CALSHRM LEGISLATIVE REPORT – MARCH 2019

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LEGISLATIVE SUMMARY

As the April 26th deadline for bills to pass key committee votes approaches, the 2019-2020 California Legislative Session is beginning to come into clearer focus. And once again, there are a number of significant employment bills pending, including bills that would:

- Prohibit mandatory pre-employment arbitration agreements for Fair Employment and Housing Act (FEHA) and/or Labor Code violations (AB 51);
- Clarify that employees who received sexual harassment training in 2018 need not be re-trained in 2019 (SB 778);
- Impose joint liability for harassment upon client employers and labor contractors (AB 170);
- Amend the Labor Code to preclude discrimination or retaliation against sexual harassment victims and their family members (AB 171 and AB 628);
- Extend the statute of limitations for FEHA claims from one to three years (AB 9) and for Labor Code claims from six months to three years (AB 403);
- Preclude discrimination based upon hair texture and hairstyles (SB 188);
- Expand CFRA leave to employers with five or more employees and only require 180 days service (rather than 1,250 hours and 12 months of service) (SB 135);
- Create CFRA leave for part-time employees working 900 hours (AB 1224);
- Increase California's annual paid sick leave requirements from three to five days (AB 555);
- Require employers to provide up to thirty days unpaid leave for organ donations (AB 1223);
- Further expand workplace lactation accommodation requirements (SB 142);
- Prohibit so-called "no rehire" provisions in employment-related settlement agreements (AB 749);
- Address the California Supreme Court's *Dynamex* ruling regarding independent contractors (AB 5, AB 71 and SB 238);
- Encourage employers to assist employees with student loan repayment assistance (AB 152); and
- Require larger employers to submit annual "pay data reports" (SB 171).

There also are a number of so-called "spot bills" remaining on a wide range of employment subjects, suggesting this list may still expand.

As mentioned, the next major deadlines are the April 26th deadline for bills to pass key policy committee votes and the May 31st deadline for bills to pass the first legislative chamber. Many of these bills will likely undergo significant amendments as these deadlines approach.

In the interim, below is an overview of the currently pending employment bills grouped largely by subject matter, followed by a listing of remaining employment-related "spot bills."

PENDING BILLS

Harassment/Discrimination/Retaliation

Clarification Proposed Regarding Sexual Harassment Training Deadlines (SB 778)

In 2018, California unanimously enacted SB 1343 which extended so-called AB1825 harassment training in two material respects: (1) it required employers with five or more employees (rather than 50 employees) to provide this training; and (2) it required employers to train both supervisors and non-supervisory employees. Although SB 1343 requires employers to provide this training by January 1, 2020, it was initially unclear whether employers would need to re-train employees who had received AB1825-compliant training in 2018, before SB1343 was enacted but within the two-year period for AB1825 training purposes. In late 2018, the Department of Fair Employment and Housing added to this confusion via published "Frequently Asked Questions" suggesting employers needed to retrain all employees in 2019, even those trained in 2018.

This bill would resolve this ambiguity by specifying that an employer who has provided this training after January 1, 2018 would not need to provide refresher training to the employee until after December 31, 2020.

This clarifying bill is proposed by the Senate's Committee on Labor, Public Employment and Retirement and appears very likely to be enacted and quickly.

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

Proposed Ban on Mandatory Arbitration for FEHA and Labor Code Claims (AB 51)

This bill responds to concerns that employers conceal sexual harassment through mandatory arbitration agreements and non-disparagement provisions. Accordingly, new Labor Code section 432.6 would preclude employers from requiring applicants, current employees or independent contractors to agree as a condition of employment, continued employment, or the receipt of any employment-related benefit to waive any right, forum, or procedure related to any violations of the Fair Employment and Housing Act (FEHA) and the Labor Code, including the right to file a claim with a state or law enforcement agency. It would also preclude employers from threatening, retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refuses to consent to the waivers prohibited under this section. It would also specify that any agreement that requires an employee to opt out

of a waiver or to take any affirmative action to preserve their rights will be considered a condition of employment.

However, it would not apply to post-dispute settlement agreements or negotiated severance agreements.

Although AB 51 does not mention arbitration specifically, the bill is clearly intended to essentially prohibit mandatory arbitration for not only FEHA claims, but also Labor Code claims. To escape a likely forthcoming preemption challenge, the bill's author states this bill does not preclude arbitration agreements for FEHA and Labor Code claims, but simply precludes employers from requiring them as a condition of employment, or retaliating against employees who choose not to agree to arbitration.

This prohibition would apply to any contracts for employment entered into, modified or extended on or after January 1, 2020. Further, prevailing plaintiffs who enforce their rights under this section would be entitled to recover their reasonable attorney's fees and injunctive relief (e.g., reinstatement, nullification of the improper contract provisions, etc.)

New Labor Code section 432.4 would also preclude employers from requiring as a condition of employment, continued employment or the receipt of any employment-related benefit that an applicant, employee or independent contractor agree to not disclose any instance of sexual harassment the employee or independent contractor suffers, witnesses, or discovers in the workplace or while performing a contract. Employers also could not require such individuals agree not to oppose any unlawful practice or from exercising any right or obligation or participating in any investigation or proceeding with respect to unlawful harassment or discrimination.

Lastly, new Government Code section 12953 would specify that it shall be an unlawful employment practice, thus implicating the FEHA, for an employer to violate proposed new Labor Code section 432.6.

An identical bill (AB 3080) narrowly passed the Legislature but was vetoed by then-Governor Jerry Brown. New Jersey recently joined the state of Washington in enacting similar state-wide bans on arbitration agreements for most employment disputes.

Status: Passed the Assembly's Labor and Employment and Judiciary Committees and is pending in the Assembly Appropriations Committee.

New Penalties for an Employer's Breach of Arbitration Agreement (SB 707)

This bill attempts to address concerns that after forcing an employee to compel arbitration employers are strategically failing to pay arbitration-related fees, thus stalling the proceedings. Accordingly, this bill would implement new penalties if an employer failed to pay within 30 days of their due date the fees to initiate or to maintain arbitration proceedings for employment or consumer claims.

New Code of Civil Procedure sections 1281.97 and 1281.98 would deem such an employer in material breach of the arbitration agreement and in default of the arbitration, thus waiving their right to compel or proceed with arbitration. The employee would then have the option to withdraw the claim from arbitration and proceed in an appropriate court, or continue the arbitration but with the employer paying the employee's attorneys' fees involved with the arbitration. If the employee elects to proceed with court action, the statute of limitations would be deemed tolled during the pendency of the arbitration, and the court would be required to order sanctions against the employer, including monetary, evidentiary and potentially terminating sanctions.

Status: Pending in the Senate Rules Committee.

Extended Statute of Limitations for FEHA Complaints Re-introduced (AB 9)

Government Code section 12960 presently requires employees to file an administrative charge with the DFEH within one year from the date an unlawful employment practice has occurred. This bill would extend this deadline from one year to three years, but retain a one year limitations period for filing Unruh Act-related claims against business. It would also make conforming changes to the provision allowing employees an additional period up to 90 days if they first obtain knowledge of the facts of the alleged unlawful practice after the limitations period had expired. Finally, it would specify that this extended limitations period would not revive already lapsed claims, and would define "filing a complaint" as filing an intake form with the DFEH.

An identical bill (AB 1870) passed the Legislature but was vetoed by then-Governor Jerry Brown.

Status: Passed the Assembly's Labor and Employment Committee and is pending in the Assembly's Appropriations Committee.

Joint Responsibility for Labor Contractor Harassment (AB 170)

Labor Code section 2810.3 presently requires client employers and labor contractors to share civil liability for workers supplied by that contractor for certain violations (e.g., failure to pay wages or secure workers' compensation coverage). This bill would add a new FEHA provision (proposed Government Code section 12940.2) requiring such client employers and labor contractors to share both legal responsibility and civil liability for "harassment" (as defined in FEHA) by any workers supplied by a labor contractor.

The bill's author states it is intended to assist subcontracted employees, who may not even be aware they are working for someone other 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, client employers and labor contractors would share responsibility and liability for harassment for all workers supplied by the labor contractor, regardless of whether the harasser was employed by the client employer or the labor contractor. It would also specify that both entities may have responsibility to address the harassment -- depending on the facts, who was in the best position to learn of the conduct, or who did first learn of it – and impose civil liability if they fail to take prompt and effective remedial measures once they knew or should have known of the harassment.

For purposes of this new provision, "client employer" shall mean a "private" employer regardless of its form that obtains workers to perform labor within the usual course of business from a labor contractor. However, it would not include business entities with fewer than 25 workers, including those provided by a labor contractor, or a business entity with five or fewer workers supplied by a labor contractor. "Labor contractor" would mean any individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business, but would not include community nonprofit organizations, labor organizations or apprenticeship programs, motion picture payroll services or a third party who is a party to an employee leasing arrangement.

Relatively similar changes were proposed as part of AB 3081 which then-Governor Jerry Brown vetoed in 2018.

Status: Passed the Assembly's Labor and Employment Committee and is pending in the Assembly Judiciary Committee.

Deleting FEHA's Preemption Provision? (SB 218)

Government Code section 12993(c) presently states the Legislature's intent that the FEHA is intended to occupy the entire field of regulation regarding discrimination in employment and housing, but that it also does not affect the application of the Unruh Act (Civil Code section 51) regarding discrimination in certain business relationships. This bill would delete this subsection, presumably to permit municipalities to also enact regulations regarding discrimination, harassment and retaliation.

Status: Pending in the Senate Judiciary Committee.

Presumption of Post-Harassment Complaint Retaliation (AB 171)

Labor Code section 230 presently precludes all employers from discriminating or retaliating against victims of domestic violence, sexual assault or stalking, if the victim provides notice to the employer of the status or the employer has actual notice of this status.

This bill would amend this section to similarly preclude discrimination or retaliation against victims of "sexual harassment" (as defined by the Fair Employment and Housing Act in

Government Code section 12940(j).) In this regard, while the FEHA presently precludes retaliation against someone who has made a sexual harassment complaint, this bill would extend retaliation protections to someone who is a sexual harassment victim (but may not have made a complaint) if the employer knew about the harassment. It would also create a rebuttable presumption of unlawful retaliation if, within 90 days of the employee providing notice of or the employer learning of their status as a victim of sexual assault, domestic violence, sexual assault or sexual harassment, the employer discharges, threatens to discharge, demotes, suspends or takes any other adverse action against the employee.

These changes were proposed as part of AB 3081 which then-Governor Jerry Brown vetoed in 2018.

Status: Passed the Assembly's Labor and Employment and Judiciary Committees and is pending in the Assembly's Appropriations Committee.

Further Labor Code Protections for Sexual Harassment Victims (AB 628)

As with AB 171, this bill would amend Labor Code section 230 to preclude discrimination or retaliation against victims of sexual harassment if the employer is aware of such status. It would also amend Labor Code section 230 to preclude discrimination or retaliation against victims of sexual harassment who take time off from work to obtain legal relief for the employee or their child, and would extend similar protections to "family members" who take time off work to provide assistance and support to the victim seeking relief. It would also impose new confidentiality requirements related to employees taking leave because the employee needed to appear in legal proceedings or needed to take time off related to legal proceedings due to being a victim of domestic violence, sexual assault, stalking or sexual harassment.

For purposes of this time off, it would define "family member" as (a) a child (including adopted children, step-children, legal wards or someone to whom the employee stands in loco parentis); (b) a parent (as defined, including legal guardians or someone who served as loco parentis when the employee was a minor child); (c) a spouse; (d) a registered domestic partner; (e) a grandparent; (f) a grandchild; or (g) a sibling.

For purposes of section 230, "employer" would include any person employing another under any appointment or contract for hire, and includes the state of California and the Legislature.

For purposes of section 230 only, it would also define "sexual harassment" very broadly, including beyond the workplace, and to include any leering, derogatory comments, blocking movements, etc.

This bill would additionally amend Labor Code section 230.1, which applies to employers with 25 or more employees. In this regard, while it presently precludes discrimination or retaliation against employees who take time off for specified purposes (e.g., medical attention, psychological counseling, and domestic violence centers) that are victims of domestic violence,

sexual assault and stalking, it would add similar protections for victims of sexual harassment. It would similarly preclude discrimination or retaliation against "family members" who take time off from work to provide specific assistance and support to a victim of sexual assault, domestic violence, stalking or sexual harassment. "Family member," "sexual harassment" and "employer" would have the same definitions as discussed above regarding section 230.

A similar but broader bill (AB 3081) passed the legislature despite heavy opposition in 2018 but was vetoed by then-Governor Jerry Brown.

Status: Scheduled for hearing in the Assembly's Labor and Employment Committee on April 3, 2019.

FEHA Amendments for "Protective Hairstyles" (SB 188)

This bill would amend the definition of "race" under FEHA to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Protective hairstyles, in turn, would be defined as "including, but is not limited to, such hairstyles as braids, locks, and twists."

New York City recently adopted similar guidelines to protect the rights of employees to maintain natural hair or hairstyles closely associated with their racial, ethnic or cultural identities, including the same specific protections for locks, twists and braids.

Status: Unanimously passed the Senate Judiciary Committee and is pending in the Appropriations Committee.

Economic Incentives Forthcoming to Combat Race and Gender Discrimination in Restaurant Industry (AB 1526)

This bill states the Legislature's intent to address perceived race and gender disparities in management positions within the restaurant industry. If enacted, the Legislature would be tasked with foster workplace equity by providing economic incentives to "equitable employers" in the restaurant industry that complete specified training programs and contractually commit with the state to improve workplace equity by implementing standard and transparent hiring, promotion, training, and evaluation practices. The Legislature would also commit to enacting legislation publicly supporting these restaurant employer partners, including highlighting them during an annual state-sponsored restaurant week.

Status: Pending in the Assembly but not yet assigned to a committee.

Harassment Training for Janitorial Service Workers (AB 547)

Known as the Janitor Survivor Empowerment Act, this bill would enact specific harassment training rules related to the janitorial service industry, including allowing peers to provide direct training on harassment prevention for janitors. It would also require employers, upon request, to

provide a copy of all training materials used during the training and require employers to use a qualified organization from the list maintained by the Department of Industrial Relations.

It would also amend Labor Code section 1421 to require employers to maintain records for three years identifying the names and addresses of all employees engaged in rendering janitorial services for the employer.

A similar bill (AB 2079) passed the Legislature in 2018 but was vetoed by then-Governor Brown.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 24, 2019.

Harassment Poster Requirement for Educational Institutions (AB 543)

While the Education Code presently requires educational institutions to display its sexual harassment policy in a prominent location, this bill would expand these notice protections to include not only employees, but also students. Accordingly, it would require each educational institution to create and conspicuously display a poster notifying pupils of the institution's written policy on sexual harassment. As with many other poster requirements, this bill specifies many of the formatting requirements for this poster but otherwise directs that it contain "age appropriate" and "culturally relevant" information.

Status: Pending in the Assembly Education Committee.

Targeting "Implicit Bias" in Certain Industries (AB 241-243)

AB 242 would develop new implicit bias training for members of the judicial branch. Specifically, judges, commissioners, referees, clerks, bailiffs, and all attorneys appearing before a court, would be required to take eight hours of mandatory training every two years. The Judicial Council will be tasked with developing this training.

AB 241 and AB 243 are expected to require implicit training for the healing arts professions and law enforcement respectively.

Status: AB 241 and 243 are pending in the Assembly's Business and Professions Committee, and AB 242 is pending in the Judiciary Committee.

Sexual Harassment Settlements for Legislature Members (AB 1094)

This bill would preclude the Assembly and the Senate from paying any monies to compromise or settle any sexual harassment claim against a member of the Legislature.

Status: Pending in the Assembly but not yet assigned to a committee.

Veterans' Hiring Preference for Private Employers (AB 160)

This bill attempts to address the higher-than-normal unemployment rate for returning veterans. Accordingly, new Government Code section 12958 would authorize employers to extend a preference during hiring decisions to veterans. "Veterans" would be defined as any person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and was discharged or released under conditions, other than dishonorable. Employers would be permitted to require a veteran to submit United States Department of Defense Form 214 to confirm eligibility for this preference. Section 12958 further specifies that such a preference shall be deemed not to violate any state or local equal employment opportunity law, including the FEHA, if used uniformly and not established for purposes of unlawfully discriminating against any group protected by the FEHA.

Government Code section 12940(a)(4) presently provides that using veteran status in favor of Vietnam-era veterans shall not constitute sex discrimination under the FEHA. This bill would broaden this exemption by removing the references to "sex" and to "Vietnam-era veterans," and provide that FEHA's discrimination provisions would not affect an employer's ability to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference policy in accordance with new section 12958.

Similar bills (AB 1383 and AB 353) have unanimously passed the Assembly before stalling in the Senate's Judiciary Committee in 2016 and 2017, even though similar preferences have been enacted in nearly 40 states.

Status: Overwhelmingly passed the Assembly Veterans Affairs Committee, and is pending in the Assembly Labor and Employment Committee.

Leaves of Absence/Time Off-Related Laws

Increased Paid Family Leave Benefits (AB 196 and AB 406)

California's "paid family leave" is a state-sponsored insurance program within the state disability insurance program to provide wage replacement benefits for up to six weeks within a twelve-month period for certain purposes (e.g., time off to care for seriously ill family member or to bond with minor child). Currently the program provides benefits based upon weekly benefits available pursuant to unemployment compensation disability law, and essentially allows up to 70% of income for low income earners and 60% for middle and high income earners up to a maximum weekly benefit of $1,216.

AB 196 would revise the formula for determining benefits available for the family temporary disability insurance program for periods of disability commencing after January 1, 2020. This change would redefine the weekly benefit amount to be equal to 100% of the wages paid to an individual for employment by employers during the quarter of the individual's disability base period in which these wages were highest, divided by 13, but not exceeding the maximum workers' compensation temporary disability indemnity weekly benefit established by the Department of Industrial Relations.

AB 406 would require the Employment Development Department to distribute "Paid Family Leave" in all non-English languages spoken by a substantial number of non-English speaking applicants.

Status: AB 196 and AB 406 are scheduled for hearing in the Assembly Insurance Committee on April 24, 2019.

CFRA Expansions to Accommodate Paid Family Leave Benefit Usage (SB 135)

Expanding both the benefits available and the usage of Paid Family Leave wage replacement benefits is a major legislative focus for new Governor Gavin Newsome and the California legislature. Accordingly, this bill would materially expands the circumstances under which Paid Family Leave Benefits may be used generally, and also expand leave protections to enable employees the time off to draw upon these benefits.

The California's Family Rights Act (CFRA, Government Code section 12945.2) is the state law equivalent of the Family Medical Leave Act and allows eligible employees to take up to 12 workweeks of job-protected leave for certain specified reasons (e.g., to bond with a newborn child, to care for the serious health condition of the employee or family member). While the CFRA presently requires the employee work at least 1,250 hours in the 12 month period preceding such a leave (thus mirroring the FMLA), this bill would eliminate the 1,250 hours of service and the 12 months of service, and require only the employee have 180 days of service with the employer to qualify for up to 12 weeks of job protected leave. It would also drop from 50 employees to 5 employees the threshold number of employees for an employer to be subject to CFRA. 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.

This bill would also expand the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken to care for. 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. As this list notes, an employee could take time off not only for family members, but also a "designated person" identified by them at the time they request family care and medical leave, but the employer could limit the employee to designating only one person per 12-month period for family care and medical leave. 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.

The definition of "child" would also expand to include a child of a domestic partner or a child-in-law, with child-in-law defined as the "spouse of domestic partner of a child." Similarly, the bill would also enable employees 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.

The bill also would define "grandparent," "grandchild," "sibling" and also "parent-in-law," suggesting that if enacted, this bill contemplates allowing time off for parents-in-law even though not currently specifically enumerated in the definition of "family care and medical leave."

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.

This bill would also delete a current CFRA provision that provides if both parents are employed by the same employer and are otherwise entitled to leave, the employer would not be required to grant leave that is greater than 12 weeks.

In 2017, California enacted the New Parent Leave Act (SB 63, Government Code section 12945.6) requiring employers with 20 or more employees to provide up to 12 weeks leave to bond with a child. Because SB 135 would essentially supersede this law by expanding job protected leave for the same purpose to even smaller employers, it would repeal Government Code section 12945.6. Accordingly, the dramatically-expanded CFRA would now govern parent leave.

Lastly, this bill would amend multiple provisions in the Unemployment Insurance Code to authorize "paid family leave" benefits to be used for the additional purposes outlined in CFRA (i.e., to care for a "designated person," or a "child in law").

Status: Pending in the Senate Rules Committee.

CFRA for Part-Time Workers and Paid Family Leave Expansions (AB 1224)

Citing a desire to enable part-time workers to obtain CFRA-like leave protections, this bill would add new Government Code section 12945.7 entitling employees who have worked for 900 or more hours in the preceding 12 months to take leave, upon request and without a determination by their physician they are disabled, so long as all other conditions for taking CFRA leave are satisfied. (Notably, while this bill seems to suggest it is only modifying the hours requirement and not the employer size (50 employees) and length of service (12 months) for CFRA purposes, it remains to be seen if those other CFRA requirements remain if SB 135 (discussed above) is enacted). This leave would be separate from any CFRA-related leave and would not be required to be taken concurrently with CFRA leave.

While the Unemployment Insurance Code presently authorizes up to six weeks of temporary disability benefits in any 12 month period, this bill would also authorize up to 12 weeks of such benefits by permitting a maximum of two qualifying events of up to six weeks each in any 12-month period. According to the bill's author, this expansion is intended to reflect the reality that women may either give birth twice in twelve months, or give birth and have to care for a

seriously ill family member in the same twelve months.

Status: To be heard in the Assembly's Labor and Employment Committee on April 3, 2019.

Paid Sick Leave Changes, Including Increased Usage, Accrual and Carryover Limits (AB 555)

Enacted in 2014, California's paid sick leave law (Labor Code section 245, *et seq.*) generally requires employers to allow employees to accrue/use/carryover up to three days/24 hours of sick leave per 12-month period. This bill would amend these requirements and instead entitle an employee to use up to five days/40 hours of paid sick leave in each calendar year, year of employment, or 12-month period. It would also correspondingly increase from six days/48 hours to 10 days/80 hours the accrual cap and carryover limitations an employer may have for paid sick leave purposes.

Employers would still be entitled to use alternative accrual methods beyond the default one hour accrued for every 30 hours worked, provided the employer uses a regular accrual method so that the employee has 40 hours accrued by the 200th day, or by providing five days/40 hours paid sick leave available for use by the completion of the 200th day.

This bill would also make corresponding changes to paid sick leave limits for in-home support service providers beginning January 1, 2026.

This bill would also expand the purposes for which the employee may use paid sick leave. If enacted, an employee could also use paid sick leave for absences due to the employee's donation of bone marrow or an organ, or due to the closure because of a public health emergency of the employee's place of business or the employee's school or childcare.

This bill would also modify the circumstances under which an employer may require documentation about an employee's usage of paid sick leave or PTO. Presently, Labor Code section 247.5 requires employers to retain records for three years of paid sick leave accrued and used, but also provides that an employer is not required to inquire into or record the purpose for which paid sick leave or PTO is used. If enacted, an employer would be specifically prohibited from compelling an employee to provide documentation verifying use of their first 5 days or 40 hours of paid sick leave or PTO.

The bill's author justifies these expansions partially upon the need of the statewide version to catch up to the more generous paid sick leave laws enacted in various California municipalities. However, recognizing the compliance challenges presented by these varying paid sick leave ordinances, this bill would partially (but not entirely) preempt various municipal level provisions, including regarding basic accrual, when an employee may being using, employer

accrual limits, advance notification, the purposes for which leave may be use, employer recordkeeping, and employee documentation.

A similar bill, but without the preemption language (AB 2841), stalled in 2018.

Status: Pending in the Assembly but not yet assigned to a committee.

Increased Leave Time for Organ Donation Purposes (AB 1223)

Since 2010, Labor Code section 1510 has required private and public employers to allow employees to take a paid leave of absence of up to 30 days within a one-year period for the purpose of donating an organ to another person. This bill would require private and public employers to grant an employee an additional unpaid leave of absence of up to 30 days within a one-year period for these same purposes.

Status: To be heard in the Assembly's Labor and Employment Committee on April 3, 2019.

Job Protections for Employees Using Medication-Assisted Treatment (AB 882)

Labor Code section 1025 presently requires employers with 25 or more employees to reasonably accommodate an employee who voluntarily participates in an alcohol or drug rehabilitation program, but does not preclude an employer from disciplining an employee whose current drug or alcohol usage renders them unable to perform their job duties. This bill would add new Labor Code section 1029 and apply to all employers, regardless of the number of employees, to preclude an employer from discharging an employee if the sole reason was because the employee tested positive on a drug test for a drug being used as a medication-assisted treatment under the care of a physician or pursuant to a licensed narcotics treatment program. This seemingly includes not only medical marijuana but also other lawful medicines (e.g., opioids) making it even broader than AB 2069, which stalled last year.

Status: Scheduled for hearing in the Assembly's Labor and Employment Committee on April 24, 2019.

Private Civil Action for Violations of Labor Code Section 230 (AB 1478)

This bill would also amend Labor Code section 230 and expand an employee's ability to bring a private civil action for violations of this provision without having to exhaust administrative remedies. Specifically, it would make clear that an employee may directly file a private action without first involving the Labor Commissioner for any violations regarding (1) an employee's ability to take time off for jury duty; (2) an employee's status as a crime victim; (3) an employee's ability to take time off to seek legal aid because of a sexual assault, domestic violence or stalking; (4) an employee's status as a victim of sexual assault, domestic violence, or stalking; and (5) because an employee sought reasonable accommodation related to sexual

assault, domestic violence or stalking. In addition to awarding reasonable attorneys' fees to a prevailing employee, the court would also be able to award "any other relief" that the court deems would effectual the purpose of these protections, including reinstatement, front and back pay, and emotional distress.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3, 2019.

Paid Maternity Leave for School and Community College Employees (AB 500)

This bill would require the governing body for school districts, charter schools and community colleges to provide at least six weeks paid leave for a certificated employee or an academic employee due to pregnancy, miscarriage, childbirth and recovery from those conditions. This leave may begin before and continue after childbirth, if the employee is actually disabled by pregnancy, childbirth or related condition.

Status: Overwhelmingly passed the Assembly Higher Education Committee.

Pay Equity

Annual Pay Data Reports (SB 171)

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 stopped 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), who 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.

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).

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. It would also contain a legislative declaration that information obtained through these reports would be considered confidential information and not subject to the California Public Records Act, but would permit the DFEH to develop and publicize aggregate reports via the information provided.

A very similar bill (SB 1284) passed the Senate but stalled in the Assembly in 2018. At the federal level, a district court recently held the Trump Administration failed to meet the legal requirements to stay the Obama Administration's reporting rules regarding EEO-1 pay data, and appeals are ongoing. Foreseeably, if the Obama Administration's pay data reporting rules are upheld, that may assist with passage of SB 171 to the extent complying with its state-level reporting requirements would arguably involve simply submitting the EEO-1 to the DFEH and the EEOC at the same time.

Status: Passed the Senate Labor, Public Employment and Retirement Committee, and scheduled for hearing in the Senate Judiciary Committee on April 2, 2019.

Pay Equity Protections to Include Gender Identity and Expression (AB 758)

California's Pay Equity provisions (Labor Code section 1197.5 *et seq.*) prohibit employers from paying employees less than employees of the opposite sex for substantially similar work. This bill would specify that "sex" includes a person's "gender," which in turn includes a person's gender identity and gender expression. "Gender expression" would mean a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

While this section presently requires any civil action be initiated within one year of a cause of action occurring, this bill would impose a similar one-year requirement to initiate an

administrative action.

The bill states it is intended to be declarative of existing law, suggesting a possible intent to have the changes apply retroactively.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3, 2019.

Wage and Hour

Dueling *Dynamex* Bills Proposed (AB 5, AB 71 and SB 238)

In 2018, the California Supreme Court issued its landmark decision in *Dynamex Operations West, Inc. v. Superior Ct.* (2018) 4 Cal. 5th 903 articulating a new legal test (the so-called "ABC Test") for determining whether someone is an independent contractor or an employee. Not surprisingly, there are multiple bills addressing the *Dynamex* decision albeit via very different approaches.

The first -AB 5- would state the Legislature's intent to codify the *Dynamex* decision, thus protecting it from legislative or judicial rollback. It would add new Labor Code section 2750.3 specifying that *Dynamex's* ABC test for determining whether someone is an independent contractor would apply to all provisions of the Labor Code or the Industrial Welfare Commission's Wage Orders, absent those provisions discussing an "employee" specifically contain an alternative definition. Thus, an individual providing labor or services shall be considered an employee absent all of the following "ABC" factors being met: (A) the person is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

However, AB 5 would also specifically enumerate the following four occupations that would not be governed by *Dynamex* but instead would remain governed by the so-called *Borello* test: (1) persons or organizations licensed by the Department of Insurance (as specified); (2) a physician and surgeon licensed by the State of California (as specified); (3) a securities broker-dealer or investment advisor or their agents and representatives registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or State of California (as specified); or 4) a direct sale representative as described in Unemployment Insurance Code section 650, so long as the conditions for exclusion from employment under that section are met.

It would also declare these provisions are simply declarative of existing law, rather than a change.

Lastly, it would expand the definition of a crime with respect to employer violations of the law regarding an employee.

The second -AB 71- would essentially jettison *Dynamex's* ABC Test and instead use the previously used multi-factor test set forth in *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341.

The third –SB 71- would for purposes of claims for wages and benefits arising under the IWC Wage Orders essentially apply the Economic Realities Test used under the FLSA. This test would analyze whether the worker is economically dependent upon the hiring entity to determine if the worker is an employee. This test would analyze the following factors: (1) the nature and degree of control by the principal; (2) the worker's opportunities for profit and loss; (3) the amount of the worker's investment in facilities and equipment; (4) the permanency of the relationship; (5) the required skill necessary for success; and (6) the extent to which the services rendered are an integral part of the principal's business.

Status: On February 26, 2019, the Assembly's Labor and Employment Committee convened a special meeting dedicated exclusively to *Dynamex*-related issues, confirming independent contractor classification will be a major legislative focus this session. AB 5 and AB 71 is currently pending in the Assembly Labor and Employment Committee, and SB 238 is pending in the Senate Rules Committee.

Clarification Regarding Independent Contractor Status for Insurance Agents (AB 233)

This industry-specific rule for the insurance industry would enable certain individuals to be characterized as independent contractors provided certain criteria are met, but without resort to the more broadly-applicable *Dynamex* or *Borello* tests discussed above. Specifically, it would provide that the definition of "employee" used in other contexts (e.g., Wage Orders, Workers Compensation, Unemployment Insurance, etc.) shall not apply to particular insurance industry positions (e.g., insurance agent or broker, surplus line broker, or a life and disability insurance analyst, etc.) if that individual has entered into a written agreement with an insurer or organizational licensee containing specific terms.

The written agreement would need to include all of the following statutorily enumerated provisions in new Insurance Code section 49: (1) the parties have voluntarily entered into the agreement; (2) the worker is classified as an independent contractor; (3) each party has the right to terminate the contract upon notice to the other party; (4) the worker may work outside the hirer's physical place of business; (5) the worker is responsible for the payment of necessary expenditures or losses incurred as a direct result of discharging the worker's responsibilities under the agreement; (6) the consideration provided by the hirer to the worker is in the form of commissions, fees or incentives, or all of these; and (7) the worker is responsible for the payment of all applicable taxes on compensation earned.

The parties to the agreement would have the general discretion to characterize the worker as an

independent contractor or an employee, but they could only characterize as an independent contractor if the preceding contractual provisions are met.

Status: Scheduled for hearing in the Assembly Insurance Committee on April 3, 2019.

Additional Notice Requirements for Labor Contracts (AB 1454)

Labor Code section 2810 generally prohibits an entity from entering into a contract for labor or services with specified types of contractors (e.g., construction, garment, janitorial security guard, etc.) if the entity knows or should know that the contract does not include sufficient funds to allow the contractor to comply with all state, federal and local laws governing labor or services. This section also creates a rebuttable presumption of no violation if the governing contract contains certain provisions, and this bill would add to these requirements to include the email addresses of the entity seeking and the contractor providing labor or services.

Status: Pending in the Assembly Labor and Employment Committee.

"Cure" Period Proposed for Itemized Wage Statement Violations (AB 789)

This bill would amend Labor Code 226 to provide employers an opportunity to cure any alleged wage statement violations before actions could be pursued directly by an employee or as a representative action under the Private Attorney General Act (PAGA). If enacted, an employee or their representative would need to first provide written notice by certified mail of the alleged violation, including the facts and theories to support the alleged violation. The employer would then have 65 days from the postmark date of the notice and if the employer does so, then no civil or PAGA claim could commence. However, this cure period would only apply for technical violations of the itemized statements written requirements (e.g., legal name of employer, employee's name identification number etc.), and would not apply if the employer had also failed to make a complete and timely payment of all wages due to the employee.

Status: Pending in the Assembly Labor and Employment Committee.

Attorneys' Fees Limits in PAGA Actions Regarding Wage Statement Violations (AB 443)

While Labor Code section 226 authorizes a prevailing plaintiff to recover attorneys' fees in an action involving wage statement violations, this bill would limit these fees in PAGA actions for such violations. Specifically, if the gross judgment amount or gross settlement amount in the action, including a class action, is fifty thousand dollars ($50,000) or more, the attorneys' fees shall not exceed 25 percent of these amounts.

Status: Pending in the Assembly Labor and Employment Committee.

Expanded Statute of Limitations and Attorneys' Fees Recovery for Labor Code Violations (AB 403)

This bill would amend two Labor Code provisions to make it easier or more enticing for

plaintiffs to file suit. First, it would amend Labor Code section 98.7 to extend from six months to three years the period for a person to file a 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 recovery, presumably to preclude a prevailing defendant to recover even if the claims were frivolous.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3, 2019.

Expanded Remedies for Wage-Related Penalties (AB 673)

Labor Code section 210 presently enumerates statutory penalties of $100 per violation per employee for various wage-related violations, but specifies that the Labor Commissioner shall recover that penalty with a percentage also being paid to the Labor and Workforce Development Agency. This bill would amend section 210 to specify that an "affected employee" (i.e., "the employee who was the subject of the violation") may bring a civil or an administrative action to recover the civil penalties presently available only to the Labor Commissioner.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 24, 2019.

Wage Payment Rules for "Print Shoot" Employees (SB 671)

This industry-specific bill would create special final wage deadlines for "print shoot employees," defined as an individual hired for a period of limited duration to render services relating to or supporting a print shoot. Modeled upon similar rules for other motion picture industry employees, new Labor Code section 201.6 would require that a print shoot employee would be entitled to receive payment of the wage earned and unpaid at the time of termination by the next regular payday (as defined). The employer may mail these wages to the employee or make them available at a location specified by the employer in the county where the employee was hired or performed labor.

Status: Pending in the Senate Rules Committee.

<u>Recruiting/Onboarding/Background Checks</u>

Prohibition on "No Rehire" Provisions (AB 749)

Continuing the recent trend of legislatively limiting otherwise common settlement agreement provisions, this bill would prohibit any settlement agreement related to an employment dispute from preventing or restricting the "aggrieved person" from working for the employer against which the claim was filed, or any parent company, subsidiary, division, affiliate, or contractor of

the employer. Any such provision in an agreement entered into or after January 1, 2020 shall be deemed void as a matter of law and against public policy.

Status: Scheduled for hearing in the Assembly Judiciary Committee on April 9, 2019.

Student Loan Repayment Assistance (AB 152)

While California already has a tax provision essentially mirroring Internal Revenue Code section 127, which excludes from an employee's income certain amounts paid by the employer on behalf of an employee's current education, this bill would extend this benefit to include employer payments made to help satisfy pre-existing student loan debt. Specifically, this bill would modify California's Revenue and Taxation Code section 17151 to exclude from an employee's gross income up to $5,250 per calendar year amounts paid or incurred by an employer to a lender relating to any "qualified education loans," as defined in Internal Revenue Code section 221, incurred by the employee. This bill is intended to assist employers in employee recruitment/retention by allowing them to make payments on behalf of students to reduce the students' educational loan balance. If enacted, this exclusion would apply to payments made by employers beginning January 1, 2019 and before January 1, 2024.

This bill would also specify that for taxable years beginning January 1, 2019 through January 1, 2024, the total aggregate amount excludable from an employee's income shall be $10,500 (essentially the $5,250 presently excludable for payments for an employee's current education assistance, and the $5,250 contemplated to assist with an employee's student loan repayments).

A federal bill (HR 1043) would make a similar exclusion from federal gross income payments made by an employer to reduce an employee's educational loan balance. In 2018, a similar California bill (AB 2478) unanimously passed several committee votes before stalling.

Status: Pending in the Assembly Revenue and Taxation Committee.

Preventing "Document Servitude" (AB 589)

To combat so-called "document servitude," this bill would prohibit employers from knowingly destroying, concealing, removing, confiscating or possessing an employee's passport, immigration document, or other actual or purported government identification document, for the purposes of committing trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. While federal law already prohibits employers from withholding or destroying immigration or identification documents for trafficking purposes, new Labor Code section 1019.3 would create a state law equivalent with new penalties and requirements. Accordingly, it would provide that violations of this prohibition would be a misdemeanor and subject the employer to a $10,000 penalty, in addition to any otherwise available civil or criminal penalty. The Labor Commissioner would also be authorized to issue a citation if it determines a violation has occurred.

Employers would need to post a notice concerning these new protections conspicuously at the

place of work if practicable, or otherwise where it can be seen as employees come and go to their places of work, or at the office or nearest agency for payment kept by the employer. This notice shall specify the rights of an employee to maintain custody and control of the employee's own immigration documents, and that the withholding of immigration documents by an employer is a crime. The notice shall also include the following specific language: "If your employer or anyone is controlling your movement, documents, or wages, by using direct or implied threats against you or your family, or both, you have the right to call local or federal authorities, or the National Human Trafficking Hotline at 888-373-7888."

New Labor Code section 1019.5 would also require the DLSE to develop and make available to employers by July 1, 2020 the "Worker's Bill of Rights" containing the following information: (1) the employee's right to retain their immigration and identification documents and the employer's inability to take these documents except for employment eligibility verification purposes; (2) the employee's right to be paid the mandatory minimum wage established by law or agreed to in an employment contract, whichever is higher; (3) the right to live where the employee chooses and that the employee does not have to live at any place designated by the employer; (4) the right not to be subject to debt bondage in lieu of being paid wages owed to the employee; and (5) the right to call local or federal authorities, or the national Human Trafficking Hotline at 888-373-7888 if the employer or anyone else is controlling the employee's movement, documents or wages, or using direct or implied threats against the employee or the employee's family. The DLSE will make this notice available in English and the 12 languages most commonly spoken in California by non-English speaking people or people with limited English language proficiency.

The employer would be required to provide copies of the Worker's Bill of Rights to all employees, with the timing of this delivery depending on whether the employee is hired before or after July 1, 2020. For employees hired on or after July 1, 2020, employers must provide this notice prior to verifying an employee's employment authorization. For employees hired before July 1, 2020, employers must provide the document to each employee after the DLSE makes it available.

Employers would be required to provide a copy in the language understood by the employee, and to obtain and retain for three years the employee's signature confirming receipt of this notice, and to provide a copy of the signed document to the employee. The employer may comply with the language requirement either by providing the document in the language understood by the employee or, if the DFEH has not made available a version in the language understood by the employee, by having the document interpreted for the employee in the language the employee understands

A similar bill (AB 2732) passed the Legislature with some bi-partisan support but was vetoed by then-Governor Brown.

Status: Unanimously passed the Assembly Labor and Employment Committee, and is scheduled

for hearing in the Assembly Judiciary Committee on April 2, 2019.

Advanced Authorization for Multiple Consumer Reports (AB 1008)

Both the federal Fair Credit Reporting Act (FRCA) and the California Investigative Consumer Reporting Agencies Act (ICRAA) detail various procedures before an employer may obtain an investigative report for employment purposes, including detailed advance disclosure requirements. However, while the FRCA expressly allows an employer to obtain a one-time blanket disclosure for obtaining these reports during the employment relationship, it is less clear whether employers can do so under the ICRAA or whether the employer needs to comply with the disclosure requirements each time they obtain such a report. This bill would clarify this ambiguity by expressly authorizing employers seeking investigative information for employment purposes to obtain a one-time authorization for single, multiple on ongoing disclosure of investigative consumer reports. As under current California law, the employer would still need to expressly disclose that it seeking either a one-time or a blanket authorization, and the employee would need to authorize in writing their approval for either the single report or the blanket authorization.

Status: Pending in the Assembly Privacy and Consumer Protection Committee.

"Ban the Box" Exception for Criminal Justice Agencies (AB 1372)

Although California has enacted various laws limiting when employers may obtain criminal conviction information and how they may use it, there are also various statutorily-enumerated exceptions for particular industries (e.g., peace officers, etc.). This bill would make a minor amendment to include persons already employed as nonsworn members of a criminal justice agency as an exception to these general rules regarding criminal conviction information, but only for those positions that relate to the collection or analysis of evidence or relate directly to certain activities described in Penal Code section 13101.

Status: Scheduled for hearing in the Assembly's Public Safety Committee on April 2, 2019.

<u>Miscellaneous</u>

Lactation Accommodation Requirements (SB 142)

Even though California just amended its lactation accommodation requirements in 2018 (AB 1976) to generally require employers provide a space other than a bathroom and providing guidelines for temporary lactation locations, the legislature has re-introduced a much broader bill that then-Governor Jerry Brown vetoed last year (SB 937).

Amongst other things, while Labor Code section 1030 presently requires employers to provide a reasonable amount of break time to express milk, this bill would specify the employer must provide a reasonable amount of break time each time the employee needs to express milk.

Secondly, while Labor Code section 1031 presently requires the employer provide a location "other than a bathroom" (following the adoption of AB 1976), this bill would specifically enumerate many physical requirements for this location, including adopting some specific requirements in the San Francisco Lactation Accommodation Ordinance, which took effect on January 1, 2018. For instance, it would reiterate that this location shall not be a bathroom and shall be in proximity to the employee's work area, shielded from view, and free from intrusion while the employee is lactating.

It would also require that the lactation room or location comply with all of the following requirements: (1) it be safe, clean, and free of toxic or hazardous materials; (2) contain a surface to place a breast pump and personal items; (3) contain a place to sit; and (4) have access to electricity. Employers would also need to provide access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace. And it would also require that where the lactation room is a multipurpose room, the use for lactation purposes shall take precedence over other uses during the period it is in use for lactation purposes.

For employers in multi-tenant buildings who cannot provide a lactation room within its own workspace, they would be permitted to provide a shared space amongst multiple employers that otherwise complies with these requirements. Recognizing that some employers may not be able to meet these new requirements due to operational, financial or space limitations, it would allow employers to comply by designating a temporary lactation location, provided these temporary spaces are identified by signage, are free from intrusion while the employee is expressing milk, and should remain lactation spaces for the time they are used for lactation purposes.

Employers with fewer than 50 employees may establish an exemption from these requirements if they can show the requirement would impose an undue hardship by causing the employer significant expense or operational difficulty when considered in relation to the size, financial resources, or structure of the employer's business.

New Labor Code section 1034 would also require employers to develop and implement a lactation accommodation policy including the following specific provisions: (1) notice of the employee's right to lactation accommodation; (2) identification of the process to request accommodation; (3) the employer's obligations to respond to such requests; and (4) the employee's right to file a complaint with the Labor Commissioner. Employers would be required to include this policy within their handbook or sets of policies made available to employees, and to distribute to employees upon hire or when an employee makes an inquiry about or requests parental leave.

Although employers would not need to respond to all lactation accommodation requests in writing, they would be required to respond within five days, and to respond in writing if unable to provide break time or a compliant location for lactation purposes. Employers would also be required to maintain requests for three years from the date of the request and allow the Labor

Commissioner to access these records. And employees would be entitled to access these records in the same manner as accessing payroll-related records under Labor Code section 226. An employer who does not maintain adequate records, or does not allow the Labor Commissioner reasonable access to such records, shall be presumed to have violated these accommodation-related requirements absent clear and convincing evidence otherwise.

New Labor Code section 1035 would require the DLSE to develop and publish a model lactation accommodation policy and a model lactation accommodation request form that employers could use. The DLSE would also be required to establish lactation accommodation "best practices" that provide guidance to employers and a list of "optional but recommended amenities," but non-compliance with these "best practices" would not be deemed a violation of this chapter.

This bill would also add retaliation protections for employees who request lactation accommodation, and amended Labor Code section 1033 would specify that the denial of reasonable break time or adequate space to express milk shall be deemed a failure to provide a rest period in accordance with Labor Code section 226.7. While section 1033 presently authorizes a civil penalty of $100 for each violation, this bill would specify that the Labor Commissioner may award this penalty for each day an employee is denied reasonable break time or adequate space to express milk. Employees would also be entitled to file complaints with the Labor Commissioner, in which case they could seek reinstatement, actual damages, and appropriate equitable relief. Continuing another legislative trend, the statute would allow the prevailing employee to recover their reasonable attorneys' fees, but not allow a prevailing employer to recover.

Lastly, for building owners and construction contractors, it would require newly constructed or remodeled non-residential buildings with at least 15,000 square feet of employee workspace to be constructed with lactations rooms, meeting the other requirements of this bill.

Status: Passed the Senate Labor, Public Employment and Retirement Committee, and scheduled for hearing in the Senate Judiciary Committee on April 9, 2019.

New Requirements for Emergency Ambulance Employees (AB 26 and AB 27)

These industry-specific bills would impose new requirements for emergency ambulance employees. The first -AB 26- would require emergency ambulance providers to provide each emergency ambulance employee, who drives or rides on the ambulance, with body armor and safety equipment to wear during the employee's work shift. The emergency ambulance employer would also be required to provide training to the emergency ambulance employee on the proper fitting and use of the body armor and safety equipment.

The second -AB 27- would require every current emergency ambulance employee, on or before July 1, 2020, and every new employee hired on or after January 1, 2020, within six months of being hired, to attend a six-hour training on violence prevention. After this initial six-hour training session, the employees would need to receive a one-hour refresher each calendar year

thereafter. This training would need to be free of charge to the emergency ambulance employee, but they would need to be compensated at their base hourly rate of pay while participating in the training.

Status: Both bills are pending in the Assembly Labor and Employment Committee.

Protections for Public Employees Opting Out (AB 249)

Government Code section 3550 presently precludes public employers from deterring or discouraging public employees from becoming or remaining members of an employee organization. This bill would amend section 3550 to provide similar protections to public employees or applicants who decide to opt out of becoming or remaining a member of an employee organization. It would preclude a public employer from taking adverse action (including reducing the public employee's current level of pay or benefits) against a public employee or applicant to be a public employee who opts out of becoming or remaining a member of an employee organization.

Status: Scheduled for hearing in the Assembly Public Employment and Retirement Committee on April 3, 2019.

Employing Infants in the Entertainment Industry (AB 267)

This bill would amend Labor Code section 1308.8 and extend its current requirements for infants under the age of one month working "on any motion picture set or location" to the "entertainment industry" more broadly. Specifically, it would preclude infants under the age of one month from working in the entertainment industry absent certification from a physician or surgeon board certified in pediatrics as to the infant's medical ability to withstand the potential risks of such employment.

Status: Unanimously passed the Assembly Labor and Employment Committee and is pending in the Assembly's Arts, Entertainment, Sports, Tourism and Internet Media Committee.

Whistleblower Protections Expansion to State or Local Contracting Agency (AB 333)

This bill would add new Labor Code section 1102.51, extending the protections in California's whistleblowing statute (Labor Code section 1102.5) to state and local independent contractors and contracted entities tasked with receiving and investigating complaints from facilities, services and programs operated by state and local government. It would also clarify that these retaliation prohibitions apply to the state or local contracting agency.

Status: Unanimously passed the Assembly's Labor and Employment Committee and is pending in the Assembly's Appropriations Committee.

Union-Related Privilege (AB 418)

This bill would establish a privilege between a union agent and a represented employee to

prevent the disclosure in any court or agency proceeding confidential communications made between the two while the agent was acting in the union agent's representative capacity. Under new Evidence Code section 1048, a represented or former represented employee would also have a privilege to prevent another from disclosing such confidential communications. This privilege would not preclude the disclosure of such communications in an action against the union agent or the union, or if the bargaining unit member consented after appropriate disclosures.

Status: Passed the Assembly's Judiciary Committee on a party-line vote.

Legislative Employee Union Organizing (AB 969)

Entitled the Legislature Employer-Employee Relations Act, this bill would permit Legislature employees (including some supervisory and managerial employees) to form, join and participate in union-related activities. It would also extend similar protections (e.g., against retaliation etc.) afforded to state and public employee organizations contained within the Ralph C. Dills Act.

Status: Pending in the Assembly but not yet assigned to a committee.

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 and remains ineligible during the entire trade dispute, this bill would restore eligibility after the first two weeks of absence due to a trade dispute.

Status: Scheduled for hearing in the Assembly's Insurance Committee on April 24, 2019.

"Informal" Review Hearings with the Labor Commissioner (SB 229)

In 2017, California enacted SB 306 to provide greater protections against retaliation after filing a wage-related claim, including authorizing the Labor Commissioner to obtain injunctive relief addressing retaliation concerns during the investigative process. This bill is intended to build upon SB 306, including to align the process for review and appeals with the existing process the Labor Commissioner uses for unpaid wage claims.

For instance, it establishes procedural requirements and deadlines for contesting of citations, judicial enforcement and collection of remedies due. It would also require that the amount of the bond that must be posted to challenge a Labor Commissioner's decision and order via writ of mandate must include the amount of penalties and other monetary relief due.

Status: Passed the Senate Labor, Public Employment and Retirement Committee and scheduled for hearing in the Senate Judiciary on April 9, 2019.

Precluding Employer Voter Intimidation (AB 17)

Entitled the Voter Protection Act, this bill would add new Election Code section 14002 to preclude employers from requiring or requesting that an employee bring their vote by mail ballot to work or vote their vote by mail ballot at work. The Secretary of State or any public prosecutor with jurisdiction may seek civil fines up to $10,000 per violation against any employer who violates these protections.

Status: Passed the Assembly's Elections and Redistricting Commission, and is pending in the Appropriations Committee.

Threshold Wage Levels for Personal Service Contracts (AB 790)

This bill attempts to address the perceived wage gap between the highest and lowest earning wage earners in California by specifying certain minimum wage levels for certain professions. Accordingly, beginning by January 2021, the Department of Industrial Relations (DIR) would be required to identify publicly held companies with a market capitalization of at least one billion dollars. Such "eligible employers" that enter into a "personal services contract" after January 1, 2021, would be required to include a contractual provision requiring the employer to pay a wage equal to 85% of the area median income. "Personal service contracts" would include janitorial and housekeeping services, custodial services, food service workers, laundry services, window cleaning services, bus driving services, or security guard services, as well as any similar services the DIR determines should also be covered.

Status: Pending in the Assembly's Labor and Employment Committee.

Employer Notices Regarding Dependent Care Assistance Program (AB 1554)

Internal Revenue Code section 129 allows employers to provide "dependent care assistance benefits" for their employees on a tax-free basis (so-called Dependent Care Assistance Programs [DCAPs]). These include allowing employees to make pre-tax contributions through a cafeteria plan up to certain annual limits, and which remain tax-free if used for particular purposes (e.g., caring for a minor child under age 13, etc.). This bill would require an employer to notify an employee who participates in an employer-provided DCAP, via a dependent care flexible spending account, of any deadlines to withdraw funds before the plan year ends. This notice shall be by two different forms, one of which may be electronic.

Status: Pending in the Assembly's Labor and Employment Committee.

Prevailing Wage Expansion (AB 520)

California's prevailing wage laws require that workers performed on certain public works (as defined) be paid not less than the general prevailing wage for work of a similar character in the location in which public work is performed. In turn, Labor Code section 1724 defines "locality in which public work is performed" as either the county in which the contract is awarded in some

instances, and as the limits of the political subdivision in other instances. This bill would eliminate that distinction and instead define "locality in which public work is performed" as the county in which the public work is done.

Labor Code section 1720 presently exempts from the definition of "public works" certain private development projects if the political subdivision provides – directly or indirectly – a "de minimis" public subsidy. This bill would define such public subsidies as de minimum if they are both less than $275,000 and 2% of the total project bid.

Status: Unanimously passed the Assembly Labor and Employment Committee and pending in the Appropriations Committee.

Respirators for Outdoor Workers (AB 1124)

This bill would require the Occupational Safety and Health Standards Board to adopt by July 13, 2019, emergency regulations requiring employers to make respirators available to outdoor workers on any day the outdoor worker could reasonably be expected to be exposed to harmful levels of smoke from wildfires or burning structures due to a wildfire, while working. If enacted, it would take effect immediately.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3, 2019.

Updated OSHA Requirements for Reporting Serious Occupational Injuries (AB 1804)

While employers presently must submit a report of serious injury, illness or death to the Division of Occupational Safety and Health by telephone or email, this bill would delete the "or email" requirement and instead direct the employer to use "a specified online mechanism established by the Division" for reporting purposes.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3, 2019.

Changes Proposed to OSHA's Definition of "Serious Injury or Illness" (AB 1805)

This bill would recast slightly the definitions of "serious injury or illness" and "serious exposure" for purposes of triggering an employer's duty to notify the Division of Occupational Safety and Health. For instance, it would remove the 24-hour minimum time requirement for qualifying hospitalizations, would include the loss of an eye as a qualifying injury and include amputation (rather than loss of a body member). The term "serious exposure" would be recast to include exposure to a hazardous substance creating a "realistic possibility" (rather than the current "substantial probability") that death or serious physical harm in the future could result from the actual hazard created by the exposure.

Status: Scheduled for hearing in the Assembly Labor and Employment Committee on April 3,

2019.

Tax Credit to Close Skills Gap (AB 1542)

This bill would state the Legislature's intent to enact future legislation to address the skills gap between the needs of California industries and the skills of California's workforce. This would include a Worker Training Tax Credit to encourage businesses to invest in training their low and middle-income workers in the skills needed for the 21st century economy.

Status: Pending in the Assembly but not yet assigned to a committee.

Call Center Job Protections (AB 1677)

Entitled the Call Center Job Protection Act of 2019, this bill would require employers (as defined) of customer service employees working in a call center to provide at least 120 days' notice to the Labor Commissioner before relocating the call center from California to a foreign country. If a violation occurs, the Labor Commissioner would be authorized to award either a civil penalty up to $10,000 for every day of violation, or to award damages proportionate to the impact on the community as determined by a community impact study, which the employer shall pay for.

The Labor Commissioner will also compile and publish a list of employers providing notice regarding an intent to relocate, and the list will be made available to specified state entities. Employers appearing on the list will be ineligible for state grants, state-guaranteed loans, or tax benefits for five years after the date that the list is published, and would be required to remit the unamortized value of any existing grant, guaranteed loan, or tax benefit, as specified.

Lastly, it would require that call center customer service work performed by a private entity for a state entity be performed in California by no later than 2021.

Status: Pending in the Assembly Labor and Employment Committee.

Shortened Period for Notices of Adverse Action Involving State Employees (AB 1007)

This bill would amend the State Civil Service Act and require that a notice of adverse action against a state employee for a cause for discipline be served within one year (rather than the current three years) for any adverse action not based on fraud, embezzlement, falsification of records, harassment on specified bases, or sexual assault.

Status: Pending in the Assembly Public Employment and Retirement Committee.

"Spot Bills" to Watch

The Legislature has also introduced other various so-called "spot bills" (i.e., bills initially

referencing only “technical and non-substantive” changes that are subsequently materially amended later in the proceedings.) These “spot bills” include AB 440 (Private Attorneys General Act), AB 674 (DLSE subpoenas), AB 1661 (Labor Code section 1771), AB 1756 (state contracting discrimination protections), SB 649 (DLSE personnel records), SB 672 (Labor Code retaliation protections), SB 734 (working hours), SB 755 (employment agencies and job listing services).