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LEGISLATIVE SUMMARY

The 2018 California legislative session started quickly with the Legislature unanimously passing and Governor Jerry Brown signing the Legislative Employee Whistleblower Protection Act (AB 403), and with the Division of Labor Standards Enforcement and the Attorneys General Office issuing updates regarding the recently-enacted law restricting immigration worksite enforcement agencies (AB 450).

The so-called #MeToo Movement has also influenced the new legislative session, with the Legislature presently considering a number of sexual harassment and retaliation-related measures, including bills that would:

- Amend the Fair Employment and Housing Act (FEHA) to impose individual liability upon employees who engage in post-complaint retaliation (SB 1038);
- Expand current sexual harassment prohibitions to additional business, service and professional relationships (SB 224);
- Expand the scope of currently-mandated harassment training to additional employers, and for non-supervisory employees (SB 1300, SB 1343, and AB 3081);
- Impose new limits on settlement agreements regarding sexual harassment claims, including prohibiting confidentiality provisions (SB 820, SB 1300, and AB 3057);
- Prohibit mandatory pre-employment arbitration provisions regarding sexual harassment claims (AB 3080);
- Extend the statute of limitations for pursuing sexual harassment claims from one year to three years (AB 1870);
- Impose new record keeping requirements for sexual harassment complaints (AB 1867);
- Extend immunities from defamation claims for sexual harassment allegations (AB 2770); and
- Require employers to provide time off work for victims of sexual harassment and immediate family members (AB 2366).

Not surprisingly, the Legislature is also considering a number of other significant employment-related measures, including bills that would:

- Amend the FEHA to preclude discrimination against medicinal marijuana users (AB 2069);
- Prohibit inquiries regarding “familial status” (AB 1938);
- Invalidate settlement agreement provisions restricting employment or re-employment (AB 3109);
- Reform the Private Attorneys General Act (PAGA) to expand the ability to cure Labor Code violations pre-litigation (AB 2016);
- Enable employers to assist employees with student loan repayments (AB 2478);
- Update and potentially materially expand workplace lactation accommodation requirements (AB 1976 and SB 937);

- Increase California's paid sick leave requirements from three to five days (AB 2841);
- Authorize scheduling flexibility through increased access to "compensatory time off" and allow individual "alternative workweek schedules" (AB 2482 and AB 2484); and
- Require larger employers to submit annual "pay data reports" to state agencies (SB 1284).

There are also approximately twenty so-called "spot bills" that have been introduced and will likely be materially amended, including THOSE regarding paid family leave (SB 1123), prior salary history inquiries (AB 2282), tip pools (SB 1402), and overtime compensation (AB 3234).

Somewhat surprisingly, perhaps, a bill (AB 5) that would essentially have extended statewide San Jose's Opportunity to Work Ordinance stalled during an early vote. It remains to be seen whether other "opportunity to work" or "predictive scheduling" bills will be introduced this session.

Looking ahead, now that the deadline to introduce new bills has expired, the next major legislative hurdle is the April 27th deadline for bills to pass key policy committee votes, so many of the pending bills may soon be materially amended.

In the interim, below is an overview of the recent agency and legislative enactments, followed by a summary of the key employment-related bills that are currently pending in Sacramento.

ENACTED LAWS AND AGENCY DEVELOPMENTS

California Passes Whistleblower Retaliation Protections for Legislative Employees (AB 403)

Responding to multiple high-profile sexual harassment claims in the Legislature, California quickly passed and enacted the Legislative Employee Whistleblower Protection Act (AB 403). This newly-enacted law prohibits interference with the right of legislative employees to make protected disclosures of ethics violations and would prohibit retaliation against employees who have made such protected disclosures. It also establishes a procedure for legislative employees to report violations of these prohibitions to the Legislature, and imposes civil and criminal liability on an individual violating these protections. It also imposes civil liability on any entity that interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure.

Multiple California Agencies Publish Resources Regarding AB 450, Including Model Posting for Employer Usage Preceding Immigration Agency Inspection of Employment Records

Taking effect January 1, 2018, California's Immigrant Worker Protection Act (AB 450) was certainly one of the more significant new employment laws confronting California employers, and has continued to generate headlines as the federal government increases worksite enforcement to ensure employment eligibility. As discussed in greater detail in prior newsletters, AB 450: (1) imposed new limits on the ability of California employers to voluntarily provide worksite access to immigration authorities; (2) imposed new notice and posting requirements on employers; and (3) enacted significant statutory penalties.

The first of the new posting/notice requirements is implicated when immigration agencies provide

notice of an intent to inspect I-9 forms or other employment records. Under that circumstance, new Labor Code section 90.2 requires employers that receive a Notice of Inspection of I-9 records or other employment records by an immigration agency to post notice of this impending inspection. This notice must be posted within 72 hours of receiving notice of the inspection in the language the employer normally uses to communicate employment-related information to employees. This notice must also include: (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

Fortunately perhaps, AB 450 directed the Division of Labor Standards Enforcement (DLSE) to develop and publish on its website a template posting that employers may use to satisfy this pre-inspection notice of a forthcoming inspection by a federal immigration agency of I-9 forms or other employment records. The DLSE has now published this sample template on its website at: http://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf. Employers are permitted to use this DLSE-provided template or to develop their own version provided it contains all the statutorily-required information.

As a reminder, AB 450 also imposes post-inspection notice obligations upon an employer after it receives the results from a records inspection. Specifically, within 72 hours of receiving notice regarding the results of the records inspection, the employer must provide each current "affected employee," and their "authorized representative," a copy of the written immigration agency notice that provides the results of the inspection. This notice shall relate to the affected employee only and must be hand-delivered at the workplace if possible, and if not, by mail and email, if the employer knows the employee's email address, and to the employee's authorized representative. This notice must contain the following information: (1) a description of all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee; (2) the time period for correcting any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; and (4) the employee's right to be represented during this meeting.

Unfortunately, the DLSE was not tasked with developing a template regarding these post-inspection notices of results, and it is presently unclear whether it will do so.

The California Labor Commissioner and the California Attorney General have also recently published "joint guidance" on AB 450 in the form of Frequently Asked Questions available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/immigration-ab450.pdf.
The California Attorney General and the Department of Justice have also published an "advisory" regarding AB 450 to assist employers comply with the new laws. It is available at:
https://oag.ca.gov/sites/all/files/agweb/pdfs/immigrants/iwpa.pdf

PENDING BILLS

FEHA Protections for Medicinal Cannibis Users (AB 2069)

While California in 1996 enacted the Compassionate Use Act to authorize medicinal marijuana and in

2016 enacted the Adult Use of Marijuana Act to permit recreational marijuana usage, it had not yet followed the lead of other states enacting laws protecting medical cannabis patients against employment discrimination. This law would change that by amending the FEHA to prohibit employers from discriminating against a person on their status as, or positive drug test for cannabis by, a qualified patient or a person with an "identification card," as defined by Health and Safety Code provisions related to medicinal marijuana.

Anticipating the potential conflict with federal law, it would also specifically provide that employers would not be prohibited from refusing to hire or discharging a "qualified patient or person with an identification card" if hiring the individual or failing to discharge the employee would cause the employer to lose a monetary or licensing-related benefit under federal law or regulations. It would also make clear that employers would be authorized to take disciplinary action, including termination, against an employee who is impaired on the employer's property or place of work or during work hours because of cannabis usage.

Prohibitions on "Familial Status" Inquiries (AB 1938)

This bill would amend the FEHA to preclude employers or other covered entities from making non-job-related inquiries or expressing any limitations based on an employee or applicant's "familial status." Specifically, it would amend Government Code section 12940(d) to prevent an employer or employment agency from making a verbal or written non-job related inquiry about an applicant or employee's "familial status." "Familial status" would be defined in Government Code section 12926(g) and essentially include individuals under the age of 18 who reside with a parent or other person with care and legal custody, and would also apply to individuals who are pregnant or in the process of obtaining care and custody of someone under 18 years of age.

Individual Liability for FEHA Retaliation (SB 1038)

This bill would amend the FEHA to impose personal liability upon employees who violate its retaliation provisions, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

Expanded Sexual Harassment Liability in Business, Service or Professional Relationships (SB 224)

In addition to the FEHA which governs workplace sexual harassment, Civil Code section 51.9 prohibits sexual harassment in various business, service or professional relationships that are either specifically identified in the statute or that are "substantially similar" to those identified. Responding to recent high-profile sexual harassment allegations, this bill would specifically identify investors, elected officials, lobbyists and directors or producers as the types of individuals who can be liable for sexual harassment occurring within the business, service or professional relationship.

Expanded Sexual Harassment Training Requirements (SB 1300)

This bill would expand the scope and content of so-called AB 1825 harassment training. For instance, while Government Code section 12950.1 presently requires employers with 50 or more employees to

provide two hours of harassment training to supervisory employees within certain time frames, this bill would expand this requirement to all employers (not simply those with 50 employees), and require training be provided to all employees (not simply supervisory employees). This mandatory training would retain the general requirements for AB 1825 training (i.e., "practical guidance" and "practical examples"), it would also need to include "bystander intervention training" and information explaining to all employees how and to whom harassment should be reported and how to complain to the DFEH. "Bystander intervention training" would require information and practical experience how to enable bystanders to recognize potentially problematic behaviors, and provide the motivation, skills and confidence to intervene as appropriate.

This bill would also amend Government Code section 12940(k) to make clear that employees may sue separately for an employer's failure to take "all reasonable steps" to prevent discrimination or harassment, even if the employee cannot prove they actually endured sexual harassment or discrimination.

This bill would also add new Government Code section 12964.5 to prohibit employers from requiring the execution of a release of a claim or a right under FEHA in exchange for a raise, bonus, or as a condition of employment or continued employment. This prohibition would also preclude employers from requiring employees to execute a statement that they do not currently possess any such claim against the employer, and would preclude the release of the right to pursue a civil action or an administrative charge. It would also preclude employers from requiring an employee to signing a non-disparagement agreement or other document prohibiting an employee from disclosing information about "about unlawful acts in the workplace," including but not limited to sexual harassment. It would also nullify as contrary to public policy any such agreement.

Expanded Sexual Harassment Training Requirements (SB 1343)

This bill would also expand the current so-called AB 1825 harassment requirements, with some similarities and some differences to SB 1300 discussed above. For instance, this bill would amend Government Code section 12950.1 to require that by January 1, 2020, employers with five or more employees provide the AB 1825 harassment training to all employees, not just supervisory employees, within six months of their hire. Employers who provide this harassment training after January 1, 2019, would not be required to provide additional training and education by the January 1, 2020 deadline, but thereafter would need to provide such harassment training to all California employees every two years.

This bill would also require the DFEH to develop a two-hour sexual harassment training video and make it available on its web site, to develop these materials in at least three languages and to provide them to an employer upon request. This bill would specify that an employer would have the option to develop its own two-hour training module or may direct employees to view the DFEH's training video.

Sexual Harassment Training (AB 3081)

According to the bill's author, this bill would expand currently existing sexual harassment training requirements to employers with 25 or more employees, and would also require the establishment of anonymous harassment reporting procedures. Continuing another recent trend, this bill would amend

the FEHA's retaliation provisions to state that certain employment actions occurring within 90 days of a harassment complaint would be presumed retaliatory.

Janitor Survivor Empowerment Act (AB 2079)

According to the bill's author, this bill would enact specific harassment training rules related to the janitorial service industry, including allowing peers to provide direct training on harassment prevention for janitors.

Harassment and Eating Disorder Training for Talent Agencies (AB 2338)

This industry-specific bill would require that talent agencies provide training and educational materials regarding sexual harassment prevention, retaliation, nutrition and eating disorders to their employees and artists. Similarly, regarding minors in the entertainment industry, this bill would require the Labor Commissioner, prior to issuing a work permit to the minor, to provide the minor and the minor's parents training regarding sexual harassment, nutrition and eating disorders.

Prohibition on Confidentiality in Sexual Harassment Settlement Agreements (SB 820)

This bill responds to concerns that non-disclosure provisions in sexual harassment settlement agreements prevented the disclosure of prior sexual harassment. It would add Code of Civil Procedure section 1001 to prohibit settlement agreement provisions preventing the disclosure of "factual information related to the action" in civil actions in which the pleadings asserted claims for sexual assault, sexual harassment under the Unruh Act, or workplace sexual harassment or discrimination in violation of the FEHA. Any settlement agreement containing such provisions entered into on or after January 1, 2019 would be deemed void as against public policy.

This general prohibition would not apply to non-disclosure provisions requested by the claimant, as opposed to the employer or defendant, and would not prohibit provisions precluding the disclosure of the amount paid in settlement of a claim (as opposed to the "factual information" underlying the claim).

Settlement Agreements Related to Sexual Abuse or Harassment (AB 3057)

Code of Civil Procedure section 1002 presently prohibits settlement agreement provisions that prevent the disclosure of factual information related to claims for felony sex offenses, childhood sexual abuse, sexual exploitation of a minor, and elder sexual abuse. This bill would amend this section and add to this list of otherwise serious and often criminal conduct any provision related to "sexual abuse or harassment that is not otherwise governed by this subdivision." Any provision entered into violating these restrictions is deemed void as a matter of law.

Ban on Arbitration for Sexual Harassment Claims (AB 3080)

According to the bill's author, this bill would prohibit employers from requiring employees agree, as a condition of employment, to arbitrate any future disputes related to claims of sexual assault, sexual harassment or sex discrimination. It would also prohibit retaliation against employees who refuse to sign such an arbitration provision, <u>and would prohibit settlement agreement provisions preventing the</u>

disclosure of information about sexual harassment observed or endured.

Defamation Protections for Sexual Harassment Allegations and Investigations (AB 2770)

This bill would amend Civil Code section 47(c) to provide conditional protections against defamation claims for sexual harassment allegations and investigations. Specifically, it would provide that the so-called "common interest" privilege would apply to statements made "without malice" relating to a complaint of sexual harassment by an employee to an employer based upon credible evidence. It would also apply to subsequent communications by the employer to other "interested persons" during a sexual harassment investigation, and to statements made by the employer to prospective employers as to whether any decision not to rehire is based upon a determination the former employee had engaged in sexual harassment.

Lastly, for purposes of the malice needed to overcome this conditional privilege, it would amend Civil Code section 48 to define malice as "a state of mind arising from hatred or ill will" and not simply a false statement.

Restrictions on Employment or Reemployment Void (AB 3109)

This bill would add Civil Code section 1670.11 to render void and unenforceable any contract or settlement agreement entered into or after January 1, 2019 that waives free speech and petition rights. This section would also prohibit any contracts or settlement agreements that restrict a party's right to seek employment or reemployment in any lawful occupation or profession.

Extended Statute of Limitations for FEHA Complaints (AB 1870)

Presently, Government Code section 12960 requires employees to file an administrative charge with the Department of Fair Employment and Housing within one year from the date an unlawful employment practice has occurred. This bill would amend Government Code section 12960 to extend from one year to three years the deadline for employees to file administrative complaints regarding violations of the FEHA. It would make corresponding amendments to Government Code section 12980 regarding the limitations period for discrimination in the housing context.

New Record Keeping Requirements Regarding Sexual Harassment Complaints (AB 1867)

In 2004, California enacted AB 1825 requiring employers with 50 or more employees to provide at least two hours of harassment training within six months of their assumption of a supervisory position and once every two years. This bill would add new Government Code section 12950.5 to require employers with 50 or more employees to maintain records of employee complaints of sexual harassment for 10 years from the date of filing. "Employee complaint" would be defined as a "complaint filed through the internal complaint process of the employer." This section would also provide that the DFEH would have the ability to seek an order requiring the employer to comply with this provision.

Labor Code Protections Related to Sexual Harassment Victims and Immediate Family Members (AB 2366)

Labor Code section 230 presently precludes discrimination or retaliation against victims of domestic violence, sexual assault or stalking, and section 230.1 precludes employers with 25 or more employees from retaliating or discriminating against such victims who take time off from work. This law would amend both sections to expand these employment protections to include victims of "sexual harassment" and to extend these protections, including time off from work, to a victim's "immediate family members," as defined. For purposes of both provisions, sexual harassment would be broadly but specifically defined, to include leering, derogatory comments, quid pro quo offers and making or threatening retaliatory action. Both provisions would also define immediate family member as a "spouse, child, stepchild, brother, stepbrother, sister, stepsister, mother, stepmother, father or stepfather."

Elected Officials to Repay Settlements for Proven Sexual Harassment (AB 1750)

Responding to high-profile sexual harassment claims against elected officials, this bill states the Legislature's intent to enact legislation requiring an elected official to reimburse a public entity that pays any compromise or settlement involving conduct constituting sexual harassment, if an investigation reveals evidence supporting the claim of sexual harassment against the elected official.

New Protections from Sexual Assault or Harassment for Hotel Employees (AB 1761)

This bill would amend the California Occupational Safety and Health Act (Cal-OSHA) which generally requires that employers provide a safe workplace for its employees. This industry-specific bill would add Labor Code section 6403.7 and require "hotel employers" to take certain steps to protect employees from sexual assault and sexual harassment. For instance, the hotel employer would need to provide a panic button, free of charge, to employees working alone in a guestroom, and would authorize the employee to cease work if they reasonably believe there is an ongoing crime, harassment or other emergency happening in the employee's presence. The hotel employer shall also record any accusations it receives against a guest and maintain such records for five years from the first accusation and decline service to such guest for three years for any accusation supported by a sworn statement. The hotel employer would also have additional notice obligations to the employees regarding these complaints, would have new posting obligations for each guestroom, and would be required to honor various rights (e.g., the right to transfer to another floor or work area) by an employee who has reported an act of violence.

"Employee" would be defined as any individual performing at least two hours of work in a workweek. "Hotel employer" means any person, who directly or indirectly, including through the services of a temporary staffing agency or service, employs or exercises control over employees working at a hotel, motel or bed and breakfast inn.

Expanded Lactation Accommodation Requirements (SB 937)

This bill would expand the workplace lactation accommodations presently required under Labor Code

section 1031, including the enaction statewide of some of the more specific requirements recently adopted in the San Francisco Lactation Accommodation Ordinance, which took effect on January 1, 2018. For instance, this bill would replace the current language requiring the location not be a toilet stall, with language stating "a lactation room or location shall not be a bathroom and shall be in proximity to the employee's work area, shielded from view, and free from intrusion." It would also require that the lactation room or location comply with all of the following requirements: (1) it be safe, clean and free of toxic or hazardous materials; (2) contain a surface to place a breast pump and personal items; (3) contain a place to sit; and (4) have access to electricity. Employers would also need to provide access to a sink with running water and a refrigerator in close proximity to the employee's workspace. The bill would also specify that where the lactation room is a multipurpose room, the use for lactation purposes shall take precedence over other uses.

For employers in multitenant buildings who cannot provide a lactation room within its own workspace, it would be permitted to provide a shared space amongst multiple employers that otherwise complies with these requirements. Employers with fewer than five employees would be permitted to apply to the Labor Commissioner for an undue hardship exemption, in which case the Labor Commissioner would apply the same "undue hardship" factors considered in the disability accommodation context.

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

Employers would be required to respond to an employee's lactation accommodation request within five days, and any denials would need to be in writing. Employers would also be required to maintain requests for three years from the date of the request and allow the Labor Commissioner to access these records.

This bill would also add retaliation protections for employees who request lactation accommodation, and would increase the civil penalty from $100 to $500 for each violation. Employees would also be entitled to file complaints with the Labor Commissioner or to file a civil action, in which case they could seek reinstatement and actual damages, appropriate equitable relief, and reasonable attorney's fees.

Lastly, new Labor Code section 1035 would require the DLSE to develop and publish a model lactation accommodation policy and a model lactation accommodation request form that employers could use. The DLSE would also be required to establish lactation accommodation "best practices" that provide guidance to employers and a list of "optional but recommended amenities."

Lactation Area Cannot be a Bathroom (AB 1976)

Presently, Labor Code section 1031 requires employers to make reasonable efforts to provide an employee with the use of a room or other location, "other than a toilet stall," for purposes of expressing

milk at work. Responding to concerns that this language authorized the use of a bathroom, as opposed to simply a toilet stall, for lactation purposes, this bill would amend Labor Code section 1031 to make clear that an employer must make reasonable efforts to provide an employee with the use of a room or other location, other than a bathroom.

Infant at Work Program for State Employees (AB 2481)

This bill would add Government Code section 19991.20 to authorize a state agency to adopt an Infant at Work program to allow an agency employee who is a new parent or caregiver to bring an infant to the workplace. The bill's author notes it is intended to support breastfeeding, to encourage state employees to return to work sooner than they might otherwise, and to develop a family friendly community. The program would be limited to infants from six weeks to six months of age, or until the infant is crawling. The infant would be the sole responsibility of the parent/caregiver, and the infant would need to be cleared for participation by a physician. As presently worded, this program would only remain in effect until January 1, 2020.

Increase in Paid Sick Leave Use, Accrual and Carryover (AB 2841)

Enacted in 2014, California's paid sick leave law (Labor Code section 245, *et seq.*) essentially requires employers to allow employees to use up to 3 days/24 hours of sick leave per 12-month period. This bill would amend these requirements and instead entitle an employee to use up to 5 days/40 hours of paid sick leave in each calendar year, year of employment or 12-month period. It would also correspondingly increase from 6 days/48 hours to 10 days/80 hours the accrual cap an employer may use for paid sick leave. Employers would still be entitled to use alternative accrual methods beyond the default 1 hour accrued for every 30 hours worked, provided the employer uses a regular accrual method so that the employee has 40 hours accrued by the 200th day, or by providing 5 days/40 hours paid sick leave available for use by the completion of the 200th day.

The bill's author justifies this expansion partially upon the need of the statewide version to catch up to the more generous paid sick leave laws enacted in various California municipalities.

Expanded Compensatory Time Off (AB 2484)

One benefit some employees prefer to allow additional work-life flexibility is so-called "compensatory time off;" whereby instead of receiving overtime pay, the employee receives compensating time off commensurate with the higher rate (i.e., one-and-a-half hours paid time off in lieu of one hour of overtime pay). Hardly surprisingly, however, is the ability of employers to provide "compensatory time off" due to the detailed statutory requirements of Labor Code section 204.3, but also by the fact that it is expressly prohibited by Wage Orders Nos. 8-80, 13-80 and 14-80 (affecting industries handling products after harvest, preparing agricultural products and agricultural occupations), Order Nos. 3-30 (affecting the canning, freezing and preserving industry), Orders No. 5-89 and 10-89 (affecting the public housekeeping, amusement and recreation industries), and Order No. 1-89 (affecting the manufacturing industry).

This bill would remove the current express prohibitions to the industries noted above, meaning it would

potentially be available to employees subject to all wage orders. However, the employer would still need to comply with the numerous other statutory requirements regarding this benefit currently enumerated in section 204.3.

Individual Alternative Workweek Schedules Proposed (AB 2482)

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. Known as the Workplace Flexibility Act of 2018, this bill would 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. This bill would retain the general daily overtime rule for employees who did not elect such schedules, and would also retain daily and weekly overtime for work performed beyond the hours contemplated in the schedule.

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 a number of 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.

Student Loan Repayment Assistance (AB 2478)

While California already has a tax provision essentially mirroring Internal Revenue Code section 127, which excludes from an employee's income certain amounts paid by the employer on behalf of an employee's current education, this bill would extend this benefit to include employer payments made to help satisfy pre-existing student loan debt. Specifically, this bill would modify California's Revenue and Taxation Code to exclude from an employee's gross income up to $5,250 per calendar year amounts paid or incurred by an employer to a lender relating to any "qualified education loans," as defined in Internal Revenue Code section 221, incurred by the employee. This bill is intended to assist employers in employee recruitment/retention by allowing them to make payments on behalf of students to reduce the students' educational loan balance. If enacted, this exclusion would apply to payments made by employers beginning January 1, 2018.

A federal bill (HR 795) would make a similar exclusion from federal gross income payments made by an employer to reduce an employee's educational loan balance.

Paid Family Leave (AB 2587)

California's so-called "paid family leave" benefit provides up to 12-weeks wage replacement benefits funded through the state disability compensation program to allow employees to take time off to care for a seriously ill family member or to bond with a minor child. Presently, Unemployment Insurance Code section 3303.1 authorizes an employer to condition an employee's receipt of these benefits by requiring the employee to take up to two weeks of earned but unused vacation leave before receiving benefits. This bill would eliminate that authorization and condition requirement.

Annual Pay Data Reports (SB 1284)

Beginning by September 30, 2019, and annually thereafter by this same deadline, employers incorporated within the state of California and having 100 or more employees, will be required to submit "pay data reports" to the Department of Industrial Relations (DIR), who can then share this report with other state agencies, including the DFEH. The pay data report will need to include very specific information enumerated in new Labor Code section 160, 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 of 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 pay shown on the IRS W-2 form for 12 months was in the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey.

Employers would also need to identify each employee's total earnings as shown on the IRS Form W-2 for a 12-month period looking back from any pay period between July 1st and September 30th of each reporting year. For part-time employees and partial-year employment, the employer shall include the total number of hours worked by each employee included in each pay band over the last 12 months. 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. Fortunately, perhaps, 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 DIR.

Employers who fail to comply with this new section would be subject to a civil penalty of $500.

PAGA Reforms (AB 2016)

The Private Attorneys General Act of 2004 (PAGA, Labor Code section 2699 *et seq*.) authorizes aggrieved employees who comply with certain notice and filing requirements to file a civil action to enforce various Labor Code provisions and to recover specified penalties that would otherwise be collected by the Labor and Workforce Development Agency (LWDA). Citing PAGA abuses, legislative reforms are annually proposed but frequently stall.

Against this backdrop, AB 2016 would strengthen the notice and filing requirements for proposed PAGA actions. Specifically, while Labor Code section 2699.3 presently requires a pre-filing letter to the LWDA to identify "facts and theories," this bill would require the notice set forth the relevant facts, legal contentions and authorities supporting each violation and an estimate of current and former employees against whom the alleged violation or violations were committed and on whose behalf relief is sought. If the aggrieved employee or representative seeks relief on behalf of 10 or more employees, the bill would require that the notice be verified in a manner prescribed by other laws and that a copy of the complaint be attached to the notice.

Secondly, while PAGA presently provides an employer a "right to cure" certain violations before the aggrieved employee may file a civil action, common objections are that this cure provision is too narrow and that the cure period is too short. Accordingly, this bill would expand the cure provision to include all potential PAGA violations other than health and safety violations, and would extend the cure period from 33 to 65 calendar days.

Responding to an objection that PAGA's civil penalties are being awarded to employees without regard to any actual injury by that employee, this bill would amend PAGA and limit civil penalties to aggrieved employees based only upon a violation by the employer actually suffered by that employee.

Expanded Remedies and Limitations Period for Labor Code Violations (AB 2946)

This bill would continue the ongoing trend of making it easier for employees to sue and expanding the remedies available under the Labor Code. For instance, it would amend Labor Code section 98.7 to extend from the current six months to three years the period for an employee to file a complaint with the DLSE.

It would also amend California's whistleblowing provision (Labor Code section 1102.5) to authorize a court to award reasonable attorneys' fees to a plaintiff who brings a successful action for a violation of this provision.

Additional Statutory Penalties for Payday-Related Violations (AB 2613)

Presently, Labor Code section 204 requires that employers pay wages to their employees on regular paydays and enumerates various rules related to such payments, and allows the Labor Commissioner to recover civil penalties for non-compliance. This bill would impose additional specified penalties payable either to the Labor Commissioner or in a civil action to the aggrieved employee. Specifically, in addition to any other penalty provided by the Labor Code, amended section 204 would allow a statutory penalty payable to each affected employee of $100 for each initial violation plus $100 for each subsequent calendar day, up to seven days, on which a violation continues. It would also allow for subsequent violations, or any willful or intentional violation, a penalty of $200 for each employee affected, plus $2,000 for each calendar day, up to seven days, on which a violation occurs.

Monthly Wage Statements (AB 2223)

While Labor Code section 226 presently requires that itemized wage statements be provided either

semi-monthly or at the time wages are paid, this bill would also authorize the requirement that a written statement be provided monthly.

Proposed End of State Employer Exemption from Regular Payday Rule (SB 1234)

While Labor Code section 204 requires employers pay wages to their employees twice per calendar month on days designated in advance as regular paydays, Labor Code section 220 presently exempts the State of California from these requirements. This bill would amend Labor Code section 220 to repeal that exemption, thereby subjecting the State of California to the requirement of paying wages twice per month under Labor Code section 204.

Employee Retention of Immigration Documents (AB 2732)

Continuing the recent trend of new laws regarding unfair immigration-related practices, this bill would prohibit employers from knowingly destroying, concealing, removing, confiscating or possessing an employee's passport, immigration document, or other actual or purported government identification document, for the purposes of committing trafficking, peonage, slavery, involuntary servitude or a coercive lab or practice. Violations of new Labor Code section 1019.3 would be a misdemeanor and subject the employer to a $10,000 penalty, in addition to any otherwise available civil or criminal penalty. Employers would also be required to post conspicuously at work a notice specifying the rights of an employee to maintain custody and control of the employee's own immigration documents, and that the withholding of immigration documents by an employer is a crime.

New Labor Code section 1019.5 would also require employers to provide to each employee the "Worker's Bill of Rights," to be developed by the DLSE. Employers would be required to provide a copy in the language understood by the employee, and to obtain and retain the employee's signature confirming receipt of this notice.

Agricultural Workers Overtime Rights (AB 2875)

Enacted in 2016, the Phase-In Overtime for Agricultural Workers Act (AB 1066) phases in over a four-year period the overtime requirements for workers "employed in an agricultural occupation." While Labor Code section 859 presently defines such workers by reference to Wage Order 14-2001, this bill would amend this section and instead identify eight specific agricultural occupations entitled to these new overtime requirements, as phased in.

Human Trafficking Awareness Training for Hotel Employees (SB 970)

Reflecting the Legislature's recent focus on combatting human trafficking, this bill would amend the FEHA to require certain employers (i.e., hotels, motels, or bed and breakfast inns [as defined under the Business and Professions Code]) to provide training regarding human trafficking. Specifically, by January 1, 2020, covered employers would need to provide at least 20 minutes of classroom "or other interactive training and education" regarding human trafficking awareness to each employee likely to interact or come into contact with victims of human trafficking and was employed as of July 1, 2019, and to each such employee within six months of their employment in such a role. After January 1, 2020,

employers will be required to provide such human trafficking awareness training to such employees every two years.

Employees deemed "likely to interact or come into contact with human trafficking" would include those that have recurring interactions with the public, including those in the reception area, housekeepers, bellhops and drivers. The mandated training would need to include the following: (1) the definition of human trafficking and commercial exploitation of children; (2) guidance on how to identify individuals most at risk for human trafficking; (3) the difference between labor and sex trafficking specific to the hotel sector; (4) guidance on the role of hospitality employees in reporting and responding regarding human trafficking; and (5) the contact information of appropriate agencies. Employers would not be precluded from providing additional training beyond these requirements, and are also permitted to use information provided by certain specified federal agencies, including the Department of Justice.

The bill provides that the failure to provide this training shall not "by itself" result in the employer or employee's liability to human trafficking victims. The Department of Fair Employment and Housing would also have the authority to issue an order requiring compliance.

Employee Housing for Farmworkers (SB 829)

As introduced, this bill would state the Legislature's intent to enact legislation expanding the Employee Housing Act to: (1) further incentivize the creation of farmworker housing in agricultural communities; (2) authorize the Department of Housing and Community Development to partner private agricultural operators with independent nonprofits to manage and operate residences; and (3) preserve and protect the civil rights of tenants living in employee housing.

Sleep Time for Domestic Workers (SB 1188)

This bill would amend Labor Code section 1454 regarding live-in domestic workers who are required to be on-duty for 24 or more consecutive hours. It would authorize the domestic worker and the employer to agree, in writing, to exclude from hours worked a regularly scheduled sleeping period of not more than eight hours provided adequate sleeping facilities are provided and the employee can enjoy an uninterrupted night's sleep. For purposes of this section, an uninterrupted night's sleep consists of at least five hours of sleep during the regularly scheduled sleeping period. If the sleeping period is interrupted by a call to duty, the interruption period shall count as hours worked. However, absent a written agreement, the hours available for sleep will constitute hours worked, and the domestic work employer would be prohibited from terminating or otherwise discriminating against a domestic worker for failing to agree to exclude from hours worked a regularly scheduled sleeping period. Domestic work employees on duty for less than 24 consecutive hours would not be eligible to have any regularly scheduled sleeping periods deducted from hours worked.

This bill is similar to SB 1344 and SB 482 which stalled in 2016 and 2017 respectively, although this version includes some additional employee protections.

Original Contractor Liability for Labor-Related Liabilities (AB 1565)

Added in 2017 by AB 1701, Labor Code section 218.7 took effect January 1, 2018 and provides that direct contractors (as defined) assume and are liable for various labor-related liabilities incurred by a subcontractor. This bill would repeal subsection (h) of this recently-effective section that states that the obligations and remedies are in addition to existing obligations provided by law, except that it is not to be construed to impose liability on a direct contractor for anything other than unpaid wages and fringe or other benefit payments or contributions including interest owed. This law states that it is being introduced on an emergency basis and would take effect immediately.

Minor Work Permits (SB 1428)

While Labor Code section 1304 and various Educational Code provisions generally preclude employment of any minor absent a work permit issued by the proper education officers, this bill would amend these provisions to specify that no such work permit is required for a minor who has received the equivalent of a diploma of graduation. While Education Section 49101 presently does not apply to a minor who has already "graduated" from a four-year high school, this bill would expand this exemption to those minors who have received "the equivalent of a diploma or graduation." New Education Section 49142 would similarly provide that no work permit is required to work during the regular summer vacation of the school that the child attends, if the minor is not required by the minor's school to attend summer school during that period.

Minors in Social Media Advertising (AB 2388)

This bill would amend Labor Code section 1308.5 which regulates the employment of minors in the entertainment industry and requires the Labor Commissioner's written consent for minors under the age of 16 years old to take part in certain types of employment. It would include the employment of a minor in "social media advertising" (as defined in Labor Code section 980) as those types of employment subject to obtaining the Labor Commissioner's written consent.

Protections for "Prospective Public Employees" (AB 2017)

Government Code section 3550 presently precludes public employers from deterring or discouraging public employees from becoming or remaining members of an employee organization. This bill would amend section 3550 to provide similar protections to "prospective public employees."

Expanded Whistleblower Protections for State and Local Independent Contractors (AB 2317)

Following on the heels of AB 403 which enacted whistleblower protections for legislative employees, this bill would enact Labor Code section 1102.51 to extend the protections of California's whistleblower statute to any state and local independent contractors tasked with receiving complaints from programs or services operated by state or local government.

Presumption of Employee Status for Janitorial Employees (AB 2496)

While Labor Code section 2750.5 presently identifies a presumption of employee, rather than

independent contractor, status for workers performing services for which a license is required under certain statutes, this bill would amend this section to create the same rebuttable presumption of employee status for "property service employees" governed by Labor Code section 1420.5, *et seq.* (i.e., janitorial employees). This bill would make corresponding changes to Unemployment Insurance Code section 621.6 regarding eligibility for unemployment insurance benefits for "property service employees.

Criminal Conviction History Consent Forms (AB 2680)

Both the Labor Code and the FEHA limit the circumstances under which employers may obtain and use information related to an applicant's prior conviction history. This bill will would add new Labor Code section 432.9 and require the Department of Justice to develop a conviction history consent form that private and public employers would need to use to obtain an applicant's consent before a conviction history background check would be performed. The Department of Justice would be required to ensure this form complies with the federal Fair Credit Reporting Act.

EDD to Assist Hiring of Individuals with Prior Criminal Convictions (AB 3039)

This bill would task the Employment Development Department to create new features on its CalJOBS internet site to enable persons with prior criminal convictions to access available employment opportunities. These internet features would also enable employers to declare their interest in and ability to hire individuals with prior criminal convictions.

Tax Deduction for Labor Organization Dues (AB 2577)

This bill would amend California Revenue and Taxation Code section 17072 and allow as a deduction from gross income for state income tax purposes the amount paid or incurred for member dues paid by a taxpayer during the taxable year to specified labor organizations.

Unfair Labor Practices in Agricultural Relations (AB 3092)

California law authorizes the right of agricultural employees to form or join labor organizations for collective bargaining purposes with agricultural employers, and also prohibits such labor organizations or its agents from engaging in specified unfair labor practices. This bill would amend Labor Code section 1154 to add to the list of unfair labor practices the abandonment or failure to represent the bargaining unit for a period of three years or more. The Agricultural Labor Relations board would be authorized to decertify a labor organization that violates this new provision.

Member Consent Required to Approve Mediator Award in Agricultural Relations Bargaining Dispute (AB 3093)

California's Agricultural Labor Relations Act also specifics that mandatory mediation may be required where the parties have failed to reach a collective bargaining agreement. This bill would add Labor Code section 1164.1 to require that before the terms of a binding mediation shall take effect or be enforceable, a majority of the agricultural employee of the bargaining unit affected by the order must approve the mediator's order.

California Agricultural and Service Worker Act (AB 1885)

This bill would state the Legislature's intent to enact a model program to provide undocumented agricultural employees a permit to work and live in California. Amongst other things, it would declare that such individuals are entitled to the same wage, hour and working conditions as employees who are legal residents of California.

"Spot Bills" To Watch

The California Legislature often attempts to meet the letter if not the spirit of the deadline to introduce new bills by allowing so-called "spot bills," whereby the author promises only "non-substantive technical" changes to a statute before materially amending these bills later during the process. Some of the spot bills to potentially watch are: SB 1069 [workers compensation (Mendoza –D)], SB 1123 [paid family leave compensation (Jackson – D)], SB 1402 [gratuities under Labor Code section 351 (Lara – D)], AB 1913 [foreign labor contractors (Kalra –D)], AB 2282 [prior salary history (Eggman – D)], AB 2314 [private employment (Ting – D)], AB 334 [ER reports of occupational injury or illness (Thurmond – D)], AB 2509 [gratuitous employees with powers of attorney (Waldron – R)], AB 2610 [piece rate compensation (Aguiar-Curry – D)], AB 2616 [sexual harassment investigations on behalf of legislative employee [Caballero – D]),AB 2751 [agricultural employee labor relations (Stone – D]), AB 2765 [portable employee benefits (Low – D)], AB 2819 [ethnic pay gap in Silicon Valley (Holden – D)], AB 2827 [immigration worksite enforcement (Allen – R)], AB 2907 [PAGA (Flora – R]), AB 3014 [employee housing (Quirk – D)], AB 3069 [property bonds in employment (Cooper – D)], AB 3073 [DLSE minimum wage enforcement (Low – D)], AB 3145 ["wages" under Labor Code (Salas – D)], AB 3172 [wage earners under LC 50.5 (Nazarian – D)] and AB 3234 [Overtime compensation (Carrillo – D)].