LEGISLATIVE SUMMARY

The deadline for bills to pass the initial chamber votes has expired, bringing the 2018 California Legislative Session to the halfway point and the overall session into 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 smaller 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 the FEHA and/or 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);
- Require employers to retain records of sexual harassment complaints for ten years (AB 1867);
- Extend immunities from defamation claims for sexual harassment allegations (AB 2770);
- Update and potentially materially expand workplace lactation accommodation requirements (AB 1976 and SB 937);
- Clarify various provisions of the new law prohibiting inquiries about prior salary history (AB 2282); and
- Require larger employers to submit annual "pay data reports" to state agencies (SB 1284).

There were also several bills that stalled, including bills that would have required employers to reasonably accommodate medicinal marijuana usage (AB 2069), increased California's paid sick leave usage and accrual requirements (AB 2841) allowed employers to assist employees with student loan repayment (AB 2478, expanded to three years the statute of limitations to file Labor Commissioner claims (AB 2946), or imposed new penalties for late wage payments (AB 2613).

Looking ahead, the Legislature will soon begin its Summer Recess before returning to process these surviving bills through the second legislative chamber before the August 31st deadline.

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 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 Department of Fair Employment and Housing (DFEH). "Bystander intervention training" would require information and practical experience 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 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 the 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 the FEHA's costs provisions which presently authorize 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 the defendant's 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. Among 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 on a party-line vote and is pending in the Assembly. This bill faces significant opposition.

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

Labor Code section 230 presently precludes all employers from discriminating or retaliating against victims of domestic violence, sexual assault or stalking, including those 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 bill would amend both provisions in several respects. First, it would amend Labor Code section 230 to similarly preclude discrimination or retaliation against victims of sexual harassment if the employer is aware of such status. It would also create a rebuttable presumption of unlawful retaliation if an employer takes any adverse action against an employee within 90 days after the employee provides notice of their status as a sexual harassment victim, or exercises any rights under section 230, or cooperates in an investigation, or opposes any policy, practice or act prohibited by section 230. 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, and would create these additional retaliation protections for sexual harassment victims, but not victims of domestic violence, sexual assault or stalking.

Similarly, while section 230 also precludes discrimination or retaliation against victims of domestic violence, sexual assault or stalking for taking time off to obtain legal relief (i.e., obtaining a restraining order, etc.), this bill would provide similar protections to "family members" who take time off work to provide assistance and support to the victim seeking relief. Interestingly, while these amendments do not presently require the employer to provide time off for sexual harassment victims to obtain legal relief, they do suggest that an employer can condition such time off on specified documentation that the employee is undergoing treatment "from an act of domestic violence, sexual assault, sexual harassment or stalking."

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

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. In this regard, while the DFEH previously had primary responsibility for addressing workplace sexual harassment, this bill would expand the Labor Commissioner's role in addressing sexual harassment.

For purposes of section 230, "employer" would include any person employing another under

any appointment or contract for hire, and includes the state of California and the Legislature.

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

Moreover, it would also amend Labor Code section 231 which applies to employers with 25 or more employees. In this regard, while it presently precludes discrimination or retaliation against employees who take time off for specified purposes that are victims of domestic violence, sexual assault and stalking, it would add similar protections for victims of sexual harassment. It would similarly preclude discrimination or retaliation against "family members" who take time off from work to provide specific assistance and support to a victim of sexual assault, domestic violence, stalking or sexual harassment. "Family member" would have the same definition as discussed above regarding section 230.

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 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.

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 persons submitting the allegations to provide their own contact information.

Lastly, while Labor Code section 2810.3 presently requires client employers and labor contractors to share civil liability for workers supplied by that contractor for certain violations (e.g., failure to pay wages or secure workers' compensation coverage), 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 on a party-line vote and is pending in the Senate. This bill is heavily opposed.

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 (including temporary or seasonal employees) provide the AB 1825 harassment training to all employees, not just supervisory employees, within six months of their hire. The employer would be able to provide this training in conjunction with other training provided to the employees. The training may also be completed by the employee individually or as part of a group presentation, and may be completed in shorter segments, as long as the total two-hour requirement is met.

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. For temporary, seasonal or other employees who will be employed for less than six months, the employer shall provide the training within two weeks of their hiring dates.

This bill would also require the DFEH to develop a two-hour sexual harassment online training video and make it available on its web site, to develop these materials in at least six languages (English, Spanish, Simple 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.

The DFEH will also be responsible for providing a method for employees who have completed the training to save electronically and print a certificate of completion, but the employer or

employee would not be required to retain this certificate.

Status: Unanimously passed the Senate and is pending in the Assembly. This training-related bill appears to face considerably less opposition than SB 1300 and AB 3081.

Individual Liability for FEHA Retaliation (SB 1038)

This bill would amend the FEHA to impose personal liability upon certain employees who violate its retaliation provisions. Specifically, it would provide that an employee would be jointly and severally liable with the employer for any unlawful retaliation if the employee intended to retaliate, 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: Narrowly passed the Senate and is pending in the Assembly. This bill is heavily opposed.

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

This bill responds to concerns that nondisclosure 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 nondisclosure provisions requested by the claimant, as opposed to the employer or defendant, unless a government agency or public official is a party to the settlement agreement. It also 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 with bipartisan support and is pending in the Assembly.

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

This bill responds to concerns that employers are able to perpetuate or conceal sexual harassment via employment-related waivers and/or arbitration agreements. Accordingly, it would add new Labor Code section 432.6 to preclude employers from requiring applicants, current employees or independent contractors to agree as a condition of employment, continued employment or the receipt of any employment-related benefit to waive any right, forum, or procedure related to any violations of the FEHA and the Labor Code, including the right to file a claim with a state or law enforcement agency. It would also preclude employers from threatening, retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refuses to consent to the waivers prohibited under this section. It would also specify that any agreement that requires an employee to opt out of a waiver or to take any affirmative action to preserve their rights will be considered a condition of employment.

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, continued employment or the receipt of any employment-related benefit that an applicant, employee or independent contractor agree to not disclose any instance of sexual harassment the employee or independent contractor suffers, witnesses, or discovers in the workplace or while performing a contract. It would also preclude the employer from requiring the applicant, employee or independent contractor to agree not to oppose any unlawful practice or from exercising any right or obligation or participating in any investigation or proceeding with respect to unlawful harassment or discrimination.

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

Status: Passed the Assembly on a party-line vote, and is pending in the Senate. This bill is heavily opposed and likely will face legal challenges on preemption grounds if enacted.

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 and is pending in the Senate Judiciary Committee. This bill appears unopposed.

Voiding Settlement Agreement Provisions Precluding Testimony about Sexual Harassment or Unduly Limiting Re-Employment (AB 3109)

This bill seeks to limit the use of nondisclosure provisions in settlement agreements that preclude a sexual harassment victim from shedding light on this misconduct. Accordingly, it would add Civil Code section 1670.11 to render void and unenforceable any contractual or settlement agreement provision entered into on or after January 1, 2019 that waives a party's right to testify in any proceeding concerning alleged criminal conduct or sexual harassment by the other party or the other party's employees/agents when the testifying party has been required or requested to attend by court order/subpoena or by written request by an administrative agency or the legislature. This new section would not enable a signatory to voluntarily show up and speak at a public hearing, but it would enable them to do so in response to a subpoena or written request.

This bill also seeks to address concerns that overbroad "no re-rehire" provisions in settlement agreements conflicted with California's general public policy in favor of allowing employees to select their chosen profession. Accordingly, new section 1670.11 would similarly void any contract or settlement agreement constituting a "substantial restraint" on a party's right to seek employment or reemployment in any lawful occupation or profession. While it would not categorically preclude a contract or settlement agreement restricting employment with the prior employer, this exception would not apply if the prior employer is a public employer (as defined by Government Code section 7522.04) or a private employer that so dominates the labor market that such a restriction would impose a substantial restraint on the party's right to seek employment or reemployment in any lawful occupation or profession. In this regard, the bill seeks to codify the recent appellate court decision in *Golden v. California Emergency Physicians Medical Group* wherein the Ninth Circuit invalidated an overbroad "no re-hire" provision that precluded the physician not only from working for the prior medical group but also any emergency room that contracted with that medical group now or in the future.

Status: Unanimously passed the Assembly and pending in the Senate's Judiciary Committee.

Extended Statute of Limitations for FEHA Complaints (AB 1870)

Government Code section 12960 presently requires employees to file an administrative charge with the DFEH within one year from the date an unlawful employment practice has occurred. This bill would extend from one year to three years the deadline for employees to file administrative complaints regarding FEHA violations.

Status: Passed the Assembly and is pending in the Senate.

New Recordkeeping 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: Overwhelmingly passed the Assembly and is pending in the Senate.

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 their 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 employer would also have certain requirements if the employee informs the hotel employer that they have been subjected to an act of violence, sexual assault, or sexual harassment by a guest. For instance, the employer would also be required to provide paid time off for an employee to contact law enforcement, seek injunctive or other relief, contact an attorney or seek medical treatment or counseling for physical or mental injuries resulting from the act of violence, sexual assault or stalking. To obtain this paid time off, the employee would be required to provide reasonable advance notice, if possible. If an unscheduled absence occurs, the employer would not be permitted to take adverse action against the employee if the employee provides, within a reasonable time, documentation establishing that the absence was for one of these reasons.

The employer would also have the duty to provide reasonable accommodations, upon request by the employee, including transfer, reassignment, modified schedule or any other reasonable adjustment to a job structure, workplace facility or work requirement. If the employee requested, the employer would also be required to report the act committed against the employee to law enforcement and to cooperate in any law enforcement investigation, if the act constitutes a crime.

The employer would additionally be required to comply with any other applicable local, state or federal laws, including the requirement to report all acts of workplace harassment and take appropriate corrective actions, including under the FEHA.

The bill would also prohibit any discrimination or retaliation against an employee who reasonably uses a panic button, reports an act of violence, sexual assault or sexual harassment or requests reasonable accommodation under these new provisions.

"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.

Hotel employers that violate these requirements would be subject to a statutory penalty of $100 per day for each day the violation occurs, not to exceed $1,000.

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.

Relatedly, the City of Sacramento recently enacted the Sacramento County Hotel Worker Protection Act of 2018 requiring hotel employers with 25 or more rooms in Sacramento County to provide a panic button to employees.

Status: Passed the Assembly and is pending in the Senate.

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 and is pending in the Senate. It appears unopposed.

Harassment Training for Janitorial Service Workers (AB 2079)

Known as the Janitor Survivor Empowerment Act, this bill would enact specific harassment training rules related to the janitorial service industry, including allowing peers to provide direct training on harassment prevention for janitors. It would also require employers, upon request, to provide a copy of all training materials used during the training and require employers to use a qualified organization from the list maintained by the Department of Industrial Relations.

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

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, and authorize the Labor Commissioner to charge a $25 fee for this training.

Status: Unanimously passed the Assembly and is pending in the Senate. This bill appears

largely unopposed.

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 that 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 preclude its use to explain a resulting wage disparity.

Status: Unanimously passed the Assembly and is pending in the Senate. This bill appears unopposed.

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.

It would further define "particular conviction" as a "conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses."

Status: Narrowly passed the Senate and is pending in the Assembly.

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

over other uses during the period it is in use for lactation purposes.

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

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

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

Although employers would not need to respond to all lactation accommodation requests in writing (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. Employees would also be entitled to access these records in the same manner as accessing payroll-related records under Labor Code section 226. An employer who does not maintain adequate records, or does not allow the Labor Commissioner reasonable access to such records, shall be presumed to have violated these accommodation-related requirements absent clear and convincing evidence otherwise.

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 Division of Labor Standards Enforcement (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." These "optional but recommended amenities" would include: (1) a permanent lactation location that is suitable for the preparation and storage of food; (2) a door that can be locked from the inside; (3) at least one electrical outlet; (4) a washable, comfortable chair; (5) adequate lighting; (6) the ability to partition the room; (7) a refrigerator that the employer permits employees to use for storage of breast milk; (8) a sink with hot and cold running water; (9) a hospital-grade breast pump; (10) a full-length mirror; (11) a microwave; (12) a locker to place personal belongings; and (13) a permanent sign outside designating the room for lactation accommodation. However, it would also provide that non-compliance with these "best practices" would not be deemed a violation of this chapter.

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 and is pending in the Assembly.

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 with the federal Affordable Care Act which specifies that the space for lactation purposes cannot be a bathroom.

Status: Overwhelmingly 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 and is pending in the Senate.

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 for the initial violation and $5,000 for a subsequent violation. It would also authorize the Labor Commissioner to issue a citation for any violations.

The bill would require the Labor Commissioner to maintain these pay data reports for at least 10 years. However, it would be unlawful for any DFEH officer or employee to publicize any "individually identifiable information" obtained through these reports prior to the initiation of any Equal Pay Act or FEHA claim. It would also contain a legislative declaration that information obtained through these reports would be considered confidential information and not subject to the California Public Records Act, but would permit the DFEH to develop and publicize aggregate reports via the information provided.

Status: Passed the Senate on essentially a party-line vote and is pending in the Assembly. 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, each publicly held, domestic or foreign 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.

For purposes of these requirements, "female" would mean "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth." A "publicly held corporation" would mean a corporation with "outstanding shares listed on a major United States stock exchange."

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

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 and is pending in the Senate. This bill appears unopposed.

Paid Family Leave Changes (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, and is pending in the Assembly. This bill appears unopposed.

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: Passed the Assembly with some bi-partisan support and is pending in the Senate. 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 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. (Covered employers who have already provided this training after January 1, 2017 would be exempted from the January 1, 2020 deadline but would be required to provide the biannual training thereafter).

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's or employee's liability to human trafficking victims. The DFEH would also have the authority to issue an order requiring compliance.

Status: Unanimously passed the Senate and is pending in the Assembly.

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: Passed the Assembly with bi-partisan support and is pending in the Senate. This bill appears largely unopposed.

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 the Assembly and is pending in the Senate. 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 Patients' Rights Advocates (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 county patients' rights advocates, as defined in Welfare and Institutions Code section 5520. 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 and is pending in the Senate.

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: Passed the Assembly and is pending in the Senate.

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: Passed the Assembly with some bi-partisan support and is pending in the Senate.

Publicly-Available Injury and Illness Reports (AB 2334)

Perhaps highlighting the ongoing tension between California and the federal government, this bill would potentially 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 Cal-OSHA to monitor the United States OSHA's efforts to implement the previously-proposed federal regulations regarding electronic submission of workplace injury and illness data. If Cal-OSHA determines that the federal OSHA has eliminated the previously-proposed regulation to require employers to electronically submit this information, then Cal-OSHA would be required to adopt regulations to require California employers to adhere to the previously-proposed federal regulations as they read on January 1, 2017.

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

Expedited Enforcement of ALRB Awards (AB 2751)

California's Agricultural Labor Relations Act of 1975 grants agricultural employees the right to form and join labor organizations and engage in collective bargaining, and creates the Agricultural Labor Relations Board (ALRB) to administer and enforce this act, including certifying elections and issuing remedies for unfair labor practices. Responding to concerns about delayed ALRB enforcement, new Labor Code section 1149.3 would require the ALRB to process to final board order all decisions with monetary remedies owed to employees, including those requiring a compliance proceeding, within one year of a finding of liability, unless certain exceptions apply.

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