CALIFORNIA LEGISLATIVE SUMMARY

If 2018 was the year of the #MeToo movement, and 2019 was the year of AB 5 and worker misclassification issues, 2020 will clearly be known as the year of "COVID 19." Relatively unheard of before 2020 (and even as of early March 2020), this pandemic has completely reshaped the legislative agendas at the federal, state and local levels.

At the federal level, Congress has quickly enacted and President Trump has already signed both the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The FFCRA took effect on April 1, 2020, and required most employers to provide emergency paid sick leave and emergency medical leave for various purposes related to the Coronavirus, and to post a new FFCRA poster. The CARES Act provided much needed unemployment benefits for displaced workers and forgivable loans (aka "paycheck protection") for small businesses that retained workers during this crisis. The federal agencies, and in particular the Department of Labor (DOL), have continually provided updated information regarding COVID-19 issues, including the FFCRA and the CARES Act. For instance, the DOL has an entire page devoted to COVID-19 issues, including very informative Frequently Asked Questions and the required poster, not only in English but also nine other languages.

This pandemic has also proven to be the only thing that can stop the legislative process in Sacramento, as the Legislature remains on suspension and is not expected to reopen until at least May 13, 2020. Because this ongoing suspension has vacated crucial deadlines and in light of the public emergency focus, the Legislature has signaled that even when it reopens, it will focus on a much smaller number of bills, most of which will involve public emergency issues. Since the COVID-19 pandemic has impacted nearly every employer and employee, not surprisingly a number of these will focus on employment-related items, including the already introduced bills that would:

- Amend Labor Code section 230.8 to expand the protected time-off related for employees affected by school/childcare closures (SB 1383);
- Allow employees to use already accrued paid sick leave during work closures due to "public emergencies" (AB 3123);
- Require all employers to provide additional paid sick leave related to "public emergencies" (AB 2887); and
- Expand California's Paid Family Leave benefits to employees who need time off related to COVID-19 purposes.

It is anticipated that many more such COVID-19 employment bills will be introduced before the Legislature convenes, and that the majority of bills previously introduced during the 2020 session will simply stall.

Finally, various municipalities have also begun enacting their own COVID-19 related provisions. For instances, Los Angeles has already enacted and at least three others (San Francisco, San Jose and Oakland) are considering supplemental paid sick leave bills for COVID-19 purposes. While each municipality's version differs in the details, they are uniform in their intent to require the larger employers (e.g., 500 or more employees) exempted from the FFCRA to provide COVID-19-related paid sick leave.

As noted above, it remains to be seen when the California Legislature will resume operations and what the new legislative calendar will be, or even what bills are being considered. However, listed below is an overview, arranged largely by subject matter, of the key employment bills previously introduced, including the recently-introduced COVID-19 proposals.

PENDING BILLS

Leaves of Absence/Time off/Accommodation Requirements

Additional Paid Sick Leave during Public Emergencies (AB 2887)

This bill would amend California's statewide paid sick leave law (Labor Code section 245 *et seq.*) to require employers to provide additional paid sick leave in the event of a state-declared public health emergency (such as COVID-19) for employees to immediately use, regardless of how long the employee has been employed by that employer.

Full-time employees would be granted a specified number of paid sick days sufficient to provide the employee with 14 continuous days from work, or the sufficient amount of quarantine time recommended by the World Health Organization, without reduction in pay. Part-time or hourly employees will be entitled to a specified number of paid sick days that the employee was scheduled to work, or sufficient amount of quarantine time recommended by the World Health Organization, or, if the employee is not scheduled to work, the number of hours regularly worked in a 14-day period.

This additional "family care and medical leave due to a medical crisis" could be used for (a) leave to care for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner affected by the public health crisis; (b) leave to care for a child because of a school closing related to the public health crisis; or (c) leave for an employee affected by the public health crisis.

This public health emergency paid sick leave would be separate from and in addition to the paid sick leave that the employer otherwise is required to provide under California's current statewide laws. This law also would not preempt other laws providing greater sick leave or protections to an employee. However, the bill law also states it is not intended to discourage or prohibit an employer from providing paid sick leave that is more generous than these changes would require.

A "stated declared public health emergency" triggering these obligations would be limited to a state of emergency proclaimed by the Governor under the California Emergency Services Act.

Separately, this bill would also require the DLSE to set up a program (funded by the Legislature) to provide paid sick days for independent contractors and day laborers to use for "family care and medical leave" during a state-declared public health state of emergency.

Los Angeles Enacts Supplemental Paid Sick Leave Ordinance (and Other Cities are Considering Similar Ordinances)

On April 7, 2020, Los Angeles Mayor Eric Garcetti issued an Executive Order essentially modifying and then enacting (albeit replacing) the Supplemental Paid Sick Leave Ordinance passed by the Los Angeles City Council on March 27, 2020. The now-effective Order (and original Ordinance) is intended to largely mirror and supplement the federal Families First Coronavirus Response Act's (FFCRA) provisions regarding Emergency Paid Sick Leave, while expanding it to the employers exempted from the FFCRA (i.e., those with 500 or more employees). In this regard, the Los Angeles Supplemental Paid Sick Leave is consistent with the FFCRA in requiring covered employers provide up to 80 hours of supplemental paid sick leave for full-time employees (with different amounts for part-time employees) with the supplemental paid sick leave being up to $511 per day and $5,110 in the aggregate.

However, while the Supplemental Paid Sick Leave Order includes the same bases for leave as the FFCRA (e.g., quarantine orders, care for self or family members, care for children home to school/day care closures), it also allows this Supplemental Paid Sick Leave to be used for two additional purposes: (1) the employee takes time off work because the employee is at least 65 years old or has a health condition such as heart disease, asthma, lung disease, diabetes, kidney disease or weakened immune system; and (2) in addition to caring for children under the age of 18 because of a school or child care provider closure, the employee's family member needs care because a senior care provider is closed.

Notably, Mayor Garcetti's Order scaled back the definition of "employer" in the Los Angeles Ordinance to soften the economic impact upon employers affected by COVID-19 closures. Accordingly, the now-effective Order only applies to employers with either: (1) 500 or more employees within the City of Los Angeles; or (2) 2,000 employees within the United States (whereas the originally passed Ordinance would have applied to any employers with 500 or more employees regardless of where employed). The Mayor's Order also specifically exempts from the Supplemental Paid Sick Leave Requirements (e.g. up to 80 hours for full-time employees) the following categories of employees or employers:

- Emergency and Health Service Personnel (as defined);
- Critical Parcel Delivery (i.e., employers providing "global parcel delivery services");
- Employers already providing more than 160 hours of paid leave annually;

- New Businesses (as defined, but generally including businesses that started in or relocated to the City of Los Angeles after September 4, 2019);
- Government Agencies; and
- Closed Businesses and Organizations (as defined, but generally including businesses or organizations closed or not operating for 14 or more days to a city official's COVID-19 emergency order).

The Ordinance also prohibits retaliation, and identifies various remedies, including reinstatement, back pay and Supplemental Paid Sick Leave, and reasonable attorneys' fees.

The full text of the now-effective Los Angeles Supplemental Paid Sick Leave Order is available here.

The City Councils for San Francisco, Oakland and San Jose have each passed similar "supplemental paid sick leave" ordinances, but these have not yet been signed by their respective mayors.

Worker Protections due to Coronavirus Impacts (AB 3123)

This bill is intended to address potential impacts upon employees affected by public health emergencies, including the coronavirus. Accordingly, it would allow employees to use their earned sick leave if their place of business is closed by order of a public official due to a public health emergency, or if the employee is providing care or assistance to their child, whose school or childcare provider is closed by order of a public official due to a public health emergency. It would also prohibit retaliation by an employer against an employee complying with an isolation or quarantine order issued by a public official due to a public health emergency.

Expanded Time-Off Protections for School-Related Closures (SB 1383)

Presently, Labor Code section 230.8 requires employers with 25 or more employees to provide up to 40 hours of unpaid time off for an employee who is a parent (as defined) of a child (as defined) to (1) enroll in school or participate in school-related activities; or (2) to address a child care or school emergency. This bill would expand these requirements to all employers (regardless of size).

It would also expand the "emergency" situation to include a school closure pursuant to a state of emergency declared by a federal, state or local government agency. Time off pursuant to this emergency situation would not be limited to 40 hours and may be extended to the duration of the emergency.

Paid Family Leave Expansion for COVID-19 Purposes (SB 943)

This bill would, until January 1, 2021, allow Paid Family Leave wage replacement benefits for workers who take time off to care for a minor child whose school has been closed due to the COVID-19 virus outbreak. The additional costs of this extension would be funded from the State's General Fund.

If enacted, it would take effect immediately as an urgency statute.

Paid Sick Leave for Behavioral Conditions (AB 1844)

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

"Kin Care" Amendments (AB 2017)

This bill would amend California's so-called "kin care" statute (Labor Code section 233) to specify that the designation of sick leave for kin care purposes shall be made at the sole discretion of the employee. The author states it is intended to ensure the employee, not the employer, gets to designate how sick leave is credited and to preclude situations where an employer charges a sick day against kin care purposes, thus reducing the amount of kin care usage available for later purposes.

Status: Scheduled for hearing on March 18, 2020 in the Assembly Labor and Employment Committee.

Bereavement Leave (AB 2999)

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

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

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

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

Paid Family Leave Changes in Proposed Budget

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

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

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

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

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

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

The definition of "family care and medical leave" would also be expanded to include "qualifying exigencies" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the United States Armed Forces (as defined elsewhere).

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

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

CFRA Expansions and Other Leave Time Proposals (AB 2992)

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

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

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

While CFRA presently defines a child as someone under 18 years of age, these amendments would expand that definition to a person under 25 years of age. For purposes of the new bereavement leave (discussed above), the definition of child would include any person regardless

of age or dependency status. "Sibling" would be defined as "a biological, foster or adoptive sibling, a stepsibling, or a half-sibling."

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

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

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

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

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

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

Further, while Labor Code section 230.1 presently only prohibits employers with 25 or more employees from discriminating against victims of sexual assault, domestic violence or stalking who take time off to obtain medical attention, this bill expands this protection to all employers, regardless of size. It would also expand these leave provisions to include attending the funeral (or equivalent), or making arrangements necessitated by the death, or grieving the death of an employee's immediate family member or household member who is deceased as a result of crime or abuse. It would also make corresponding changes as those discussed above to section 230 regarding the definition of victim and household member, and regarding the provision of up to six workweeks leave in a 12-month period.

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

Status: Pending in the Assembly.

"Qualifying Exigency" Changes for Paid Family Leave Purposes (AB 2399)

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

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

Status: Pending in the Assembly Insurance Committee.

Harassment/Discrimination/Retaliation

FEHA Accommodation Protections for Medicinal Cannabis Users (AB 2355)

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

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

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

Anticipating the potential conflict with federal law, it would also specifically provide that employers would not be prohibited from refusing to hire or discharging a "qualified patient or person with an identification card" if hiring the individual or failing to discharge the employee would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations, including the Department of Transportation regulations or the Drug-Free Workplace Act of 1988. This bill would also exempt employers from these new cannabis protections, including reasonable accommodation, if the employer requires all employees and job applicants to be drug and alcohol free for legitimate safety reasons, as required by federal and state laws, or if the employer is required to conduct applicant and ongoing testing of employees by those laws or regulations.

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

A similar bill (AB 2069) stalled in 2018.

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

FEHA Protections for Drug Rehabilitation Programs (AB 882)

While Labor Code section 1025 presently requires employers with 25 or more employees to reasonably accommodate an employee who voluntarily enters an alcohol or drug rehabilitation program, this bill would include additional discrimination protections in the Fair Employment and

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

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

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

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

This bill would add new Government Code section 12940.5 to specify that an intentional FEHA violation occurs if any of the enumerated protected characteristics were a motivating factor in the employment action or decision, even if other factors may also have motivated the action or decision. This change is presumably intended to amend or overrule the so-called "same decision" defense whereby an employer argues these other factors would have resulted in the same decision, even if a protected characteristic also played a role.

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

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

Employer Responsibility for Harassment by Contractors (AB 2043)

An emerging trend in California is to have client employers and labor contractors share responsibility and civil liability for certain violations (e.g., failure to pay wages or secure workers' compensation coverage) or for actions taken by the contractor's employees. Another trend has been to expand the circumstances under FEHA for which employers may be liable for their

harassment of others (e.g., interns, volunteers) or the harassment of their employees by others (e.g., non-employees). Continuing both trends, this bill would amend FEHA to specify when an employer may be responsible for a contracted employee's harassment of the employer's employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract in the workplace.

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

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

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

Status: Scheduled for hearing on March 18, 2020 in the Assembly Labor and Employment Committee.

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

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

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

Status: Pending in the Senate Judiciary Committee.

Harassment Training for Minors in Entertainment Industry (AB 3175)

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

Training Exemption for Minors in the Entertainment Industry (AB 3369)

This bill would clarify that otherwise mandatory sexual harassment training for minors in the entertainment industry would remain governed by Labor Code section 1700.52 rather than Government Code section 12950.1.

Status: Pending in the Assembly.

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

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

Status: Pending in the Assembly.

<u>Independent Contractors/Worker Classification</u>

"AB 5" Amendments for Photographers, Photojournalists and Freelance Writers (AB 1850)

Drafted by AB 5's author, this bill would lift the current 35 submission annual limit for specified exemptions (e.g., photographers, photojournalists, freelance writers etc.) and instead use revised criteria to determine if these professions are governed by the *Borello* standard rather than *Dynamex's* ABC Test to determine worker classification.

Photographers or photojournalists would qualify for this exemption if they work under a contract that specifies in advance the rate of pay, intellectual property rights and obligation to pay by a certain time, as long as the services are not replacing an employee, and the freelancer does not primarily perform the work at the hiring entity's business location and the freelancer is not restricted from performing work for more than one hiring entity. This particular exemption would not apply to individuals working on motions pictures (as specified).

The exemption for freelance writers, editors, or newspaper cartoonists would require the same criteria to be satisfied (e.g., advance identification of rate of pay, no prohibitions on working for other entities), but would not involve the motion picture limitation applicable to photographers.

Status: Pending in the Assembly Labor and Employment Committee.

Proposed Repeals of AB 5 (AB 1928/SB 806)

AB 1928 would essentially repeal AB 5 and *Dynamex's* "ABC Test" in its entirety and instead require the so-called *Borello* test be used for determining whether someone is an employee or an independent contractor.

SB 806 would also essentially overrule *Dynamex* and repeal AB 5, but instead of simply reverting to the prior *Borello* test, it would identify a new standard to determine whether someone is an employee or an independent contractor. Specifically, a person providing services would be presumed to be an employee unless the hiring entity demonstrates the person is free from the control and direction of the hiring entity in performing the work, both under the contract for the performance of the work and in fact. In making this assessment, a preponderance of factors, with no single factor being determinative, shall determine whether the worker is free from the direct control of the hiring entity.

If the hiring entity satisfies the above standard, it would also have to establish either that (a) the person performs work that is either outside the usual course of the hiring entity's business or the work is performed outside the hiring entity's place of business or the worker is worker is responsible for the costs of the place where the work is performed; or (b) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

If enacted, SB 806's new standard would apply to all pending civil or administrative actions filed on or after January 1, 2018 relating to classification of workers.

Status: AB 1928 is pending in the Assembly but failed an initial procedural vote. SB 806 is pending in the Senate Labor, Public Employment and Retirement Committee.

Proposed One-Year Delay of AB 5 (AB 2075)

This bill would delay until January 1, 2021 the so-called ABC Test set forth in new Labor Code section 2750.3 after AB 5 was enacted. Until that new date, any hiring entity liability based upon the alleged improper classification of workers as independent contractors shall be based upon the multifactor *Borello* test that otherwise applied before the California Supreme Court's *Dynamex* decision. If enacted, AB 2075 would apply retroactively to all claims not yet finalized for liability based upon facts or conduct occurring before January 1, 2021.

Flexible Work Options as a Constitutional Amendment (ACA 19)

Known as the Right to Earn a Living Act, this bill would amend the California Constitution in several respects. First, it would provide that determinations of whether a person is an employee or an independent contractor shall be governed by the prior *Borello* test, presumably instead of the so-called ABC Test or the recently-enacted AB 5.

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

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

"Third" Classification for Gig Workers Contemplated (SB 1039)

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

Status: Pending in the Senate.

Further Amendments to AB 5 (SB 900)

This bill, proposed by a Democrat, would recast and then expand many of the exemptions within AB 5. For instance, it would repeal current Labor Code section 2750.3, which was enacted by AB 5 in 2019, and instead recast its provisions within an entirely new Labor Code article, commencing with section 2775.

It would also expand various existing exemptions. For instance, while AB currently exempts licensed health care professionals (as defined), this bill would additionally exempt licensed professional clinical counselors, licensed clinical social workers or licensed marriage and family therapists performing professional services to or by a prescribed health care entity.

It would also exempt amateur athletic officials supervising an amateur sporting contest held by an amateur sports organization.

It would also exempt a franchisee (as defined) if certain requirements are met.

It would also expand the professional services exemption to include prescribed security researchers, appraisers and certified shorthand reporters.

It would expands the definition of "referral agency" within the business relationships exemption to include businesses that connect clients with service providers providing certified interpretation or translation services. It would also expand the definition of "tutor" to include a person who teaches curriculum that is proprietarily and privately developed or provides private instruction or supplemental academic enrichment services by using their own teaching methodology or techniques.

It would also exclude from the existing exemption for direct salespersons (as defined) a manufactured housing salesperson. It would also revise the conditions for exclusion to exempt persons performing demonstrations and sales of products in the home or business of the buyer.

It would also exclude from a retail or wholesale establishment, under the unemployment insurance provisions, a bus, van or truck from which the individual sells specified products.

Small Business Exemption from AB 5 (AB 1925)

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

Status: Pending in the Assembly Labor and Employment Committee.

Exemptions from AB 5 for Newspaper Carriers and Freelance Journalists (SB 867, SB 868 and AB 2796)

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

Secondly, while AB 5 presently exempts freelance journalists who submit no more than 35 submissions per year to the "putative employer," SB 868 would remove that cap and exempt "freelance journalists" from the ABC Test regardless of the number of content submissions per year. "Freelance journalists" would include freelance writers, editors, photographers, photojournalists, videographers, or newspaper cartoonists.

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

Status: SB 867 and SB 868 are pending in the Senate Labor, Public Employment and Retirement Committee. AB 2796 is pending in the Assembly Labor and Employment Committee.

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

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

Status: Pending in the Senate Labor, Public Employment and Retirement Committee.

Exemption from AB 5 for Musicians (SB 881)

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

Status: Pending in the Senate Labor, Public Employment and Retirement Committee.

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

This bill precludes AB 5 and *Dynamex's* "ABC Test" from being applied in the franchisee-franchisor relationship. Instead, a franchisee would not be deemed a franchisor's employee and will be considered an independent contractor unless a court determines the franchisor exercises actual control over the franchisee or the franchisee's employees beyond what a franchisor customarily exercises to control its trademarks, service marks, or trade dress. As with most other AB 5 exceptions, this would apply retroactively to the extent permitted by law.

Status: SB 967 is pending in the Senate Labor, Public Employment and Retirement Committee, and AB 2489 is pending in the Assembly Labor and Employment Committee.

Expanded "Contracting Business" Exception to AB 5 (AB 3281)

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

Status: Pending in the Assembly Labor and Employment Committee.

Additional Industry-Specific Exemptions from AB 5

A large number of Senate and/or Assembly bills (and sometimes both on the same subject matter) have been introduced to exempt additional occupations from AB 5. These include

proposed exemptions for referees or umpires for independent youth sports organizations (AB 3185/SB 963), health facilities [as defined] (SB 965/AB 2794)) licensed pharmacists (SB 966/AB 2457), transportation network companies (SB 990), physical therapists (AB 2458), modified exemptions for barbers and cosmetologists (AB 2465), transport network employees (AB 2822), certified shorthand reporters (AB 3136) licensed marriage and family therapists (AB 2793), livestock judges (AB 2497) and additional land surveyors/landscape architects/geologists or geophysicists (AB2823).

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

Wage and Hour

Annual Pay Data Reports (SB 973)

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

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

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

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

This bill would permit, but not require, employers to include a section providing any "clarifying remarks" regarding any of the information provided. Employers required to file an EEO-1 report with the EEOC or other federal agency containing the same information may comply with this new reporting requirement by submitting the EEO-1 to the DFEH, provided it contains the same or substantially similar data required by this bill.

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

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

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

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

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

Status: Pending in the Senate Labor, Public Employment and Retirement Committee.

Additional "Cure" Options for Itemized Wage Statement Violations and a PAGA Cap (SB 1129)

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

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

Notably, while PAGA presently requires employers provide three years of compliant wage statements to "cure," this bill would shorten this to only one year of compliant wage statements. However, this cure option would not be available if the employer has failed to initially provide a wage statement altogether.

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

Status: Pending in the Senate Labor, Public Employment and Retirement Committee.

Private Attorney General Act Notice Requirements (AB 2530)

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

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

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

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

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

Labor Commissioner Involvement in Arbitration of Wage Claims (SB 1384)

This bill would enable an employee who cannot have his wage claims determined by the Labor Commissioner because of an arbitration agreement with their employer to request the Labor Commissioner to represent them in the arbitration proceeding. The Labor Commissioner shall represent the employee if they are unable to afford counsel and the Labor Commissioner determines, upon conclusion of an informal investigation, that the claim has merit.

The petition to compel arbitration of a claim pending before the Labor Commissioner shall be served upon the Labor Commissioner. Upon the employee's request, the Labor Commissioner shall have the right to represent the employee in proceedings to determine enforceability of the arbitration agreement, either in court or with the arbitrator.

Expanded Direct Contractor Liability for Wages (SB 1368)

While certain so-called direct contractors are liable for specified debts owed to a wage claimant incurred by a subcontractor, this bill would expand that liability. For instance, for contracts entered into before January 1, 2021, the direct contractor may also be liable for penalties and liquidated damages. Second, in addition to wage-related liabilities, the director contractor would also potentially be liable for the subcontractor's failure to obtain valid workers' compensation coverage. It would also authorize the Employment Development Department to sue the direct contractor for any relief it could obtain against a subcontractor for failure to report and pay all required employer contributions.

It would also amend Labor Code section 226.2 to preclude compensation on a piece rate basis for work performed under a construction contract.

Scheduling Predictability Requirements for Certain Industries (SB 850)

Entitled the Fair Scheduling Act of 2020, this bill would require grocery stores, restaurants and retail store establishments (as defined) to provide employees advance notice of their schedules, and would require employers to provide "modification pay" for any changes made with less than seven days' notice. Specifically, new Labor Code section 510.5 would require employers to provide non-exempt employees at least seven days' notice of the first day on the work schedule which, in turn, would be require to list all scheduled shifts for all employees for at least 21 consecutive calendar days. Employers would be permitted to create separate work schedules for each department as long as all hours have a designated beginning and ending time. This scheduling requirement, and the modification pay requirements below, would not prohibit employees from requesting additional or fewer hours of work.

Employers would also be required to provide "modification pay" per shift for each previously scheduled shift that the employer cancels or moves to another date or time or for any previously

unscheduled shift that the employer requires an employee to work. Specifically, the employer would be required to provide one hour of pay at the employee's regular rate of pay if the employer provides less than seven days but more than 24 hours' notice of any change. If less than 24 hours' notice is provided, the employer shall provide "modification pay" equal to or greater than half of that shift's scheduled hours at the employee's regular rate, but not less than two hours or more than four hours.

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

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

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

Employers would also be required to post a poster containing specified information, including information about these deadlines and an employee's modification pay rights, and require the Labor Commissioner to develop this poster. Employers would also be required to retain for three years records documenting the hours worked and modification pay awarded, and allow the Labor Commissioner or an employee to inspect these records.

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

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

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

The City of Los Angeles is also considering a Fair Workweek Ordinance that would apply to employers with 300 or more employees.

Status: Pending in the Senate Labor, Public Employment and Retirement Committee.

Electronic Platform for Labor Commissioner Complaints (SB 1159)

This bill would require the Labor Commissioner to develop by January 1, 2023 an online platform to facilitate the wage claim process, including allowing employees to electronically file and track claims.

It would also require the Labor Commissioner to annually submit a report detailing the effectively of the DLSE's enforcement activities. Amongst other things, this report would need to identify the number of claims received, the results of the claims, the total dollar amount awarded and the length of time to resolve each claim.

Expanded Liability for Garment Manufacturers (SB 1399)

Enacted in 1999, AB 633 sought to prevent wage theft in the garment industry by making those who contracted for garment manufacturing liable as guarantors for the unpaid wages and overtime incurred in making their garments. This bill responds to concerns garment manufacturers have attempted to sidestep this liability by adding more layers between the entity requesting the work and those actually performing it. This bill amends the Labor Code to make clear that a person contracting to have garments made is liable for unpaid minimum wage and overtime wages to the workers who manufacture the garments regardless of how many layers of contracting that person may use. It would also impose new surety bond requirements upon garment manufacturers to ensure workers get paid despite a potential bankruptcy and impose new document retention requirements upon garment manufacturers. It would also create a presumption of employment for any claims filed with the Labor Commissioner if the worker provides labels with the garment manufacturers name or brand, and would also allow private rights of action against the garment manufacturer.

Extension for Petroleum Facility Rest Period Rules (AB 2479)

This bill would amend Labor Code section 226.75 and extend until January 1, 2026, the exemption from the generally-applicable rest period rules for specified employees holding safety-sensitive positions at petroleum facilities (as defined) if certain requirements are met.

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

Human Resources/Workplace Policies

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

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

Status: Scheduled for hearing on March 17, 2020 in the Assembly Judiciary Committee.

Wellness Program Requirements (AB 648)

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

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

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

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

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

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

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

Status: Pending in the Assembly Appropriations Committee.

Human Resources Required to Report Child Abuse (AB 1963)

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

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

Status: Pending in the Assembly.

Labor/Union Issues

Benefits during Strike Disputes (AB 3240)

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

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

Status: Pending in the Assembly.

Unemployment Insurance Benefits during Trade Disputes (AB 1066)

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

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

Miscellaneous

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

The federal H-2A program provides a temporary federal visa to farm workers admitted into the United States for work in the agricultural industry, including in California. While the federal H-2A workers are covered by many federal, state and local labor laws and are provided a "job order" summarizing some applicable federal laws, this bill attempts to address concerns that this job order does not identify key worker protections under California law.

Accordingly, new Labor Code section 2810.6 bill would require all of California's H-2A's visa employers provide to all H-2A farm workers a written notice of basic California labor rights on their first day of work in California or beings work for another employer after being transferred by an H-2A or other employer. The California Labor Commissioner would be required to develop by January 2, 2021, a template that H-2A employers may use to comply with these notice requirements, and the Labor Commissioner will have the discretion to decide whether this template will be included as part of the notices presently required under Labor Code section 2810.5.

This template would include in a separate and distinct section a "Summary of Key Legal Rights of H-2A Workers Under California Law," detailing many California labor rights, including the right to meal and rest periods, overtime, prohibited deductions, sexual harassment requirements and anti-retaliation protections.

Status: Scheduled for hearing on March 25, 2020 in the Senate Labor, Public Employment and Retirement Committee.

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

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

and clinical practice guidelines, and allow employees to file a complaint with the Labor Commissioner.

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

Status: Pending in the Assembly Labor and Employment and Health Committees.

Cal-OSHA Protections for Household Domestic Service Employees (SB 1257)

This bill would remove the current exclusion for household domestic service employees from the California Occupational Safety and Health Act (Cal-OSHA), which governs health and safety in working conditions. It would also establish a protocol for Cal-OSHA representatives to investigate complaints of alleged serious violations in workplaces that are residential dwellings. It would also require the residential dwelling "employer" to investigate and, if needed, correct the violation and reports its efforts to Cal-OSHA, and to provide copies of all correspondence received from Cal-OSHA to the domestic service employee.

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

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

Status: Pending in the Assembly Insurance Committee.

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

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

Status: Pending in the Assembly.

Prevailing Wage Definition of "Locality" (AB 2231)

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

Status: Scheduled for hearing on April 1, 2020 in the Assembly Labor and Employment Committee.

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

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

Status: Pending in the Assembly Labor and Employment Committee.

Public Sector

Paid Absences for School Employees (SB 796)

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

Status: Scheduled for hearing on April 1, 2020 in the Senate Education Committee.

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

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

Status: Pending in the Senate Rules Committee.

Union Protections for UC Employees (AB 1926/AB 3096)

AB 1926 bill would prohibit the University of California from requiring that union employees or their representatives waive the right to petition the government or the voters as part of a collective bargaining agreement.

AB 3096 would authorize employee organizations to bring a claim before the Public Employment Relations Board regarding concerns the UC Regents discouraged or deterred union members. It would also authorize a prevailing employee organization on such claim to recover a statutory penalty of $1,000 for each affected employee and attorneys' fees and costs.

Status: AB 1926 is scheduled for hearing on March 18, 2020 in the Assembly Public Employment and Retirement Committee.

Expanded Whistleblower Protections (AB 1961)

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

Status: Pending in the Assembly.

Employee Information for Public Employers (SB 1173)

Various public sector laws (e.g., the Meyers-Milias Brown Act) require covered public employers to provide certain labor representatives with information about newly-hired employees (e.g., names/addresses, job titles, etc.) within a certain amount of time following hire. This bill would generally authorize an exclusive representative to file an unfair labor practices charge with the Public Employment Relations Board for violating these requirements, and authorize civil penalties.

"Spot Bills" to Watch

A number of so-called "spot bills" have been introduced promising only technical, non-substantive changes but may be materially amended later including: SB 1001 (Confidentiality of Medical Information Act); AB 2294 (workers' compensation); AB 2317 (employer obligation waivers); SB 806 (worker classification); AB 2397 (unemployment/disability insurance); AB 2750 (worker classification); AB 2758 (alternative workweek schedules); SB 1236 (worker classification); AB 2850 (wages); AB 2930 (wages); AB 2864 (workers compensation); AB 3056 (workers compensation); AB 3120 (workers compensation leaves of absence); AB 3295 (workers compensation apportionment); AB 2905 (internship incentives); AB 2915 (farm labor contractors sexual harassment training;, AB 2941 (itemized wage statements); AB 3053 (OSHA); AB 3075 (employer literary assistance); SB 1433 (DIR powers); AB 3187 (overtime); AB 3241 (unemployment insurance); and AB 3265 (state employee whistleblower protections).