LEGISLATIVE SUMMARY

The deadline for bills to pass key initial committee votes has expired, bringing the 2018 California Legislative Session into slightly clearer focus. Not unexpectedly given the enduring impact of the #MeToo Movement and the current composition of the California Legislature, a number of significant employment-related bills have moved forward. These include bills that would:

- 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 and SB 1300);
- Amend the Fair Employment and Housing Act (FEHA) to impose individual liability upon employees who engage in post-complaint retaliation (SB 1038);
- Prohibit mandatory pre-employment arbitration provisions regarding FEHA and Labor Code violations (SB 1300 and 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);
- Require employers to provide time off work for victims of sexual harassment and family members (AB 2366).
- Amend the FEHA to require reasonable accommodation of medicinal marijuana users (AB 2069);
- 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); and
- Require larger employers to submit annual "pay data reports" to state agencies (SB 1284).

A number of bills also failed to clear this initial hurdle, including bills that would have reformed the Private Attorneys' General Act (AB 2016 and AB 2907), allowed individual employees to obtain so-called alternative workweek schedules (AB 2482), expanded the availability of so-called compensatory time-off (AB 2484) and precluded employers from inquiring about an applicant's "familial status" (AB 1938).

Looking ahead, the majority of the bills that advanced are pending in the respective Appropriations Committees and will soon proceed to full floor votes in advance of the June 1st deadline to pass the first legislative chamber. Accordingly, it is foreseeable that many of the

pending bills may soon be materially amended and that other non-employment bills may be "gutted and amended" to become employment-related bills.

In the interim, below is a summary of the key employment-related bills, largely grouped by subject matter that survived this initial key hurdle and are currently pending in Sacramento.

PENDING BILLS

"Omnibus" Sexual Harassment Bill (SB 1300)

This bill would make numerous changes to the Fair Employment and Housing Act (FEHA). First, it would expand the scope and content of so-called AB 1825 harassment training. 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 with five or more employees, and require training be provided to all employees, not simply supervisors. This mandatory training would retain the general requirements for AB 1825 training (i.e., "practical guidance" and "practical examples"), and 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 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 harassment or discrimination. It would be sufficient for the plaintiff to show that the employer knew that the conduct was unwelcome to the plaintiff, that the conduct would meet the legal standard for harassment or discrimination if it increased in severity or became pervasive, and that the defendant failed to take all reasonable steps to prevent the same or similar conduct from recurring. In other words, even though the conduct may not be sufficiently severe and pervasive to allow an employee to recover under a hostile work environment theory, the employee may be entitled to recover under a failure to reasonably prevent theory to the extent the employee notified the employer and they failed to timely respond. The bill's author explains this change is intended to motivate employers to respond earlier and prevent such conduct from ever becoming severe and pervasive.

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.

It would also preclude employers from requiring an employee to sign a non-disparagement

agreement or other document prohibiting an employee from disclosing information "about unlawful acts in the workplace," including but not limited to sexual harassment. It would also preclude the release of the right to pursue a civil action or an administrative charge. Notably, although the bill does not mention arbitration, the bill's author states that this provision is intended to preclude employers from requiring employees "as a condition of employment" to waive their ability to file a civil suit or an administrative charge. It would also nullify any such agreement as contrary to public policy.

While the FEHA presently provides that employers may be liable for the acts of non-employees with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, this bill would extend that liability to any form of harassment, not just sexual.

This bill would amend FEHA's costs provisions which presently authorizes the court to award a prevailing party reasonable attorney's fees and costs, including expert witness fees. If amended, a prevailing defendant would be prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or totally without foundation when brought or that the plaintiff continued to litigate after it clearly became so. It would also specify that this limitation on defendants' costs recovery would apply notwithstanding the provisions of Code of Civil Procedure section 998 (i.e., if the defendant offered a pre-judgment offer to compromise greater than the plaintiff's trial recovery.)

Lastly, this bill would include a number of Legislative declarations concerning what it believes the appropriate legal standard courts should consider when evaluating harassment claims. Amongst these would be the Legislature's suggestion that harassment cases are rarely appropriate for summary judgment, that a single instance of harassment may be sufficient for a hostile work environment claim, and that courts should not apply the so-called "stray remarks" doctrine developed under federal law.

Status: Passed the Senate's Labor and Industrial Relations and Judiciary Committees, and is pending in the Appropriations Committee.

Additional Sexual Harassment-Related Protections and Training (AB 3081)

While Labor Code section 230 presently precludes discrimination or retaliation against victims of domestic violence, sexual assault, and stalking, this bill would provide similar protections for victims of sexual harassment if the employer is aware of such status. In this respect, AB 3081 would seemingly create additional retaliation protections for sexual harassment complainants, but in the Labor Code as opposed to simply the FEHA.

It would also create a three-year period (rather than the current one-year period) for employees to file a Labor Commissioner claim for the following types of violations: (1) discrimination/retaliation against victims of domestic violence, sexual assault or stalking who take time off from work for certain purposes; (2) discrimination or retaliation against employees because of their status as a victim of domestic violence, sexual assault or sexual harassment; or

(3) for failure to provide reasonable accommodation to a victim of sexual assault, domestic violence or stalking who requests an accommodation for their safety while at work.

It would also add new Labor Code section 1080 to require all employers provide to all employees, initially at time of hire and annually thereafter, a written notice containing ten specific items relating to sexual harassment protections and how to file an administrative charge. The Labor Commissioner would be required to develop a template for potential employer usage, or presumably the employer may develop its own form containing all required information. Employers would be required to deliver the written notice in a manner ensuring distribution to each employee, either using the Labor Commissioner template or information included with an employee's pay.

While Government Code section 12950.1 presently requires larger employers (i.e., with 50 or more employees) to provide anti-harassment training to supervisors, new Labor Code section 1081 would expand these training requirements to non-supervisory employees. Specifically, employers with 25 or more employees would be required to provide harassment-related training to all non-supervisory employees at the time of hire and at least once every two years thereafter. This training would need to be in the language understood by that employee and would need to include seven specifically-enumerated elements (e.g., the definition of harassment, internal complaint process, etc.). Employers would be permitted to use the DFEH's training pamphlet (DFEH-185) as a guide to training, or use other written material that contains the information required by this new section.

Employers would also be required to provide the employee a copy of pamphlet DFEH-185 and a record of training using a Labor Commissioner-provided form identifying the name of the trainer and the date of the training. Employers would be required to keep records for three years identifying the names of all employees who have received this training.

New Labor Code section 1082 would require the Labor Commissioner to establish a 24-hour hotline to assist workers regarding sexual harassment protections in the workplace. The Labor Commissioner would also be required to create a mechanism for employees to electronically submit sexual harassment or sexual assault allegations, and while the Labor Commissioner could request the identity of witnesses supporting the allegations, it would not be permitted to require the person submitting the allegations to provide their own contact information.

Lastly, while Labor Code section 2810.3 presently requires client employers and labor contractors share civil liability for workers supplied by that contractor for certain violations (e.g., failure to pay wages or secure workers' compensation coverage), AB 3081 would impose shared responsibility for sexual harassment, sexual discrimination or sexual assault of a worker by a labor contractor or another worker.

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

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 and AB 3081 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 six languages (English, Spanish, Chinese, Korean, Tagalog and Vietnamese) 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 to direct employees to view the DFEH's training video.

Status: Unanimously passed the Senate's Labor and Industrial Relations and Judiciary Committees, and is pending in the Appropriations Committee.

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. It would essentially negate the California Supreme Court decision in *Jones v. The Lodge at Torrey Pines* (2008) 42 Cal.4th 1158 which had held supervisors are immune from FEHA retaliation claims based upon the statute's language and the public policy goals of not chilling effective business management.

Status: Passed the Senate's Judiciary Committee on a party-line vote and pending in the Appropriations Committee.

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

This bill responds to concerns that non-disclosure provisions in sexual harassment settlement agreements prevent 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). Since it only applies to settlements after a civil action has been filed containing certain claims, it does not appear it would apply to settlements prior to a civil suit being filed. It also would not apply to protective orders that prevent the disclosure of information underlying those actions, which would remain governed by Code of Civil Procedure section 1002.

Status: Passed the Senate's Judiciary Committee and is pending in the Appropriations Committee.

Ban on Arbitration for FEHA and Labor Code Claims (AB 3080)

This bill would add new Labor Code section 432.6 to preclude employers from requiring applicants to agree as a condition of employment to waive any right, forum, or procedure related to any violations of the Fair Employment and Housing Act and the Labor Code, including the right to file a claim with a state or law enforcement agency. It would also preclude employers from threatening, retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refuses to consent to the waivers prohibited under this section. Prevailing plaintiffs who enforce their rights under this section would be entitled to recover their reasonable attorney's fees and injunctive relief (e.g., reinstatement, nullification of the improper contract provisions, etc.) Although AB 3080 does not mention arbitration specifically, the author has indicated it is intended to essentially prohibit mandatory arbitration for both FEHA and Labor Code claims.

This bill would also add new Labor Code section 432.4 to preclude employers from requiring as a condition of employment that an employee or independent contractor agree to not disclose any instance of sexual harassment the employee or independent contractor suffers, witnesses, or discovers in the workplace or while performing a contract.

Lastly, it would amend FEHA by adding new Government Code section 12953, specifying that it shall be an unlawful employment practice, thus implicating FEHA, for an employer to violate proposed new Labor Code sections 432.4 and 432.6.

Status: Passed the Assembly's Labor and Employment and Judiciary Committees on party-line votes and is pending in the Appropriations Committee.

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.

Status: Unanimously passed the Assembly's Judiciary Committee, and is pending in the Appropriations Committee. This bill appears unopposed.

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.

Status: To be heard May 8, 2018 in the Assembly's Judiciary Committee.

Extended Statute of Limitations for FEHA Complaints (AB 1870)

Government Code section 12960 presently requires employees 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 extend from one year to three years the deadline for employees to file administrative complaints regarding FEHA violations.

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

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 to an employee 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.

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

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

As mentioned above, Labor Code section 230 presently precludes all employers from

discriminating or retaliating against victims of domestic violence, sexual assault or stalking who take time off from work to obtain legal relief (e.g., obtaining a restraining order) or to take other measures necessary to protect the health, safety, or welfare of the victim or the victim's child. Labor Code section 230.1 imposes additional requirements upon employers with 25 or more employees, including requiring the employer to provide time off for a victim to obtain other kinds of services, such as counseling, training or the services of a women's shelter or rape crisis center.

This law would expand these protections in two respects. First, it would extend the job-protected leave currently afforded to victims of domestic violence, sexual assault and stalking to victims of sexual harassment. Interestingly, AB 2366 does not presently extend the employer's accommodation obligations under these sections to sexual harassment victims even though it applies to victims of domestic violence, sexual assault, or stalking, and it remains to be seen if this will be amended.

Second, it would also extend job-protected leave to the victim's "family members" so that they may assist the victim in obtaining legal remedies or other relief or services. Both provisions would also define "family member" as (a) a child (including adopted children, step-children, legal wards or someone to whom the employee stands in loco parentis); (b) a parent (as defined, including legal guardians or someone who served as loco parentis when the employee was a minor child); (c) a spouse; (d) a registered domestic partner; (e) a grandparent; (f) a grandchild; or (g) a sibling.

The bill would also specifically define sexual harassment for these provisions to mean "unwelcome sexual advances, requests for sexual favors and other verbal, visual or physical conduct of a sexual nature, made by someone from or in the work setting." It would also specify that sexual harassment may be either "quid pro quo" or "hostile work environment" and provide definitions of both forms.

Amended section 230 would also require, except in specified instances, the employer to maintain the confidentiality of any employee requesting leave because they are a victim of a crime, or a victim of domestic violence, sexual assault, sexual harassment or stalking.

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

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.

Status: Pending in the Senate's Judiciary Committee. This bill had previously passed the Senate and Assembly prior to the relevant amendments being added, so it likely would need to be approved again.

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 and would include a subcontracted worker. "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.

It would also provide that these new protections are the minimum standard and do not affect more favorable laws or ordinances related to the prevention of violence or harassment.

Status: To be heard May 2, 2018 in the Assembly's Labor and Employment Committee.

Harassment and Discrimination Protections in Building and Construction Trade Apprenticeships (AB 2358)

While California law presently prohibits discrimination and harassment in apprenticeship training programs based on certain factors, this industry-specific bill would expressly prohibit discrimination in any building and construction trade apprenticeship program based on certain enumerated categories (e.g., race, sex, disability, age, sexual orientation, etc.). It would also require the apprenticeship program to take certain steps (e.g., designating a compliance officer, etc.) to oversee this commitment to preventing harassment and discrimination and to retain certain records reflecting these efforts. It would also direct the Administrator of Apprenticeships

to look to the FEHA and the DFEH's interpretive guidance when implementing these programs.

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

Janitor Survivor Empowerment Act (AB 2079)

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.

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

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, and 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, and nutrition and eating disorders. It would also require the Labor Commissioner to develop and provide educational and training tools related to these topics.

Status: Unanimously passed the Assembly's Labor and Employment Committee and is pending in the Appropriations Committee. This bill appears largely unopposed.

FEHA Accommodation Protections for Medicinal Cannabis 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 or requiring reasonable accommodation. This law would partially change that by stating the Legislature's intent to make it unlawful for an employer to discriminate against a person based upon their status as a qualified patient or a person with an identification card entitled to the protections of the Compassionate Use Act, or the use of cannabis for medical purposes. It would also add new subsection (6)(A) to Government Code section 12940(a) [FEHA's discrimination provision] to provide that FEHA's reasonable accommodation and interactive process requirements apply "when used to treat a known physical or mental disability or known medical condition, [and for] the medical use of cannabis by a qualified patient or a person with an identification card," as defined by Health and Safety Code provisions.

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.

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

Clarifications Regarding Ban on Prior Salary History Inquiries (AB 2282)

In 2016, California enacted AB 168 precluding employers from inquiring about prior salary history and requiring employers to provide upon "reasonable request" by an applicant a "pay scale" for a position. This bill would amend Labor Code section 432.3 to define "pay scale" as a "salary or hourly wage range." It would also define "reasonable request" as a "request after an applicant has completed an initial interview with the employer," and would further define "applicant" and "applicant for employment" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." It would also add new subsection (i) specifying that section 432.3 does not prohibit an employer from asking an applicant about his or her salary expectation for the position being applied for.

In 2015, California had amended its Equal Pay Act (Labor Code section 1197.5) to state that "prior salary shall not, by itself, justify any disparity in compensation." This bill would strike that language and make clear that prior salary history "shall not justify any disparity in compensation." It would further make clear that while an employer may make a compensation decision based on a current employee's existing salary, any wage differential resulting from that compensation decision must be justified by one or more of the specified factors in section 1197.5 (e.g., seniority system, merit system, etc.). In other words, while section 1197.5 left open the possibility prior salary history could be a factor, but not the sole basis for, a wage disparity, this bill would recognize an employer's ability to consider prior salary history when setting compensation, but expressly precluding its use to explain a resulting wage disparity.

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

Clarified and Tightened Exceptions to "Ban the Box" Limitations (SB 1412)

In recent years, including in the "ban the box" law implemented in 2017 (AB 1008), California has enacted various limitations on an employer's ability to obtain or consider information related to an applicant's or employee's conviction history. However, even within these limitations, Labor Code section 432.7 has identified various exceptions from these general prohibitions, including if the inquiries are required by other state or federal law.

Responding to concerns these exceptions were either insufficiently clear or too broad, this bill would amend these exceptions to the general ban the box rules presently contained in subsection

(m) of Labor Code section 432.7. More importantly, it would tighten several of these exceptions and limit their consideration to only "particular" convictions, the goal being to prevent the consideration of convictions other than those that would specifically bar the applicant from holding the desired position. Specifically, it is intended to address concerns that employers who were authorized to obtain and consider information about particular disqualifying convictions were running more general conviction history checks that allowed them to obtain and potentially consider items, including expunged or judicially dismissed convictions, beyond the particular disqualifying conviction.

Accordingly, this bill would specify that these "ban the box"-type limitations do not prohibit an employer from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if, pursuant to state or federal law, (1) the employer is required to obtain information regarding the "particular" conviction of the applicant, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation; (2) the applicant would be required to possess or use a firearm in the course of employment; (3) an individual with that "particular" conviction is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation; or (4) the employer is prohibited by law from hiring an applicant who has that "particular" conviction, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

Status: Passed the Senate's Labor and Industrial Relations and Public Safety Committees on party-line votes and is pending in the Appropriations Committee.

Negligent Hiring Protections Following Ban-the-Box Limitations (AB 2647)

While California has recently enacted various limitations on an employer's ability to obtain information regarding an applicant's conviction history, one concern has been about the potential employer liability for so-called negligent hiring if the applicant/employee subsequently commits a crime. This bill attempts to respond to this concern by rendering the employee's or former employee's criminal history inadmissible if (a) the criminal history does not bear a direct relationship to the facts underlying the civil action; or (b) before the occurrence of the act underlying the civil action, the employee's criminal conviction was sealed, reversed/vacated, expunged, or nullified by pardon; or (c) the arrest or charge did not result in a criminal conviction.

Status: To be heard on May 8, 2018, in the Assembly Judiciary Committee.

Criminal Background Checks for Healthcare Facilities (AB 3039)

This industry-specific bill would enact new guidelines concerning the types of criminal conviction history healthcare facilities could consider during criminal background checks.

Status: Pending in the Assembly's Human Services Committee.

Expanded Lactation Accommodation Requirements (SB 937)

This bill would expand the workplace lactation accommodations presently required under Labor Code section 1031, including the enactment 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 makes an inquiry about or requests parental leave.

Although employers would not need to respond to all lactation accommodation requests in writing (as originally proposed), they would be required to respond in writing if unable to provide break time or a compliant location for lactation purposes. Employers would also be required to maintain requests for three years from the date of the request and allow the Labor Commissioner to access these records.

This bill would also add retaliation protections for employees who request lactation accommodation, and amended Labor Code section 1033 would specify that the denial of reasonable break time or adequate space to express milk shall be deemed a failure to provide a

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

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."

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

Status: Passed the Senate's Labor and Industrial Relations, Judiciary and Trucking and Housing Committees, and is pending in the Appropriations Committee.

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. In doing so, it would conform the Labor Code to the federal Affordable Care Act which specifies that the space for lactation purposes cannot be a bathroom.

Status: Overwhelming passed the Assembly and is pending in the Senate's Labor and Industrial Relations Committee.

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, and it would not be permitted in circumstances that are inappropriate based on safety, health or other concerns for the infant or adult.

Status: Unanimously passed the Assembly's Committee on Public Employees, Retirement and Social Security, and is pending in the Appropriations Committee.

Annual Pay Data Reports (SB 1284)

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

Accordingly, beginning 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 would 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 or mid-level officials and managers; (c) professionals; (d) technicians; (e) sales workers; (f) administrative support workers; (g) craft workers; (h) operatives; (i) laborers and helpers; and (j) service workers. Employers would also need to identify the number of employees, identified by race, ethnicity, and sex, whose 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. 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.

The bill would provide that it would be unlawful for any DFEH officer or employee to publicize

any "individually identifiable information" obtained through these reports prior to the initiation of any Equal Pay Act or FEHA claim. It would also provide that information obtained through these reports would be considered confidential information and not subject to the California Public Records Act, but would permit the DFEH to develop and publicize aggregate reports via the information provided.

Status: Passed the Senate Labor and Industrial Relations and Judiciary Committees, and is pending in the Appropriations Committee. Governor Jerry Brown vetoed a bill with similar goals but a slightly different reporting structure (AB 1209) in 2017.

Required Number of Female Directors for California Corporations (SB 826)

This bill would require that by no later than December 31, 2019, a domestic general corporation or a foreign publicly-traded corporation with its principal executive offices in California must have at least one female on its board of directors. The corporation would be permitted to increase the number of directors on its board to comply with this requirement. By December 31, 2021, the corporation would need to have at least two female directors if the corporation has five authorized directors, or three female directors if the corporation has six or more authorized directors. The bill would also require the Secretary of State to publish various reports on its internet web site documenting the number of corporations in compliance with these provisions, and to impose fines for non-compliance.

Status: Passed the Senate Banking and Financial Institutions and Judiciary Committees on party-line votes and is pending in the Appropriations Committee.

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.*) 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.

Status: Passed the Assembly's Labor and Employment Committee on a party-line vote and is pending in the Appropriations Committee.

Later Meal Periods Proposed for Certain Commercial Drivers (AB 2610)

Labor Code section 512 generally prohibits an employer from requiring an employee to work more than five hours per day without providing a thirty minute meal period, and also authorizes the Industrial Welfare Commission to adopt orders permitting meal periods to commence after six hours of work if consistent with the health and welfare of affected employees. This bill would amend section 512 to specifically allow commercial drivers employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer under certain specified conditions (e.g., in rural areas), to commence a meal period after six hours of work provided the driver's regular rate of pay is at least one-and-a-half times the minimum wage and the driver receives overtime compensation under Labor Code section 510. The bill's author states this flexibility will enable drivers to find a safe place to stop rather than pulling over in unsafe areas.

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

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 and before January 1, 2023.

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.

Status: Overwhelmingly passed the Assembly's Revenue and Taxation Committee, and is pending in the Appropriations Committee.

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 the requirement to make it conform to a similar law passed in 2016 (AB 908).

Status: Unanimously passed the Assembly and is pending in the Senate's Labor and Industrial Relations Committee.

Family Leave Benefits for Military-Related Purposes (SB 1123)

This bill would expand California's "paid family leave" provisions to allow an employee to receive wage replacement benefits for time off due to qualifying exigencies (as defined) related to the service by the employee's spouse, domestic partner, child or parent in the United States armed service. Employees seeking such benefits from the Employment Development Department may be required to provide copies of the active duty orders or other military-issued documentation confirming the family member's service.

Status: Unanimously passed the Senate's Labor and Industrial Relations Committee, and is pending in the Appropriations Committee.

Minimum Income Requirements for Personal Service Contracts (AB 1902)

This bill would require the Department of Industrial Relations to, by January 1, 2020 and annually thereafter, develop a list of "eligible employers" worth at least $1 billion. "Eligible employers" would be statutorily defined to include those located in California, or listed on an established stock exchange. It would also require an eligible employer that enters into a "personal services contract" on or after January 1, 2020, to include a provision requiring that employees performing these services be paid a wage equal to a currently unspecified amount. Presently, "personal services contracts" would include contracts to provide janitorial and housekeeping services, custodial services, food services, laundry services, window cleaning services, bus driving services or security guard services to an eligible employer.

Status: Passed the Assembly's Labor and Employment Committee on a party-line vote and is pending in the Appropriations Committee.

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, but it would not permit a prevailing employer to seek such fees.

Status: Passed the Assembly's Labor and Employment and Judiciary Committees on party-line

votes and is pending in the Appropriations Committee.

Increased Penalties and Remedies for Late Wage Payments (AB 2613)

This bill would significantly amend Labor Code sections 210, 1194.2 and 1197.1 relating to the penalties available for a failure to pay wages owed. For instance, while Labor Code section 210 presently provides that the Labor Commissioner may recover statutorily-enumerated penalties ($100 for first violation, $200 for each subsequent violation) for various wage violations, this bill would require these penalties be paid directly to the affected employee per pay period where the wages are not paid on time. It would further impose these penalties not simply on any "person," but upon "an employer or other person acting individually or as an officer, agent or employee or other person" who fails to pay. It would also specify that these penalties cannot be waived by an agreement of the employee.

Amended section 210 would further allow the employee to file a civil suit within the timeframe used to recover wages (generally three years) rather than simply a penalty (one year), and would provide that remedies under this section would be in addition to and entirely independent from any other damages or penalties provided under the Labor Code. It would not, however, apply to so-called waiting time penalties owed under Labor Code section 203.

Similarly, section 1194.2 and 1197.1 presently authorize actions if an employer fails to pay at least the minimum wage, and allows the employee to recover civil penalties, liquidated damages, and wage restitution, amongst other remedies. This bill would expand these sections to also allow suit and obtain liquidated damages if the employer fails to pay or causes a failure to timely pay an employee the regular wages due to that employee, and would also incorporate the corresponding amendments to section 210 made under this bill.

Status: Passed the Assembly's Labor and Employment Committee on a party-line vote and is pending in the Appropriations Committee.

Worker Protections Regarding 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 labor practice. While federal law already prohibits employers from withholding or destroying immigration or identification documents for trafficking purposes, this bill would create a state-law equivalent with new penalties and requirements to combat so-called "document servitude." Accordingly, it would provide that 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.

New Labor Code section 1019.5 would also require the DLSE to develop and make available to

employers by July 1, 2019 the "Worker's Bill of Rights" containing specified information, including notices that the employee may retain their immigration and identification documents, the employee's right to be paid at least minimum wage, and how to report any violations. The employer would be required to provide copies of the Worker's Bill of Rights to all employees hired before July 1, 2019, and thereafter, would need to provide copies only to non-citizen employees hired after that date.

Employers would be required to provide a copy in the language understood by the employee, and to obtain and retain for three years the employee's signature confirming receipt of this notice, and to provide a copy of the signed document to the employee. 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.

Status: Unanimously passed the Assembly's Labor and Employment and Judiciary Committees and is pending in the Appropriations Committee. This bill appears unopposed.

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.

Status: Unanimously passed the Senate's Labor and Industrial Relations and Judiciary Committees, and is pending in the Appropriations -Committee.

Domestic Worker Enforcement Pilot Program (AB 2314)

This bill would require the Division of Labor Standards Enforcement (DLSE) to establish a "Domestic Worker Enforcement Pilot Program" with "qualified organizations" (as defined in proposed new Labor Code section 1455). The program's purpose would be to increase the DLSE's capacity and expertise to improve enforcement in the domestic work industry.

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

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.

Status: Unanimously passed Assembly's Arts, Entertainment, Sports, Tourism and Internet Media and the Labor and Employment Committees and is pending in the Appropriations Committee. This bill appears largely unopposed.

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" defined as "an applicant for public employment, including an individual who attends an orientation to become an in-house supportive services provider." It would also include those employers of excluded supervisory employees and judicial council employees.

Status: Passed the Assembly on a largely party-line vote and is pending in the Senate.

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 and contracted entities tasked with receiving and investigating complaints from facilities, programs or services operated by state or local government. It would also provide that the general retaliation protections in Labor Code section 1102.5 shall apply to the state or local contracting entity.

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

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."

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

Tax Deduction for Labor Organization Dues (AB 2577)

This bill would amend California Revenue and Taxation Code section 17072 and allow as an above the line 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. The bill's author states that while such deductions presently exist, they are generally not helpful to most union workers who may not itemize their deductions. This deduction would be available beginning for 2018 but would automatically be repealed at the end of 2023.

Status: Unanimously passed the Assembly's Revenue and Taxation Committee, and pending in the Appropriations Committee.

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.

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

Publicly-Available Injury and Illness Reports (AB 2334)

Perhaps highlighting the ongoing tension between California and the federal government, this bill would impose new reporting obligations on employers regarding workplace illnesses and injuries. For background, while in 2016 the United States Department of Labor adopted the Improve Tracking of Workplace Injuries and Illnesses, in 2017 this same agency proposed a rule to relax these heightened reporting requirements for workplace injury and illnesses.

Accordingly, this bill would add new Labor Code section 6410.2 to require employers who are required to keep injury and illness records (as defined), to electronically submit to the California Division of Occupational Safety and Health (DOSH) annually by February 1st (1) the Log of Work-Related Injuries and Illnesses Form 300; (2) the Summary of Work-Related Injuries and Illnesses Form 300A; and (3) the Injury and Illness Report Form 301. In turn, DOSH would be required to develop by January 1, 2020, a searchable database on its Internet website and to annually publish on its website the Forms 300A submitted each year.

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