expanded Obligations to Notify and Rehire Workers Laid Off Due to Closure of a "Chain" Establishment (SB 627)

Entitled the Displaced Worker Retention and Transfer Rights, this bill would impose new obligations on an employer operating a chain of establishments upon closure of an establishment in the chain. For purposes of this law, a "chain" is a business in California that has 100 or more establishments nationally that share a common brand and are owned and operated by the same parent company. A "chain employer" would be defined as any person, including a corporate office or executive, who directly or indirectly or through an agent or any other person, owns and operates a chain and employs or exercises control over the wages, hours, or working conditions of workers. A "chain employer" would *not* include a franchisee that owns and operates fewer than 100 establishments but *would* include a franchisee that owns and operates 100 or more establishments nationally under an agreement with one franchisor.

The bill would impose several obligations on a chain employer who closes an establishment in the chain, resulting in layoffs of workers:

1. The chain employer must give a "displacement notice" to covered works and their exclusive representative 60 days before the closure takes effect, including specified information. A chain employer would not be required to give the displacement notice if the closure is necessitated by a physical calamity or act of war or the chain employer was actively seeking capital or business to avert the closure, if certain conditions apply.
2. The chain employer must provide all covered workers the opportunity to transfer to a location of the chain within 25 miles of the closed establishment as positions become available for one year after the closure. This would not require a chain employer to alter or terminate the employment of any worker or displace any worker at a location within 25 miles of the covered establishment.

There are specific requirements regarding maintaining a preferential list of workers and deadlines and methods for providing notice of job openings. And a chain employer that is a franchisee with 100 or more establishments would only be required to make an offer to transfer to a location within 25 miles of the covered location that the franchisee owns and operates under an agreement with one franchisor.

3. The chain employer must retain specified records for each covered worker for three years, including name, job classification, date of hire, contact information, and copies of written notices and communications.
4. The chain employer must not retaliate against workers for seeking to enforce their rights under this section.

For purposes of this bill, a "covered worker" is a person whose primary place of employment is at the covered establishment subject to closure, who is employed directly by the employer, and who has worked for the employer for at least 6 months before the date of the closure; however, this law does *not* cover managerial, supervisor, or confidential workers, or temporary/seasonal workers. (The bill does not define "confidential worker.")

This bill would not apply to employees covered by a collective bargaining agreement under certain circumstances, including that the agreement expressly waives the requirements of this bill in clear and unambiguous terms.

A laid-off worker would be authorized to file a complaint with the Division of Labor Standards Enforcement for violation of these new rules, seeking transfer and reinstatement, front pay or back pay, and the value of benefits the covered worker would have received. Any employer, agent of the employer, or other person who violates or causes to be violated these rules would be subject to a civil penalty of $100 for each worker whose rights are violated and an additional sum payable as liquidated damages in the amount of $500 **per worker per day** continuing until the violation is cured, which shall be recovered by the Labor Commissioner, and paid, upon appropriation by the Legislature, to the worker as compensatory damages.

Notably, "chain employer" is defined to include any person, *including a corporate officer or executive*, who directly or indirectly owns or operates a chain and employs or exercises control over the wages, hours, or working conditions of workers; and the penalties could specifically be imposed on any person who violates these rules. Therefore, this bill could impose personal liability on corporate officers, executives, or other individuals who fail to comply with the new requirements in connection with closures.

While the DLSE will have exclusive authority to enforce this new section, this law would not preclude an employee's ability to sue for wrongful termination, and it would not preempt local ordinances providing greater worker protections.

Status: Passed the Senate despite some bipartisan opposition and is pending in the Assembly.

Changes to Protections for Grocery Workers Upon Change in Control of Grocery Establishment (AB 647 and SB 725)

Existing law imposes requirements on grocery employers upon change in control of a grocery establishment, including requiring that the incumbent employer provide the successor employer with a list of eligible grocery workers within 15 days, and that the successor maintain a preferential hiring list, hire from that list for 90 days, and retain eligible workers for at least 90 days. (Labor Code section 2500 *et seq.*) There are two pending bills that would make different changes to strengthen employee protections under the law.

- **Grocery Workers (AB 647)**

First, AB 647 would add and change some key definitions. It would specify that "eligible grocery workers" – presently generally defined as workers at the grocery establishment with at least six months' tenure at the establishment – would also include "separated employees." Separated employees, in turn, would be defined in a new subsection and mean employees who were employed by the incumbent employer for 6 months out of the last 12 months and whose most recent separation was due to change in control, lack of business, reduction in force, transfer more than 15 miles from the employee's residence, or another economic nondisciplinary reason. This definition for "separated employees" would also create a rebuttable presumption that any termination occurring within a year of a change in control was due to a nondisciplinary reason.

It would also expand the definition of "grocery establishment" to include "distribution centers" owned and operated by a grocery establishment to distribute goods from its owned stores, regardless of the distribution center's square footage.

Second, the bill would specify that in addition to a list of workers, the incumbent grocer must provide the successor with cell phone numbers and e-mail addresses for eligible workers. If the incumbent employer does not provide the information within 15 days, the successor employer may obtain the information from a collective bargaining representative.

Third, new Labor Code section 2505 would provide that if a separated employee is offered a position more than 15 miles from their place of residence, they have the right to refuse the offer and retain a right to recall without loss of seniority prior to the hiring of any new employees for one year after the separation of employment.

Fourth, the bill would prohibit retaliation against a person seeking to enforce rights under the law, including employees who mistakenly but in good faith, allege noncompliance by the employer of these protections.

And finally, the bill would create an enforcement mechanism for violations of this law. An employee, collective bargaining representative, or nonprofit corporation would be able to bring a civil action and recover hiring and reinstatement rights, front pay or back pay, the value of benefits the employee would have received, punitive damages, and attorneys' fees and costs. (A prevailing employer could recover

attorneys' fees upon a court finding that the lawsuit was frivolous.) The Division of Labor Standards Enforcement would enforce these provisions, and an employer, agent of any employer, or other person who violates the law or causes the law to be violated is subject civil penalties of $100 for each employee whose rights are violated and liquidated damages of $500 per employee, **per day** until the violation is cured. The liquidated damages shall be recovered by the Labor Commissioner and paid to the employee as compensatory damages.

Status: Passed the Assembly and is pending in the Senate.

- **Grocery Workers (SB 725)**

First, this bill would revise the definitions in Labor Code Section 2502. It would add purchase, acquisition, or disposition of all or substantially all of the cash on hand to the definition of "change in control," which would trigger the protection of the statute. In addition, the bill would specify that consolidation, merger, or reorganization *by the incumbent* grocery employer would also be a "change in control." It would also add distribution centers to the definition of "grocery establishment." SB 725 would also change the definition of "successor grocery employer" to specify that the successor may be the same entity as an incumbent employer when a change in control occurs, but the covered employer remains the same.

Next, SB 725 would add Labor Code section 2507 to provide that if a successor grocery employer does not hire an eligible grocery worker following a change in control and does not retain such worker for at least 90 days following the change in control or the worker's employment commencement date, the successor employer shall pay severance of one week of pay for each full year of employment with the incumbent employer, payable at a defined rate of compensation (unless a collective bargaining agreement provides for a greater amount of severance). Severance would not need to be paid if the worker quit or was discharged for cause. This rule could be superseded, in whole or in part, by a collective bargaining agreement if the waiver is explicitly set forth in the agreement in clear and unambiguous terms.

However, new Labor Code section 2517 would exempt certain incumbent grocery employers and successor grocery employers, based upon their total nationwide employment, from these requirements. Specifically, the requirements discussed above will not apply to an incumbent grocery employer and the successor grocery employer executing the transfer document with that incumbent grocery employer if the sum of both of the following is less than 300: (1) the number of grocery workers employed, immediately prior to the change in control, by the incumbent grocery employer across that employer's grocery establishments nationwide; and (2) the number of grocery workers employed, immediately prior to the change in control, by the successor grocery employer across that employer's grocery establishments nationwide. This section would also define "grocery establishment" and "grocery worker" specifically for this new section only, with "grocery establishment" including grocery establishments in other states, and "grocery worker" meaning an individual whose primary pace of employment is at a grocery establishment owned, controlled, or operated by the incumbent or successor grocery employer.

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

Notice of Acquisition of Retail Grocery Stores and Retail Drug Stores (AB 853)

As mentioned above regarding AB 647 and SB 725, California already has "grocery establishment" specific rules regarding worker retention and preferential rehire eligibility following a change in control. (Labor Code section 2500, *et seq.*) This bill is motivated by concern that increasing consolidation retail chain grocery stores and pharmacies potentially affects the supply and affordability of food and medicine and the supply of experienced retail workers and pharmacy workers in California.

Based on these public health and safety concerns, this bill would add several sections to the California Corporations Code and require any person planning to acquire any voting securities or assets of a retail grocery firm or retail drug firm, as defined, to provide written notice (under penalty of perjury) to the California Attorney General at least 180 days before the acquisition becomes effective. The notice would be required to include information including (1) any plans or proposals to liquidate the retail grocery or retail drug firm, to sell its assets or merge or consolidate it, or to make any other material changes in its businesses or corporate structure or management; (2) information required to assess the competitive effects of the proposed acquisition, including factors affecting the supply of experienced grocery workers, including wages, benefits, and unemployment; and (3) information required to assess economic and community impact of any planned divestiture or store closures, including but not limited to possible impacts on unemployment. The bill would authorize the Attorney General to seek an order temporarily staying or preliminarily enjoining the acquisition if they need additional time to analyze the competitive effects of the acquisition.

Status: Passed the Assembly with bipartisan support and is pending in the Senate.

Public Sector/Labor Relations

Constitutional Amendment Protecting Union Rights (SCA 7)

This resolution would propose an amendment to the California State Constitution, which would provide that all Californians have the right to join a union and to negotiate with their employers, through their legally chosen representative, and the right to protect their economic well-being and safety at work. It would also provide that after January 1, 2023, no statute or ordinance shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and workplace safety. If this resolution is passed by 2/3 of both houses of the legislature, it would be presented to the voters of California. It would only become law if approved by the electorate.

Status: Pending in the Senate Labor Committee.

Legislative Employees Allowed to Organize (AB 1)

Entitled the Legislature Employer-Employee Relations Act, this bill would authorize employees of the California Legislature to unionize. Similar bills have been introduced multiple times but stalled.

Status: Passed the Assembly with bi-partisan support and is pending in the Senate.

Paid Parental Leave for California State University Employees (AB 1123)

This bill would add section 89519.3 to the Education Code and would grant leaves of absence to "employees" of California State University (as defined in Government Code section 3562). Employees would be entitled to a leave of absence with pay for one semester of an academic year, or an equivalent duration, in a one-year period commencing on the date leave is first taken, following the birth of a child or placement of a child with an employee for adoption or foster care. The leave would be required to be taken without interruption unless otherwise agreed to by mutual consent between the employee and an appropriate administrator, and only working days will be charged against the leave of absence. (This bill is similar to AB 2464, which was vetoed in 2022).

Status: Passed the Assembly with bipartisan support and is pending in the Senate.

Public Sector Employee Support for Labor Disputes (AB 504)

Citing the right of public employees to show solidarity with other striking employees, this bill would expand public employees' rights to honor a strike or picket line. The bill applies only to "public employees," defined as persons employed by public agencies of counties, cities, districts, and other political subdivision of the state, but does not apply to *state* employees. The bill provides that it would not be unlawful or a cause for discipline for a public employee to refuse to enter property that is the site of a primary labor dispute, perform work for an employer involved in a primary labor dispute, or go through or work behind a primary picket line. It would also prohibit an employer from directing an employee to take such actions, and would authorize recognized employee organizations to inform employees of these rights and encourage them to exercise those rights. Any provision in a public employer policy or a collective bargaining agreement that limits or waives these rights would also be void as against public policy.

These new provisions, however, would not apply to certain employees of public employees (i.e., those subject to Labor Code section 1962 [i.e., firefighters prohibited from refusing to cross picket lines].)

Status: Passed the Assembly on a party-line vote and is pending in the Senate.

State Provided Benefits

Expansion of Paid Family Leave to Care for a Seriously Ill "Designated Person" (AB 518)

Existing law (Unemployment Insurance Code sections 3301, *et seq.*) provides up to 8 weeks of paid leave under the state disability insurance program for prescribed purposes, including to care for a seriously ill family member. Existing law defines "family member" as child, spouse, parent, grandparent, grandchild, sibling, or domestic partner. This bill would expand benefit eligibility to individuals who take time off work to care for a seriously ill "designated person."

This change would be similar to the 2022 amendment to California Family Rights Act (AB 1041), which expanded the definition of family to include a single designated person related by blood or whose association with the employee is the equivalent of a family relationship.

Status: Unanimously passed the Assembly and is pending in the Senate.

Expansion of Paid Faily Leave to Add Responsibilities for a Child In Loco Parentis and Remove Restrictions (AB 575)

Existing law (Unemployment Insurance Code sections 3301, *et seq.*) provides up to 8 weeks of paid leave under the state disability insurance program for prescribed purposes, including to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. This bill would expand the program to provide benefits to workers who take time off work to bond with a minor child within one year of assuming responsibilities of a child in loco parentis.

Existing law provides that a worker is not eligible for these benefits if another family member is ready, willing, and able and available for the same period of time in a day that the individual is providing care. This bill would delete the restriction.

Finally, existing law authorizes an employer to require a worker to take up to 2 weeks of earned but unused vacation leave before receiving benefits under the disability insurance program. The new bill would delete this provision.

Status: Unanimously passed the Assembly and is pending in the Senate.

Extension of Authorization to Deposit Workers' Compensation Disability Indemnity Payments in Prepaid Cards (AB 489)

Existing law allows an employer to deposit disability indemnity payments in a prepaid card account for employees who have workers' compensation injuries (with the employee's written consent). That law is set to expire January 1, 2024. This bill would extend the authorization for this program to January 1, 2025.

Status: Unanimously passed the Assembly and is pending in the Senate.

Unemployment Assistance for Undocumented Workers (SB 227)

Existing law prohibits payment of unemployment compensation benefits to a person who is not a citizen or national of the United States, unless that person is lawfully admitted for permanent residence, was lawfully present for the purposes of performing work, or was permanently residing in the United States under color of law.

This bill would establish, until January 1, 2027, the "Excluded Workers Program" to provide income assistance to excluded workers who are not eligible for state or federal unemployment benefits. The bill would apply to individuals who reside in California and who performed at least 93 hours of work or earned at least $1,300 in gross wages over the course of three calendar months (which do not need to be consecutive) for work performed in California within the 12 months preceding their application for

benefits or the calenda3r year preceding their application for benefits. Eligibility would be based on self-attestation and submission of specified documentation to establish proof of work history or a credibility interview. Eligible individuals would be able to receive $300 per week for each week of unemployment between January 1, 2025, and December 31, 2025, up to a maximum of 20 weeks. The bill would require a separate appropriation by the Legislature of sufficient funds to carry out the program. (A similar law [AB 2847] passed the Legislature in 2022 but was vetoed by Governor Newsom.)

Status: Passed the Senate and is pending in the Assembly.

Miscellaneous

Increased Liability and Responsibility for Fast Food Franchisors (AB 1228)

This bill would impose upon fast food restaurant franchisors increased liability and responsibility for compliance with employment laws by their franchisees. A similar provision was originally included in the 2022 bill creating the Fast Food Industry Council (AB 257) but was removed through the amendment process before the bill became law. (Implementation of AB 257 is now suspended pursuant to a referendum petition.)

The new bill would apply to fast food restaurant franchisors and franchisees. "Fast food restaurant" is defined to mean any establishment in California that is part of a chain of 100 or more establishments nationally that share a common brand or standardized operations, and that regularly provide food or beverages for immediate consumption to consumers who pay before eating with limited or no table service. (This is the same definition applicable to the Fast Food Industry Council law.) The bill would:

- Declare that a fast food restaurant franchisor shares with is franchisee all civil legal responsibility and civil liability for the franchisee's violations of specified laws, including California's Unfair Business Practices Act, the Fair Employment and Housing Act, and many sections of the Labor Code.

- Specify that all the listed laws may be enforced directly against the franchisor to the same extent they may be enforced against the franchisee (including by a civil lawsuit), after the franchisor has been given 30 days written notice of the alleged violation of the law and an opportunity to cure the alleged violation. A franchisor would not be subject to an enforcement action or lawsuit if it cured the alleged violation by ensuring that its franchisee is in compliance with the law and any workers against whom a violation was committed are made whole.

- Forbid a franchisee from waiving these protections or agreeing to indemnify its franchisor.

- Allow franchisees to sue franchisors for monetary or injunctive relief if the terms of a fast food restaurant franchise prevent or create a substantial barrier to the franchisee's compliance with the specified laws, including because the franchise does not provide for funds sufficient to allow the franchisee to comply with the law. The bill specifies that any changes in the terms of a franchise that increase the costs of the franchise would create a rebuttable presumption of a substantial barrier to compliance with the specified laws.

Status: Passed the Assembly despite some bipartisan opposition and is pending in the Senate.

Labor Trafficking Unit within the DLSE and/or Civil Rights Department (AB 380)

This bill would each establish a Labor Trafficking Unit in the Division of Labor Standards Enforcement (DLSE) to coordinate with other state enforcement agencies. The bill would give the unit authority to receive and investigate complaints alleging labor trafficking and to take steps to prevent labor trafficking. The unit would also receive evidence from the Division of Occupational Safety and Health regarding possible labor trafficking and would coordinate with other agencies and refer cases for potential civil and criminal actions relating to labor trafficking violations. The unit would also annually submit a report to the Legislature regarding their activities, including the number of complaints received and the number of complaints referred.

AB 380 is similar to AB 1820 (2022), which was vetoed by Governor Newsom. His veto message stated that the CRD – not the DLSE – would be the appropriate location for a Labor Trafficking Unit.

Status: Unanimously passed the Assembly and is pending in the Senate.

Cal-OSHA Protections Extended to Household Domestic Workers (SB 686)

While California law generally requires every employer to provide a safe and healthful workplace for employees, "domestic workers" have historically been excluded from occupational safety and health laws. In 2021, SB 321 was enacted requiring the formation of an advisory committee to discuss policies to protect the health and safety of privately funded household domestic service employees, including drafting voluntary industry-specific guidelines to educate household domestic service employers and workers.

This bill essentially adopts this committee's recommendations, including to remove the household domestic serve exception and thereby applying all OSHA provisions to domestic workers and their employers (except in very narrow statutorily enumerated exceptions [e.g., publicly funded, or family daycare homes].) By July 1, 2024, Cal/OSHA will be required to adopt industry guidelines consistent with Safety Committees voluntary guidelines to assist household domestic service employers on their legal obligations under existing occupational safety and health laws that apply to household domestic service employees. By January 1, 2025, household domestic service employers will be required to comply with all applicable occupational safety and health regulations.

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

Public Availability of Labor Statistics (SB 335)

Existing law requires the Department of Industrial Relations to publish an annual report containing statistics on state work injuries and occupational diseases and fatalities and requires the report to be made available to the public. This bill specifies that the report shall be submitted to the Legislature and the Governor.

Status: Passed the Senate and is pending in the Assembly.

Change in Court Rules regarding Arbitration (SB 365)

Existing law allows a party to appeal an order dismissing or denying a petition to compel arbitration. Existing law generally stays the proceedings in the trial court while an order is being appealed, subject to specified exceptions. This bill would provide that notwithstanding the general rule, an appeal of an order dismissing or denying a petition to compel arbitration does not *automatically* stay the trail court proceedings. (The U.S. Supreme Court is currently considering a similar issue under the Federal Arbitration Act in the case *Bielski v. Coinbase*.)

Status: Passed the Senate on a party-line vote and is pending in the Assembly.

Requirements for Call Centers Contracting with State Agencies (AB 1381)

This bill would require, beginning January 1, 2025, state agencies that contract with a private entity specifically for call center services to provide public or customer service for that or another state agency shall ensure that by January 1, 2026, 90% of the call center work is conducted in California. However, this change would not apply to contracts entered into before January 1, 2025 and does not apply to contracts for programs or other services that are not call centers. For state agencies contracting with private entities for programs or other services, including no-fee contacts, in which call center work is included but the contract is not specifically for call center support work, the agency shall prioritize the work being conducted in California, including by using "scoring incentives" to be established by the Department of General Services under this new law. Simply summarized, these to-be-developed scoring incentives will provide and award private entities with 50 percent, 75 percent or 90 percent of their contracted call center work associated with the state agency contract, if located within California.

These new requirements would authorize temporary exceptions allowing non-California call center usage in the event of a disaster, or for overflow periods not to exceed 48 hours, or for previously approved periods approved by the state agency to accommodate seasonable needs and avoid unreasonable, short-term costs for the state.

Status: Passed the Assembly on a party-line vote and is pending in the Senate.

Workplace Readiness/Work Permits (AB 800)

This bill is intended to inform and educate young people about their rights as workers, including their explicit rights as employed minors.

Pursuant to that goal, this bill would require the week of each year that includes April 28th to be known as "Workplace Readiness Week" and would require secondary schools to educate pupils on their rights as workers on specified topics during that week (including the right to organize a union, the history of the labor movement, and the labor movement's role in winning various specified employee protections). This would be mandatory for students in grades 11 and 12 and optional for other grades.

The bill would also require that any minor seeking a signature on a work permit, must receive a document clearly explaining basic labor rights extended to workers. The bill would encourage the University of California Labor Center to produce, with input from bona fide labor organizations, a draft template of the document to be provided to minors.

Status: Passed the Assembly with some bi-partisan support and is pending in the Senate.

Proposed Standard to Require Women's Restrooms (AB 521)

This bill is motivated by the concern that women are underrepresented in the trades, and that one barrier faced by women is access to clean and secure restrooms on jobsites. This bill would require the Division of Occupational Safety and Health to submit a rulemaking proposal to consider a regulation to require at least one women's designated restroom at any construction jobsite with two or more required water closets. The deadline for submitting the proposal would be December 1, 2025.

Status: Unanimously passed the Assembly and is pending in the Senate.

MINIMUM WAGE INCREASES

The California statewide minimum wage is $15.50, but a number of cities and counties impose higher minimum wages. The following localities will increase their minimum wages as of July 1, 2023:

City or County	Minimum Wage Effective July 1, 2023
Alameda	$16.52
Berkeley	$18.07
Emeryville	$18.67
Fremont	$16.80
Los Angeles (City)	$16.78
Los Angeles (County, unincorporated areas)	$16.90
Malibu	$16.90
Milpitas	$17.20
Pasadena	$16.93
San Francisco	$18.07
West Hollywood	$19.08

Please note that other cities/counties increased their minimum wages in January, and be sure to investigate any applicable minimum wages for cities in which you operate.

FEDERAL REGULATORY CHANGES

Federal Guidance re: Artificial Intelligence

Employers should note that even though AB 331 (which sought to impose restrictions on the sue of artificial intelligence and automated decision tools) did not pass this year, it is possible that use of AI or an ADT could lead to a discrimination claim. Indeed, in May 2023, the federal Equal Employment Opportunity Commission (EEOC) issued new guidance regarding the use of software, algorithms, and artificial intelligence used in employment selection procedures and the ways in which such tools could cause a violation of Title VII. (Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission (eeoc.gov)) Previously, in May 2022, the EEOC and Department of Justice issued guidance regarding the use of algorithms and artificial intelligence to assess job applicants and employees and warned that use of AI may violate the Americans with Disabilities Act. (The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov) and Guidance Document: Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring (ada.gov)) These are all part of the EEOC's Artificial Intelligence and Algorithmic Fairness Initiative. More information is available here: Artificial Intelligence and Algorithmic Fairness Initiative | U.S. Equal Employment Opportunity Commission (eeoc.gov) And in March 2022, California's Fair Employment and Housing Counsel issued proposed amendments to the regulations implementing the Fair Employment and Housing Act which would regulate the use of Automated Decision Systems in employment and specifically define the ways in use of such systems could constitute unlawful discrimination. (AttachB-ModtoEmployRegAutomated-DecisionSystems.pdf (ca.gov))

Federal Guidance re: COVID, the ADA, and the Rehabilitation Act

The EEOC issued new guidance on May 15, 2023 regarding COVID-19, the ADA, the Rehabilitation Act, and other employment laws. (What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)) Employers should review this updated information, including numerous questions and answers about how to treat requests for accommodations and sick leave;, the questions an employer may ask employees about testing, symptoms, and exposure; vaccinations; and more.

End to Form I-9 Flexibilities

On May 4, 2023, Immigrations and Customs Enforcement (ICE) announced that the COVID-era flexibilities that allowed remote inspection of many employees' Form I-9 documents will end July 31, 2023, and employers will have until August 20, 2023 to complete their physical inspection requirements. Employers who have not already physically inspected documents for all employees for whom they completed Form I-9's remotely since March 20, 2020 now have a fixed deadline to do so (even if their workforce is and will remain remote). Employers have until August 30, 2023 to ensure that all employees' documents have been physically inspected, and that their Form I-9's are updated accordingly. As always, employers may

designate an authorized representative to complete the physical inspection and annotate the Form I-9 if they are unable to do so themselves (for example, in a situation where the employee is located remotely, or the employer has a high volume of documents to physically inspect). The Department of Homeland Security has indicated that it will be issuing a Final Rule that should again allow for remote document examinations in the Form I-9 context. However, the timing of the Final Rule is uncertain, and will not be in place before August 30, 2023. Therefore, employers who have not already physically inspected the Form I-9 documents for all employees should put a plan in place to be able to comply by August 30, 2023. For more information, see ICE's announcement here or our Special Alert here.

Guidance re: Calculating FMLA Leave in Holiday Weeks

On May 30, 2023, the federal Department of Labor (DOL) issued an opinion letter addressing how to calculate the amount of Family and Medical Leave Act (FMLA) leave used when an employee takes leave during a week which includes a holiday. Consistent with the general rule that an employee's usual workweek is the appropriate basis for determining that employee's FMLA leave entitlement, the DOL takes the position that in situations where the employee is taking only a partial week of FMLA leave, the holiday is *not* counted as FMLA leave unless the employee was actually scheduled to work on that holiday. *See* 29 C.F.R. § 825.205(b). In such an instance, to calculate the fraction of the workweek of FMLA leave used, the amount of leave taken (not including the holiday) is divided by the total workweek (including the holiday). Thus, for example, if an employee takes leave for one workday in a workweek with a holiday, and they were not scheduled to work on the holiday, the employee has taken one-fifth (1/5) of a week of leave.

However, if an employee takes a *full* workweek of FMLA leave in a week containing a holiday, the entire week (including the holiday hours) will count against the employee's FMLA entitlement. *See* 29 C.F.R. § 825.200(h). Thus, an employee taking leave for a full workweek that includes a holiday has taken one week of leave.

For more information, review the entire opinion letter here.

NOVEMBER 2024 BALLOT

Initiative to Raise the Minimum Wage

This ballot measure seeks to increase the minimum wage by $1.00 per year until it reaches $18.00 per hour and then to increase the minimum wage annually to adjust for inflation. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

Initiative to Repeal PAGA

This ballot measure seeks to repeal the Private Attorneys General Act, which allows employees to file lawsuits on behalf of themselves and other employees to recover monetary penalties for certain state employment law violations. The Labor Commissioner would retain the authority to enforce these laws

and impose penalties. The initiative would require the legislature to provide funding for Labor Commissioner enforcement. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

Initiative Challenging the 2022 Law Authorizing Creation of a Fast Food Industry Council

This ballot measure seeks to repeal 2022 Assembly Bill 257, which created a fast food industry council to establish sector-wide minimum standards on wages, working hours, and other working conditions for fast food restaurant workers. This initiative has qualified for the ballot, and AB 257 is on hold until after the November 2024 election.

If you have questions about how these proposed bills may affect your business, please contact us.

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