SEPTEMBER 2020

CALSHRM LEGISLATIVE REPORT

PREPARED BY

MICHAEL S. KALT,
CALSHRM GOVERNMENT AFFAIRS DIRECTOR
WILSON TURNER KOSMO LLP

mkalt@wilsonturnerkosmo.com
Telephone: 619-236-9600
https://twitter.com/michaelkalt_law

The 2020 California Legislative session drew to a close with the expiration of the August 31st deadline for the Legislature to pass any bills. And as expected, a number of significant employment related bills – particularly related to COVID-19 issues – were passed and sent to Governor Gavin Newsom for signature of veto. These include bills that would:

- Expand the CFRA to apply to employers with five or more employees and expand the family members for whom leave could be taken due to a serious medical condition (SB 1383);
- Enact "COVID-19 supplemental paid sick leave" for employers with 500 or more employees (AB 1867);
- Create a presumption of workers compensation coverage and enact new employer notice requirements related to COVID-19 exposure (SB1159/AB 685);
- Amend AB 5, including expanding the professional services and industries exempted from the so-called ABC Test for worker classification purposes (AB 2257);
- Require larger employers to annually submit "pay data reports" to the DFEH (SB 973);
- Require California corporations to have directors from "underrepresented communities" (AB 979);
- Add human resources professionals and supervisors to the list of "mandated reporters" for child abuse purposes (AB 1963);
- Extend for an additional year the "employment" exemptions from the California Consumer Privacy Act (AB 1281);
- Expedite the process for the DIR to approve "work sharing plans" submitted by employers in lieu to layoffs (AB 1731); and
- Require employers to notify newly-hired employees regarding any federal, state or locally declared disasters (SB 1102).

There were also several bills that stalled, including to require that employers provide ten days of bereavement leave (AB 2999), clarify various wage and hour issues for telecommuting employees (AB 1492), increase the amount of paid sick leave under California's statewide law (AB 3216), enact a PAGA holiday for meal and rest period claims involving telecommuting employees (SB 729), and impose new posting and document retention requirements for employer wellness programs (AB 648). However, since this is the first year of a two-year legislative cycle, these and other previously-introduced bills may be reconsidered in 2021.

Governor Newsom has until September 30th to sign any bills which, if enacted, will take effect on January 1, 2021, unless specifically identified as an urgency provision. Below is an overview of the employment bills the Governor is presently considering.

BILLS SENT TO GOVERNOR NEWSOM

COVID-19-Related Proposals

COVID-19 Supplemental Paid Sick Leave for Larger Employers, and Small Employer Mediation Program for CFRA Claims (AB 1867)

This budget trailer bill reflects a number of Governor Gavin Newsom's stated priorities and, if enacted, would generally take effect immediately, although the various paid sick leave requirements would not take effect until 10 days after enactment and only remain in place until the later of December 31, 2020 or the expiration of the federal Families First Coronavirus Response Act (FFCRA). In this regard, it would also incorporate many of the provisions of several other pending or previously pending bills on these same subjects (SB 729 and AB 3216) and implement a small employer mediation program to help such small employers respond to the contemplated expansion of the CFRA under SB 1383.

COVID-19 Supplemental Paid Sick Leave

As discussed in earlier newsletters, the FFCRA essentially created a paid sick entitlement for COVID-19 purposes that only applied to employers with fewer than 500 employees. The FFCRA also authorized health care or emergency responder employers to exclude certain health care providers and emergency responders from the FFCRA.

AB 1867's provisions regarding COVID-19 Supplemental Paid Sick Leave (COVID-19 SPSL) are intended to fill in the FFCRA's gaps in coverage. For instance, while several California municipalities (e.g., San Francisco, Los Angeles, etc.) had enacted local "supplemental paid sick leave" ordinances to extend the FFCRA for larger employers within California (albeit each with their own variations), AB 1867 would do so on a statewide basis. Similarly, it applies to workers for health care providers or emergency responders that had elected to exclude such employees from the FFCRA's emergency paid sick leave provisions.

Accordingly, new Labor Code section 248.1 would entitle "covered workers" (i.e., those satisfying the broad statutory definitions and who leave their home or other place of residence to perform work for the person's hiring entity) to COVID-19 SPSL (meaning paid sick leave above and beyond that already provided under California's generally applicable paid sick leave law [Labor Code section 245 *et seq.*]). Simply summarized, a "hiring entity" (as defined, but generally meaning an entity with 500 or more employees in the United States) would be required to provide such COVID-19 SPSL to workers who perform work for the hiring entity if that worker cannot work due to any of the following reasons: (A) the worker is subject to a federal, state or local quarantine or isolation order related to COVID-19; (B) the worker is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or (C) the worker is prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19.

Notably, and in contrast with the current statewide paid sick leave entitlement, this COVID-19 SPSL would be available immediately (i.e., no 30 day employment requirement, or 90 days of employment before usage), and would also apply to those workers otherwise excluded from the general definition of "employee" for paid sick leave purposes in section 245.5(a) (e.g., CBA-covered employees, flight crew members, city/state employees, in-home support workers, etc.).

BILLS SENT TO GOVERNOR NEWSOM

Covered workers would be entitled to 80 hours of COVID-19 supplemental paid sick leave if the hiring entity considered the covered worker to be "full time," or if the worker worked or was scheduled to work, on average, at least 40 hours per week for the hiring entity in the two weeks preceding the date the worker took this COVID-19 supplemental paid sick leave (AB 1867 also enumerates slightly different amounts applicable to full-time firefighters and other specified public employees).

Other covered workers would be entitled to differing amounts of supplemental paid sick leave depending on the type of schedules they worked and/or the length of service with the hiring entity. For instance, covered workers with a normal weekly schedule would be entitled to the total number of hours the covered worker is normally scheduled to work for the hiring entity over a two week period. Workers with variable schedules would be entitled to 14 times the average number of hours the worker worked each day for the hiring entity in the six months preceding the date the worker took supplemental paid sick leave. If the worker has worked less than six months but more than 14 days, this calculation would be made over the entire period the worker has worked for the hiring entity. If the worker works a variable number of hours and has worked for the hiring entity for 14 or fewer days, the worker will be entitled to the total number of hours worked for the hiring entity.

As noted, this "supplemental" paid sick leave would be in addition to the amount of paid sick leave provided under California's currently existing statewide paid sick leave law. Workers would be immediately entitled to use this supplemental paid sick leave (i.e., there is no 30 day employment period), and they could use it upon oral or written request (i.e., no need for medical certification) and the worker would determine how much to use.

The supplemental paid sick leave would be paid at a rate equal to the highest of either: (A) the worker's regular rate for the last pay period; (B) the state minimum wage; or (C) the local minimum wage to which the worker is entitled. However, as with the federal FFCRA, the hiring entity would not be required to pay more than $511 daily and $5,110 in the aggregate for the supplemental paid sick leave taken by the worker.

The hiring entity also could not require the worker to use other paid or unpaid leave, paid time off or vacation provided by the hiring entity before or in lieu of the worker using this supplemental paid sick leave. However, the hiring entity would not be required to provide this supplemental paid sick leave if it already provides a similar benefit capable of being used for the same purposes as this supplemental benefit, excluding the paid sick leave otherwise currently required under the statewide paid sick leave law. In addition, if a hiring entity provided time off for the purposes contemplated under this COVID-19 SPSL between March 4, 2020 and the effective date of this bill, but did not compensate the worker at the rates discussed above, the hiring entity would be entitled to retroactively provide the supplemental pay to the covered worker to satisfy the compensation requirements, in which case those previously provided hours would count towards the total amount of available supplemental paid sick leave.

Within seven days of this bill's enactment, the Labor Commissioner would be required to develop a model notice regarding this benefit that the hiring entity would need to post, but the hiring entity could satisfy this notice requirement for workers that do not frequent a workplace by disseminating through electronic means or email.

BILLS SENT TO GOVERNOR NEWSOM

The provisions of this new law would be enforceable under the Business and Professions Code for unfair business practices, or by a complaint with the Labor Commissioner. Notably, while the bill refers to "workers" and "hiring entities" rather than "employees" and "employers," it states that for Labor Code purposes and this bill, "covered workers" and "hiring entities" shall be considered employees and employers respectively.

This law would remain in effect until the later of December 31, 2020 or the expiration of the FFCRA, but workers using such benefit when the law expires would still be entitled to use the full amount of COVID-19 supplemental paid sick leave.

Food Sector Worker Paid Sick Leave

In April 2020, Governor Newsom enacted Executive Order N-51-20 which created an entitlement to paid sick leave for food sector workers (as defined). AB 1867 would essentially codify these requirements, making them retroactive to April 16, 2020 and applicable until the later of either December 31, 2020 or the expiration of the federal FFCRA. This "COVID-19 food sector supplemental paid sick leave" would be codified in new Labor Code section 248 and would operate in a manner very similar to the provisions noted above regarding the more generally applicable COVID-19 supplemental paid sick leave" available to almost all other workers.

Handwashing Time for Food Facility Employees

AB 1867 would also amend the Health and Safety Code to specifically authorize food employees in any food facilities to wash their hands every 30 minutes, and even more often if needed.

Small Employer Mediation Program for CFRA Claims

As discussed herein, the Legislature is also currently considering SB 1383 which would essentially extend the CFRA to apply to employers with five or more employees (instead of the current 50 employee threshold). Perhaps anticipating the potential burden upon smaller employers, this bill would, until January 1, 2024, enact a small employer family leave mediation pilot program. Under this program, small employers (i.e., those with between five to 19 employees) or employees could within specified time frames (i.e., within 30 days of the receipt of a right to sue notice for CFRA claims) request all parties to participate in a dispute resolution program to be established by the DFEH. Such a request would preclude the employee from initiating a civil action until the mediation is completed, but the statute of limitations for the CFRA and all related claims would also be tolled.

AB 1867's provisions related to the small employer pilot mediation program would only take effect if SB 1383 is also enacted.

Governor Newsom has already signaled support for many of AB 1867's provisions, and the fact that multiple large cities have already enacted their own version of COVID-19 SPSL suggests AB 1867 is likely to be signed into law. As noted, the COVID-19 SPSL provisions in AB 1867 would take effect 10 days after being signed by Governor Newsom but would sunset at the end of 2020 unless the FFCRA is further extended.

BILLS SENT TO GOVERNOR NEWSOM

Expanded Cal-OSHA Powers and New Employer Notices Regarding COVID-19 Exposure (AB 685)

While Cal-OSHA presently has the authority to prohibit usage of or entry into an area posing an imminent risk to employees, this bill would, until January 1, 2023, expand that power to include situations when the agency determines place of employment, operation or process would constitute an imminent hazard of exposure to COVID-19. The agency would be required to provide a notice to the employer for posting in a conspicuous place at the place of employment. However, this prohibition would be limited to the immediate area in which the imminent hazard of COVID-19 exposure exists, and would not extend to other employer areas or processes which are not exposing employees to COVID-19 or is outside of the imminent hazard area. This prohibition would also not preclude the employer from entering into the area or using the process for the sole purpose of eliminating the conditions creating the imminent hazard of COVID-19 exposure.

This bill would also enact new mandatory employer notification requirements related to potential COVID-19 exposures. Specifically, if an employer or a representative of the employer receives a "notice of potential exposure to COVID-19," the employer must take all of the following steps within one business day of the notice of potential exposure. First, the employer must provide written notice to all employees, and to the employers of subcontracted employees, who were on the premises at the same worksite as the "qualifying individual" within the infectious period that they may have been exposed to COVID 19. This notice must be in writing and made in a manner the employer normally uses to communicate employment-related information. The written notice may include, but would not be limited to, personal service, email or test message if it can reasonably be anticipated to be received by the employee within one business day of sending. This notice would also need to be in both English and the language understood by the majority of the employees.

The employer would also need to provide this notice to any exclusive representative for the employees receiving the above-mentioned notice. This notice to the exclusive representative would need to include the same information as would be used in a Cal-OSHA Form 300 Injury and Illness Log, even if the employer is not otherwise required to maintain such a log.

Within this same time frame, the employer must notify any employees who may have been exposed and any exclusive representative about COVID-19-related benefits under applicable federal, state or local laws, including COVID-19-related leave, employer sick leave and workers' compensation, or negotiated leave provisions, as well as the employee's protections against retaliation or discrimination.

The employer must notify all employees, and the employers of subcontracted employees, and any exclusive representative, of the employer's disinfection and safety plan the employer will implement and complete per the federal CDC guidelines.

For purposes of triggering these notification requirements, a "notice of potential exposure" would include any of the following: (a) notice from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite; (b) notice from any employee or their emergency contact that the employee is a qualifying individual; (c) notice through the employer's testing protocol that the employee is a qualifying individual;

or (d) notice from a subcontracted employer that a qualifying individual was on the worksite of the employer receiving notification.

A "qualifying individual" would include any person that has any of the following: (1) a laboratory-confirmed case of COVID-19 (as defined by the California Department of Public Health); (b) a positive COVID-19 diagnosis from a licensed health provider; (3) a COVID-19-related order to isolate provided by a public health officer; or (4) died due to COVID-19, as determined by the county public health department or per inclusion in the county's COVID-19 statistics.

"Worksite" would mean the building, store, facility, agricultural field or other location where the employee worked during the infectious period, but would not apply to other employer areas the qualified individual did not enter. In a multi-worksite context, the employer would only need to notify employees who were at the same worksite as the qualified individual.

This bill would also impose additional notice obligations if the employer is notified about the number of cases that meet the State Department of Public Health's definition of a COVID-19 "outbreak." In that instance, the employer would need to provide notice within 48 hours to the local public health agency in the worksite's jurisdiction of the names, number, occupation and worksite of the employees who meet the definition of a "qualifying individual." The employer would also need to report the business address and NAICS code of the worksite where the "qualifying individuals" work. The employer experiencing such an outbreak would need to continue to update the local health department of any subsequent laboratory-confirmed cases of COVID-19 at the worksite.

This bill would not require employers to disclose medical information unless otherwise required by law. Employers would also be required to maintain records of the written notifications for at least three years.

The bill would also prohibit retaliation against a worker for disclosing a positive COVID-19 test, diagnosis or an order to quarantine or isolate, and workers would be permitted to file a retaliation complaint with the DLSE.

The state agencies receiving this information would publish this information on their internet websites in a manner to allow the public to track outbreaks. The State Department of Public Health would also establish a procedure for employers to report COVID-19 cases and make this information available on its website.

While this bill would apply to public and private employers, it would not apply to "health facilities" (as defined) or to employees who, as part of their duties, conduct COVID-19 testing or screening, or provide direct patient care to individual who have tested positive for COVID-19.

Rebuttable Presumption of Workers Compensation Coverage for Employees that Contract COVID-19 and New Notice Requirements to Workers Compensation Administrators (SB 1159)

This bill would codify Governor Newsom's Executive Order (N-62-20) which had expired in July but had created a rebuttable presumption of workers compensation coverage for "essential workers" who contracted COVID-19. It would also extend and create a similar presumption of workers compensation coverage to include any employee with a COVID-19-related illness under certain circumstances, with slightly different rules depending on whether the

workplace exposure occurred before or after July 6, 2020. This urgency statute would take effect immediately once enacted.

Specifically, until January 1, 2023, an employee's COVID-19-related illness would be included within workers compensation coverage if all of the following applied: (1) the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor at the employer's place of employment (not including an employee's home or residence) at the employer's direction; (2) this day of labor occurred between March 19, 2020 and July 5, 2020; and (3) the diagnosis was made by a licensed physician and confirmed by a COVID-19 serologic test within 30 days of the date of diagnosis.

Such COVID-19-related illnesses that develop or manifest during this employment would be entitled to a rebuttable presumption (as defined) of having arisen out of the course and scope of employment. Responding to employer concerns it would be difficult to negate a presumption of coverage, this bill specifically notes employers can point to health and safety measures adopted by the employer and non-occupational exposures the employee may have encountered.

This bill would also require an employee to exhaust any paid sick leave benefits specifically available in response to COVID-19 before any temporary disability benefits or other benefits due under certain workers compensation provisions would be payable. If no such paid sick leave is available, the employee would be immediately entitled (i.e., no waiting period would apply) to temporary disability benefits.

The bill would also enact somewhat similar coverage rules and presumptions for certain peace officers, firefighters and health care workers, amongst other groups.

Proposed new Labor Code section 3212.88 would apply to employees who test positive for COVID-19 after working on or after July 6, 2020 and who test positive during an "outbreak" at the employee's "specific place of employment" and whose employer has five or more employees. It would provide that "injury" for workers compensation coverage would include COVID-19 illness or death if: (1) the employee tests positive within 14 days after a day the employee performed labor or services at the employee's place of employment at the employer's direction; (2) the day of work occurred on or after July 6, 2020; and (3) the employee's positive test occurred during a period of an "outbreak" (as defined) at the employee's specific place of employment. Such injuries would be entitled to a disputable presumption of having arisen out of and in the course of employment.

"Specific place of employment" would mean the particular building, store, facility or agricultural field where the employee works at the employer's direction, but generally would not include the employee's residence. If the employer directs the employee to work at multiple places of employment within 14 days of the employee's positive test, the employee's positive test would be counted to determine a possible outbreak at each of those places, and if an outbreak is found to exist at any of them, they shall be considered the employee's specific place of employment.

An "outbreak" would be deemed to exist if within 14 calendar days one of the following occurred at the "specific place of employment": (a) if the employer has 100 employees or fewer at a specific place of employment, four employees test positive for COVID-19; (b) if the employer has 100 or more employees at a specific place of employment, four

percent of the number of employees who reported to the specific place of employment test positive for COVID-19; or (c) a specific place of employment is ordered to be closed by specified public health agencies or a school superintendent due to a risk of infection due to COVID-19.

Notably, this new section would also require the employer, upon learning an employee has tested positive for COVID-19, to notify their claims administrator in writing (via email or facsimile) within three business days about this result. The employer would need to inform the claims administrator: (1) that an employee has tested positive (without providing personally identifiable information about the employee unless the employee asserts it is work related or has submitted a claim); (2) the date the employee tested positive; (3) the address or addresses of the employee's specific place or places of employment during the 14 day period preceding the employee's positive test; and (4) the highest number of employees who reported to that location within the preceding 45 day period preceding the last day the employee worked at each specific place of employment.

As noted above, this bill is intended to take effect immediately, and so this bill would also identify slightly different employer notice requirements to the claims administrator for positive tests for COVID-19 that the employer learns about between July 6, 2020 and the effective date of this new law, if enacted.

This section would also authorize civil penalties and potential Labor Commissioner citations against any employer who intentionally submits false or misleading information or fails to submit required information regarding these items.

COVID-19 Specific OSHA Standards for Agricultural Employers and Employees (AB 2043)

This bill would require California's Occupational Safety and Health Standards Board to disseminate to agricultural employers "best practices" for COVID-19 prevention, consistent with the division's guidance or in coordination with other state agencies, including the guidance document entitled "Cal-OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees." It would also require the division to collaborate with various organizations to conduct a statewide outreach campaign targeted at agricultural employers to disseminate these best practices and to educate employees on any COVID-19-related employment benefits to which they are entitled, including access to paid sick leave and workers compensation. These provisions would be repealed when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature.

This bill would take effect immediately as an urgency statute.

<u>Leaves of Absence/Time off/Accommodation Requirements</u>

CFRA and PDL Expansions to Apply to Almost All Employers (SB 1383)

The California 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 five employees the threshold number of employees for an employer to be subject to CFRA, thus applying it to almost every employer in California. 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 provide care. For instance, while "family care and medical leave" presently includes the serious health condition of a child, spouse or parent of an employee, this bill would expand this list to include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner" who has a serious health condition. The bill would make corresponding changes including these individuals for whom the employer may request medical certification to support the employee's request for leave to care for a serious health condition.

The definition of "child" would also expand to include a child of a domestic partner or person to whom the employee stands *in loco parentis*, and would eliminate the current requirement the child be under 18 years of age or an adult dependent child.

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 for the birth, adoption or foster care of a child.

While CFRA currently allows an employer to refuse reinstatement to the same or comparable position under certain conditions, this bill would delete those provisions, thus essentially guaranteeing reinstatement.

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 1383 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, while the current Pregnancy Disability Leave Law (PDL, Government Code section 12945) currently applies to employers with five or more employees, these amendments would expand the PDL to apply to employers with one or more employees (essentially all employers).

This bill is heavily opposed but appears to have the backing of Governor Newsom.

BILLS SENT TO GOVERNOR NEWSOM

"Kin Care" Amendments (AB 2017)

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

This bill is unopposed and likely to be enacted.

Protected Time-Off Proposals (AB 2992)

Labor Code section 230 presently prohibits discrimination against and enumerates various protections for employees who need to take time off for various purposes, including for victims of domestic violence, sexual assault or stalking who are seeking legal relief. This bill is intended to essentially extend these time-off leave provisions from applying to victims of only certain enumerated serious crimes and instead apply broadly to almost all victims of violent crime, and also allow time off for immediate family members of homicide victims. It is also intended to expand the certification employees can provide to qualify for this protected time off.

Accordingly, it would expand the definition of "victim" for many of its provisions to include any of the following: (1) victims of stalking, domestic violence or sexual assault; (2) a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury; (3) a person whose immediate family member is deceased as the direct result of a crime; or (4) for purposes of current subdivision (b) [appearing in court in response to a subpoena or court order], any person against whom any crime has been committed.

Current subsection (d) requires the employee provide advance notice where feasible, and identifies the following forms of acceptable certification to justify the absence: (1) a police report; (2) a court order; or (3) documentation from enumerated health care providers, medical professionals or domestic violence counselors. This bill would add to this third category "victim advocate" defined as an individual providing services to victims "under the auspices or supervision" of either an agency or organization providing services to victims, or a court or law enforcement/prosecution agency.

While presently employees must provide a police report, court order or medical note, this bill would also authorize any other documentation that "reasonably verifies" the crime or abuse occurred, including a written statement from the employee or an individual acting on their behalf, certifying the absence is authorized under section 230 or section 230.1.

While section 230 applies to employers of all sizes, Labor Code section 230.1 prohibits employers with 25 or more employees from discriminating against victims of sexual assault, domestic violence or stalking who take time off for additional purposes (e.g., seeking medical attention, obtaining services from certain agencies, obtaining psychological counseling, participating in safety planning). This bill would largely incorporate the above-described changes to

section 230, including its expanded definition of "victim" (i.e., broader than simply domestic violence, sexual assault or stalking) and the expanded certification for unforeseen absences.

It would also expand the purposes for which the time off could be taken, expanding it from the current requirements the services relate to sexual assault, domestic violence or stalking, and instead apply for any qualifying "crime" or abuse.

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

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

This bill is unopposed and likely to be enacted.

Independent Contractors/Worker Classification

Various AB 5 Amendments, Including to Exempt Additional Industries and Professional Services, and Re-Work Various Exceptions (AB 2257)

Enacted in 2019, AB 5 codified and expanded the so-called *Dynamex* ABC Test to determine worker classification relationships, and also contained numerous exemptions for various professional services and industries, which would instead be governed by the prior so-called *Borello* test. Almost immediately, it was clear that further amendments would be needed both to address additional industries and relationships, and to clarify AB 5's language, and over 30 bills were initially introduced proposing such amendments.

Drafted by AB 5's author, this wide-ranging bill encapsulates many of those separate proposals into a single bill, including materially revising several of the exemptions currently contained in Labor Code section 2750.3, and adding further exemptions. Please note, AB 2257's changes are both very extensive, and often very industry or exception specific, both in terms of the particular group contemplated and the potentially applicable criteria, so the reader is encouraged to review AB 2257 itself regarding any potential exemption. Further, as a reminder, in many instances meeting the criteria for a potential exemption does not mean the worker qualifies as an independent contractor, but simply means that worker's status will be governed by the so-called prior *Borello* multi-factor test rather than AB 5's ABC Test.

New Exemptions

This bill adds a number of new specifically-identified occupations that would be governed by *Borello* rather than the ABC Test for worker classification purposes.

For instance, it would enact an entirely new subsection (proposed subsection (b)) related to various music industry occupations in connection with the creating, marketing, promoting or distributing sound records or musical compositions, which would be governed by *Borello* rather than the ABC Test. These would include: (a) recording artists (but with some exceptions); (b) songwriters, lyricists, composers and proofers; (c) managers of recording artists; (d) record producers and directors; (e) musical engineers and mixers; (f) musicians (with some exceptions); (g) vocalists (with exceptions); (h) photographers working on recording photo shoots, album covers and other publicity purposes; (i) independent radio performers; and (j) any other individual engaged to render creative, production, marketing or independent music publicist services.

However, as the above notes, there would be numerous carve outs to these exemptions, and there would be new limitations applicable to collective bargaining agreements and organizing rights within the music industry.

While new subsection (b) would govern the creation of sounds recordings in the music industry, new subsection (c) would instead govern "single engagement live performance events," and have them governed by *Borello* under certain enumerated circumstances. The rules regarding these "live performance events" are quite detailed so the reader is encouraged to review proposed subsection (h) if potentially applicable.

It would also create an entirely new subsection (proposed subsection (d)) regarding "individual performance artists" (as defined), who would also be subject to the *Borello* test if certain enumerated criteria are met.

One of the more controversial aspects of AB 5 was its rules regarding both photojournalists/still photographers and freelance writers/editors/cartoonists, and the limitation of only 35 submissions to any "putative employer" to qualify for an exemption to the ABC Test. This bill would delete the current statutory exemptions for these particular "professional services" and replace them with new statutory exemptions that remove the 35 submission/project cap and use alternative criteria to determine when *Borello* should apply. Very broadly summarized, it would apply to photojournalists/still photographers and freelance writers/editors/cartoonists/translators who (a) work under a contract containing certain terms; (b) are not replacing an employee performing the same amount and type of work; (c) do not primarily perform the work at the hiring entity's business location; and (d) the individual is not restricted from performing work for more than one hiring entity. However, as with various other provisions, the exceptions for photographers, etc. is very detailed and has various express limitations (i.e., for those working on motion pictures), so the reader is encouraged to read the statute itself.

It would also amend several provisions or definitions within Labor Code section 2750.3, including regarding "commercial fisherman" and "travel agent services."

Further, this bill would also amend the so-called "professional services" exemption in current subsection (d) by adding "specialized performers" hired by a performing arts company or organization to teach a "master class" (as defined) for no more than one week.

It would also create additional professions or occupations, including for underwriting inspections, manufactured housing salespersons, international exchange visitor program workers and competition judges with specialized skills.

It would also create exceptions for specialized performers teaching master classes and real estate providers. It would also exempt home inspectors altogether from AB 5's provisions.

It would also add proposed new subsection (k) to have the relationship between "feedback aggregators and an individual providing feedback" be governed by *Borello* if certain enumerated conditions are met.

Business-to-Business Exception Changes

Responding to criticisms that AB 5's "business-to-business" exemption was unduly confusing and complicated, AB 2257 proposes a number of changes to this exception. These include deleting language that suggested a sole proprietorship could not qualify for this business-to-business exemption, and adding language clarifying that a business services provider need only have the opportunity to contract with other clients, rather than actually needing to have contracts with other clients. It also adds language intending to make it easier for businesses to qualify when they are seemingly providing services to the contracting entity's customers under a business-to-business contract. In this regard, this bill adds language allowing the business entity to potentially qualify even though interacting directly with the contracting entity's customers (e.g., in the delivery context) if the business service provider if it regularly contracts with other businesses and its employees are working under the name of the business service provider.

Referral Agencies

The so-called "referral agency" exemption in section 2750.3(c) currently exempts from the ABC Test relationships between a referral agency and a "service provider" (as defined) that satisfy statutorily-enumerated conditions. As with the business-to-business exemption, AB 2257 makes numerous changes, including modifying the applicable definitions, as well as identifying certain relationships (e.g., youth sports coaching) that might qualify if the statutorily-enumerated criteria are met and identifying certain services that will not qualify (e.g., janitorial, retail, trucking, etc.).

This urgency bill would take effect immediately, and appears largely unopposed and likely to be signed by Governor Newsom. It seems very unlikely, however, that AB 2257 will address all of the issues associated with AB 5, so the reader should watch for further amendments in 2021, and keep an eye on the various pending legal challenges as well as Proposition 22 to exempt certain rideshare companies (e.g., Uber, Lyft, etc.)

Pay Equity Issues

Annual Pay Data Reports (SB 973)

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

Accordingly, beginning March 31, 2021, and annually thereafter by this same deadline, private employers with 100 or more employees that are required to submit an annual EEO-1 will be required to submit "pay data reports" for the

prior calendar year (i.e., the "Reporting Year") to the Department of Fair Employment and Housing (DFEH), which can also then share this report with the Division of Labor Standards Enforcement (DLSE) upon request. The pay data report would need to include very specific information enumerated in proposed new Government Code section 12999, including the number of employees by race, ethnicity and sex in the following job categories: (a) executive or senior level officials and managers; (b) first or mid-level officials and managers; (c) professionals; (d) technicians; (e) sales workers; (f) administrative support workers; (g) craft workers; (h) operatives; (i) laborers and helpers; and (j) service workers.

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

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

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

The information submitted to the DFEH would also need to be made available in a format that would enable the DFEH to search and sort the information using readily available software.

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

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

If the DFEH does not receive the required report, it may seek an order requiring employer compliance and shall be entitled to recover its enforcement costs (i.e., likely attorneys' fees). The Employment Development Department would be required, upon request, to provide the DFEH with the names and addresses of all businesses with 100 or more employees.

This bill would also authorize the DFEH to "receive, investigate, conciliate, mediate and prosecute complaints" alleging equal pay violations under Labor Code section 1197.5. However, the DFEH would be required to coordinate with the DLSE and the DIR to enforce these provisions.

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

Requirement for California Corporations to Have Directors from "an Underrepresented Community" (AB 979)

In 2018, California enacted SB 826, which required publicly held, domestic or foreign corporations with their principal executive offices in California to have a certain number of females on their board of directors, with the threshold number dependent on the applicable statutory deadline and the size of the board of directors.

This bill would enact very similar provisions and require such corporations to have at least a certain number of directors from "an underrepresented community," defined as individuals who are "Black, African-American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native or who self-identifies as gay, lesbian, bisexual, or transgender."

Thus, by no later than the close of the 2021 calendar year, each publicly held domestic or foreign corporation with its principal executive offices in California (according to the corporation's SEC Form 10-K) must have at least one director from an underrepresented community on its board of directors. The corporation will be permitted to increase the number of directors on its board to comply with this requirement. By the close of the 2022 calendar year, the corporation must have at least two such members if it has four but less than nine directors, and at least three such members if it has more than nine directors. If the board has four or fewer members, the corporation shall have at least one member from an underrepresented community.

A "publicly held corporation" means a corporation with "outstanding shares listed on a major United States stock exchange."

The law also requires the California Secretary of State to publish various reports on its web site documenting the number of corporations in compliance with these provisions, and to impose fines for non-compliance. The Secretary of State may impose fines for violating this section of $100,000 for the first violation and $300,000 for each subsequent violation. Each director seat required by this section to be held by an underrepresented director which is not held by such a member during at least a portion of a calendar year shall count as a violation, but an underrepresented community director having held a seat for at least a portion of the year shall not be a violation.

Wage and Hour

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

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

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

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

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

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

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

Online Tracking of Wage Claims and Annual Data (AB 3053)

This bill would take effect July 1, 2021 and require the Labor Commissioner to update its website to develop a portal whereby "aggrieved employees" could submit and track their claims, and submit requested documents.

This bill appears unopposed.

Expanded Local Enforcement of Statutory Wage Requirements and Expanded Successor Liability, and Proposed New Corporate Law Disclosures of Outstanding Wage Judgments (AB 3075)

This bill would enact several seemingly unrelated changes, but all tied to the current trend of more aggressive wage enforcement.

First, it would provide greater statutory authority to local jurisdictions (e.g., city, county or agency) to enforce labor standards. While Labor Code section 1205 presently recognizes local jurisdictions may enact wage and hour laws more stringent than the state version, this bill would expressly provide they may enforce labor standard requirements regarding the payment of wages that are more stringent than the state standard. It would also expressly authorize the local jurisdictions to enforce state labor standard requirements regarding the payment of wages set forth in Division 2 of the Labor Code (commencing with section 200).

This bill would also add several provisions to address concerns judgment debtor employers are attempting to avoid final judgments by simply forming a new business entity. Accordingly, it would also add new Labor Code section 200.3 to expand successor liability for wages, damages or penalties owed to a judgment debtor's former workforce under a final judgment (i.e., no appeal is pending and the time to appeal has expired) beyond the current property service context and to apply generally. Specifically, the successor employer would be liable if it meets any of the following

criteria: (a) it uses substantially the same facilities or substantially the same workforce to offer substantially the same services as the judgment debtor (with some statutory exceptions); (b) it has substantially the same owners or managers that control the labor relations as the judgment debtor employer; (c) it employs as a managing agent (as used under Civil Code section 3294) any person who directly controlled the wages, hours or working conditions of the affected workforce of the judgment debtor; or (d) it operates a business in the same industry and the business has an owner, partner, officer or director who is an immediate family member of any owner, partner, officer or director of the judgment debtor.

This new section also provides that it would not preclude potential other means to establish successor liability for wages, damages or penalties.

In addition to expanding successor liability, it would require business owners to potentially disclose prior wage judgments if they attempt to form a new entity by amending California's Corporation Code regarding the filing of so-called statements of information with the California Secretary of State. This bill would require this statement of information to also include a statement whether any officer or director (or members or managers for limited liability corporations) has any outstanding final judgment issued by the Division of Labor Standards Enforcement or a court for any violation of a wage order or the Labor Code. These disclosures would be required upon the earlier of either January 1, 2022 or upon the Secretary of State's certification that it has implemented California Business Connect.

Extension for Petroleum Facility Rest Period Rules (AB 2479)

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

This bill appears unopposed.

New Rest Period Rules for Registered Security Officers (AB 1512)

This bill would, until January 1, 2027, amend Labor Code section 226.7 to implement new rest period rules for security officers registered pursuant to the Private Security Services Act and whose employer is a registered private patrol operator. Specifically, it would permit employers to require such security officers to remain on premises during rest periods and to remain on call, and to carry and monitor a communication device during rest periods. If a rest period is "interrupted," the security officer shall be permitted to restart the rest period anew as soon as practicable, and if the security officer is then able to take an uninterrupted rest period, the security officer employer will have satisfied its rest period obligation. However, if the security officer is unable to take an uninterrupted rest period of at least 10 minutes every four hours worked (or major fraction), then the employer shall pay one additional hour of pay for each workday the rest period is not provided.

The bill would clarify that "interrupted" for penalty provisions means being called upon to return to active duty before completing the rest period, and does not include simply being on the premises, remaining on alert or monitoring any communication devices.

However, this subdivision would only apply to such security officers that are covered by a valid collective bargaining agreement that contains specific provisions related to wages, hours of work, etc.

In effect, this bill would nullify for purposes of security guards only the California Supreme Court's decision in *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, but would not apply to existing cases filed before January 1, 2021.

This bill would only remain in effect until January 1, 2027, at which point it would be automatically repealed and section 226.7 would revert back to its current statutory language.

It appears unopposed.

Human Resources/Workplace Policies

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

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

This bill appears largely unopposed.

Human Resources Required to Report Child Abuse (AB 1963)

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

This bill would amend Penal Code section 11165.7 to expand the list of mandated reporters to include "human resources employees" for businesses that employ minors. "Human resources employee" would be defined as "the employee or employees designated by the employer to accept any complaints of misconduct" as required under the FEHA.

It would also add, for purposes of reporting sexual abuse (rather than child abuse or neglect) any adult person whose duties require direct contact with, and supervision of, minors in the performance of the minors' duties in the workplace of a business subject to the FEHA. This duty for supervisors to report sexual abuse would not obviate their obligation to also report child abuse or neglect if the individual is working in another capacity that would otherwise make them a mandated reporter.

This bill would also require employers subject to these new reporting requirements to train employees who fall within this definition of mandated reporter about these reporting duties (i.e., how to identify abuse/neglect and how to report it). The employer could satisfy this training requirement by completing the general online training for mandated reporters offered by the Office of Child Abuse Prevention in the State Department of Social Services.

Notice Requirements Regarding State or Federal Emergencies, plus Labor Notices for Federal H-2A Visa Farm Workers (SB 1102)

Labor Code section 2810.5 presently requires employers provide notices to most employees upon hire identifying certain statutorily-enumerated items (e.g., rate of pay, regular paydays, employer name, etc.). This bill would also require these notices identify the existence of either a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed and that was issued within 30 days prior to the employee's first date of employment that may affect their health and safety during their employment.

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

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

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

Echoing the proposed changes to Labor Code section 2810.5 regarding generally applicable hiring notices, section 2810.6 would also require this notice identify any federal or state emergency or disaster declarations that may affect this H-2A employment. It would also prohibit any retaliation against H-2A employees who raise questions about such declarations.

To the extent any such disaster or emergency declaration would require additional steps regarding housing, required toilets, handwashing stations, drinking water and heat working conditions, the H-2A employer would be required to notify the H-2A employee of these changes, and would be prohibited from retaliating against any H-2A employee who inquired about these changes.

Employers would also be required to notify every H-2A employee of any federal or state emergency or disaster declaration within seven days of it being issued that may affect the H-2A employee's health or safety. Employers

would also be prohibited from retaliating against H-2A employees that raise questions about the declaration's requirements or recommendations.

For employees required to work at night, the employer would be required to provide reflective garments and headlamps or other approved lighting for work areas, and to conduct safety meetings advising H2-A employees of the location of certain items, including bathrooms and rest areas.

Lastly, while California presently requires employers to compensate employees for travel time from an employee housing facility to the worksite, new Labor Code section 2810.65 would exempt H-2A employees from this requirement if they are covered by a collective bargaining agreement containing certain identified provisions.

Expedited Work-Sharing Plan Procedures (AB 1731)

California currently authorizes employers to participate in "work sharing" plans as an alternative to layoffs, with the affected employees able to obtain unemployment insurance benefits from the Employment Development Department (EDD) for the reduction in wages as a result of this work sharing arrangement. Presently, under Unemployment Insurance Code section 1279.5(c), employers must submit a signed written work sharing plan to the agency for approval based upon specific criteria in that section.

This bill is intended to develop a faster alternative process for the submission and approval of these employer work sharing plan applications. Accordingly, it would require the Employment Development Director to accept electronically submitted applications and to develop a portal on its internet website for these applications to be submitted. It would also provide that, upon approval by the director, any work sharing plan applications submitted by eligible employers between September 15, 2020 and September 1, 2023 be deemed approved for one year upon receipt.

The bill would also require the EDD to forward electronically to each eligible employer a claim packet for each participating employee within five business days following approval of the application. Once the claim packet documents are completed, the EDD would establish an unemployment insurance claim for each employee, with the employer and employee responsible for subsequently completing and updating any weekly certification requirements.

This urgency bill would take effect immediately, and would remain in effect until January 1, 2024, at which point it would be automatically repealed unless extended or replaced. It appears unopposed and likely to be enacted.

Harassment/Discrimination/Retaliation

Harassment Training for Minors in Entertainment Industry (AB 3175)

This industry-specific bill would require that, before an entertainment work permit is issued to minors, the parents of minors aged 14 to 17 years must ensure the minors complete sexual harassment training provided by the DFEH (including its online training) or other legally-compliant training. The training would need to be provided in a language the person can understand whenever reasonably possible.

This bill would take effect immediately as an urgency statute.

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

This bill would clarify that otherwise mandatory sexual harassment training for minors in the entertainment industry would remain governed by the industry specific training requirements in Labor Code section 1700.52 rather than the more generally applicable training requirements in the Fair Employment and Housing Act and Government Code section 12950.1. For those employees who had also received compliant training within the last two years, they will be required to read and acknowledge receipt of the employer's anti-harassment within six months of receiving a new position, and thereafter placed on a two year tracking schedule based on the employee's last training. If challenged, the current employer would bear the burden of proving the prior training was legally compliant with these requirements.

Miscellaneous

Additional One Year Extension of Portions of California Consumer Privacy Act Proposed (AB 1281)

This bill would grant a further one year exemption (until January 1, 2022, rather than January 1, 2021) from the California Consumer Privacy Act (CCPA) of certain information gathered by a business about a natural person in the course and scope of that person's employment.

As background, the CCPA was enacted in 2018 and took effect in 2020 to enable "consumers" to request from covered businesses (as defined) the personal information the business collects or sells about the consumer, and to request that the business delete any personal information collected about them. Responding to concerns the broadly worded CCPA would apply to information about employees and enable them to request their employer delete information about them (e.g., a sexual harassment charge made against the employee), in 2019 the CCPA was amended by AB 25 to provide a one year partial exclusion form the CCPA for employees acting within their scope as an employee.

Specifically, AB 25 amended Civil Code section 1798.145(g)(1) to specify the CCPA does not apply to personal information gathered by an employer in three specific circumstances. First, it does not apply to personnel information collected by a business in the course of that person acting as a job applicant, employee, owner, director, officer, medical staff member or contractor of that business to the extent this personal information is collected and used by that business solely within the context of that person's role or former role of that business. In a similar manner, it does not apply to personnel information gathered by a business about these individuals that is either "emergency contact information" or that is necessary for the business "to retain to administer benefits" for another natural person, provided this information is collected and used solely for purposes of "having an emergency contact on file" or in the "context of administering those benefits."

However, AB 25 only provided a one year period (until January 1, 2021) for this exclusion, contemplating that further amendments would be made to the CCPA generally. AB 1281 would simply extend this exemption for an additional year (until January 1, 2022). It would also be contingent upon voters not approving a ballot proposition related to the CCPA in the November 3, 2020 general election.

BILLS SENT TO GOVERNOR NEWSOM

Right of Recall for Certain Laid Off Employees (AB 3216)

This bill would expand statewide many of the provisions recently enacted in the City of Los Angeles' Right of Recall Ordinance and the Worker Retention Ordinance. Accordingly, proposed new Labor Code section 2810.8 would require covered employers (as defined, but generally including airport employers, qualified hotels, event center employers, building services and private clubs with at least 50 guest rooms) to notify its laid off employees about job positions that become available that the employee previously held or is or could be qualified for.

The employer would need to offer those positions based on a preference system outlined in the law, and would need to allow five business days for the employee to accept or decline the offer. The employer would be permitted to make simultaneous, conditional employment offers to laid off employees, with a final offer of employment conditioned on application of the priority system mentioned above. Employers who decide to hire someone other than a laid off employee would need to provide written notice to the laid off employee identifying the reasons for the decision. Employees would be permitted to file a Labor Commissioner complaint or a civil action if these requirements are not followed.

For purposes of these notice/recall provisions, "laid off employee" would mean any employee who had been employed for six months in the 12 months preceding the state of emergency prompting this law, and whose recent separation from active service was due to a public health directive, government shutdown order, lack of business, a reduction in for, or other economic, non-disciplinary reason related to the state of emergency.

The "retention" provisions would protect workers' jobs upon a change in ownership or control and require the incumbent business employer to provide a list of its workers to the successor employer, who must then hire from a preferential hiring list for a specified time period (i.e., until six months after the enterprise is open to the public under the successor employer). If the successor employer extends an employment offer to an eligible employee, the successor employer must retain records of this written officer for at least three years from the offer date. The successor employer must also retain for at least 90 days any eligible employees hired under these new requirements. The successor employer would also have the ability to extend simultaneous condition employment offers, provided the final employment offer is contingent upon the priority system discussed above.

In this regard, these worker retention provisions are very similar to the Los Angeles ordinance and to those enacted statewide in 2015 (AB 359) for the grocery industry upon a change in ownership or control.

Cal-OSHA Protections Extended to Most Household Domestic Service Employees (SB 1257)

This bill would remove the current exclusion for household domestic service employees from the California Occupational Safety and Health Act (Cal-OSHA) except for such household domestic service that is publicly funded unless certain regulatory provisions applied. It would also require Cal-OSHA head to convene an advisory committee relating to industry-specific regulations related to household domestic service, and to adopt such industry-specific regulations by January 1, 2022.

BILLS SENT TO GOVERNOR NEWSOM

It would also establish a protocol for Cal-OSHA representatives to investigate complaints of alleged serious violations in workplaces that are residential dwellings. It would also require the residential dwelling "employer" to investigate and, if needed, correct the violation and reports its efforts to Cal-OSHA, and to provide copies of all correspondence received from Cal-OSHA to the domestic service employee. It would also authorize Cal-OSHA representatives to enter into the residential dwelling with permission or with an inspection warrant to investigate complaints alleging death or serious injuries in household domestic service. However, such inspections of residential dwellings would need to be conducted in a manner that avoids unwarranted invasions of personal property.

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

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

Unemployment Insurance Code section 702.5 also presently authorizes an "employment unit" for whom services are performed that do not constitute employment under the insurance code for some purposes to elect that the services constitute employment for purposes of disability compensation. This bill would specify that purposes of computing these disability benefits and contributions, these individuals would be treated as individuals whose services ordinarily constitute employment under these particular provisions if the individual is providing services through the In-Home Supportive Services program or the Waiver Personal Care Services program.

This bill would take effect immediately as an urgency statute.

Effect of an Employer's Failure to Provide Requested Unemployment Insurance-Related Records (AB 1066)

While the Unemployment Insurance Code presently requires an employer to provide requested information within a "reasonable time" or face a conclusive presumption the employee is entitled to the maximum amount of benefits, this bill would instead, beginning January 1, 2021, set a 10 day deadline before such a conclusive presumption arose. The director would have the authority to extend the 10 day deadline on a determination of good cause in the furnishing of the required reports for a full determination of any claim for unemployment insurance compensation benefits.

Prevailing Wage Definition of "Locality" (AB 2231)

California law requires that a so-called "prevailing wage" be paid on "public works" (as defined) that are financed by public funds, but exempts private development projects where the public funding is "de minimis." This bill would define "de minimis" as both less than $500,000 and less than 2% of the total project cost.

Personal Protective Equipment for Direct Care Workers (AB 2537)

This bill would require public and private employers of workers in general acute care hospitals (as defined) to supply those workers who provide direct patient care or that directly support personal care with personal protective

equipment (PPE) necessary to comply with DIR regulations regarding aerosol transmissible diseases and ensure their usage. It would also require the employer to ensure the employee uses the personal protective equipment supplied to them. Beginning April 1, 2021, it would also require these employers to maintain a PPE stockpile equal to three months of normal consumptions. This equipment would also need to be new and not previously work or used.

Retaliation Protections for "Domestic Work Employees" (AB 2658)

Labor Code section 6311 presently precludes retaliation against employees who refuse to work in unsafe work environments. This bill would expand these protections to include domestic work employees, except or persons performing household domestic services that are publicly funded. While such publicly funded household domestic workers would be exempted from the provisions allowing affected employees to sue, they would be included within the protections imposing criminal liability upon individuals who willfully and knowingly direct any employee to work in areas that are a menace to public health or safety.

Safety Devices for Emergency Ambulance Employees (AB 2092)

This bill would require emergency ambulance employers to establish a voluntary personal protective equipment (PPE) program that allows emergency ambulance employees to purchase subsidized PPE pursuant to an employer-provided subsidy and authorize the employee to wear the PPE while on duty.

Educational Training Costs for Direct Patient Care Employees (AB 2588)

This bill would provide that the indemnification provisions in Labor Code section 2802 would apply to any cost or expense of any employer-provided or employer required education program or training for an employee providing direct patient care fir an employer for a "general acute care hospital."