

2022 CALIFORNIA STATE HR

# ADVOCACY & LEGISLATIVE CONFERENCE

2022 Employment Law and  
Legislative Forecast

SHERATON GRAND HOTEL - SACRAMENTO

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**CALIFORNIA**  
STATE COUNCIL OF SHRM



# Session Objectives

- Provide an overview of currently pending employment bills potentially affecting Human Resources Professionals
- Identify how these bills may change current policies
- Discuss tips for providing HR-input into the legislative process

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# The California Outlook

- Continued one-party rule in Sacramento
  - Sizable (and increased) “super majorities” in both legislative chambers
  - Governor Gavin Newsom is from same party
  - Approximately 25 new laws in both 2020 and 2021 (despite COVID “limits”)
- Busy agenda in Sacramento for 2022
  - Normal legislative processes/limits reinstated
  - 2021 bills still pending, plus 2022 new bills proposed
- However, two powerful legislatures re: employment have retired (Senator Hannah-Beth Jackson and Assembly Woman Lorena Gonzalez)



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# Relationship with Washington D.C

- Biden Administration with congressional control means federal developments relevant (especially federal agencies)
- Cooperation rather than combat between Washington D.C. and Sacramento
- Federal Government and California Government mirroring one another (example AB5, etc.)



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# 2022 Advocacy Day

- **Virtual office visits today will discuss two CalSHRM sponsored bills:**
  - **AB 1729 (Student Loan Repayment Assistance)**
  - **SB 1454 (California Consumer Privacy Act Exemption)**
- **Watch for further advocacy opportunities in 2022**



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# **NEW LAWS ALREADY IN EFFECT**

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# COVID-19 Supplemental Paid Sick Leave (SPSL) Reinstated (SB 114)

- Largely reinstates California's prior COVID-19 Supplemental Paid Sick Leave Law (SB95 [which expired on September 30, 2021])
- Took effect February 19, 2022, applies retroactively to January 1, 2022, but only (currently) effective until September 30, 2022



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# COVID-19 Supplemental Paid Sick Leave (SB 114) – New Law

- Many aspects regarding COVID-19 SPSL similar to SB 95 (e.g., covered employees, when available, pay rates, notices, etc.) but with some nuances.
- Provides one week of COVID-19 SPSL to all employees and a second “additional” week to employees who test positive or to provide care for family members who test positive.
- Labor Commissioner has posted updated FAQ’s re: COVID-19 SPSL
- Reminder: need to also watch municipal ordinances

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# **PENDING EMPLOYMENT BILLS TO MONITOR**

## **COVID-19 ISSUES**

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# COVID Vaccination Issues (AB 1993/AB 2539)

- AB 1993 would require employers, by January 1, 2023, to obtain proof of vaccination from all employees and independent contractors, unless an exemption applies
- AB 2539 would require any entity mandating proof of COVID-19 vaccination status to accept either a written medical record or a government-issued digital medical card



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## **More COVID Vaccination Issues (AB 2693/AB 1890/1920 and AB 1751)**

- In 2020, AB 685 enacted various employer notification requirements related to potential COVID-19 exposure. AB 2693 would extend these requirements to January 1, 2025 (rather than current January 1, 2023 expiration)
- Similarly, AB 1751 would extend to January 1, 2025 the presumption of workers compensation coverage for COVID-19-related illnesses.
- AB 1890/AB 1920 would enable employers to claim a tax credit for expenses of complying with CA COVID-19 SPSL.

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# Harassment/Discrimination Retaliation

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# “Family Responsibility” Protections under the FEHA (AB 2182)

- Would amend FEHA to prohibit discrimination/harassment based on “family responsibilities”
- “Family responsibilities” defined as “obligations . . . to provide direct and ongoing care for a minor child or care recipient” (i.e., “family member” means expanded CFRA definition, “any other individual related by blood,” or whose close association akin to a family relationship)
- No general accommodation obligation provided policies (example: attendance) applied consistently
- However, accommodation/interactive process provisions would apply if needed to care for a minor child or “care recipient” because of unforeseen closure/unavailability of school/care provider



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# Preventing Harassment of Customers (AB 2448)

- Private businesses open to the public with 100 or more employees must address “harassment” of customers on their “premises” whether by the business’ employees or third-parties (“premises” means inside building or outside areas if under business management or control)
- “Harassment” defined as “words, gestures or actions” at a specific person because of a protected characteristic (slightly different standard from FEHA)
- Covered businesses must do all of the following:
  - post a DFEH-created sign re: customer rights
  - ensure employee training re: third-party bias-based harassment;
  - develop a policy re: third-party harassment, collect data and provide to DFEH upon request



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# Preventing Harassment of Customers (AB 2448)

- Employers need not affirmatively intervene in harassment, but cannot retaliate against employees for actions taken pursuant to these requirements
- By January 1, 2025, covered businesses must provide bias-based training (which the DFEH will develop) to all employees who interact with the public (two hours for supervisors, one hour for non-supervisors)
- Similar to other harassment training, must provide within six months of hire/promotion (unless employee has received timely training from a preceding employer), and refresher training every two years

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# Revival of Sexual Assault and Other Claims (AB 2777)

- Would permit claims for sexual assault or of a sexual nature (and “related claims”) otherwise time-barred as of January 1, 2023 to be filed until December 31, 2023
- To qualify, the plaintiff must show:
  - they were subjected to conduct of a sexual nature;
  - one or more entities are legally responsible for the resulting damages; and
  - these entities covered up the alleged misconduct (including moving the perpetrator or incentivizing people to remain silent, including through confidentiality provisions)



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# Revival of Sexual Assault and Other Claims (AB 2777)

- To prevent litigation abuse, heightened pleading and certification standards would apply for potential revival purposes
- But revival would also apply to “related claims” (including sexual harassment and wrongful termination) unless by January 1, 2023:
  - resolved by written settlement agreement; or
  - litigated to finality in court of competent jurisdiction

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# “Cannabis” Discrimination Protections (AB 2188)

- Would amend the FEHA to preclude employers from discriminating against employee/applicant based on:
  - Cannabis usage away from work; or
  - A drug screening test revealing non-psychoactive cannabis metabolites
- Does not preclude performance-based impairment testing, or corrective action if employee is impaired on worksite during employment hours.
- Also does not preclude testing for active presence of THC on worksite or during employment hours.
- Would not preclude THC-related screening tests if:
  - Federal law requires testing
  - Employer would lose monetary or licensing benefit unless it tests
- AB 2188 not applicable to building/construction industries

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# Natural Disaster Retaliation Protections (SB 1044)

- Would preclude employers during a “state of emergency” or “emergency condition” from:
  - taking adverse action against employees who refuse to report to or leave a workplace within the affected area if the employee feels unsafe, or
  - preventing employee’s from accessing their mobile device or other communications device to seek emergency assistance or to assess safety.



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# Natural Disaster Retaliation Protections (SB 1044)

- “State of Emergency” means any of the following where a worker lives or works and poses imminent risk of harm:
  - a Presidential declaration of disaster by natural forces;
  - a declared state of emergency;
  - a Federal/State/Regional alert of imminent threat due to natural disaster
- “Emergency Condition” means either:
  - serious danger to workplace or worker’s health;
  - evacuation order of workplace, a worker’s home or child
- Notice by worker required, if feasible

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# Human Resources/Workplace Policies

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# Pay Scale/Pay Data Reporting Changes (SB 1162)

- Presently, employers must provide a pay scale after an "applicant" has completed an initial interview
- SB 1162 would require employers/third parties to provide the pay scale in the job posting
- Current employees would also be entitled to pay scale for current position
- Employers must maintain job postings throughout employment plus three years post-termination
- Authorizes new civil penalties between \$500 - \$10,000 per violation, and creates a rebuttable presumption in employee's favor if records not maintained

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# Pay Scale/Pay Data Reporting Changes (SB 1162)

- To prevent unfair promotion processes, would require employers to announce promotion opportunity and pay scale to all current employees:
  - on same calendar day; and
  - before promotion decision announced
- Employees entitled to same rights/remedies regarding proposed pay scale requirements



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# Pay Scale/Pay Data Reporting Changes (SB 1162)

- In 2020, SB 973 required employers with 100+ employees to submit a pay data report (or submit its EEO-1) to the DFEH
- SB 1162 would require a separate pay data report if the employer hires employees through a labor contractor (as defined), including disclosure of labor contractor ownership
- Employers also required to include median and mean hourly rates for each combination of race, ethnicity and sex.
- Employers can no longer submit EEO-1 in lieu of report
- DFEH to publish private employer pay data report
- Additional civil penalties authorized

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# Further Extension of the CCPA's Employee Exemption (SB 1454/AB 2891)

- The California Consumer Privacy Act of 2018 (CCPA) and California Privacy Rights Act (CPRA) grants "consumers" rights regarding their personal information, including the right to request deletion of that information
- Issue: does the CCPA/CPRA's definition of "consumer" apply to employees and allow them to request deletion of unfavorable information gathered by the employer. (Example: a sexual harassment finding)?

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# Further Extension of the CCPA's Employee Exemption (SB 1454/AB 2891)

- A so-called employee exemption was subsequently created for personal information:
  - Collected by a business from an applicant/employee to the extent used solely in employee context;
  - For emergency contact information;
  - To administer benefits
- This employee exemption currently expires on January 1, 2023, but would either be extended three more years (AB 2891) or indefinitely (SB 1454)

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# Biometric Information Privacy (SB 1089)

- Echoing the CCPA, the Biometric Information Privacy Act (BIPA) would impose guardrails upon collection, use, disclosure and retention of “biometric information” by private entities in California.
- “Biometric information” defined as an individual’s data generated by unique biological or behavioral characteristics that can authenticate identity (e.g. faceprint, fingerprint, voice print, retina/iris image)



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# Biometric Information Privacy (SB 1089)

- By September 1, 2023, private entities possessing such info must develop and make available a written policy regarding its retention and destruction, and comply with the policy.
- Prohibits collecting, purchasing or obtaining a person's biometric information, absent specific disclosures and written releases, including being separate from other similar releases or employment contracts.
- Requires private entities to store/transmit/protect biometric information using a reasonable standard of care (i.e., for similar confidential/sensitive information.)
- Authorizes civil actions, including statutory damages up to \$1,000 per violation per employee per day.
- Illinois BIPA a cautionary tale?

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# Worker Metric Reporting (AB 2095)

- Beginning March 31, 2024, larger employers (1,000+ employees in California) must annually submit to LWDA statistics about employer workforce regarding:
  - Pay
  - Hours
  - Workforce Scheduling
  - Prospects for internal advancement
  - Benefits
  - Workplace security
  - “Equity”
- Report to include nation-wide information and CEO signs under penalty of perjury
- LWDA to publish information based on industry, and score and certify “high road” employers

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# Tax Relief for Student Loan Assistance (AB 1729)

- Current: Employers may provide up to \$5,250 annually for ongoing educational assistance
- Proposed: Exclude up to \$5,250 per year from an employee's state income amounts that are paid or incurred by an employer against an employee's existing student loan debt
- Federal CARES Act already allows similar employer assistance with student loan debt until 2026
- SHRM/CalSHRM sponsored bill



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# Background Checks via Court Records (SB 1262)

- In 2021, a California Appeals Court precluded accessing date of birth or drivers license information when searching court records for background check purposes
- SB 1262 would specifically authorize searching/filtering of publicly accessible court records based on such information



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# LEAVES OF ABSENCE/TIME OFF/FLEXIBILITY

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# Bereavement Leave (AB 1949)

- Upon request, employers would have to provide five days off upon death of spouse, child, parent, sibling, grandparent, grandchild or domestic partner
  - Applies to private employers with five or more employees, and employees eligible after 30 days
  - Time off need not be consecutive, but must be completed within 30 days of person's death.
- Unpaid leave but employees could use other paid time off
- If employer has existing bereavement leave policy, employees only entitled to additional time off to reach five days
- Employers may request documentation to justify time off



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# Individual Alternative Workweek Schedules (AB 1761)

- Permit “individual” alternative workweek schedules without “business unit” approval process provided certain requirements met
- Employees could work 4/10 schedule without overtime after eight hours, but retains weekly overtime requirement



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# Wage and Hour

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# Four-Day Workweek Proposed (AB 2932)

- For employers with 500+ employees, any work beyond 32 hours shall be considered overtime (as would work beyond eight hour daily)
- The employee's compensation rate would be the same at 32 hours as at 40 hours
- Employers would also be precluded from reducing an employee's regular rate of pay due to this reduced hourly workweek requirement.
- Does not apply to employees at smaller employers (less than 500 employees) or certain enumerated exemptions

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# PAGA Ballot Initiative?

- Proposed ballot initiative would recast the Private Attorneys General Act (PAGA)
- If enacted, LWDA would be fully funded and would handle all complaints (rather than “private attorneys”), with 100% of award to employees
- Would create a LWDA consultation unit to resolve some violations without penalty, but authorize double penalties for willful violations.
- June 6<sup>th</sup> deadline to obtain signatures to qualify for November 2022 ballot.

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# Miscellaneous

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# Public Access to Employee-Only Restrooms (AB 1632)

- Business open to general public for sale of goods/services with employee-only restrooms would need to permit access to non-employees if:
  - the individual has an “eligible medical condition” (e.g. Crohn’s Disease, IBS, etc.) or uses an ostomy device;
  - three or more employees are then onsite;
  - permitting bathroom access would not create obvious health/safety or security risk;
- Businesses may require reasonable evidence of eligible medical condition or ostomy bag usage.

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# Potential FEHC Regulations for Artificial Intelligence in Employment Decision-Making

- FEHC has published draft regulations regarding artificial intelligence/machine learning in employment decision making
- Would prohibit use of “automated-decision systems” (ADS) that screen out applicants/employees (or classes) based on a protected characteristic, unless job-related and consistent with business necessity
- Would apply to ADS that are intentionally discriminatory or create disparate impact

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# Potential FEHC Regulations for Artificial Intelligence in Employment Decision-Making

- ADS broadly defined to include any “computational/process .... including artificial intelligence techniques that screens.....recommends...makes a decision or facilitates human decision making” impacting applicants/employees
- Regulations would apply to employers and “employment agencies,” including technology vendors
- Would expand record retention period from two years to four years, and also require retention of “machine-learning data.”

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# Fast Food Industry Regulations (AB 257)

- Would establish a “fast food sector council” to establish minimum standards on wages, working hours and other working conditions regarding health/safety
- Would require franchisors to ensure franchisees comply with California laws, and impose joint and several liability upon franchisors/franchisees
- Creates new retaliation protections for fast food workers, including presumption of retaliation for actions taken within 90 days of protected activity

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# Resources for Monitoring Legislation

- SHRM (<https://shrm.org>)
- CalSHRM
  - Twitter: @CalSHRM
    - @MichaelKalt\_law
    - @SHRMCAJason
    - @SHRM
    - @SHRMATEAM
  - One Voice Newsletter (<http://calshrm.org/one-voice.html>)
  - CalSHRM Legislative Report
- California Legislative (<http://leginfo.legislature.ca.gov/>)
- NCSL (<https://www.ncsl.org>)

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# THANK YOU

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