CALIFORNIA LEGISLATIVE SUMMARY

With the expiration of the October 10, 2021, deadline for Governor Gavin Newsom to sign or veto pending bills, an unusual 2021 California Legislative Session ended. Perhaps fortunately for California employers and Human Resources professionals, this session resulted in fewer new employment laws generally and certainly fewer material employment laws of widespread application than in recent years. Whether this is the simply the aberrational result of some unique factors in 2021 (e.g., ongoing COVID limitations on the number of bills introduced plus several significant laws being enacted early in the 2021 session [e.g., COVID 19 Supplemental Paid Sick Leave, Hospitality Recall Rights]) remains to be seen.

In any event, and since this is California, Governor Gavin Newsom did sign several new employment laws for employers and Human Resources professionals to consider. These include laws that:

- Expand the California Family Rights Act (CFRA) to allow time off to care for a "parent-in-law" (AB 1033).
- Limit confidentiality provisions in settlement agreements involving any form of FEHA harassment or discrimination and extend non-disparagement prohibition limitations to separation or severance agreements (SB 331).
- Expand from two years to four years the retention period for certain employment records (SB 807).
- Clarify several aspects of an employer's notice obligations related to COVID-19 exposure at work (AB 654); and
- Define intentional wage deprivation as "grand theft" for criminal prosecution purposes (AB 1003).

In addition, the minimum wage for California and for many municipalities will increase again on January 1, 2022.

On the other hand, the California Legislature did not extend (at least for now), the COVID-19 Supplemental Paid Sick Leave Law (SB 95), which expired on September 30, 2021. Other proposals to increase paid sick leave usage/accrual requirements, to expand the California Family Rights Act to "designated persons" and to allow tax favored employer student loan repayment assistance all stalled in 2021 but may resurface in 2022 so stay tuned.

For now, however, below is an overview of the new laws California employers must prepare for which, unless otherwise indicated, take effect on January 1, 2022:

NEW EMPLOYMENT LAWS

Leaves of Absence/Time off/Accommodation Requirements.

CFRA-Expansion to Allow Time-Off to Care for Parents-in-Law (AB 1033)

In 2020, California enacted SB 1383 materially expanding the California Family Rights Act (CFRA) both in terms of covered employers (i.e., to employers with five or more employees instead of the prior 50 or more employees) and the definition of "family care and medical leave" (i.e., adding grandparents, grandchildren, and siblings for whom leave may be taken to provide care). AB 1033 cleans up or clarifies a couple of the ambiguities from last year's amendment.

For instance, while SB 1383 had included a definition for "parent-in-law," it had not otherwise included any substantive provisions related to "parents-in-law," leaving it unclear whether they were intended to be included in this new expanded definition of "family care and medical leave." AB 1033 resolves any such ambiguity by including "parent-in-law" within the definition of "parent," meaning eligible employees at covered employers may take statutorily protected leave to care for a "parent-in-law" with a serious health condition.

A second bill from 2020 (AB 1867) had enacted until January 1, 2024, a pilot program allowing small employers (i.e., between five and 19 employees) to request mediation through the DFEH for any alleged CFRA-related violations. AB 1033 recasts this program in several respects, including deleting the authorization to request mediation. Instead, it requires the DFEH, when an employee requests an immediate right to sue alleging a CFRA violation, to notify the employee of the requirement for mediation prior to filing a civil action if mediation is requested by the employee or employer. The law also identifies various deadlines by which mediation-related activities must occur, including a 30-day period for a party to request mediation, and a 60-day period for the Department of Fair Employment and Housing (DFEH) to initiate mediation following a request. The mediator must also notify the employee of their ability to request information from the employer under Labor Code sections 226 (wage statements) and 1198.5 (personnel files) and help facilitate "reasonable requests" for information to assist with mediation.

Once mediation is deemed unsuccessful or "complete" (as defined) or if mediation did not occur within 60 days, the employee could initiate a civil suit, with the statute of limitations period tolled during the pendency of these mediation efforts.

Since many DFEH charges allege multiple violations, this law also clarifies that when a right to sue notice is issued for other violations, this pilot program applies only to the CFRA allegations unless the parties voluntarily choose to mediate all alleged violations.

Human Resources/Workplace Policies

Further Limitations and Requirements for Confidentiality Provisions in Settlement Agreements, Usage of Non-Disparagement Provisions, and for Separation Agreements (SB 331)

A primary legislative focus of the #MeToo movement has been on non-disparagement provisions or so-called "secret settlements" that opponents contend allow the unlawful conduct to continue. Entitled the Silenced No More Act, this law expands upon two recent California laws regarding confidentiality and non-disparagement provisions and enacts various changes to severance or separation agreements.

For instance, in 2018, California enacted SB 820, which codified then-new Code of Civil Procedure section 1001 to preclude settlement agreement provisions restricting the disclosure of factual information related to claims of workplace harassment or discrimination based on sex. This law expands this prohibition on settlement agreement confidentiality provisions to include all types of workplace harassment or discrimination precluded by the Fair Employment and Housing Act (FEHA), not just based on sex. While section 1001 currently only prohibits confidentiality provisions in FEHA retaliation cases where the person reported harassment or discrimination, this law also prohibits them in FEHA retaliation cases where someone has opposed this conduct, thus more closely tracking the current language of the FEHA's retaliation provision. These expansions will apply to settlement agreements in civil actions or for administrative charges entered into on or after January 1, 2022.

Also in 2018, California enacted SB 1300, which codified then-new Government Code section 12964.5 restricting the use of non-disparagement provisions or other documents that would preclude employees —in exchange for a raise or bonus, or as a condition of employment or continued employment—from disclosing information about unlawful acts in the workplace. Concerned that employer usage of non-disparagement provisions regarding other types of conduct may confuse employees into believing they cannot report unlawful conduct, this law requires employers who use non-disparagement or other contractual provisions restricting the disclosure of workplace conditions, to include language expressly informing employees they are not precluded from reporting unlawful acts in the workplace. Accordingly, employers seeking to limit the disclosure about workplace conditions must include the following language: "Nothing in this agreement restricts you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you believe to be unlawful."

Another concern about the scope of SB 1300 was that its focus upon non-disparagement provisions "as a condition of employment or continued employment" allowed employers to include broad non-disparagement provisions in separation or severance agreements. This law seeks to close that loophole regarding non-disparagement provisions in the separation agreement context. Accordingly, it precludes non-disparagement provisions in separation

agreements that prohibit the disclosure of information about unlawful acts in the workplace, and any such provisions would be deemed against public policy and unenforceable.

As with other non-disparagement provisions in the continued employee context regarding workplace conditions, non-disparagement or contractual provisions in separation agreements limiting the disclosure of workplace conditions must contain the same affirmation specifying these provisions do not preclude the disclosure of unlawful acts. Specifically, a non-disparagement provision regarding workplace conditions in the separation agreement context would need to include the following language: "Nothing in this agreement restricts you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you believe to be unlawful."

However, these prohibitions will not preclude the inclusion of a general release or waiver of all claims in an employment separation agreement, provided that the release or waiver is otherwise lawful and valid. Similar to the confidentiality limitations in Code of Civil Procedure section 1001 regarding settlement of pending lawsuits or claims, these separation agreement provisions will not preclude confidentiality regarding the amount paid in the separation agreement, nor prohibit employers from protecting trade secrets or confidential information that does not involve unlawful acts in the workplace.

Lastly, and seemingly unrelated to the #MeToo concerns regarding the above changes, this law also requires additional provisions to be included in separation agreements. For instance, employment separation agreements must notify the employee that they have the right to consult an attorney and provide the employee with a reasonable period (but not less than five business days) in which to do so. Employees may sign the release prior to the expiration of this review period, provided their decision to do so is not induced by either (a) employer fraud, misrepresentations, or a threat to withdraw or alter the offer prior to the expiration of the reasonable time period, or (b) by the employer offering different terms to employees who sign such an agreement before the review period expiration.

FEHA Enforcement Changes, Including Four-Year Retention Period for Employment Records (SB 807)

This law amends several provisions related to the FEHA and the DFEH's enforcement provisions, including to coincide with the recent extension of the statute of limitations from one year to three years for FEHA claims. For instance, it increases from two years to four years the period that employers must retain the employment records identified in Government Code section 12946 (e.g., applications, personnel, and employment referral records) after the records are created or received, or after an employment action is taken. It also specifies that upon the filing of any verified complaint with the DFEH, the employer must preserve any records and files until the later of (1) the first date after the period for filing a civil action has expired (i.e., the worker's statute of limitations has expired); or (2) the first date after the complaint has been fully disposed

of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.

It also amends FEHA's venue provision to allow actions involving class or group allegations on behalf of the DFEH to be filed in any county within California.

While the statute of limitations to file an initial charge with the DFEH for FEHA-related claims was recently extended to three years, this law amends the statute of limitations for filing other types of charges (e.g., Unruh Act, Equal Pay Act claims, etc.). It also specifies that the statute of limitations for filing a civil action is tolled upon the filing of a DFEH charge until the DFEH either files a civil action or one year after the DFEH notifies the complainant it is closing its investigation. This tolling provision applies retroactively but will not revive already-lapsed claims.

Presently, the DFEH may enforce the FEHA by petitioning a superior court to compel compliance with the DFEH's investigation of certain employment complaints. This law permits the DFEH to appeal superior court decisions to the appellate courts. Continuing a trend, it also enables a prevailing party to recover their fees and costs but limits an employer's ability to recover its fees and costs (even if a CCP 998 offer was issued) only if the employer proves the DFEH's appeal was frivolous or unreasonable when brought or if litigated after it became so.

While the DFEH presently may convene a dispute resolution conference, this law requires the DFEH to do so before filing a civil action, which will also potentially toll the deadline to file a civil action.

SB 807 also identifies new procedures and deadlines related to FEHA class actions.

Written Disclosure Requirements of "Quotas" for Warehouse Distribution Center Employees (AB 701)

Citing concerns that "quota" requirements in large warehouses pose safety issues, this law requires "warehouse distribution centers" (as defined) to provide nonexempt employees, upon hire, or within 30 days of this law's enactment, a written description of each quota applicable to the employee. These notices must identify the quantified number of tasks to be performed, or materials to be produced or handled, within the quantified period and any adverse employment action that could result from not meeting the quota.

Employers cannot maintain a quota that prevents compliance with meal or rest periods, use of bathroom facilities, or occupational health and safety laws. An employer is also prohibited from taking any adverse action against an employee for failing to meet a quota that precludes compliance with meal or rest periods, health or safety standards, or that was not disclosed. Any time spent by an employee complying with health and safety laws will be considered time on task and productive time under the quota system.

If a current or former employee believes a quota caused a violation of meal/rest periods or health/safety laws, they may request a written description of each quota applicable to them as

well as their most recent 90 days of personal work speed data. Employers must provide this requested information within 21 calendar days from the date of the request.

As with many recent new laws, this law creates a rebuttable presumption of retaliation for any adverse employment action taken within 90 days of an employee (a) making the first request in a calendar year for the quota or personal work speed data discussed above; or (b) making a complaint related to a quota alleging a violation of these provisions to the Labor Commissioner, any local or state agency, or the employer.

The Labor Commissioner will enforce these provisions by engaging in coordinated and strategic enforcement efforts with the Department of Industrial Relations, including the Division of Occupational Safety and Health and the Division of Workers' Compensation. Amongst other things, this law permits information sharing amongst these state agencies, including employee injury data and the identity of uninsured employers. If a particular worksite or employer has an actual employee injury rate of at least 1.5 times higher than the warehousing industry's average annual injury rate, these agencies must notify the Labor Commissioner to determine whether investigation and further coordinated enforcement is needed.

Upon receiving a complaint, a state or local government entity may request or subpoena records regarding these quotas and employee work speed data. A current or former employee may also bring an action for injunctive relief to obtain compliance with these requirements and, if successful, recover costs and attorneys' fees. If the employee alleges the applicable quota precluded compliance with Cal-OSHA regulations, the employee may seek injunctive relief limited to suspension of the quota and any adverse action resulting from the quota's enforcement. For any potential PAGA actions, the employer would have the right to cure alleged violations.

Lastly, and also similar with some other recent new laws, this law expressly provides that it does not preempt any city or county ordinance providing equal or greater protection.

COVID-19 Developments

Clarifications Regarding COVID-19 Notices and Reporting (AB 654)

In 2020, California enacted AB 685, which, amongst other things, imposed various notice obligations upon employers related to COVID-19, including providing written notice to employees of a potential COVID-19 exposure, and reporting specified information to the local public health department if an "outbreak" (as defined) has occurred. In turn, the State Department of Public Health is required to make this workplace industry information received from local public health departments available on its internet website to allow the public to track the number and frequency of COVID-19 cases and outbreaks by industry.

This clean-up law amends both requirements, including to provide statutory consistency in terms of what information employers must provide to the employees. For instance, AB 685 had required employers to provide notices of potential exposure to employees "who were on the premises," but had required employers to provide notices of available COVID-19 benefits to

employees who "may have been exposed" and to provide information regarding its disinfection plan to "all employees," seemingly regardless of whether they were on the premises or may have been exposed. AB 654 harmonizes these three provisions to clarify all three types of required employer notices must be provided to "employees who were on the premises at the same worksite as the qualifying individual within the infectious period."

Similarly, while AB 685 had required employers to provide written notice to the employees' exclusive representative, if any, for "employees" on the same worksite as a qualifying individual (as defined), this new law limits this written notice to representatives of qualifying individuals and employees "who had close contact" with these qualifying individuals. "Close contact" will be defined as "being within six feet of a COVID-19 case for a cumulative period of 15 minutes or greater in any 24-hour period within or overlapping with the high-risk exposure period" (as defined) and applies regardless of the use of face coverings.

AB 685 had defined "worksite" for purposes of these notice requirements, including stating that term did not apply to locations the employee did not enter, but was ambiguous whether it applied to an employee's personal residence or alternative work locations. AB 654 amends the definition of "worksite" to provide that it also does not apply to "locations where the employee worked by themselves without exposure to other employees, or to a worker's residence or alternative work location chosen by the worker when working remotely."

Currently, employers are required to notify the local public health agency of an "outbreak" within "48 hours," which is potentially problematic or ambiguous to the extent it involved periods where employers may not be open (e.g., weekends). AB 654 clarifies employers must provide this notice to the local public health agency within 48 hours or one business day, whichever is later.

This new law also expands the employers exempt from the COVID-19 outbreak reporting requirement to various licensed facilities, including community clinics, adult day health centers, community care facilities, and childcare facilities.

This urgency statute is immediately effective but will be repealed on January 1, 2023.

California Enacts Rehire Rights for Employees in Certain Industries Laid Off due to COVID-19 Impacts (SB 93)

As a reminder, on April 16, 2021, California Governor Gavin Newsom signed this new law creating rehire rights for employees in the hospitality and business service industries who had been laid off for reasons related to the COVID-19 pandemic. As a budget bill, it took effect immediately, and although presumably related to the COVID-19 pandemic, it will remain in effect until it automatically expires on December 31, 2024.

Since the law's enactment, the DLSE has not yet issued regulations regarding this law but it has issued FAQ's.

The key provisions of this new law are discussed below.

What Employers and Industries does it apply to?

This law applies to an "enterprise," which is specifically defined to mean hotels, private clubs, event centers, airport hospitality operations, airport service providers, or who provide building services to office, retail, or other commercial buildings. Each of these terms is further defined in SB 93 as follows:

- "**Hotel"** means a residential building for lodging and other related services for the public, and that contains 50 or more guest rooms, or suites of rooms (calculated based on the greater of the room count on the opening of the hotel or on December 31, 2019).

- **"Private club"** means a private, membership-based business or nonprofit organization that operates a building or complex of buildings containing at least 50 guest rooms or suites of rooms that are offered as overnight lodging to members (as with "hotels," the number of guest rooms/suites of rooms is calculated based on the greater of the room count on the opening of the hotel or on December 31, 2019).

- **"Event Center"** means a publicly or privately owned structure of more than 50,000 square feet or 1,000 seats that is used for public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums and convention centers.

- **"Airport hospitality operation"** means a business that prepares, delivers, inspects or provides any other service in connection with the preparation of food or beverage for aircraft crew or passengers at an airport, or that provides food and beverage, retail, or other consumer goods or services to the public at an airport.

- **"Airport service providers**" means a business that performs, under contract with a passenger air carrier, airport facility management, or airport authority, functions on the property of the airport that are directly related to the air transportation of persons, property or mail.

- "**Building Service**" means janitorial, building, maintenance or security services.

Please note, hotels, private clubs and event centers also include any contracted, leased or sublet premises connected to the "enterprise's" purpose.

What Employees are Covered?

This law applies to "laid off employees" which is defined as an employee who had worked for the employer six months or more in the 12 months preceding January 1, 2020 and whose recent separation from active service was due to the COVID-19 pandemic. "Employee" is further defined

to include an individual who in a particular week perform at least two hours of work for an employer. Qualifying COVID-19-related impacts include public health directives, government shut-down orders, lack of business, a reduction in force, or other economic, non-disciplinary reasons due to the COVID-19 pandemic.

What do these Rehire Obligations include?

Broadly speaking, as covered employers begin creating or filling prior positions, they must notify laid-off employees about positions for which those employees would be qualified. Specifically, within five days of establishing a position, the employer must offer its laid off employees in writing all positions that become available for which the employee is qualified. These written notices must be by either hand delivery or sent to their last known physical address, and by email and text message to the extent the employer possesses such information. An employee is deemed qualified if they held the same or similar position at the employer at the time of the employee's most recent lay-off.

The employer will need to offer positions to laid-off employees in an order of preference corresponding to the law's qualification guidelines. If more than one employee is entitled to preference for the position, the employer must offer the position to the laid-off employee with the greatest length of service based on the employee's date of hire.

The laid-off employee will be entitled to five business days (i.e., any day except Saturday, Sunday, or any official state holiday) to accept or decline the position. Employers may make simultaneous, conditional offers of employment to laid off employees, with a final offer conditioned upon application of the law's preference system.

An employer that declines to recall a laid-off employee on the grounds of lack of qualifications and instead hires someone other than a laid-off employee will need to provide the laid-off employee written notice explaining the reason for the decision and the length of service of the person hired instead. This written explanation must be provided within 30 days of the decision.

Record Retention Obligations

Employers are required to retain records for at least three years from the date of the written layoff notice for each employee. The records to be maintained are identified as follows:

- The employee's full legal name.
- The employee's job classification at the time of separation from employment.
- The employee's date of hire.
- The employee's last known address of residence.
- The employee's last known email address.
- The employee's last known telephone number.
- Copies of the written notice regarding the layoff; and
- All records of communication between the employee and the employer concerning offers of employment made to the employee pursuant to this new law.

Other Circumstances when these Recall/Rehire rights apply?

In addition to the broad definition of "enterprise," and the broad definitions of each term within that term, SB 93 also specifically applies to other instances. For instance, it applies to any of the following:

- The ownership of the employer changed after the separation from employment of a laid-off employee, but the enterprise is conducting the same or similar operations as before the COVID-19 state of emergency.
- The form of organization of the employer changed after the COVID-19 state of emergency.
- Substantially all the employer's assets were acquired by another entity which conducts the same or similar operations using substantially the same assets; or
- The employer relocates the operations at which a laid-off employee was employer before the state of emergency to a different location.

Retaliation Protections

As with almost all California employment laws, SB 93 precludes any discrimination or retaliation against laid-off employees seeking to enforce their rights, participate in proceedings or otherwise asserting their rehire rights. These protections also apply to any employee or laid-off employee who mistakenly, but in good faith, alleges noncompliance with this new law.

How will these rights be enforced?

The California Division of Labor Standards Enforcement (DLSE) has exclusive jurisdiction to enforce this new law. In response to an employee complaint filed with the DLSE, the agency may award any or all the following: (a) hiring and reinstatement consistent with this new law; (b) front pay or back pay for each day a violation continues (calculated at the highest of three different enumerated options); or (c) the value of benefits the employee would have received under the employer's benefit plan.

While no criminal penalties are authorized, this law also enumerates statutory penalties to be imposed against the employer or its agents. These civil penalties include $100 for each employee whose rights are violated, and $500 in liquidated damages per employee per day for each violation until it is cured. These penalties will be deposited into the Labor and Workforce Development Fund and paid to the employee as compensatory damages.

What about similar local ordinances?

California employers have already been attempting to comply with recall or retention ordinances enacted by various municipalities (e.g., Los Angeles, San Diego, Long Beach, Oakland, San Francisco, and Santa Clara). Unfortunately, and as with California's patchwork of municipal level paid sick leave laws, these recall/retention ordinances often vary, thus creating compliance challenges for statewide employers. Unfortunately, also, SB 93 specifically provides that it does

not preclude local government agencies from enacting ordinances imposing greater standards or that establish additional enforcement provisions. It also provides that it does not preclude discharged or eligible employees from bringing a common law claim for wrongful termination.

However, and perhaps reflecting the influence of organized labor who supported SB 93, it also provides that these new rehire rights may be waived in a valid collective bargaining agreement that explicitly waives these protections in clear and unambiguous terms.

Wage and Hour

Wage Deprivation as "Grand Theft" (AB 1003)

Labor Code sections 215 and 216 presently specify that certain wage-related violations may constitute a misdemeanor. However, to address concerns that some employers are intentionally keeping tips otherwise intended for employees, this law adds new Penal Code section 487m providing that the intentional theft of wages (including gratuities) in an amount greater than $950 from any one employee, or $2,350 in the aggregate from two or more employees in any consecutive 12-month period, may be punished as grand theft. It defines "theft of wages" to be the intentional deprivation of wages (as defined by the Labor Code), benefits or other compensation, by unlawful means, with the knowledge that the wages, benefits or other compensation is due to the employee. For purposes of this new Penal Code section, independent contractors are included within the definition of "employee," and hiring entities of independent contractors would be included within the definition of "employer."

Wages, benefits, or other compensation that are the subject of a prosecution under this new section may be recovered as restitution under the Penal Code, and employees and the Labor Commissioner may file a civil action to recover Labor Code remedies for acts prohibited by this new section.

Labor Commissioner Liens on Real Property (SB 572)

While California law presently authorizes the Labor Commissioner to obtain a lien on real property owned by the debtor/employer to help recover amounts owed in favor of an employee, this law authorizes the Labor Commissioner to obtain a real property lien to secure amounts due to the Commissioner under any final citation, hearing, or decision. This lien will exist for up to ten years, and the Labor Commissioner must release the lien upon payment of the amount owed, including any interests and costs that lawfully accrued on the original amount owed.

California's Minimum Wage Increases Again on January 1, 2022 (SB 3)

In 2016, California enacted SB 3, authorizing annual minimum wage increases until it reaches $15.00, and identifying a two-tiered schedule for the effective dates of these increases depending on whether the employer has more than 25 employees. Accordingly, on January 1, 2022, the minimum wage for employers with 26 or more employees will increase to $15.00 per hour, meaning the salary threshold for exemption purposes will be $62,400 annually. On January 1,

2022, the minimum wage for employers with 25 or fewer employees will increase to $14.00 per hour, and the salary threshold exemption for those employers will be $58,240 annually.

Phaseout of the Sub-Minimum Wage for Employees with Developmental Disabilities (SB 639)

While California and federal labor laws presently authorize employers to pay employees with certain disabilities lower wages than other employees, including amounts below the otherwise applicable minimum wage, this law phases out this exemption under California law. Concerned the unemployment rate for people with disabilities remains disproportionally high, it requires a general phaseout of this subminimum wage exemption in California. Amongst other things, it requires the State Council on Developmental Disabilities to work with stakeholders and relevant state agencies to develop and implement a plan by January 1, 2023, to phase out the subminimum wage certification program.

Beginning January 1, 2022, California will preclude any new special licenses from being issued to authorize the payment of lower wages. Beginning on the later of January 1, 2025, or when the state's multiyear phaseout plan is released, California will prohibit employers from paying employees with disabilities less than the higher of the state or applicable local minimum wage.

While Labor Code section 1191.5 presently authorizes the Industrial Welfare Commission to issue special licenses for nonprofit organizations and authorizes a special minimum wage for covered employees, this provision will also be repealed effective January 1, 2025.

Additional Wage and Hour Protections in the Garment Manufacturing Industry (SB 62)

In 1999, California enacted AB 633 to target wage theft in the garment industry and to create access to justice for victims. Citing concerns some manufacturers have attempted to frustrate the purpose of AB 633, including by adding layers of subcontracting, this law strengthens the protections for garment workers.

Accordingly, it expands the definition of garment manufacturing, including by adding certain garment manufacturing processes such as dyeing, altering a garment's design, and affixing a label.

Citing a concern that piece rate payments ensure workers receive less than the state-mandated minimum wage, it also prohibits employees engaged in garment manufacturing from being paid by the piece or unit, or by a piece-rate, except in certain specified circumstances. It also imposes statutory damages of $200 per employee payable to the employee for each pay period in which each employee is paid by the piece-rate.

It also defines and includes "brand guarantors" for purposes of these provisions, regardless of whether the brand guarantor performs the manufacturing or simply contracts with others. It also specifies that garment manufacturers, contractors, or brand guarantors will share joint and several liability with any contractor or manufacturer who violates these protections. It also makes garment manufacturers and contractors liable for the full amount of any violation.

It also expands the period that garment manufacturers must retain certain business records from three years to four years, and it creates certain rebuttable presumptions in the employee's favor for claims filed with the Labor Commissioner.

Expanded Joint and Several for Customers of Port Drayage Drivers (SB 338)

The California legislature has recently been focused on wage and hour/labor code violations amongst "port drayage" drivers who transport cargo by road to and from ports to warehouses distribution centers and railyards. For instance, in 2018, California enacted SB 1402 to impose joint and several liability on businesses that hire port drayage carriers to transport their goods if those port drayage carriers have failed to pay judgments for labor violations or have not provided unemployment insurance. Joint and several liability lasts as long as a carrier is listed on the Division of Labor Standards Enforcement (DLSE) website for failing to pay outstanding judgments.

This law addresses concerns that port drayage carriers are continuing to skirt these enforcement measures. Accordingly, it expands a customer's joint and several liability to the state for port drayage services obtained after the date the motor carrier appeared on the state's prior offender list. In this regard, it adds potential responsibility and liability to include a port drayage motor carrier's employment tax assessments and failure to comply with health and safety laws.

Secondly, citing a concern that port drayage carriers are essentially buying their removal from the DLSE website by simply exerting settlement pressure over vulnerable drivers, this law enacts new procedures related to how a motor carrier can be removed from the DLSE's offender list. These include requiring the DLSE to determine there has been full payment or settlement of an unsatisfied judgment or other financial liabilities, and requiring the carrier to submit sworn certification and "sufficient documentation" (to be defined) that all identified violations have been remedied or abated.

Expanded Direct Contractor Liability for Subcontractor Wage and Hour Violations (SB 727)

Presently, under Labor Code section 218.7 and for certain construction contracts entered into after January 1, 2018, the direct contractor is jointly and severally liable for a subcontractor's failure to pay wages or fringe benefits but is not jointly liable for penalties or liquidated damages. Concerned that this joint liability has not provided a sufficient deterrent effect, this law (via new Labor Code section 218.8) expands direct contractor joint liability to include penalties and liquidated damages under specified circumstances for covered construction contracts entered into on or after January 1, 2022.

AB 5 Exemptions Extended for Certain Industries and Professions (AB 1561)

In 2019 and 2020, various laws were enacted to exempt specific industries from AB 5's "ABC Test" for worker classification purposes. Continuing this trend, AB 1561 extends the current licensed

manicurists' exemption to January 1, 2025, and extends the current exemption for certain construction industry subcontractors also to January 1, 2025. It also expands the exemption for individuals licensed by the Department of Insurance to include claims adjusting or third-party administration and modifies the exemption in the data-aggregating context.

Further Extension of AB 5 Exemption for Newspaper Carriers in Exchange for Annual Reporting (AB 1506)

Following AB 5's codification of the so-called "ABC Test" in 2019 for worker classification purposes, newspaper carriers have received multiple temporary exemptions, with the current exemption otherwise set to expire on January 1, 2022. Accordingly, this law once again extends the current exemption for newspaper carriers from the "ABC Test" (this time until January 1, 2025) in exchange for newspaper publishers and distributors annually reporting to the Labor and Workforce Development Agency information regarding carrier employment, wage claims and lawsuits and average wage rate.

PAGA Exemption for Janitorial Employees (SB 646)

This law creates a new Labor Code section 2699.8 and exempts from the Private Attorneys General Act janitorial employees (as defined) with respect to work performed under a valid collective bargaining agreement in effect before July 1, 2024, governing wages, hours of work, and working conditions and containing specific provisions (including an explicit PAGA waiver and a grievance procedure to address wage and hour issues that otherwise might invoke PAGA). This new PAGA exception expires upon the earlier of the CBA expiration or on July 1, 2028.

This law does not preclude janitorial employees from pursuing a PAGA action if a court or administrative agency of competent jurisdiction has concluded the labor organization breached its duty of fair representation in relation to a potential PAGA claim.

The law's author states that it is intended to increase unionization of janitorial employees, thus ending a "race to the bottom" involving unscrupulous employers who attempt to cut labor costs. It also continues a recent trend of labor groups to obtain limited exemptions for employees working under a collective bargaining agreement. (E.g., AB 1654 (2019) [exempting certain CBA-covered employees in the construction industry].)

<u>Miscellaneous</u>

Extensions of Fee Deadlines in Employment Arbitration Proceedings (SB 762)

In 2019, California enacted SB 707 requiring employers to pay arbitrator fees within thirty days of invoicing or risk allowing employees the option to return to court proceedings. Concerned employers were obtaining fee payment extensions without the employee's awareness, this law requires the arbitrator to provide to all parties an invoice for the full amount owed, and, absent an express contractual provision identifying a specific number of days for fee payment, require

the invoice fees be paid as due upon receipt. Any extension of the due date must also be agreed to by all parties, not simply the arbitrator.

Increased Cal-OSHA Enforcement of Safety Issues (SB 606)

Citing concerns CalOSHA protections proved inadequate during the COVID-19 pandemic, this law expands CalOSHA's enforcement power in several respects that will likely continue well beyond the pandemic. First, it authorizes Cal-OSHA to issue a citation to an "egregious employer" (as defined) for each willful violation, with each employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties. This change tracks similar powers given to the federal OSHA to stack penalties and encourage workplace safety rather than issuing a single blanket violation by such employers.

Second, regarding employers with separate places of employment, it creates a rebuttable presumption the employer has committed an enterprise-wide violation if either of the following are true: (1) the employer has a written policy or procedure (except as specified) that violates Health and Safety Code section 25910 or any standard, rule, order or regulation; or (2) Cal-OSHA has evidence of a pattern or practice of the same violation or violations at more than one of the employer's location. If the employer failed to rebut this presumption, Cal-OSHA may issue an enterprise-wide citation requiring enterprise-wide abatement based upon that written policy or procedure. Enterprise-wide violations would also be subject to the same penalty provision as willful or serious violations.

Agricultural Worker Protections for Wildfire Smoke (AB 73)

California law presently requires the State Department of Public health to implement various public health programs, including the establishment of a personal protective equipment (PPE) stockpile for healthcare workers and essential workers (as defined) during a 90-day pandemic or other health emergency. This law includes wildfire smoke events among health emergencies for these purposes and includes agricultural workers in the definition of essential workers.

It also requires the agency to review and update its wildfire smoke protection training and post it on its internet website. The employer training of its agricultural employees must be in a language and manner readily understandable by these employees, considering their ethnic and cultural backgrounds and education levels, including potentially using pictograms as needed.

It also modifies the composition of the Personal Protective Equipment Advisory Committee, including increasing the representation of labor organizations representing health care workers and essential workers (as defined).

Public Works Disclosures by Contractors/Subcontractors (AB 1023)

Presently, Labor Code section 1771.4 requires contractors and subcontractors working on "public works" (as defined) to furnish payroll records to the Labor Commissioner at least monthly or more frequently if specified in the applicable contract. This law revises this requirement to clarify

that "monthly" means at least once every 30 days work is being performed on the project and within 30 days after the final day of work is performed on the project. It also requires these records be submitted in an electronic format in the manner prescribed by the Labor Commissioner.

Contractors or subcontractors who fail to furnish these records related to its employees will be liable for a penalty of $100 per day, but not to exceed $5,000 per project, to be deposited in the State Public Works Enforcement Fund. The Labor Commissioner cannot levy these penalties until 14 days after the deadline for furnishing records and must ensure these penalties accrue to the actual contractor or subcontractor that failed to provide these records.

Advisory Committee Regarding Cal-OSHA Protections Extended to Most Household Domestic Service Employees (SB 321)

This law requires the California Division of Occupational Safety and Health to convene an advisory committee to make recommendations to Cal-OSHA or the California Legislature to ensure the safety of household domestic service employees, and to develop voluntary industry-specific occupational health and safety guidance to educate household domestic service employees and employers. These recommendations must be publicly posted and submitted to the California Legislature by January 1, 2023.

Notice Requirement for Disqualification of Unemployment Insurance Benefits (AB 397)

Presently, an individual may be disqualified for unemployment compensation benefits if the individual willfully made false statements or representations to obtain unemployment insurance benefits. This law will require the Employment Development Department (EDD) to provide advance written notice and an opportunity to correct the alleged false representations before disqualifying the individual from being eligible for unemployment compensation benefits.

Public Sector/Labor Relations

Public Employer Health Coverage During Strikes (AB 237)

Entitled the Public Employee Health Protection Act, this law requires "covered" public employers (i.e., those that provide health/medical benefits for non-occupational illnesses) to maintain or pay an enrolled employee's health care/medical coverage during an authorized strike at the same level as if the employee had continued to work. It will also be an unlawful practice for the covered employer to fail to collect and remit the employee's contributions to this coverage, or to maintain any policy violating these provisions or that otherwise threaten an employee's or their dependents' continued access to health or medical care during the employee's participation in a strike. The Public Employment Relations Board will be responsible for adjudicating any alleged violations of these protections.

Employee Information in Public Employment Context (SB 270)

Presently, certain California public employers must provide labor representatives with the names and home addresses of newly hired employees, as well as certain work information (e.g., job title, department, contact information) within 30 days of hire, and must also provide this information for all employees in a bargaining unit at least every 120 days. To address concerns public employers are not providing this information, commencing July 1, 2022, exclusive representatives may file an unfair labor practice charge to enforce these requirements provided certain conditions are first met (e.g., written notice of a violation and an opportunity to cure certain violations).