

# WILSON TURNER KOSMO

LLP

## LEGISLATIVE SUMMARY

With the Legislature's summer recess fast approaching, a number of key committee votes have recently occurred providing further clarity regarding the remaining employment bills being considered. Not unexpectedly, given the Legislature's current political composition, a number of significant employment bills cleared this hurdle and will move forward, including bills that would:

- Prohibit employers from inquiring about salary history during the hiring process (AB 168);
- Require larger employers to collect and publish information concerning gender pay differences for exempt employees (AB 1209);
- Preclude employers from inquiring about criminal convictions until after a conditional offer of employment and impose new limitations upon and disclosure requirements for considering criminal convictions (AB 1008);
- Require employers with more than 20 employees to provide up to 12 workweeks of parental leave (SB 63);
- Prohibit employers from responding to federal immigration agency requests or assisting with "immigration worksite enforcement actions" unless certain conditions are met (AB 450);
- Prohibit employers from discriminating based on an employee's reproductive health decisions (AB 569);
- Increase to \$47,476 the salary threshold level for the overtime exemption (AB 1565); and
- Expand the Labor Commissioner's powers when investigating retaliation complaints, including allowing pre-determination injunctive relief (i.e., TRO's) (SB 306).

However, for the second straight legislative session, and despite the fact similar bills have passed in over 35 states, the Senate Judiciary Committee failed to pass a bill that would have allowed private employers to grant a hiring preference for military veterans (AB 353).

The Legislature will be on recess until returning in mid-August to pass bills before the September 15<sup>th</sup> deadline.

Even though the California legislature will be in recess, the municipalities have not been with several new laws taking effect, including San Francisco increasing its minimum wage (to \$14 an hour), expanding its Parental Leave Ordinance, and enacting its own workplace lactation rules. Effective July 1<sup>st</sup>, the City of Emeryville's Fair Workweek Ordinance also took effect, even though it is still considering regulations regarding this new law. Los Angeles' minimum wage also increased to \$12.00 per hour for employers with 26 or more employees and to \$10.50 for employers with 25 or fewer employees.

A summary of the new laws that took effect July 1<sup>st</sup> and recent municipal and agency developments is below, followed by an overview and status update for the pending employment bills of general application.

## **NEW LAWS, AND NEW AGENCY AND MUNICIPALITY DEVELOPMENTS**

### **Labor Commissioner Unveils Notices Regarding Domestic Violence/Sexual Assault Rights**

In 2016, California enacted a new law (AB 2337) requiring employers to provide notices to employees regarding their rights to be free from and authorizing workplace accommodations for domestic violence, sexual assault or stalking. Under Labor Code section 230.1(h), employers must provide notice of these rights to new employees upon hire and to existing employees upon request. This section also states that the employer may use either a form the Labor Commissioner would develop by July 1, 2017, or develop its own substantially similar form, and that the employer would not need to start providing these notices until the Labor Commissioner posts its model notice on its website.

The Labor Commissioner recently published on its website the sample form employers may use: [http://www.dir.ca.gov/dlse/Victims\\_of\\_Domestic\\_Violence\\_Leave\\_Notice.pdf](http://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf). Now that this form is available, employers must begin providing either the Labor Commissioner's version or the employer's "substantially similar" version at time of hire for new employees or upon request by current employees.

### **San Francisco Increases its Minimum Wage to \$14 Hourly and Expands its Parental Leave Ordinance**

As part of the voter-approved initiative to increase the minimum wage to \$15.00 an hour by 2018, on July 1, 2017, the San Francisco minimum wage increased to \$14.00. It is scheduled to increase to \$15.00 on July 1, 2018, and be adjusted on July 1<sup>st</sup> each year thereafter based on changes to the Consumer Price Index. Additional information about San Francisco's minimum wage increases is available at:

<http://sfgov.org/olse/minimum-wage-ordinance-mwo>.

While the first phase of San Francisco's Paid Parental Leave Ordinance took effect on January 1, 2017 for employers with 50 or more employees, on July 1, 2017, it began applying to employers with 35 or more employees. On January 1, 2018, employers with 20 or more employees will need to comply with its provisions. Additional information about San Francisco's Paid Parental Leave Ordinance is available at:

<http://sfgov.org/olse/PAID-PARENTAL-LEAVE-ORDINANCE>.

### **San Francisco Adopts Workplace Lactation Ordinance**

Even though Labor Code section 1030 requires all California employers to provide a reasonable amount of break time and a private space to express breast milk at work, San Francisco recently enacted a "Lactation in the Workplace" Ordinance. The Ordinance's text is available at: [http://sfdbi.org/sites/default/files/File%20170240%20Ord%20Lactation\\_0.pdf](http://sfdbi.org/sites/default/files/File%20170240%20Ord%20Lactation_0.pdf). This Ordinance will take effect January 1, 2018 and applies to all employees working within the geographic boundaries of this City (although "employer" does not include the City or any governmental agency.)

The Ordinance largely mirrors but expands upon several of Labor Code section 1030's requirements. For instance, while Labor Code section 1031 requires a private room and cannot be a bathroom, this Ordinance also specifies that this location must contain a surface where a breast pump may be placed, a place to sit, and have access to electricity. The employer must also provide access to a sink with running water and a refrigerator in close proximity to the employee's workplace.

The Ordinance also requires employers to develop a written lactation accommodation policy and to include it in the employee handbook or set of policies, and to distribute it to new hires and when an employee enquires about or requests parental leave. It also requires employers to respond within five days to an employee's lactation accommodation request, and to maintain written records of requests and responses for three years from the date of a request. Additional information about these requirements as well as suggested Employer Best Practices according to the Ordinance's author are available at:

[https://sfgov.org/dosw/sites/default/files/Lactation%20in%20the%20Workplace%20Ordinance%20Briefing\\_COSW%20032217.pdf](https://sfgov.org/dosw/sites/default/files/Lactation%20in%20the%20Workplace%20Ordinance%20Briefing_COSW%20032217.pdf).

### **San Francisco Poised to Enact Ban on Prior Salary History Inquiries**

Furthering an emerging trend, San Francisco's Board of Supervisors has recently passed an ordinance that would preclude employers from inquiring about prior salary history. If enacted, this ordinance would preclude employers from inquiring about an applicant's salary history or relying upon such salary history to determine the salary to offer the applicant. The ordinance also appears to go farther than the currently proposed statewide version (AB 168 [discussed below]) in that it would preclude an employer from releasing a current or former employee's salary history without written authorization and would prohibit retaliation against an applicant for refusing to disclose salary history. It would also impose new posting requirements by employers, and permit administrative enforcement by the San Francisco Office of Labor Standards Enforcement and authorize statutory penalties.

The ordinance will now be sent to the Mayor, who is expected to sign it. If so, the Ordinance would take effect July 1, 2018 although the penalties for non-compliance would not take effect until January 1, 2019.

### **Los Angeles' Minimum Wage Also Increases**

Similar to San Francisco, Los Angeles has also approved a series of annual minimum wage increases designed to reach \$15.00 an hour by 2020 for employers with 26 or more employees, and to reach \$15.00 an hour by 2021 for employers with 25 or fewer employees. Pursuant to this pre-approved schedule, on July 1, 2017, the minimum wage increased to \$12.00 an hour for employers with 26 or more employees and to \$10.50 an hour for employers with 25 or fewer employees.

As a reminder, on July 1, 2017, Los Angeles' paid sick leave ordinance also began applying to employers with 25 or fewer employees.

## Emeryville's Fair Workweek Ordinance Takes Effect

Continuing the trend of municipalities enacting so-called “predictive scheduling” and “opportunity to work” ordinances, the City of Emeryville's Fair Workweek Ordinance took effect July 1, 2017, even though it is still considering the implementing regulations for this ordinance. This Ordinance draws upon San Francisco's Retail Workers' Bill of Rights and San Jose's recent Opportunity to Work Initiative, but also includes a number of unique provisions that foreseeably could appear in future municipal ordinances or in proposed statewide bills. The City of Emeryville has published a fairly detailed summary of the key provisions at

<http://www.ci.emeryville.ca.us/DocumentCenter/View/9403> and the Ordinance's complete text is available at <http://www.codepublishing.com/CA/Emeryville/html/Emeryville05/Emeryville0539.html>.

Emeryville's Ordinance applies to retail firms with 56 or more employees globally, and to “fast food firms” (as defined) with 56 or more employees globally and 20 or more employees in Emeryville, and to any employee for such employer that works 2 or more hours a week within Emeryville. Among other things, this Ordinance requires employers provide advance notice of work schedules, allows employees to decline schedule changes and requires premium compensation for any schedule changes, requires employers to offer work to existing part-time employees, provides employees the “right to rest” a certain number of hours between shifts, and provides employees the right to request a flexible working arrangement. This Ordinance also expands the increasingly used “presumption of retaliation” and prevents an employer from discharging any employee who engaged in protected activity within 120 days of such activity, unless the employer can show clear and convincing evidence of just cause for such discharge. It also imposes new poster, notice and record keeping requirements upon employers, and allows both agency enforcement and private rights of actions for any violations.

The City of Emeryville is still drafting implementing regulations regarding this Ordinance and will accept written comments through July 31<sup>st</sup>. The current draft regulations are available at:

<http://www.ci.emeryville.ca.us/DocumentCenter/View/9966>.

In the interim, the City of Emeryville has already initiated a “soft launch” of the now-effective Ordinance, meaning that from July 1, 2017 through December 31, 2017, the city will focus on educating affected parties about this ordinance and will not impose administrative penalties and fines during this period. Although affected employees may pursue a private right of action for any violations during this “soft launch” period, the City of Emeryville will not begin full enforcement through fines and penalties until January 1, 2018.

## FEHC's Regulations Concerning Criminal Records and Transgender Identity and Expression Now Effective

As discussed in prior newsletters, the Fair Employment and Housing Council (FEHC) had previously issued final regulations concerning the usage of criminal records information during the hiring process. These final regulations took effect July 1, 2017 and are available at:

<https://www.dfeh.ca.gov/files/2017/03/FinalText-CriminalHistoryEmployDecRegulations.pdf>

The FEHC had also issued final regulations regarding transgender identity and expression. These final regulations also took effect July 1, 2017 and are available at:

<http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/FinalTextRegTransgenderIdExpression.pdf>

The FEHC has also issued proposed updated regulations regarding national origin discrimination, and will accept comments on these regulations until July 17, 2017. The draft regulations are available at:

<http://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/Text-Regulations-Regarding-National-Origin-Discrimination.pdf>

## **PENDING STATEWIDE BILLS**

### **New Rules Regarding Federal Agency “Immigration Worksite Enforcement Actions” (AB 450)**

Work-related immigration topics have been a particular legislative priority recently, and this wide-ranging bill continues that trend and highlights the current tension between California and the federal government related to immigration. Amongst other things, it would limit California employers from voluntarily complying with federal immigration authorities, impose new notice requirements, enact many new statutory penalties and provide greater Labor Commissioner access to the worksite.

For instance, new Labor Code section 90.1 would, “except as otherwise required by federal law,” prohibit employers or their agents from providing a federal government immigration enforcement agent access to non-public areas of a place of labor without a judicial warrant. Similarly, new Labor Code section 90.2 would, “except as otherwise required by federal law,” prohibit an employer or their agents from providing a federal immigration enforcement agency access to the employer’s employment records, including I-9 forms, without a subpoena. While federal immigration laws presently allow federal immigration agencies access to non-public portions of an employer either through a warrant or the employer’s consent, these new provisions would essentially remove the employer’s ability to provide consent and require a warrant or subpoena.

Both new sections would authorize the California Labor Commissioner to recover civil penalties ranging from \$2,000 to \$5,000 for a first violation, and between \$5,000 to \$10,000 for each subsequent violation. For violations of section 90.1, the Labor Commissioner would have the authority to lower or waive the civil penalty if the federal government immigration enforcement agent accessed the non-public portions of a worksite without the consent of the owner or person in charge.

New Labor Code section 90.25 would require employers that receive a notice of inspection of I-9 records or other employment records by a federal immigration agency to provide written notice to each employee and their representative of this impending inspection. This notice would need to be delivered within 24 hours of the employer receiving the notice of inspection, would need to be hand-delivered if possible, and if not possible, by mail and email (if known) in the language the employer normally uses for notices. This notice would need to include: (1) the name of the federal immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; (4) a copy of the notice of the notice of inspection; and (5) any other information the Labor Commissioner deems material and necessary.

Once again except as required by federal law, the employer's notice obligations would continue after the inspection is concluded. Within 24 hours of receiving notice regarding the results of the records inspection, the employer would need to comply with the same notice procedures to advise each affected employee and their representative of: (1) a description of all deficiencies or other items identified in the federal immigration inspection results notice; (2) the time period for correcting any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; (4) the employee's right to be represented during this meeting; and (5) any other information the Labor Commissioner deems material and necessary.

Employers who fail to provide this advance notice or the post-inspection notices to all affected employees or their representatives would be subject to civil penalties ranging from \$2,000 to \$5,000 for the first violation, and from \$5,000 to \$10,000 for each subsequent violation. Unlike the statutory penalties in proposed new Labor Code sections 90.1 and 90.2 against employers who provide improper access, these statutory penalties would not be required if the federal agency had specifically directed the employer not to provide notice to an affected employee.

In addition to notifying potentially affected employees, new Labor Code section 90.8 would also require employers, except as prohibited by federal law, to notify the Labor Commissioner within 24 hours of learning of an impending worksite enforcement action. In those situations where a federal immigration agent appears at "or near" the employer without advance notice, the employer shall immediately notify the Labor Commissioner and the employees' representative upon learning of the worksite enforcement action.

Failure to notify the Labor Commissioner, except where directed by the federal agency or if otherwise prohibited by federal law, will result in statutory penalties ranging from \$2,000 to \$5,000 for the first violation, and between \$5,000 to \$10,000 for each subsequent violation.

AB 450 would also impose new limits on an employer's ability to conduct self-audits even outside the presence of a federal immigration agency. New Labor Code section 90.9 would require the employer, except as required by federal law, to notify the Labor Commissioner before conducting a self-audit or inspection of I-9 forms and before checking the employee work authorization documents of a current employee at a time or in a manner not required by federal law. Recent amendments have again deleted prior language suggesting the Labor Commissioner would be allowed to attend any self-audit, although it is less clear whether the Labor Commissioner will still contend it already has that authority even if not mentioned in this new statute. Failure to provide this notice would also subject the employer to statutory penalties from \$2,000 to \$5,000 for a first violation, and between \$5,000 to \$10,000 for each subsequent violation except where a federal agency or a federal statute prohibited notifying the Labor Commissioner.

In 2016, the Legislature enacted SB 1001 and new Labor Code section 1019.1 prohibiting employers from engaging in various actions while determining the employment eligibility of an applicant or employee (e.g., refusing documents that appear reasonably genuine, requiring more or different documents, etc.). AB 450 would enact new Labor Code section 1019.2 to prohibit employers or their agents from re-verifying the employment eligibility of a current employee at a time or in a

manner required under federal law. As with section 1019.1, new section 1019.2 would authorize the Labor Commissioner to recover civil penalties ranging from \$2,000 to \$5,000 for the first violation and between \$5,000 to \$10,000 for each subsequent violation.

Lastly, new Labor Code section 98.85 would authorize the Labor Commissioner, if it determines an employee complainant or witness is needed regarding an investigation related to wages, compensation, the return of tools or a discrimination charge, to issue a certification to the employee complainant or witness that they have submitted a valid complaint or are cooperating in an investigation.

Perhaps anticipating future legal challenges, a recent amendment provides these provisions would be severable so that if any particular provision were invalidated, the remainder would still take effect.

**Status:** Passed the Assembly on a party-line vote, and has passed the Senate's Labor and Industrial Relations Committee and will be heard in the Judiciary Committee on July 11, 2017.

### **Job-Protected "Parental Leave" (SB 63)**

Entitled the New Parent Leave Act, this bill would add new Government Code section 12945.6 to require, beginning January 1, 2018, employers to provide up to 12 workweeks of job-protected parental leave for an employee (male or female) to bond with a new child within one year of the child's birth, adoption or foster care placement.

Unlike the California Family Rights Act (CFRA, Government Code section 12945.2) and the Family Medical Leave Act (FMLA), which apply only to employers with more than 50 employees, this bill would define "employer" as either: (a) an entity employing 20 or more persons "to perform services for a wage or salary;" or (b) the state of California or any of its political or civil subdivisions, except for specified school districts. However, as with CFRA and the FMLA, an employee would need to have worked more than 12 months for the employer, and to have worked at least 1,250 hours during the previous 12-month period.

Notwithstanding the definition of "employer" noted above, this bill states that it would be an unlawful employment practice to deny up to 12 weeks of parental leave to an employee who meets the hours and time-worked requirements and "works at a worksite in which the employer employs at least 20 employees within 75 miles."

The bill also specifies that employees eligible for "parental leave" are also entitled to take leave under Government Code section 12945 (pregnancy disability, child birth and related conditions) if otherwise qualified for such leave. However, this new law would not apply to an employee subject to both the CFRA and the FMLA.

As with CFRA, an employer shall be deemed to have refused to provide this job-protected leave unless, on or before the leave's commencement, the employer guarantees reinstatement in the same or comparable position. This bill would also authorize the employee to use accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer during this parental leave. The basic minimum duration of the leave shall be two weeks,

but an employer would be permitted to grant requests for additional occasions of leave lasting less than two weeks.

Employers would also be required to maintain and pay for an eligible employee's medical coverage under a group health plan for the duration of the parental leave, not to exceed 12 weeks over the course of a 12-month period, commencing on the date the parental leave begins, and at the level and conditions that would have existed if the employee continued working. However, as with CFRA, an employer would be authorized to recover these premiums if an employee failed to return from leave under certain conditions.

Also as with CFRA, in situations where both parents are employed by the same employer, the employer may limit the overall leave to the maximum amount a single employee could use, and may but is not required to grant simultaneous leave to both parents.

This bill would also make it an unlawful employment practice for any employer to refuse to hire, discharge, fine, suspend, expel or discriminate against an individual for either exercising their right to parental leave, or giving information or testimony about their or another employee's parental leave in an inquiry or proceeding related to rights guaranteed under this section. It would also be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of any right provided under this section.

The bill also provides this leave shall run concurrently with parental leave taken under Education Code section 44977.5 for certain certificated school employees.

Lastly, a recently-added amendment provides that to the extent regulations implementing the CFRA are not inconsistent with this new leave, they shall be incorporated by reference to further implement this new leave.

This bill is very similar to last year's version that Governor Jerry Brown vetoed, except that this year's version proposes 12 weeks of leave compared to six.

***Status:*** Passed the Senate on a party-line vote and has passed the Assembly's Labor and Employment and Judiciary Committees, and is pending in the Assembly's Appropriations Committee.

### **Prohibition on Salary History Inquiries (AB 168)**

This bill would add new Labor Code section 432.3 to preclude employers from inquiring orally or in writing, personally or through an agent, about salary history information of an applicant, including about compensation and benefits. It would also require employers, upon reasonable request, to provide an applicant the pay scale for a position. These new requirements would apply to all employers, including state and local government employers and the Legislature.

A similar bill (AB 1676) was introduced last year, before being modified to instead amend the Equal Pay Act to state that prior salary history by itself would not be a defense to an equal pay-related claim. Similar prohibitions on salary history inquiries have already passed in several states (Massachusetts, Oregon, and the District of Columbia), and several large cities (Philadelphia and New York City) and



are pending in other states and municipalities, including San Francisco (see above).

**Status:** Passed the Assembly with some bi-partisan support, and has passed the Senate's Labor and Industrial Relations Committee and is pending in the Senate's Public Employment and Retirement Committee.

### **Gender Pay Differential Reporting Requirements (AB 1209)**

Reflecting the ongoing legislative focus on gender-related pay differentials, this bill would enact new Labor Code section 2810.7 and impose new reporting obligations on employers that are required to file a statement of information with the Secretary of State and have more than 250 employees. Specifically, beginning July 1, 2019 and annually thereafter, those employers would need to collect information relating to both the difference between the median and mean salary of male and female exempt employees, and between male and female board members. Employers would also need to collect information regarding the number of employees considered to make the determinations regarding the difference in mean and median salary information identified above.

Beginning July 1, 2020 and annually thereafter, employers would also need to submit this collected information to the California Secretary of State. While an initially-proposed requirement that the employer publish this information on a publicly available website has been deleted by subsequent amendment, the Secretary of State shall publish this information on a publicly-available website once appropriate funding is obtained and procedures are established.

**Status:** Passed the Assembly, and passed the Senate's Labor and Industrial Relations Committee and is pending in the Appropriations Committee.

### **Public Employers Subject to Equal Pay Act Violations (AB 46)**

California's Equal Pay Act (Labor Code section 1197.5 *et seq.*) has recently been a legislative focus with amendments in 2015 materially altering its definitions and exceptions (SB 358) and in 2016 to expand its protections to preclude impermissible wage differentials for employees of different races or ethnicity for substantially similar work (SB 1063). This bill would again amend the Equal Pay Act to clarify that "employer" means both public and private employers, but that public employers would be exempted from the statutory and misdemeanor penalties identified in Labor Code section 1199.

**Status:** Overwhelmingly passed the Assembly and has unanimously passed the Senate's Public Employment and Retirement Committee and is pending in the Judiciary Committee.

### **"Ban the Box" Bill (AB 1008)**

The topic of when and how employers may consider criminal convictions continues to be a hot topic, both nationally and in California. For instance, in 2013, California enacted a law (AB 218) and added Labor Code section 432.9 precluding state agencies and cities from inquiring about or using information related to criminal conviction history except in specified instances. Similarly, in 2014 and 2016 the cities of San Francisco and Los Angeles, respectively, enacted "Fair Chance" Ordinances limiting how and when employers could consider criminal conviction information regarding applicants.

The Fair Employment and Housing Council recently issued final regulations regarding “Consideration of Criminal History in Employment Decisions” which took July 1, 2017.

<https://www.dfeh.ca.gov/files/2017/03/FinalText-CriminalHistoryEmployDecRegulations.pdf>

Against this backdrop, AB 1008 would amend the Fair Employment Housing Act to preclude most private employers from inquiring about an applicant’s criminal record or conviction history until after a conditional employment offer is made, and would impose new notice and disclosure requirements if this information is sought.

Specifically, new Government Code section 12952 would preclude employers from including on employment applications any question seeking the disclosure of an applicant’s criminal history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made. It would also preclude the consideration or dissemination of the following specific items during any background checks: (a) arrests not followed by conviction; (b) referral to or participation in a pretrial or post-diversion program; (c) convictions that have been sealed, dismissed, or expunged pursuant to law; (d) misdemeanor convictions for which no jail sentence can be imposed, or infractions; and (e) misdemeanor convictions for which three years have passed since the date of conviction, excluding any period of incarceration, or felony convictions for which seven years have passed since conviction, excluding any period of incarceration. It would also prohibit employers from interfering with or restraining the exercise of any right provided under this new section.

Before denying a position based upon an applicant’s conviction history, the employer would also need to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position. Employers would need to consider all of the following: (a) the nature and gravity of the offense; (b) the time that has passed since the offense and completion of any sentence; and (c) the nature of the job held or sought. Employers would also be specifically directed to conduct this individualized assessment consistent with the Equal Employment Opportunity Commission’s 2012 Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions. The EEOC’s Guidance is available at:

[https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

If an employer makes a preliminary decision to deny employment, the employer must provide written notice of this intent to the applicant and contain all of the following: (a) an identification of the conviction that is the basis for the denial; (b) a copy of the conviction history report, if any; and (c) notice of the applicant’s right to respond and the deadline for doing so. The notice in new subsection (c) would need to inform the application they may challenge the accuracy of the information contained in the employer’s letter and/or the submission of evidence of rehabilitation or mitigating circumstances.

The applicant will then have at least ten business days to respond before a final employment decision can be made.

Employers would need to consider the applicant’s response before making a final decision. Notably, while the bill originally would have precluded the employer from disqualifying an applicant who showed evidence of mitigation or rehabilitation, this prohibition was removed by recent amendments. However, if an employer does make a final decision to deny an applicant in whole or in part upon

prior conviction history, the employer must notify the employee in writing of the following: (a) the final denial or disqualification; (b) any existing procedure the employer has for the applicant to challenge this decision; and (c) the right to file a complaint with the Department of Fair Employment Housing.

New section 12952 would not apply in the following specifically enumerated exceptions contained in proposed subsection (d): (1) for a position with a state or local agency required to conduct a conviction history background check; (2) for a position with a criminal justice agency, as defined in Penal Code section 13101; (3) for a position as a Farm Labor Contractor (as defined in Labor Code section 1685); and (4) for a position where an employer or agent is required to take an action pursuant to any state, federal or local law that requires criminal background checks for employment purposes or that restricts employment based on criminal history, including the Securities Exchange Act.

This bill would also repeal current Labor Code section 432.9, recently added in 2013, which governs when state or local agencies may inquire about criminal convictions. These issues would now be governed by the FEHA and the Government Code rather than the Labor Code.

Lastly, this bill specifies that it would not affect the rights and remedies afforded by any other law, "including any local ordinance[s]," which is potentially significant given the different requirements contained within the San Francisco and Los Angeles Fair Chance Ordinances.

**Status:** Narrowly passed the Assembly, and has passed the Senate's Labor and Industrial Relations Committee and is pending in the Judiciary Committee.

### **Expanded Protections for Military Service Members (AB 1710)**

Military and Veterans Code section 394 presently prohibits any discrimination against an officer, warrant officer or enlisted member of the military or naval forces of the state or the United States because of that membership, including with respect to employment. This bill would expand these prohibitions to include not only the denial of or disqualification from employment, but also the "terms, conditions or privileges" of that service member's employment.

**Status:** Unanimously passed the Assembly, and unanimously passed the Senate's Veterans Affairs and Judiciary Committees and is pending in the Appropriations Committee.

### **Prohibition on Reproductive Health Discrimination (AB 569)**

This bill would add Labor Code section 2810.7 to prevent employers from taking any adverse employment action based on the employee's reproductive health care decisions, including the use, timing or method of any drug, device or medical service related to reproductive health by an employee or an employee's dependent. It would also prohibit employers from requiring an employee to sign a code of conduct or similar document that purports to deny any employee the right to make his or her own reproductive health care decisions, including the use of a particular drug, device or medical services. Employers that provide employee handbooks would need to include notice of the employee's rights and remedies under this new section.

This bill appears intended to narrow the so-called “ministerial” exemption from FEHA for religious organizations, and to be in response to a recent case in which a religious school employee was discharged after she became pregnant although unmarried in violation of her employer’s Code of Conduct.

**Status:** Passed the Assembly and the Senate’s Labor and Industrial Relations Committee and is pending in the Judiciary Committee.

### **Expanded Harassment Training and New Poster Requirements (SB 396)**

California’s Fair Employment and Housing Act presently requires employers with more than 50 employees to provide at least two hours of training and education regarding sexual harassment and abusive conduct to all supervisory employees within six months of promotion and once every two years. This bill would amend Government Code section 12950.1 and require this training include the prevention of harassment based on gender identity, gender expression and sexual orientation.

Notably, the training and education would need to include practical examples inclusive of such harassment, and must be presented by trainers or educators with knowledge and expertise in those additional areas. If this bill is enacted, the DFEH foreseeably would update its regulations regarding who is a “qualified” trainer to specify the knowledge and expertise requirements regarding these additional training topics.

New Government Code section 12950.3 would require employers with more than 50 employees who provide services to the state under a contract to provide at least two hours of classroom or effective interactive training and education specified in section 12950.1, including the prevention of sexual harassment, abusive conduct and gender identify/expression and sexual orientation. This provision may be redundant of existing provisions and may be removed by future amendments.

This bill would also require the DFEH to develop a poster regarding transgender rights that employers would be required to post in a prominent and accessible location in the workplace.

**Status:** This bill appears unopposed and passed the Assembly’s Labor and Employment Committee with some bi-partisan support and is pending in the Assembly’s Appropriations Committee. Because these employment-related provisions were only recently amended due to the “gutting and amending” of an education-related bill, it would still need to be passed by the Senate.

### **Expanded Harassment Training for Farm Labor Contractors (SB 295)**

While California presently provides that farm labor contractor licenses will not be issued unless the applicant certifies certain employees have received sexual harassment training, this law would expand these requirements. For instance, it would require that training for each agricultural employee be in the language understood by the employee. It would also require a licensee, as part of their application, to provide the Labor Commissioner with a complete list of sexual harassment training materials and resources utilized to provide sexual harassment training to the agricultural employees in the preceding year. It would also require the licensee to identify the total number of agricultural

employees who received sexual harassment training, and for the Labor Commissioner to publish the total number of agricultural employees trained the previous calendar year.

**Status:** Passed the Senate with some bi-partisan support and has passed the Assembly's Labor and Employment and Judiciary Committees and is pending in the Appropriations Committee.

### **Increased Salary Threshold for Overtime Exemption (AB 1565)**

Presently, the salary threshold for being exempt from overtime is \$43,680 for employers with 26 or more employees, and \$41,600 for employers with 25 or fewer employees, and these levels will increase annually as California's recently-enacted five-step minimum wage increase takes effect (SB 3). This bill would add new Labor Code section 514.5 to set the overtime exemption salary level at \$47,476 annually (or \$3,956 monthly), which is the amount proposed in the stayed DOL overtime regulations. This new salary threshold level would govern for overtime purposes until surpassed by the generally applicable formula for overtime purposes in California (i.e., twice the minimum wage for full-time employment), which is currently slated to occur in January 2019 for employers with 26 or more employees, and in January 2020 for employees with 25 or fewer employees.

Notably perhaps, at least for now, AB 1565 does not distinguish on the basis of employer size, so potentially all employers would be immediately subject to the \$47,476 threshold level if enacted.

**Status:** Passed the Assembly despite some bi-partisan opposition and has passed the Senate's Labor and Industrial Relations Committee and is pending in the Appropriations Committee.

### **Expanded Labor Commissioner Powers (SB 306)**

While Labor Code section 98.7 authorizes the Labor Commissioner to investigate discrimination and retaliation claims and order certain relief after an investigation and determination, this bill would materially expand these powers. For instance, new Labor Code section 98.7(a)(2) would permit the Labor Commissioner to commence an investigation, even without receiving a complaint, of an employer that it suspects retaliated against an individual in violation of any law under the Labor Commissioner's jurisdiction. It would also authorize the Labor Commissioner to proceed without a complaint in those instances where suspected retaliation has occurred during the course of adjudicating a wage claim under Labor Code section 98.5, during a field inspection pursuant to Labor Code section 90.5, or in instances of immigration-related threats in violation of sections 244, 1019 or 1019.1.

It would also authorize the Labor Commissioner to seek immediate temporary injunctive relief during an investigation and before a determination is made. Specifically, upon finding reasonable cause to believe an employer has engaged in or is engaging a violation, the Labor Commissioner would be authorized to petition the superior court for appropriate temporary or preliminary injunctive relief. The court would be authorized to award such relief, and may consider not only the harm resulting directly to an individual, but also the "chilling effect" on other employees asserting their rights in determining whether temporary injunctive relief is appropriate.

Notably, if the employee has been discharged or faced adverse action for raising a claim of retaliation or asserting rights under any law within the Labor Commissioner's jurisdiction, the court shall order appropriate injunctive relief on a showing of reasonable cause. This bill does not identify the injunctive relief available, but presumably it could include reinstatement or a stay on the adverse employment action. This injunction would remain in effect until the Labor Commissioner issues a determination or completes its review, whichever is longer, and the injunctive relief would not be stayed during an employer's appeal.

This bill would also amend section 98.7(c) to provide that if the Labor Commissioner is a prevailing party in an enforcement action under this section, the court "shall" award the Labor Commissioner its reasonable attorney's fees and costs against the employer. It would further provide that an employer who willfully refuses to comply with a court order to reinstate/rehire an employee or to post any required notice or to cease and desist, shall also be liable for penalties up to \$100 per day of non-compliance up to a maximum of \$20,000. Any penalty collected pursuant to this section would be paid to the affected employee.

Presently, the Labor Commissioner must enforce a determination through a civil action. However, new Labor Code section 98.74 would enable the Labor Commissioner, if it determines a violation has occurred, to issue a citation to the person responsible for the violation, directing that person to cease the violation and to take actions necessary to remedy the violation, including rehiring or reimbursement of lost wages and posting notices. Employers would have the ability to dispute the Labor Commissioner's determination by seeking judicial review in superior court but the burden would now be on the employer to bring a court action to dispute the Labor Commissioner's determination rather than upon the Labor Commissioner to bring a court action to enforce its orders. Employers who willfully refuse to comply with a final order under this section, including failing to reinstate or post notices, would be subject to a civil penalty of \$100 per day up to a maximum of \$20,000.

Lastly, this bill would amend Labor Code section 1102.5, which authorizes employees to file civil actions related to whistleblowing, to seek temporary or preliminary injunctive relief under proposed new Labor Code section 1102.62. Under this section, the employee could petition for injunctive relief, which the court could order as it deems just and proper.

***Status:*** Passed the Senate on a party-line vote, and has similarly passed the Assembly's Labor and Employment Committee on a party-line vote and is pending in the Assembly's Appropriations Committee.

### **Rest Period Rules for Emergency Medical Service Providers (AB 263)**

This bill would add multiple new Labor Code provisions regarding the rights and working conditions of emergency medical service workers. Specifically, new Labor Code section 226.9 would identify "rest period" rules specific to employers that provide emergency medical services as part of an emergency medical services system or plan, as defined in the Health and Safety Code.

While it would retain the generally applicable rule requiring 10-minute rest breaks for every four hours worked, it would specify that the employer must relinquish control and relieve the employee of

all duties except that the employer may require employees to monitor certain devices (e.g., pagers, cellular phones, etc.) during rest and recovery periods to provide for the public health and welfare. It would permit employers to interrupt a rest period and require the employee resume work if either the employer receives an emergency call which requires the emergency vehicle lights and siren to be activated, or an unforeseeable, natural or man-made disaster. If the rest period is interrupted for either of these reasons, the employer shall pay one hour of pay at the regular rate, provide an equivalent rest period as soon as practicable during, and also identify on the itemized wage statement the amount owed for interrupted rest periods.

New Labor Code section 226.10 would include corresponding provisions relating to meal periods, but also specify that its provisions apply regardless of any written agreements for “on duty” meal periods, and further require employers to maintain accurate time records relating to meal periods and interruptions.

Proposed new Labor Code section 226.11 would identify specific rest break and meal period rules for employers certified by the Federal Aviation Administration that conduct business as an air ambulance service.

***Status:*** Passed the Assembly with some bi-partisan support, and has passed the Senate’s Labor and Industrial Relations Committee and is pending in the Appropriations Committee.

### **Gratuities for Gig Economy Employers (AB 1099)**

While Labor Code section 351 currently identifies various rules regarding the payment of gratuities to employees, this bill would add new Labor Code section 352 regarding the payment of gratuities by debit card in the so-called “gig economy.” While this bill originally targeted specifically-enumerated employers (e.g., hotels, restaurants), it has been amended to apply only to an “entity” that uses an online-enabled application or platform to connect workers with customers to engage the workers to provide labor services, including but not limited to a transportation network company (as defined in Public Utilities Code section 5431). It would require such entities that permit a patron to pay for services performed by a worker by debit or credit card to also accept a debit or credit card for payment of the gratuity. It would also provide that payment of the gratuity by a patron using a credit card must be made to the worker not later than the next regular payday following the date the patron authorized the credit card payment.

***Status:*** Passed the Assembly on a largely party-line vote and is pending in the Senate’s Labor and Industrial Relations Committee. However, it appears this bill will be pulled in light of Uber’s recent agreement to allow drivers to receive tips.

### **Payday Rules for Barbers and Cosmetologists (SB 490)**

While Labor Code section 204 identifies generally applicable payday rules, this bill would enact new Labor Code section 204.11 to identify rules relating to the payment of commission wages paid to employees licensed under the Barbering and Cosmetology Act. If enacted, commission wages paid to such employees would be due and payable twice during each calendar month on pre-designated paydays. Wages paid to an employee for which the license is required, when paid as a percentage of

a flat sum portion of the amount paid to the employer by the client recipient of such services, constitute commissions provided that the employee is paid, in every pay period worked, a regular hourly rate of at least two times the state minimum wage in addition to commissions. The bill further provides that the employer and employee may agree on a commission in addition to the base hourly rate.

**Status:** Unanimously passed the Senate, and has unanimously passed the Assembly's Labor and Employment and Appropriations Committees. It appears unopposed and an Assembly floor vote is expected shortly.

### **Whistleblower Protections for Legislative Employees (AB 403)**

Known as the Legislative Employee Whistleblower Protection Act, this bill would prohibit interference with the right of legislative employees to make protected disclosures of ethics violations and would prohibit retaliation against employees who have made such protected disclosures. It would also establish a procedure for legislative employees to report violations of these prohibitions to the Legislature, and would impose civil and criminal liability on an individual violating these protections.

This bill appears very similar to AB 1788 which unanimously passed the Assembly before stalling in the Senate's Appropriations Committee.

**Status:** Unanimously passed the Assembly, and has unanimously passed the Senate's Judiciary Committee and is pending in the Appropriations Committee.

### **Illness and Injury Prevention Program Disclosures (AB 978)**

The California Occupational Safety and Health Act of 1973 requires every employer to establish and maintain an effective illness and injury prevention program (IIPP). This IIPP must be in writing, except in certain circumstances, and must contain certain statutorily-enumerated items such as identifying the person responsible for the program, a training program, and specification of compliance and reporting methods.

Responding to concerns that many employees, particularly non-English speaking employees, are unaware of an employer's IIPP, this bill would amend Labor Code section 6401.7 and, impose new disclosure requirements regarding these IIPPs. For instance, new subsection (e)(2) would require employers who receive a written request from a current employee or their authorized representative to provide a paper or electronic copy of the IIPP (including all required attachments) within ten business days free of charge.

The employer would be permitted to designate the "authorized representative" to whom such requests should be directed, and to take reasonable steps to verify the identity of a current employee or his or her representative requesting a copy. An "authorized representative" would be defined as an attorney, a health and safety professional, a non-profit organization advocate or an immediate family member if asked for assistance by a current employee and who has been authorized in writing by a current employee to request and receive a copy of the written IIPP. A recognized or certified



collective bargaining agent would automatically qualify as an authorized representative for purposes of this disclosure requirement.

If an employee alleges a failure to comply with these disclosure requirements, the employer may assert impossibility of performance provided this impossibility is not caused by or resulting from a legal violation.

**Status:** Passed the Assembly on a party-line vote, and has passed the Senate's Labor and Industrial Relations Committee and is pending in the Appropriations Committee. A similar bill (AB 2895) stalled in 2016.

### **Original Contractor Liability for Subcontractor Labor Code Violations (AB 1701)**

This bill would enact new Labor Code section 218.7 imposing liability upon direct contractors with construction contracts with the state for any debt owed to a wage claimant incurred by a subcontractor acting at any tier. The direct contractor would be liable for any wage, fringe or other benefit payment or contribution, including interest and state tax payment owed to a wage claimant, and excluding penalties or liquidated damages unless otherwise provided by law. It would also authorize the wage claimant to sue directly or through the Labor Commissioner or district attorney, and would prohibit the direct contractor from attempting to evade this law's requirements.

**Status:** Passed the Assembly, and has passed the Senate's Labor and Industrial Relations Committee and is pending in the Judiciary Committees.

### **Special Advocacy Services for Employees Injured by Domestic Terrorism (AB 44)**

This bill originally sought to create various exceptions from California's Workers' Compensation system for employees and first responders injured by acts of "terrorism" or "workplace violence." As recently amended, however, it would instead add new Labor Code section 4600.05 to require employers to provide immediately accessible advocacy services for employees injured in the course of employment by acts of "domestic terrorism," as defined by Title 18 of the United States Code.

The bill's provisions would apply retroactively to employees and first responders injured in the San Bernardino terrorist attack and any other act of domestic terrorism that occurred before January 1, 2018.

**Status:** Unanimously passed the Assembly and is pending in the Senate's Labor and Industrial Relations Committee.

### **Expanded Workers' Compensation Exception for Board of Director Members (SB 189)**

While Workers' Compensation's definition of "employee" includes most officers and directors of private corporations, it presently excludes officers and directors of quasi-public or private corporations (as defined) who own at least 15% of the issued stock and sign a sworn written waiver of their status and intent to waive workers' compensation protections. This bill would amend Labor Code section 3352 and expand this exception to such officers or directors who own at least 10% (rather than the

current 15%) of outstanding stock and execute a written waiver. It would also expand this exception to owners of certain professional corporations who execute a written waiver of their workers compensation rights and state under penalty of perjury that they are covered by a health insurance policy or health care service plan.

**Status:** Unanimously passed the Senate and is pending in the Assembly's Insurance Committee.

### **Mandatory Annual Disbursement of Supplemental Right-to-Work Disbursements (AB 553)**

Within California's Workers' Compensation system, there is a \$120,000,000 fund designed to provide supplemental return-to-work payments intended to compensate those injured workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. This bill would amend Labor Code section 139.48 to require the Administrative Director to distribute the \$120,000,000 annually to eligible workers (as specified) and would require, commencing with the end of the 2017 calendar year, that any remaining program funds available after these supplemental payments are made be distributed pro rata to those eligible workers, subject to a \$25,000 limit per calendar year. It would also prohibit any person, including an attorney, from collecting a fee or commission for providing assistance to a worker who applies for benefits under this program.

**Status:** Passed the Assembly, and passed the Senate's Labor and Industrial Relations Committee and is pending in the Appropriations Committee.

### **Workforce Development Task Force (AB 1111)**

Entitled the Removing Barriers to Employment Act, this bill would require the Labor and Workforce Development Agency and the Labor Commissioner to create a grant program designed to identify and assist individuals with barriers to employment.

**Status:** Passed the Assembly, and unanimously passed the Senate's Labor and Industrial Relations Committee and is pending in the Appropriations Committee.

### **Attorneys' Fees for CBA-Related Motions to Compel Arbitration (AB 1017)**

Labor Code section 1128 presently provides that in the private employment context, the court shall award attorney's fees to a party to a collective bargaining agreement who prevails on a motion to compel arbitration absent substantial and credible issues presented about whether the dispute was subject to arbitration. This bill would extend this remedy to both public and private employment, but would only permit fee awards against a labor organization or an employer.

**Status:** Overwhelmingly passed the Assembly, and has passed the Senate's Public Employee and Retirement and Judiciary Committees and is pending in the Appropriations Committee.

### **Health Facility Whistleblower Protections (AB 1102)**

This industry-specific bill would amend Health and Safety Code section 1278.5, which prevents discrimination or retaliation against employees, patients or customers who complain about health

care-related violations. It would increase the maximum fine for a misdemeanor violation of these provisions to \$75,000.

***Status:*** Unanimously passed the Assembly and the Senate's Health and Judiciary Committees and is pending in the Appropriations Committee.

### **OSHA Training Requirement for Commercial Cannabis Providers (AB 1700)**

This bill would require that applicants for a state license under the Medical Cannabis Regulation and Safety Act or the Control Regulate and Tax Adult use of Marijuana Act of 2016 meet certain OSHA training standards. Specifically, under amended Business and Professions Code section 19322, applicants must certify that they employ, or will employ within one year of receiving a license, an employee who has completed an OSHA 10-hour general industry course based on federal OSHA regulations.

***Status:*** Passed the Assembly and is now pending in the Senate's Appropriations Committee.