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CALSHRM LEGISLATIVE REPORT

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LEGISLATIVE SUMMARY

The 2021 Legislative Session is now in full swing and the California Legislature has already passed a budget bill reinstating California's COVID-19-related supplemental paid sick leave (AB 84/SB 95). These supplemental paid sick leave provisions will take effect ten days after Governor Newsom signs the law (expected to happen very shortly) and will apply retroactively to January 1, 2021, but are scheduled to expire on September 30, 2021.

The remaining recently introduced bills will soon face their first test as they are heard in the various substantive committees. As expected, there are numerous pending employment-related bills dealing with both COVID-19-related issues and other issues. Some of the more interesting pending employment bills would:

- Amend the statewide Paid Sick Leave law to increase amounts available for employee accrual, usage, and carryover (AB 995).
- Amend the Fair Employment and Housing Act (FEHA) to protect "family responsibility" or "political affiliation" (AB 1119 and SB 238).
- Amend the FEHA to allow employers to provide a preference in employment decisions to individuals of "underrepresented" protected groups and to provide a voluntary hiring preference for veterans (AB 1122 and SB 665).
- Preclude employers from disciplining employees or applicants for positive "THC" test results (AB 1256).
- Expand the California Family Rights Act (CFRA) to allow time off to care for parents-in-law and anyone related by blood (AB 1033 and AB 1041).
- Require employers to provide bereavement leave (AB 95).
- Create a presumption of COVID-19-related retaliation (SB 606).
- Enact specific telecommuting-related laws related to scheduling, postings, employee acknowledgments, and final pay issues (AB 513, AB 1028, and SB 657).
- Prohibit confidentiality provisions in a settlement agreement involving any form of harassment or discrimination (SB 331).
- Expand from two years to six years the retention period for certain employment records (SB 807).
- Enable employers to provide California tax-favored student loan repayment assistance to employees (AB 116).
- Require larger employers to provide "backup childcare benefits" (AB 1179).
- Extend the Labor Code to apply to the Legislature and state agencies (AB 1301 and SB 550).
- Suspend the Private Attorneys General Act (PAGA) during COVID-19 shutdowns (AB 385); and
- Exempt various additional industries from the so-called "ABC Test" for worker classification purposes

These pending bills will need to pass key initial substantive committee votes by April 30, 2021, and their chamber of origin by June 4, 2021.

In the interim, below is an overview of the recently enacted COVID-19 supplemental paid sick leave law, followed by an overview, arranged largely by subject matter, of the key pending employment bills beginning with those related to COVID-19.

NEW LAWS

California Reinstates Expanded Version of its COVID-19 Supplemental Paid Sick Leave (AB 84/SB 95)

On March 18, 2021, the California Legislature passed a budget bill (AB 84/SB 95), which:

(1) Largely reinstates California's supplemental paid sick leave law (AB 1867), which expired on December 31, 2020 -- the same time as the federal Families First Coronavirus Response Act (FFCRA).
(2) Expands this COVID-19 supplemental paid sick leave to more employers and allows it to be used for more qualifying reasons; and
(3) Takes effect ten days after Governor Gavin Newsom signs it (expected very shortly) and will apply retroactively to January 1, 2021 but is only effective through September 30, 2021.

Each of these items is discussed in greater detail below.

COVID-19 Supplemental Paid Sick Leave

For Context: Previous Federal and State Legislation as well as Local Ordinances

To understand this new state law, it is helpful to understand the legislative backdrop and the gaps it is trying to fill. In Spring 2020, the federal government enacted the FFCRA creating a paid sick leave 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.

Concerned about the FFCRA's apparent exclusion of larger employers and various health care providers, California enacted AB 1867 to apply COVID-19 Supplemental Paid Sick Leave (COVID-19 SPSL) to larger employers (i.e., "hiring entities" with 500 or more employees) and the excluded health care providers/emergency responders. Simply put, AB 1867 was intended to fill in coverage gaps that existed under the federal FFCRA. In turn, several California cities and counties enacted their own versions of "supplemental paid sick leave" ordinances to also extend

the FFCRA's provisions to larger employers within California, albeit each with their own variations and also differing in some respects from AB 1867.

Perhaps assuming, however, that the FFCRA would be extended if needed, AB 1867 and these local ordinances consistently tied their sunset provisions to the FFCRA's expiration date. Accordingly, when the federal government subsequently only extended the FFCRA's tax credits for SPSL-related leave purposes if voluntarily extended but did not also actually extend the FFCRA's leave requirements beyond December 31, 2020, AB 1867 and nearly all these local ordinances similarly expired on December 31, 2020.

Understandably concerned that the need for COVID-19 SPSL did not automatically expire when a new calendar year dawned, California and these municipalities have attempted to reinstate and often expand their COVID-19 SPSL requirements to once again fill in the gaps caused by the FFCRA's expiration. For example, San Francisco, Oakland, Los Angeles (City and County), Sacramento, Long Beach, San Jose, San Mateo (County), Santa Rosa and Sonoma, have all extended their supplemental leave ordinances, and in many instances have expanded them to apply to employers previously covered by the FFCRA (i.e., those with 500 or fewer employees) and made these ordinances retroactive to January 1, 2021. Readers with operations within these (and perhaps other municipalities with similar ordinances) may wish to examine those local ordinances.

The new law similarly reflects California's statewide effort to reinstate and expand its COVID-19 SPSL requirements to fill in for the now-expired FFCRA.

Employers Required to Provide COVID-19 SPSL

One of the immediate differences between this new law and the prior FFCRA and AB 1867 are the "employers" required to provide COVID-19 SPSL. While previously almost any employer had to provide COVID-19 SPSL, with the only difference being whether it was required under the FFCRA (for employers with 500 or fewer employees) or AB 1867 (for employers with more than 500 employees), this new California law only applies to employers with more than 25 employees. Thus, any employer with more than 25 employees must provide COVID-SPSL under this new California law, and there is no longer any exclusion for so-called larger employers (i.e., with more than 500 employees).

Who is Eligible for COVID-19-SPSL?

Given the law's purpose of ensuring employees have paid time off related to COVID-19, it has a broad definition of eligibility. For instance, while AB 1867 defined "covered worker" to mean someone who left their home or residence to perform work, this law defines "covered employee" broadly as an employee "who is unable to work or telework for an employer" for any of the

qualifying reasons discussed below. Also, as with AB 1867 and in contrast to the generally applicable statewide Paid Sick Leave law (Labor Code section 245), COVID-19-SPSL is immediately available to any eligible employee (i.e., unlike for general paid sick leave purposes, the employee need not have worked for 30 calendar days and need not wait 90 days before usage).

What Qualifies for COVID-19 SPSL?

One of the more dramatic changes with this newly effective state law is the expanded reasons for which COVID-19-SPSL can be taken. Under AB 1867 in 2020, a "covered worker" could only use COVID-19 SPSL for the following three reasons:

> (A) the worker was subject to a federal, state, or local quarantine or isolation order related to COVID-19.
> (B) the worker was advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or
> (C) the worker was prohibited from working by the worker's hiring entity due to health concerns related to the potential transmission of COVID-19.

In contrast, the new law requires employers to provide COVID-19 SPSL under any of the following seven reasons:

(A) The covered employee is subject to a quarantine or isolation order related to COVID-19 as defined by an order or guideline of the State Department of Public Health, the federal Centers for Disease Control and Prevention, or a local health officer who has jurisdiction over the workplace (and if more than one of these applies, the employee is entitled to use the COVID-19 SPSL for the minimum quarantine or isolation period under the order or guidelines that provides the longest such minimum period).
(B) The covered employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
(C) The covered employee is attending an appointment to receive a vaccine for protection against contracting COVID-19.
(D) The covered employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from being able to work or telework.
(E) The covered employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
(F) The covered employee is caring for a family member (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5]) who is subject to an order or guidelines described in subparagraph (A) above or who has been advised to self-quarantine, as described in subparagraph (B).

(G) The covered employee is caring for a child (as defined under the statewide Paid Sick Leave law [Labor Code section 245.5(c)] whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19 on the premises.

As noted, in contrast with the current statewide paid sick leave entitlement, this COVID-19 SPSL is available immediately (i.e., no 30-day employment requirement, or 90 days of employment before usage), and *also* applies 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.).

How Much COVID-19 SPSL is Available to Workers?

As under AB 1867, the amount of COVID-19 SPSL under the new law depends on whether the covered employee is essentially full-time or part-time. For instance, and consistent with AB 1867, covered employees are entitled to 80 hours of COVID-19 SPSL if either (a) the employer considers the covered employee to be "full time," or (b) the covered employee worked or was scheduled to work, on average, at least 40 hours per week for the employer in the two weeks preceding the date the worker took COVID-19 SPSL.

Also consistent with AB 1867, other covered employees are entitled to differing amounts of COVID-19 SPSL depending on the type of schedules they work and/or their length of service with the employer. For instance, covered employees with a **normal weekly schedule** are entitled to the total number of hours the covered worker is normally scheduled to work for the hiring entity over a two-week period. Employees with **variable schedules** are entitled to 14 times the average number of hours the employee worked each day for the hiring entity in the six months preceding the date the worker took supplemental paid sick leave. If the employee has worked less than six months but more than 14 days, this calculation is made over the entire period the worker has worked for the hiring entity. Finally, if the employee works a variable number of hours and has worked for the hiring entity for 14 or fewer days, the employee will be entitled to the total number of hours worked for the hiring entity.

Moreover, as under AB 1867, workers can use the sick leave granted upon oral or written request (i.e., no need for medical certification) and the worker determines how much to use.

Two other points about the amount of COVID-19 SPSL are worth making. First, consistent with AB 1867, this "supplemental" paid sick leave is in addition to the amount of paid sick leave provided under California's currently existing statewide paid sick leave law. Second, while many of the recently extended municipal ordinances appear to only allow employees to use the balance of any SPSL not used in 2020 under that ordinance, this new statewide law appears to replenish

the amount of COVID-19 SPSL, thus seemingly allowing the employee to use the full amount of COVID-19 SPSL in 2021 regardless of how much may have been used in 2020 under AB 1867.

What is the Applicable Rate for Supplemental Paid Sick Leave?

One difference between the new law and AB 1867 in 2020 is how to pay the employees who use COVID-19 SPSL. Specifically, while AB 1867 used a single standard for identifying the SPSL pay rate for both exempt and nonexempt employees, the new state law identifies different standards depending on whether the employee is exempt or nonexempt.

For nonexempt employees, the employer shall pay the SPSL at the highest rate of the following:

(A) Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 SPSL, regardless of whether the employee worked overtime in that workweek.
(B) Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
(C) The state minimum wage.
(D) The local minimum wage to which the covered employee is entitled.

In contrast, for exempt employees, the COVID-19 SPSL is calculated in the same manner as the employer calculates wages for other forms of paid leave time.

As with the FFCRA and AB 1867, this new law restates the general rule that the employer need not pay more than $511 daily and $5,110 in the aggregate for the employee's COVID-19 SPSL usage. The new law, however, has two new exceptions to this general rule. First, it states these caps (which were originally copied from the federal FFCRA) will automatically be raised to the new levels identified in any federal legislation amending the FFCRA as of the date any such federal amendments take effect. Second, this new law also authorizes a covered employee who has reached the maximum dollar amounts to utilize other available paid leave to fully compensate the employee for leave taken.

How Does COVID-19 SPSL Intersect with Other Paid Time Off?

As with AB 1867, the employer cannot 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 new version has a provision regarding the interplay between COVID-19-SPSL and employees unable to work pursuant to the Cal-OSHA's Emergency Temporary Standards (ETS). Accordingly, to satisfy the ETS' requirement to maintain an

employee's earnings when the employee is excluded from the workplace due to COVID-19 exposure, an employer may require a covered employee to first exhaust their COVID-19-SPSL under this new law.

As noted at the outset, the COVID-19 SPSL provisions take effect 10 days after Governor Newsom signs it and apply retroactively to January 1, 2021. And as with AB 1867, employers may wonder how this retroactivity affects time off they may have already provided in the period between AB 1867's expiration on December 31, 2020 and this new law taking effect. Like AB 1867, if the employer paid the covered employee a supplemental benefit for leave taken after January 1, 2021 in an amount equal to or greater than that required under this new law and that was allowed for the same qualifying reasons as under this new law, then the employer may count the hours of this other benefit towards the total number of COVID-19-SPSL otherwise required under this new law. As under AB 1867, this can include paid leave the employer provided pursuant to any federal or local law that became effective on or after January 1, 2021. However, it bears repeating that the employer cannot take a credit for paid sick leave provided under California's generally applicable paid sick leave since the COVID-19 leave is intended to be "supplemental."

Other Retroactivity Issues

As under AB 1867, this new law also provides opportunities for an employer to retroactively compensate employees who may have taken unpaid or not fully paid time off between January 1, 2021 and this new law's enactment. For instance, if the employee took time off for a qualifying reason after January 1, 2021 and before this new law took effect, and the employer did not compensate the employee in an amount at least equal to the amount required under this new law, then the employer must provide a retroactive payment upon the oral or written request of the employee. This retroactive payment must be made on or before the payday for the next full pay period after the oral or written request of the employee and must be reflected on the itemized wage statement reflecting the amount of COVID-19 SPSL available.

Notice Requirements

California's general paid sick leave law requires (per Labor Code section 247) that employers post in a conspicuous place statutorily enumerated information about the Healthy Workplace, Health Families Act. AB 1867 similarly required employers to post a model template the Labor Commissioner would develop regarding COVID-19-SPSL, and it specifically noted employers could satisfy this notice requirement concerning COVID-19-SPSL for workers that do not frequent the workplace by electronic means, including email. This new law similarly requires the Labor Commissioner to develop an updated template for employer notice purposes within seven days of the new law's enactment, and authorizes employers to once again, for employees to do not frequent the workplace, to provide this notice through electronic means, including email.

Moreover, this new law's enforcement provisions once again incorporate section 246(i), requiring that employers provide notice within an itemized wage statement or separate writing of an employee's available COVID-19 supplemental paid sick leave. Such notice must be given each pay period and must set forth COVID-19-SPSL separately from paid sick days. As under AB 1867, this requirement is not enforceable until the next full pay period following the date that this section takes effect.

For employees with variable schedules (as defined when determining how many hours of COVID-19-SPSL are available for non-full-time employees), the employer can satisfy these available balance notice requirements by performing an initial calculation and then noting "variable" next to that calculation. However, this does not exempt an employer from providing the employee an updated calculation when such a covered employee requests to use COVID-19 SPSL or requests relevant records under the record-keeping requirements under Labor Code section 247.5.

When does this New Law Apply?

This new statewide law will remain in effect through September 30, 2021, which coincides with the most recent federal extension of FFCRA tax credits under the American Rescue Plan signed by President Biden. However, as with AB 1867, any employee who is taking COVID-19 SPSL when this law expires will be permitted to take the full amount of COVID-19-SPSL to which they otherwise would be entitled.

Please note, the various local ordinances (which are once again not preempted) often identify varying expiration dates for those ordinances, and it is possible some may already extend beyond that date or could be extended beyond that date.

How with the New Law be Enforced?

New Labor Code section 248.2(d) provides that any remedies available to enforce "any unlawful business practice" are available to help enforce these provisions. The Labor Commissioner is also authorized to enforce this new law as if COVID-19 SPSL constitutes "paid sick days," "paid sick leave" or "sick leave" under various enumerated Labor Code sections governing the statewide Paid Sick Leave law (e.g., sections 246, 246.5, 247, 247.5 and 248.5),

COVID-19 SPSL for "Firefighters" and In-Home Support Services Workers

As with AB 1867, this new law also enumerates slightly different amounts and guidelines applicable to "firefighters," as defined. These "firefighter" specific requirements are sprinkled

within new Labor Code section 248.2, which also sets forth the more broadly applicable COVID-19 SPSL rules discussed above.

This new law also adds Labor Code section 248.3 identifying SPSL requirements applicable to "in-home supportive services workers. These industry specific requirements are beyond the scope of this Alert but are mentioned here in case any of the readers may be interested in consulting the statute for further questions.

PENDING BILLS

COVID-19-Related Proposals

Presumption of COVID-19 Retaliation, and Increased Cal-OSHA Enforcement of Safety Issues (SB 606)

While California law presently precludes retaliation against an employee who discloses certain COVID-19-related information, new Labor Code section 6409.7 would create a rebuttable presumption of retaliation if the employer takes an adverse action against an employee who does any of the following: (a) discloses a positive test or diagnosis resulting from exposure at the place of employment or worksite or of a communicable disease; (b) requesting testing as a result of exposure at the place of employment or worksite; (c) requesting personal protective equipment that is reasonable under the circumstances; or (d) reporting a possible violation of an occupational safety or health standard, order, special order or regulation. Notably, while the bill references COVID-19 protections, these retaliation provisions referencing exposure to "a communicable disease" or violation of any occupational health or safety order suggests it may apply much more broadly.

This bill would also expand Cal-OSHA's enforcement power in two respects. First, it would authorize Cal-OSHA to issue a citation to an "egregious employer" (as defined) for each willful violation, with each employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties. Second, regarding employers with separate places of employment, Cal-OSHA could issue a citation or seek a restraining order regarding an employer-wide written policy or practice that violates the Labor Code or Health and Safety Code. This bill would create a rebuttable presumption that a written employer policy or practice that violates the Labor Code or Health and Safety Code exists at all places of employment for purposes of issuing citations.

Status: Pending in the Senate Labor Committee

State Agency Publication of COVID-19 Information by Worksite (AB 654)

In 2020, California enacted AB 685 which, amongst other things, imposed various notice obligations upon employers related to COVID-19, including to report specified information to

the local public health department. In turn, the State Department of Public Health is required to make this workplace industry information received from local public health departments available on its internet website to enable the public to track the number and frequency of COVID-19 cases and outbreaks by industry. This bill would require the state agency to publicize this information in a manner that enables the public to track the number of COVID-19 cases and outbreaks by both workplace and industry, not simply industry.

This urgency statute would take effect immediately if enacted.

Status: Pending in the Assembly Labor and Employment Committee.

Right of Recall for Certain Employees Laid Off Due to COVID-19 (AB 1074)

Entitled the Displaced Janitor and Hotel Worker Opportunity Act, this bill would expand statewide many of the provisions recently enacted in so-called Right of Recall or Worker Retention Ordinances passed in various municipalities (e.g., Los Angeles, San Diego, etc.). Accordingly, covered employers (as defined, but generally including hotels, airport service providers and event centers) would need to notify laid off employees about job positions that become available that the employee previously held or is or could be qualified for. "Laid off employees" would mean employees employed for six months or more in the 12 months preceding January 1, 2020, and who was separated for non-disciplinary COVID-19-related reasons.

The employer would need to offer those positions based on a preference system outlined in the law and would need to allow at least business days for the employee to accept or decline the offer. 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 complaint with the Division of Labor Standards Enforcement if these requirements are not followed.

California's Displaced Janitor Opportunity Act requires contractors and subcontractors who are awarded contracts or subcontracts to provide janitorial or building maintenance services to retain for a period of 60 days certain employees who were employed at that site by the previous contactor/subcontractor and to offer continued employment if the retained employees' performance is satisfactory. This bill would essentially extend these protections to certain hotel workers.

Governor Newsom vetoed a similar bill (AB 3216) in 2020.

Status: Pending in the Assembly Labor and Employment Committee.

COVID-19 Liability Immunity (AB 1313)

This bill would exempt a business (as defined) from liability from injury or illness due to COVID-19 based upon a claim that the person contracted COVID-19 at the business or due to the actions

of the business, if the business has substantially complied with all applicable state and local health laws, regulations, and protocols. However, this exemption would not apply if the injury or illness resulted from a grossly negligent act or omission, willful or wanton misconduct, or unlawful discrimination by the business or its employees.

A similar bill (AB 1035) was introduced in 2020 but stalled. However, several other states have implemented similar liability for protections for businesses that substantially complied with applicable health regulations.

Status: Pending in the Assembly Judiciary Committee.

COVID-19 Business License Revocation (SB 102)

This bill would preclude the Department of Consumer Affairs, a board with the Department of Consumer Affairs that does not regulate healing arts licensees, and the Department of Alcohol Beverage Control from revoking a license or imposing a fine or penalty for failure to comply with any COVID-19 state of emergency orders or COVID-19 stay-at home orders unless the board or department can demonstrate the lack of compliance resulted in COVID-19 transmission.

These changes would not preclude issuance of fines, penalties, or license revocation for any actions that are not related to the issuance of any COVID-19 state of emergency orders or COVID-19 stay-at-home orders.

This bill would take effect immediately as an urgency statute and would remain in effect until either the COVID-19 state of emergency is terminated or all COVID-19 stay-at-home orders are no longer in effect, whichever occurs later, and in any case would expire by January 1, 2024.

Status: Scheduled for hearing on March 22, 2021 in the Senate Business, Professions and Economic Development Committee.

Requesting Information Related to a COVID-19 Diagnosis (AB 757)

This bill would authorize private employers to request documentation of a positive COVID-19 test or diagnosis if an employee reports they have been diagnosed or tested positive and is unable to work or if the employer determines that the employee may be subject to a 14-day exclusion from the workplace under applicable law. This documentation can consist of either a positive COVID-19 test (as defined) or written documentation by a health care provider advising the employee to self-quarantine due to COVID-19 concerns. Employers who request and receive such documentation will be required to comply with applicable privacy requirements.

This urgency statute would take effect immediately if enacted.

Status: Pending in the Assembly Labor and Employment Committee.

COVID-19 Reimbursement for Telecommuting State Employees (AB 1460)

This bill would authorize California's Department of Human Resources to provide a one-time payment of a to-be-determined amount to state employees required to telework due to COVID-19 to offset their costs associated with working remotely.

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

Harassment/Discrimination/Retaliation

"Family Responsibility" Protections under the FEHA (AB 1119)

This bill would amend the Fair Employment and Housing Act (FEHA) to include protections for "family responsibilities," including in its discrimination and harassment provisions. "Family responsibilities" would be defined to mean "the obligations of an employee to provide direct and ongoing care for a minor child or a "care recipient." In turn, "care recipient" would mean any person who (a) is a family member or a person who resides in the employee's household, and (b) relies on the employee for medical care or to meet the needs of daily living. "Family member" would be broadly defined to include not only the seven relationships currently identified under the California Family Rights Act (CFRA) (e.g., spouse, child, parent, sibling, grandparent, grandchild, domestic partner) but also "any other individual related by blood or whose close association with the employee is the equivalent of a family relationship." (As discussed below, another bill [AB 1041] proposes to include this expanded definition of "family member" in the CFRA, California's Paid Sick Leave law and its Paid Family Leave benefits program),

It would also amend FEHA's reasonable accommodation and interactive process provisions (Government Code section 12940, subsections (m) and (n) respectively) to require the employer to potentially determine reasonable accommodation for the known family responsibilities of an applicant or employee related to obligations arising from needing to care for a minor child or care recipient whose school or place of care is closed or otherwise unavailable.

Status: Pending in the Assembly Labor and Employment Committee.

FEHA Employment Preferences for "Underrepresented" Workers (AB 1122)

This bill would amend FEHA to provide that it would not be an unlawful employment practice for an employer to hire or promote a member of a protected group if the employer determines the individual selected for the position is qualified for the position and is a member of a protected group underrepresented in the type of job in question in the relevant general workforce. For purposes of this exception, "underrepresented" means the "protected group, to a statistically significant degree, constitutes a lower percentage of the type of job in the relevant workforce than would be expected by the percentage of the protected group in the general population."

However, this exception would not apply if the individual selected is from a protected group that is overrepresented (as defined) in the type of job at that employer's workforce, or if an individual

challenging the selection decision is a member of an underrepresented group and demonstrates their protected status was a substantial factor in the selection decision.

Status: Pending in the Assembly Labor and Employment Committee.

THC Discrimination Protections (AB 1256)

This bill would preclude an employer from discriminating against an applicant or employee because a drug screening test has discovered tetrahydrocannabinol (THC, or the principal psychoactive constituent in cannabis) in their urine. Persons discriminated against would be entitled to file a civil complaint for damages, injunctive relief, and reasonable attorneys' fees.

This bill would not preclude employers for conducting screening tests for THC if: (a) federal law requires such testing; (b) the employer would lose a monetary or licensing-related benefit for not screening; or (c) the employment is in the building and construction trades.

Status: Pending in the Assembly Labor and Employment Committee.

FEHA Protections for Political Affiliation (SB 238)

This bill would add "political affiliation" as a protected characteristic under the Fair Employment and Housing Act (FEHA).

Status: Pending in the Senate Judiciary Committee.

Veterans' Hiring Preference for Private Employers (SB 665)

While the FEHA presently allows employers to grant a hiring preference in favor of Vietnam War-era veterans and as a defense against sex discrimination claims, this bill (entitled the Voluntary Veterans' Preference Employment Policy Act) would update and expand this exemption for almost all veterans (regardless of when served) and as a defense against all FEHA discrimination claim. Such a preference would 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.

"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.

However, even if signed into law, its provisions would not take effect until the federal ban on transgender military service is lifted, and until all individuals with any protected classification under FEHA's discrimination protections are permitted to serve.

Similar bills (AB 160, AB 353, and AB 1383) have unanimously passed the Assembly before stalling in the Senate's Judiciary Committee in 2015, 2017 and 2019, even though similar preferences have been enacted in nearly 40 states.

Status: Pending in the Senate Judiciary and Military and Veterans Affairs Committees.

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

This bill would amend several provisions related to the FEHA and the Department of Fair Employment and Housing Act's enforcement provisions. For instance, it would increase from two years to six years the period that employers must retain the employment records identified in Government Code section 12946 (e.g., applications, personnel, and employment referral records) after the records are created or received, or after an employment action is taken.

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

While the statute of limitations to file an initial charge with the DFEH for FEHA-related claims was recently extended to three years, this bill would amend the statute of limitations for filing other types of charges (e.g., Unruh Act, Equal Pay Act claims, etc.). It would also specify that the statute of limitations for filing a civil action is tolled with the filing of a DFEH charge until the DFEH either files a civil action or one year after the DFEH notifies the complainant it is closing its investigation. This tolling provision would apply retroactively.

Presently, the DFEH may enforce the FEHA by petitioning a superior court to compel compliance with the DFEH's investigation of certain employment complaints. This bill would permit the DFEH to appeal superior court decisions to the appellate courts, with these DFEH appeals taking priority over all other civil actions. Continuing a trend, it would also enable a prevailing party to recover their fees and costs but limit an employer's ability to recover its fees and costs (even if a CCP 998 offer was issued) only if it proves the DFEH's appeal was frivolous or unreasonable when brought or if litigated after it became so.

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

It would also identify new procedures and deadlines related to class actions related to FEHA allegations.

Status: Pending in the Senate Rules Committee.

Leaves of Absence/Time off/Accommodation Requirements.

CFRA-Related Clarifications (AB 1033)

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

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

A second bill (AB 1867) had enacted until January 1, 2024 a pilot program allowing small employers (i.e., between five and 19 employees) to request mediation through the Department of Fair Employment and Housing (DFEH) for any alleged CFRA-related violations. This bill would recast this program in several respects, including deleting the authorization to request mediation and to instead specifically require the employee to attempt in good faith to resolve the violation through the DFEH's dispute resolution program before filing a civil suit. This bill would also modify the DFEH's right-to-sue notice to include information about this dispute resolution program and would require the DFEH to notify all names respondents about this program and enable eligible small employers to stay the civil action or arbitration until mediation is complete if such notices were not provided.

Status: Pending in the Assembly Labor and Employment Committee.

Statewide Paid Sick Leave Increases (AB 995)

Presently, California's statewide Paid Sick Leave law (Labor Code section 245, *et seq.*) allows employees generally to accrue sick leave at the rate of one hour for every thirty hours worked or allows employers to use an alternative method ensuring up to three days or 24 hours of paid sick leave for usage by an employee by the 120th day of employment. This bill would modify these provisions and require employees be permitted to accrue up to at least five days or 40 hours by the employee's 200th day of employment or each calendar year, or in each 12-month period. Corresponding changes would be made regarding the employer's ability to use alternative accrual methods provided these new amounts (five days or 40 hours) are available by the 200th day. It would also raise the employer's authorized limitation on sick leave that is carried over from the current three days/24 hours to five days/40 hours and would specify an employer has no obligation to allow accrued sick leave to exceed ten days or 80 hours.

This bill would also modify the provision exempting employers from providing "paid sick days" if they have a paid time off policy meeting various criteria but would increase the accrual limits from three days/24 hours to six days/48 hours (rather than the five days/40 hours identified

elsewhere in these amendments). It remains to be seen if this differential is intentional or inadvertent.

Lastly, this bill would increase the paid sick leave available to in-home supportive services employees (as defined), beginning January 1, 2026, from three days/24 hours to five days/40 hours.

Status: Pending in the Assembly Labor and Employment Committee.

Bereavement Leave (AB 95)

Entitled the Bereavement Leave Act of 2021, this bill would require employers to provide bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild, or domestic partner (as these terms are defined either in this or other specified Labor Code sections). Employers with 25 or more employees would be required to provide up to ten business days of bereavement leave while employers with fewer than 25 employees would be required to provide up to three business days of bereavement leave. The days of bereavement leave would not need to be consecutive but would need to be completed within three months of the date of the person's death. The bereavement leave would be unpaid (unless the employer has an existing bereavement leave policy), but an employee may use otherwise accrued or available vacation, personal leave, or compensatory time off.

This law would apply to all employers (regardless of size) and to all employees (regardless of amount of time employed with the employer. However, it would not apply to employees covered by a collective bargaining agreement that contains specially enumerated provisions, including bereavement leave.

If requested by the employer, an employee would need to provide within 30 days of the first day of the leave documentation of the person's death, including a death certificate or a published obituary or written verification of death, burial, or memorial service from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency. Employers would be required to maintain the confidentiality of employees requesting this leave and to treat any documentation obtained as confidential and not disclosed except where required by law.

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

A similar bill (AB 2999) stalled in 2020.

Status: Pending in the Assembly Labor and Employment Committee.

Expanded Entitlement under CFRA, Paid Sick Leave and Paid Family Leave Benefits for Blood Relations (AB 1041)

Perhaps reflective of a concern that the statutory focus upon familial relationships for leave purposes ignores modern realities, this bill would amend the California's Family Rights Act (CFRA), its Paid Sick Leave law, and its Paid Family Leave benefits law to expand when they would apply.

Specifically, it would amend CFRA's definition of family care and medical leave to include (beyond the seven currently identified relationships for whom leave may be taken to care) "any other individual related by blood or whose close association with the employee is the equivalent of a family relationship." It would similarly amend the definition of "family member" in California's Paid Sick Leave law (Labor Code section 245.5(c)) to include individuals related by blood or having a close relationship equivalent to a family relationship. Lastly, it would amend Unemployment Insurance Code section 3301 to enable "paid family leave" benefits to be paid to a worker who cares for individuals related by blood or having a similar close relationship akin to a familial relationship.

Status: Pending in the Assembly Labor and Employment Committee.

Workplace Flexibility

Telework Flexibility Act (AB 1028)

This bill, entitled the Telework Flexibility Act, proposes several changes to encourage and/or otherwise make it easier for employers to allow non-exempt employees to telecommute.

For instance, while California authorizes "alternative workweek schedules" whereby non-exempt employees can work up to ten hours daily without receiving overtime, it is often difficult to obtain the two-thirds work-unit approval required under Labor Code section 510, especially if employees are working remotely and physical worksites are closed. Accordingly, this bill would enable individual employees who are working remotely and are not under the physical control of the employer to request and obtain an individualized alternative workweek schedule provided certain enumerated safeguards are met (e.g., in writing, particular disclosures included, employee's ability to discontinue, etc.). Because employees working under such schedules would have considerable flexibility about when they perform work, they would also not be entitled to split shift premiums if they take longer breaks during the day.

For instance, to address concerns that employers may not be able to compel non-exempt workers to take state-mandated meal and rest periods by certain points, this bill would specify that such employees working from home and not under the physical control of the employer may choose when to take any meal or rest periods during the day. The employer would still be required to notify the employee when the employee begins working from home of their right to take such a meal or rest period as required under Labor Code section 512 and the Wage Orders and would need to provide one additional hour of pay for each day the employer fails to provide the one-time notification to an employee working from home. It would preclude employers from

retaliating against employees who take or request such meal/rest periods and would reiterate that except as to the timing issue, all employer obligations regarding meal and rest periods remain.

It would also modify the Private Attorneys General Act (PAGA) to preclude civil penalties for meal/rest break issues involving employees working remotely during the COVID-19 pandemic (e.g., from March 19, 2020 until January 1, 2022, or until the state of emergency is revoked).

Status: Pending in the Assembly Labor and Employment Committee.

Telecommuting Clarifications (AB 513)

This bill would add new Labor Code section 1410 to specifically clarify several issues related to telecommuting employees. First, it would clarify that employees working from home or a remote location not at the employer may receive electronically all notices and postings required under the Labor Code, rather than requiring the notices be physically delivered to or posted at the employee's home. Second, it would authorize such employees to utilize an electronic signature or acknowledgment for any employment-related documents that require acknowledgment of receipt or attestation.

Third, it would authorize payment of final wages for telecommuting employees by mail (to extent there is no otherwise applicable direct deposit agreement) to the address the employer has on file for sending notices, and payment will be deemed made on the date of mailing. In this regard, this final change would largely track Labor Code section 202 allowing an employer to mail final wages to an employee who quits and requests their final check be mailed.

Status: Pending in the Assembly Labor and Employment Committee.

Telecommuting Clarifications for Posting and Employee Acknowledgments (SB 657)

Like AB 513, this bill would add new Labor Code section 1207 to enable employers to satisfy their posting obligations for telecommuting employees by providing required notices and postings electronically, and to obtain electronic signatures or acknowledgments on any employment-related documents. SB 657 does not, however, include AB 513's proposal regarding final pay for telecommuting employees.

Status: Pending in the Senate Labor Committee

Individual Alternative Workweek Schedules Proposed (AB 230)

Known as the Workplace Flexibility Act of 2021, this bill would also permit individual non-exempt employees to obtain an "employee-selected flexible work schedule" providing for workdays up to ten hours without daily overtime between eight to ten hours worked, and to do so without completing the more detailed alternative workweek schedule procedure in section 511 when implementing a work-unit-wide alternative schedule. In contrast to AB 1028 (discussed above) which would be limited to telecommuting employees, this bill would allow any non-exempt

employee to request an individualized alternative workweek schedule if certain criteria were present.

Both the employer and the employee would have the ability to discontinue these schedules by giving written notice, with the notice becoming effective either on the first day of the next pay period or the fifth day after the notice is given if there are less than five days before the next pay period. Employers would be permitted to express their willingness to consider such schedules, but they would be prohibited from inducing employee requests either by offering benefits or threatening detrimental action.

In response to opponents' concerns that employers might coerce employees into such schedules, this bill contains several safeguards, including that the schedules be in writing, that these schedules be signed by the employee and the employer, and that the schedule is voluntary.

This bill is similar to AB 2482, which stalled in 2018.

Status: Pending in the Assembly Labor and Employment Committee.

Human Resources/Workplace Policies

Expansion of Settlement Agreement Confidentiality Prohibitions (SB 331)

Presently, Code of Civil Procedure section 1001 precludes settlement agreement provisions restricting the disclosure of factual information related to claims of workplace harassment or discrimination based on sex. Entitled the Silenced No More Act, this bill would expand this provision to include all types of workplace harassment or discrimination, not just based on sex. It would also extend to employees who oppose harassment, discrimination, or retaliation, not simply those who report a complaint.

This bill would similarly amend Government Code section 12964.5 which presently precludes employers from requiring non-disparagement provisions or that condition bonuses or raises upon signing an agreement restricting their ability to report unlawful acts in the workplace, including sexual harassment. This bill would extend this limitation to all types of unlawful acts, including any type of harassment or discrimination, not simply sexual harassment.

Addressing one current ambiguity, this bill would also preclude employers from including such non-disparagement provisions in a separation agreement.

Status: Pending in the Senate Judiciary Committee.

Student Loan Repayment Assistance under California Tax Code (AB 116)

While California and federal law presently allow employers to annually provide up to $5,250 of payments for an employee's ongoing educational assistance that is exempted from state and federal income taxes, this bill would similarly allow employers to annually provide up to this same amount on a tax-favored basis under California law to help repay existing student loan

debt. In this regard, it is like the recent provisions in the federal Coronavirus Aid, Relief and Economic Security Act (CARES) that enables employers to provide tax-favored repayment assistance for existing student loan debt that would not be considered income for federal income tax purposes.

Similar bills (AB 2478 and AB 152) stalled in 2017 and 2019.

Status: Pending in the Assembly Revenue and Taxation Committee.

"Backup Childcare Benefits" Required for Larger Employers (AB 1179)

This bill would require larger private employers (i.e., with 1,000 or more employees) to provide up to 60 hours of paid "backup childcare benefits" to eligible employees. These backup childcare benefits would be provided either by: (a) contracting with a licensed childcare provider and providing direct payments to the licensed provider for the hours used by an employee; (b) directly paying a qualified backup childcare provider provided by the employee; or (c) reimbursing an employee for up to 60 hours for backup childcare paid by the employee.

This bill mirrors many of the statewide Paid Sick Leave law's provisions, including for default accrual and alternative accrual method purposes, except it accrues based on every 34 hours worked (rather than 30) and the employee must have up to 60 hours accrued by the 200th day (rather than 24 hours by the 120th day) to use for backup childcare benefits. Employers would be required to maintain for three years records documenting hours worked and paid backup childcare benefits accrued and used by the employee.

Status: Pending in the Assembly Labor and Employment Committee.

Harmonized Production Dates for Employee Record Inspection (AB 436)

While Labor Code section 226 requires employers permit inspection or copying of wage statements within 21 days of a request, Labor Code section 1198.5 requires such inspection or copying of their personnel file within 30 days of a request. To ease the administrative burden when an employee requests both items simultaneously, this bill would amend section 226 to provide that the deadline for producing wage statements will extend to 30 days (i.e., the personnel file deadline) if the employee has also requested their personnel file. Otherwise, the current 21-day deadline will remain if the employee is simply seeking their wage statements.

Status: Pending in the Assembly Labor and Employment Committee.

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

Citing concerns that "quota" requirements in large warehouses pose safety issues, this bill would require "warehouse distribution centers" (as defined) to provide to nonexempt employees a written description of each quota applicable to the employee. These notices will need to identify

the quantified number of tasks to be performed, or materials to be produced or handled, within the quantified period and any adverse employment action that could result from not meeting the quota. Employers would need to provide updated written information whenever these quotas or potential adverse employment actions change. Employers would be prohibited from taking adverse employment action for not meeting a quota that has not been properly disclosed, or for not meeting a quota that does not allow the worker to comply with health and safety laws.

Cal-OSHA would also be required to develop workplace standards designed to minimize the risk of illness and injury among employees working in warehouse distribution centers utilizing production quotas.

A related bill by this same author (AB 3056) stalled in the Senate in 2020.

Status: Pending in the Assembly Labor and Employment Committee.

Notice Requirements Regarding State or Federal Emergencies, plus Labor Notices for Federal H-2A Visa Farm Workers (AB 857)

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 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, 2022, 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 H-2A employees of the location of certain items, including bathrooms and rest areas.

A very similar bill (SB 1102) passed the Legislature but was vetoed by Governor Newsom in 2020.

Status: Pending in the Assembly Labor and Employment Committee.

Wage and Hour

Wage Deprivation as "Grand Theft" (AB 1003)

Labor Code sections 215 and 216 presently specify that certain wage-related violations may constitute a misdemeanor. However, to address concerns some "gig" employers are intentionally keeping tips otherwise intended for employees, this bill would add new Penal Code section 487m providing that the intentional theft of wages in an amount greater than $950, in aggregate, by an employer from one or more employees may be punished as grand theft. Notably, while motivated by stories about gig employers keeping worker gratuities, this bill would define "theft of wages" broadly to include "any" violation that results in an employee being deprived of wages. This bill would preclude such "grand theft" violations from being punished under criminal provisions other than new Penal Code section 487m, but the employee or Labor Commissioner would also be authorized to file a civil complaint.

Status: Pending in the Assembly Public Safety Committee.

Labor Commissioner Liens on Real Property (SB 572)

While California law presently authorizes the Labor Commissioner to obtain a lien on real property owned by the debtor/employer to help recover amounts owed in favor of an employee, this bill would authorize the Labor Commissioner to obtain a real property lien to secure

amounts due to the commissioner under any final citation, hearing, or decision. This lien would exist for up to ten years, and the Labor Commissioner would be required to release the lien upon payment of the amount owed, including nay interests and costs that lawfully accrued on the original amount owed.

Status: Pending in the Senate Labor Committee.

Minimum Wage for Employees with Disabilities (SB 639)

While California and federal labor laws presently authorize employers to pay employees with disabilities lower wages than other employees, including amounts below the otherwise applicable minimum wage, this bill would phase out this exemption under California law. Specifically, beginning January 1, 2022, California law would preclude any new special licenses from being issued to authorize the payment of lower wages, and beginning January 1, 2024, would prohibit employers from paying employees with disabilities less than the legal minimum wage.

While Labor Code section 1191.5 also presently authorizes the Industrial Welfare Commission to issue special licenses for nonprofit organizations and authorizes a special minimum wage for covered employees, this bill would repeal this provision effective January 1, 2024.

Status: Pending in the Senate Labor Committee

Limits on Employer Collections against Employees (SB 505)

This bill would amend Labor Code section 224 to impose new requirements before an employer could involve a third-party collection service or commence a civil action to resolve a monetary obligation owed by the employee. Specifically, unless the money obligation was owed because of fraud, misrepresentation, or theft, the employer would need to make a good faith effort to consult with the employee to obtain a written authorization allowing the employer to deduct from the employee's wages and before involving a third-party collection service or commencing a civil action. Amongst other things, this written authorization would need to avoid placing an "undue financial burden" upon the employee, and for payments over a period of time, not withhold or divert more than 5% of the employee's monthly gross wages, unless expressly waived by an employee or another applicable legal agreement. This good faith consultation would not be considered part of the time for the employer to initiate a civil action, which shall not exceed one year from the date the consultation commenced.

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

Labor Code and Government Code Extended to the Legislature (SB 550 and AB 1301))

Both bills would generally extend all state laws regulating the employment practices of private employers to apply to the California Legislature. They would similarly apply all Labor Code provisions regulating employers to the Legislature, regardless of whether the Labor Code provision otherwise exempted state agencies or public employers from its requirements.

AB 1031 would also authorize legislative employee to file a representative action under the Private Attorneys' General Act (PAGA) against the Legislature.

These bills stem from frustration the Legislature is consistently enacting many new employment laws because it does not feel the effects of those laws. Similar bills have stalled early in the legislative session.

Status: SB 550 is pending in the Senate Labor Committee.

PAGA Hiatus for Claims during COVID-19 State of Emergency (AB 385)

This bill would preclude an "aggrieved employee" from bringing a Private Attorneys' General Act (PAGA) claim on behalf of themselves or others if the following conditions are met: (1) the employee has brought an action for monetary damages or penalties for Labor Code violations occurring between March 4, 2020 and the termination date of California's declared COVID-19 state of emergency; (2) the claims for monetary damages or penalties are covered by an enforceable arbitration agreement between the employer and the aggrieved employee; and (3) the aggrieved employee and employer knowingly waive their right to enforce that arbitration agreement.

Status: Pending in the Assembly Labor and Employment Committee.

Updated PAGA Notice Requirements, Including Regarding Cure Options (AB 530)

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

Status: Pending in the Assembly Labor and Employment Committee.

Small Business Relief from Regulatory or Statutory Penalties (SB 430)

This bill would require each state agency whose policies and activities may affect small businesses to establish a policy by January 1, 2023 to reduce or waive civil penalties for a "small business's" (as defined) violation of a statutory or regulatory requirement if the violation did not involve willful or criminal conduct and did not pose a serious health, safety, or environmental threat. This policy will need to include various factors the state agency must consider when determining whether to reduce or waive the civil penalty.

Status: Unanimously passed the Senate Governmental Organization Committee and is pending in the Committee on Business, Professions and Economic Development.

Independent Contractors/Worker Classification

Proposed Repeal of "ABC Test" for Worker Classification Test (AB 25)

In 2019, California enacted AB 5 codifying the so-called "ABC Test" (first enunciated by the California Supreme Court in its *Dynamex* opinion), and in 2020, California enacted AB 2257 making numerous further amendments to AB 5. This bill signals the challenges to AB 5 will continue and would essentially repeal the ABC Test for most occupations and business relationships, and instead require the so-called *Borello* multi-factor test be used to determine whether a worker is an employee or an independent contractor.

Status: Pending in the Assembly Labor and Employment Committee.

Various AB 5 Exemptions Proposed for Specific Industries (AB 231, AB 612, AB 1227, AB 1433, and SB 805)

As in 2019 and 2020, a number of bills have also been proposed to exempt specific industries from AB 5's "ABC Test" for worker classification purposes. For instance, AB 231 would delete the current January 1, 2022 exemption expiration date for licensed manicurists, thus making them subject to the exemption indefinitely (i.e., classification issues governed by the prior *Borello* test).

Similarly, AB 1561 would extend the licensed manicurists' exemption to January 1, 2025 and extend the exemption for certain construction industry subcontractors also to January 1, 2025.

AB 612 would add new Labor Code section 2776.5 to create an exemption from the so-called ABC Test for worker classification purposes for "bona fide business-to-business arrangements" that involve a "voluntary deposit" (as defined) under certain conditions. If those conditions are present, the multi-factor *Borello* test would be used instead of the ABC Test to determine if the workers involved are employees or independent contractors.

AB 1227 would make a similar exemption for workers in seasonal live theater.

AB 1433 would exempt trainees in a technology educational program receiving a scholarship or stipend and the provider of the technology educational program (as defined).

SB 805 would exempt from the ABC Test and instead apply *Borello for* nonprofit performing arts organizations with annual gross revenues of $1.9 million or less with respect to workers in positions related to production, provided the performing arts organization procures workers' compensation coverage for those workers.

Status: AB 612 and AB 1227 are pending in the Assembly Labor and Employment Committee.

State-Provided Benefits

Workers' Compensation Coverage for Hospital Employees (SB 213)

This bill would define "injury" for workers compensation purposes regarding hospital employees providing direct patient care in acute care hospitals to include infectious diseases, cancer, musculoskeletal injuries, post-traumatic stress disorder, and respiratory diseases. Beginning January 1, 2023, COVID-19 would also be included within this definition of infectious and respiratory diseases. It would create a rebuttable presumption these injuries arose out of the course and scope of employment, with the presumption extending for specified periods after the employee's termination of employment.

Status: Pending in the Senate Labor Committee.

Direct Deposit for Unemployment Insurance Payments (AB 8 and AB 74)

Presently, California authorizes unemployment insurance payments to be directly deposited into a "qualifying account." Citing concerns that recipients should be able to receive these funds more broadly and more quickly, AB 8 would authorize the recipient to decide whether the benefit payments are deposited directly into a qualifying account or applied to a prepaid debit. AB 74 would similarly provide the recipient of unemployment or disability insurance benefits the option to receive payment via direct deposit into a qualifying account of the recipient's choice, or by other disbursement methods such as checks.

Status: AB 8 and AB 74 are pending in the Assembly Insurance Committee.

Expanded Unemployment Insurance Benefits During COVID-19 Pandemic (AB 19)

The federal Coronavirus Aid, Relief and Economic Security Act (CARES) provided for expanded unemployment insurance benefits through its Pandemic Unemployment Assistance (PUA) and Pandemic Emergency Unemployment Compensation (PEUC). This bill would require the California Employment Development Department (EDD) to continue providing these expanded unemployment insurance benefits to California recipients, even if the federal funding programs expire, for the duration of time the individual is unemployed due to the COVID-19 pandemic. These expanded benefits would be provided regardless of the otherwise applicable caps on unemployment insurance benefits under state law. However, these expanded unemployment insurance benefits paid under this bill would not be charged against an employer's reserve account.

Status: Pending in the Assembly Insurance Committee.

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

Presently, an individual may be disqualified for unemployment compensation benefits if the individually willfully made false statements or representations to obtain unemployment

insurance benefits. This bill would require the Employment Development Department (EDD) to provide advance written notice and an opportunity to the alleged false representations before disqualifying the individual from being eligible for unemployment compensation benefits.

Status: Pending in the Assembly Insurance Committee.

Additional Translations for Unemployment and Disability Insurance Programs (AB 401)

While the Employment Development Department (EDD) presently must provide unemployment and disability insurance information in eight languages (English and the other seven most used languages), this bill would require, commencing July 1, 2022, that the EDD provide translations of the materials in English and the other 30 top written languages used by California residents with limited English proficiency. The EDD would also have additional translation requirements to the extent a claimant's written language is not included within these 31 languages.

Status: Pending in the Assembly Insurance Committee.

EDD to Notify Employer of Claimant Information (AB 980)

This bill would require the Employment Development Department (EDD) to make available to an employer a list of claimants approved to receive benefits from that employer and provide a method for employers to object to the approved claim.

Status: Pending in the Assembly Insurance Committee.

Increased Paid Family Leave Benefits (AB 123)

To address concerns the current Paid Family Leave benefits paid by the state Disability Fund are insufficient to enable many lower wage workers to take family leave, this bill would increase the weekly benefits from 60% to up to 90% of an employee's wages (subject to certain caps). These increased benefits would begin January 1, 2022.

Status: Pending in the Assembly Insurance Committee.

Paid Family Leave for Child Deceased in Childbirth (AB 867)

While California's Paid Family Leave provides wage-replacement benefits for baby bonding purposes, this bill would provide benefits for a parent who was pregnant with a child if the child dies unexpectedly during childbirth at 37 weeks or more of pregnancy.

Status: Pending in the Assembly Insurance Committee.

Chip-Enabled Cards for Unemployment Insurance Benefits (AB 274)

This urgency statute would take effect immediately and revise the definition of "prepaid card" for unemployment insurance purposes and require such cards by chip enabled.

Status: Pending in the Assembly Insurance Committee.

Miscellaneous

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

In 2019, California enacted SB 707 requiring employers to pay arbitrator fees within thirty days of invoicing or risk allowing employees the option to return to court proceedings. This bill would require arbitrator fee invoices to be served upon all parties and require any extension of the due date to be agreed upon by all parties, presumably to avoid having the arbitrator provide the employer an extension without the employee being aware of the delay or extension.

Status: Pending in the Senate Rules Committee.

Subsidized Protective Gear for Emergency Ambulance Employees (AB 7)

This bill would require emergency ambulance providers to establish a voluntary personal protective equipment (PPE) program to permit employees to purchase subsidized multi-threat protective gear via an employer-funded stipend. The employer would be required to notify emergency ambulance employees upon initial hiring and thereafter annually about this subsidized program, but the employee would not be required to purchase any such items. If they do purchase any such items, the employee could not be precluded from wearing this PPE while on duty as an emergency ambulance employee.

Status: Pending in the Assembly Labor and Employment Committee.

Agricultural Worker Protections for Wildfire Smoke (AB 73)

This bill would require the Division of Occupational Safety and Health to establish by January 1, 2023, a stockpile of N95 facepiece respirators sufficient to adequately equip all agricultural workers (as defined) during wildfire smoke emergencies (as defined). Agricultural employers would be required to furnish regional Cal-OSHA offices with monthly employee totals to ensure adequate amounts of N95 respirators are stockpiled. Agricultural employers who provide this information would be entitled to access these regional stockpiles during wildfire smoke emergencies.

Cal-OSHA would also be required to develop and distributed related training and information, and agricultural employers would be required to periodically conduct the training. Refresher training would also be required during wildfire smoke emergencies prior to distribution of these respirators.

Status: Pending in the Assembly Labor and Employment Committee.

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

In 1999, California enacted AB 633 targeting wage theft in the garment industry and creating access to justice for victims. Citing concerns some manufacturers have attempted to frustrate the purpose of AB 633, including by adding layers of subcontracting, this bill is intended to strengthen the protections for garment workers.

Accordingly, it would expand the definition of garment manufacturing generally, including to include certain garment manufacturing process such as dyeing, altering a garment's design, and affixing a label.

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

It would also define and include "brand guarantors" for purposes of these provisions, regardless of whether the brand guarantor performs the manufacturing or simply contracts with others. It would also specify that garment manufacturers or brand guarantors will share joint and several liability with any contractor or manufacturer who violates these protections.

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

Status: Pending in the Assembly Labor and Employment Committee.

Fast Food Industry Regulations Forthcoming (AB 257)

Entitled the FAST Recovery Act, this bill states the Legislature's intent to enact legislation relating to the fast-food industry, including targeting alleged abuses, low wages and COVID-19 dangers allegedly flowing from a lack of regulation and/or the workers' inability to organize.

Pay Equity for Under-Represented Groups (AB 316)

While California law presently prohibits private and public employers from paying employees lower wages than those of the opposite sex, or another race or ethnicity (except in statutorily enumerated circumstances), this bill states the Legislature's intent to enact legislation to achieve pay equity in state employment across gender, racial, ethnic, and under-represented groups. Amongst other things, it would require the California Department of Human Resources to publish a report by January 1, 2023 (and every two years thereafter) a report on gender and ethnicity pay equity in each classification under the Personnel Classification Plan (as defined) where there is an underrepresentation of women and minorities.

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

Public Works Disclosures by Contractors/Subcontractors (AB 1023)

Presently, Labor Code section 1771.4 requires contractors and subcontractors working on "public works" (as defined) to furnish payroll records to the Labor Commissioner at least monthly or more frequently if specified in the applicable contract. This bill would require the contractor and subcontractor provide these payroll records no later than their final day of work performed on the project and identify new statutory penalties for failure to timely provide these records.

Status: Pending in the Assembly Labor and Employment Committee.

Large Group Health Insurance Policy Plans (SB 255)

This bill would authorize an association of employers to offer a large group health care service plan contract or large group health insurance policy consistent with ERISA, if certain requirements are met. This association would need to be an organization with business and organizational purposes unrelated to providing health care benefits, and the participating employers would need to have a commonality of interests from being in the same line of business (as defined).

Foreign Labor Contractor Registration (AB 364)

While the Labor Commissioner is presently required to register and supervise foreign labor contractors who perform foreign labor contracting activities to recruit or solicit foreign workers, these requirements presently apply only to nonagricultural workers, exempting farm labor contractors and agricultural employers. This bill would repeal Business and Professions Code section 9998, thus expanding the application of the foreign labor contractor registration provisions.

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

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's 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, 2023.

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 report 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 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 privacy.

Governor Newsom vetoed a very similar bill (SB 1257) in 2020.

Advance Notice of OSHA Workplace Investigations (AB 1175)

Presently, the Occupational Safety and Health Administration (OSHA) prohibits employers from being provided advance notice of an inspection or investigation, except in identified circumstances. This bill would revise the prohibitions, including to allow advance notice of an inspection or investigation when necessary to ensure availability of essential personnel or access to the site, equipment, or process at issue. It would also permit advance notice when the inspection or investigation is the result of an employee complaint.

Worker Protections for Direct Patient Care Providers Regarding Technology (AB 858)

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

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

A very similar bill (AB 2604) was introduced in 2020 but stalled due to the pandemic-related shutdown of the Legislature.

Status: Pending in the Assembly Labor and Employment Committee.

<u>Public Sector/Labor Relations</u>

Proposed Changes for Selecting Agricultural Labor Representatives (AB 616)

While agricultural employees presently may select their collective bargaining representatives through secret ballot election, this bill would permit these employees to also select their labor representatives by submitting a petition to the board supported by representation ballot cards signed by a majority of employees in the bargaining unit.

Secondly, while a party may presently appeal a final order regarding an unfair labor practice, this bill would require an employer who appeals orders involving make-whole, backpay or other monetary awards to employees to post an appeal bond for the entire economic value of the order.

Status: Pending in the Assembly Labor and Employment Committee.

Public Employer Health Coverage During Strikes (AB 237)

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

Collective Bargaining for Legislative Employees (AB 314)

Entitled the Legislature Employer-Employee Relations Act, this bill would provide employees of the Legislature the right to form, join or participate with unions on all employer-employee relations matters. The Public Employment Relations Board would be prohibited from including these Legislative employees in a bargaining unit containing non-Legislature employees.

Two prior versions of this bill have stalled, although this one appears to have greater support.

Employee Information in Public Employment Context (SB 270)

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