LEGISLATIVE SUMMARY

The deadline for the California legislature to pass any bills expired on August 31st. Not surprisingly, a number of significant employment bills passed this hurdle and were sent to Governor Jerry Brown for signature or veto. These include bills that would:

- Require employers with five or more employees provide harassment training for both supervisory and non-supervisory employees (SB 1343);
- Impose new limits on settlement agreements regarding sexual harassment claims, including prohibiting confidentiality provisions (SB 820 and SB 1300);
- Prohibit mandatory pre-employment arbitration provisions regarding Fair Employment and Housing Act (FEHA) and/or Labor Code violations (SB 1300 and AB 3080);
- Amend the Labor Code to preclude discrimination or retaliation against sexual harassment victims and to impose joint liability upon client employers and labor contractors for sexual harassment (AB 3081);
- Extend the statute of limitations for FEHA claims from one to three years (AB 1870);
- Require employers to retain records of sexual harassment complaints for five years (AB 1867);
- Expand workplace lactation accommodation requirements, including to prohibit usage of a bathroom for employees to express milk (AB 1976 and SB 937);
- Impose new limits during criminal record background checks (SB 1412); and
- Require larger, publicly-traded California corporations to have a certain number of female directors (SB 826).

There were also some bills that failed passage including those requiring larger employers to submit annual pay reports (SB 1284), authorizing individual liability for FEHA retaliation (SB 1038), requiring hotel employees to provide panic buttons to staff (AB 1761) and allowing employees to take an above-the-line income tax deduction for dues paid to labor organizations (AB 2577).

Governor Jerry Brown has until September 30th to sign or veto these bills. In the interim, below is an overview of the new statewide laws that have already been signed by Governor Brown, as well as those he is still considering.

NEW LAWS EFFECTIVE JANUARY 1, 2019

As mentioned, Governor Brown has already signed several new employment laws, including the following:

New Defamation Protections for Sexual Harassment Complaints, Investigations and References (AB 2770)

This bill attempts to address concerns that a fear of potential defamation liability dissuades harassment complaints from being made or from being investigated, or dissuades former employers from advising prospective employers about a former employer's sexually harassing behavior. Accordingly, it amends Civil Code section 47(c) to provide conditional protections against defamation claims for sexual harassment allegations and investigations. Specifically, it provides that the so-called "common interest" privilege applies to statements made "without malice" relating to a complaint of sexual harassment by an employee to an employer based upon credible evidence. It also applies to subsequent communications by the employer to other "interested persons" during a sexual harassment investigation.

Perhaps most significantly for employers, it amends Civil Code section 47(c) to provide a so-called "safe harbor" to allow employers to provide information during reference checks involving employees who previously engaged in sexually harassing behavior. While this section previously provided immunity from non-malicious responses as to whether the employee in question was eligible for rehire, this amendment also allows the employer or their agent to indicate whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment. In light of this latter amendment, employers will need to consider whether they will provide this additional information if contacted, and whether they will request this information when undertaking reference checks.

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. However, employers have subsequently raised numerous questions, including who is considered "an applicant," what is a "pay scale" and what constitutes a "reasonable request."

This bill is intended in part to clarify several of the provisions and terms used in AB 168. Specifically, it amends Labor Code section 432.3 to define "pay scale" as a "salary or hourly wage range." It also defines "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." And it adds 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 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 strikes that language and makes clear that prior salary history "shall not justify <u>any</u> disparity in compensation." It further makes 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.).

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 amends 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.

EMPLOYMENT BILLS GOVERNOR JERRY BROWN IS CONSIDERING

Expanded Sexual Harassment Training Requirements (SB 1343)

Presently, so-called AB 1825 harassment training applies only to larger employers (i.e., with 50 or more employees) and only requires this training for supervisory employees. This bill responds to concerns these limitations exclude most employers from providing any mandatory harassment training, and precludes arguably the most vulnerable employees (i.e., non-supervisory employees) from receiving any training.

Accordingly, amended Government Code section 12950.1 would 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. However, the harassment training for non-supervisory employees would be for one hour rather than the two hours for supervisory employees. The employer would also 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 applicable hourly requirement is met.

This bill would also require the California Department of Fair Employment and Housing (DFEH) to develop a one-hour and a two-hour sexual harassment online training video (depending on whether for supervisory or non-supervisory employees) 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 online training would include an interactive feature requiring the viewer to periodically respond to questions in order for the online training course to continue playing.

This bill would specify that an employer would have the option to develop its own training

modules or to direct employees to view the DFEH's training video. An employer who develops their own training module may also direct employees to view the DFEH's online training course and this shall be deemed to have satisfied the employer's training obligations under this section. Any questions resulting from the online training course would be directed to the employer's Human Resources Department or equally qualified persons within the DFEH.

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.

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.

Beginning January 1, 2020, for seasonal and temporary employees, or employees hired to work for fewer than six months, an employer would need to provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. However, where the temporary employee is employed by a temporary services provider (as defined in Labor Code section 201.3) to perform services for clients, the temporary services provider and not the client shall provide the training.

Beginning January 1, 2020, sexual harassment prevention training for migrant and seasonal agricultural workers (as defined in 29 U.S.C. 1801, et seq.) shall be consistent with the training for nonsupervisory employees under Labor Code section 1684(a)(8).

Status: Unanimously passed the Legislature. This bill appears unopposed and likely to be enacted.

"Omnibus" Sexual Harassment Bill (SB 1300)

This bill would make numerous changes to the FEHA.

First, it would expand the 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, new Government Code section 12950.2 would require this training also include "bystander intervention training." "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.

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.

Third, 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 prohibit the release of the right to pursue a civil action or an administrative charge. 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.

However, this section would not apply to a negotiated settlement agreement to resolve an underlying claim under FEHA that has been filed by the employee in court, before an administrative agency, alternative dispute resolution forum or through an employer's internal complaint process. "Negotiated" would mean that the agreement is voluntary, deliberate and informed, provides consideration to the employee and the employee is given notice and an opportunity to retain an attorney or is represented by an attorney.

It would also 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 precluded from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless 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: Narrowly passed the Legislature despite significant bi-partisan opposition.

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

This bill responds to concerns that employers conceal sexual harassment through mandatory arbitration agreements and non-disparagement provisions. Accordingly, new Labor Code section 432.6 would 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 bill is clearly intended to essentially prohibit mandatory arbitration for not only FEHA claims, but also Labor Code claims. To escape a likely forthcoming preemption challenge, the bill's author states this bill does not preclude arbitration agreements for FEHA and Labor Code claims, but simply precludes employers from requiring them as a condition of employment, or retaliating against employees who choose not to agree to arbitration.

This prohibition would apply to any contracts for employment entered into, modified or extended on or after January 1, 2019.

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 Legislature on party-line votes, and is heavily opposed. This bill will likely face legal challenges on preemption grounds if enacted. Governor Brown previously vetoed AB 465 (2016) citing concerns the law would be preempted by federal law, and the United States Supreme Court's recently held another California law (AB 2617 [2014]) was preempted.

Labor Code Protections for Sexual Harassment, Including Client Employer Liability for Labor Contractor Harassment (AB 3081)

This bill continues recent trends of tying together FEHA and Labor Code protections, and sharing legal responsibility between "client employers" and "labor contractors."

For instance, 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. This bill would amend subsection 230(e) to also prohibit discrimination or retaliation against an employee because of their status as a victim of sexual harassment, as defined in the FEHA.

It would also create a rebuttable presumption of unlawful retaliation if within 30 days of the employee providing notice of or the employer learning of their status as a victim of sexual assault, domestic violence, sexual assault or sexual harassment the employer discharges, threatens to discharge, demotes, suspends or in any manner discriminates against the employee. This bill would also allow sexual harassment victims who are retaliated against in violation of this section to file a complaint with the Labor Commissioner within one-year of any violation.

It is not entirely clear why these retaliation protections for sexual harassment victims are needed in the Labor Code given FEHA's express retaliation and harassment protections in Government Code sections 12940(h) and (j).

Secondly, while the FEHA presently provides that employers may be liable for harassment of its employees by non-employees, this bill would codify this liability for harassment by workers supplied by a labor contractor. Accordingly, new Government Code section 12940.2 would provide that "client employers" would share with "labor contractors" all civil legal responsibility and civil liability for FEHA-prohibited harassment for all workers supplied by the labor contractor. For purposes of this new FEHA provision, the terms "labor contractor," "client employer" and worker" shall have the same meaning as used in Labor Code section 2810.3, which presently identifies other situations where "labor contractors" and "client employers" share legal responsibility (e.g., payment of wages, failure to obtain workers' compensation insurance, etc.).

As under Labor Code section 2810.3, this new FEHA provision would prohibit the client employer from shifting to the labor contractor any legal duties owed by the client employer, and would prohibit retaliation by the client employer or the labor contractor, and would require 30 days advance notice to the client employer before a civil action invoking this section.

Status: Passed the Assembly and Senate on party-line votes. 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 conceal and perpetuate harassing behavior. Accordingly, new Code of Civil Procedure section 1001 would prohibit settlement agreement provisions preventing the disclosure of "factual information related to a claim filed in a civil action or a complaint filed in an administrative action" regarding: (1) sexual assault (as defined) (2) sexual harassment under the Unruh Act, (3) workplace sexual harassment, sex discrimination or retaliation against a

person for reporting sex harassment or discrimination under the FEHA; or (4) harassment or discrimination based on sex, or retaliation, by the owner of a housing accommodation (as defined). It would further prohibit the court from entering any stipulation or order that restricts the disclosure of information in a manner that conflicts with this new section.

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 regarding the identity of the claimant (or facts that would lead to the discovery of their identity), if 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).

Status: Passed the Legislature with some fairly significant opposition, but also has some bi-partisan support.

New Recordkeeping Requirements Regarding Sexual Harassment Complaints (AB 1867)

Entitled the Tracking Records and Complaints Act, this bill would require larger employers to retain records of sexual harassment complaints for a longer period of time. Specifically, new Government Code section 12950.5 would require employers with 50 or more employees to maintain records of employee complaints alleging sexual harassment for a minimum of five years from the last day of employment of the complainant or any alleged harasser named in the complaint, whichever is later. "Employee complaint" would mean a "complaint filed through the internal complaint process of the employer." The DFEH would also have the ability to seek an order requiring the employer to comply with this provision.

Status: Overwhelmingly passed the Legislature. This bill seems likely to be enacted.

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 this deadline from one year to three years for employees to file administrative complaints regarding any FEHA complaints against employers, but retain a one year limitations period for filing Unruh Act-related claims against business. It would also make conforming changes to the provision allowing employees an additional period up to 90 days if they first obtain knowledge of the facts of the alleged unlawful practice after the limitations period had expired. It would also specify that this extended limitations period would not revive already lapsed claims.

Status: Passed the Legislature with some bi-partisan support.

Targeting Provisions Precluding Sexual Harassment-Related Testimony (AB 3109)

This bill also seeks to limit the use of nondisclosure provisions in contracts or settlement agreements precluding a sexual harassment victim from shedding light on this misconduct. Accordingly, new Civil Code section 1670.11 would 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 eliminate all non-disclosure agreements, and would not enable a signatory to simply 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.

Status: Unanimously passed the Legislature. This bill appears unopposed and likely to be enacted.

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. It would also remove the current requirement that an individual who brings a cause of action for sexual harassment would need to demonstrate that this relationship would not be easy to terminate.

Responding to concerns that some harassers use the prospect of future work to initiate unwelcome sexual harassment, this law would also impose liability upon individuals who holds themselves out as being able to help the plaintiff establish a business, service or professional relationship with the defendant or a third party.

It would also amend the FEHA (specifically Government Code sections 12930(f)(2) and 12948) to authorize the DFEH to handle sexual harassment complaints arising from these non-employer relationships and to specify that it would be an unlawful practice under FEHA for a person to aid or conspire in the denial of rights in Civil Code section 51.9.

Status: Unanimously passed the Legislature and appears unopposed.

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 the same protected categories enumerated in FEHA. New Labor Code section would specify that these non-discrimination protections shall apply to the following 10 items: (1) recruitment, outreach and selection procedures; (2) hiring or placement, upgrading, periodic advancement, promotion, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rotation among work processes; (4) imposition of penalties or other disciplinary action; (5) rates of pay or any other form of compensation and changes in compensation; (6) conditions of work; (7) hours of work and hours or training provided; (8) job assignments; (9) leaves of absence, sick leave, or any other leave, and (1) any other benefit, term, condition or privilege associated with apprenticeship.

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 Legislature. This bill appears unopposed and likely to be enacted.

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 and Senate on largely party-line votes.

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

This industry-specific bill would require that talent agencies provide educational materials regarding sexual harassment prevention, retaliation and reporting resources, and nutrition and eating disorders to their artists. Amongst other things, the talent agency would need to provide these education materials within 90 days of representation or agency procurement of an engagement, whichever comes first. The sexual harassment educational materials shall include, at a minimum, the components specified in DFEH Form 185, and the nutritional educational materials shall include, at a minimum, the components specified in the National Institute of

Health's Eating Disorders Internet web site.

Similarly, regarding minors in the entertainment industry, this bill would require the minor and their parent/legal guardian to receive and complete training in sexual harassment prevention, retaliation and reporting resources. This harassment prevention training shall be provided by a vendor on-site, electronically, via internet web site or other means.

Status: Overwhelmingly passed the Legislature. This bill appears largely unopposed.

Division of Labor Standards Enforcement (DLSE) to Develop Harassment Prevention Policy for Construction Industry (SB 1223)

This bill would require the DLSE to develop recommendations for an industry-specific harassment and discrimination prevention policy and training standard for use by employers in the "construction industry." Beginning in 2019, the DLSE would convene an advisory committee to develop and submit to the California Legislature by January 1, 2020 recommendations for a construction industry harassment and discrimination prevention policy and training standard.

Status: Unanimously passed the Legislature. This bill appears unopposed.

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 (including the space where the employee normally works) 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 or alternative devices needed to operate an electric or battery-powered breast pump.

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. However, if a refrigerator cannot be provided, an employer may provide another cooling device suitable for storing milk, such as an employer-provided cooler.

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 or multiemployer worksites 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. Employers or general contractors that coordinate a multiemployer worksite would also need to provide lactation accommodations or a safe secure location for subcontractor employers to provide lactation accommodations on the worksite within two business days of a written request by any subcontractor employer with an employee requesting an accommodation.

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 when considered in relation to the size, nature 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.

New Labor Code section 1035 would require the DLSE to develop and publish a model lactation accommodation request form that employers could use. It would also permit (but not require) the DLSE to develop a model lactation accommodation policy and non-mandatory "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.

Status: Passed the Legislature with some bi-partisan support, but faces more opposition than the second lactation accommodation bill (AB 1976) discussed below.

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.

However, if an employer can demonstrate to the department that the "other than a bathroom" requirement would impose an undue hardship when considered in relation to the size, nature or structure of the employer's business, the employer shall still make reasonable efforts to provide a location other than a toilet stall in close proximity to an employee's work area.

This bill would also specify that an employer may comply with these requirements by providing a "temporary lactation location" if all of the following conditions are met: (1) the employer is unable to provide a permanent lactation location because of operational, financial or space limitations; (2) the temporary lactation location is private and free from intrusion while an employee expresses milk; (3) the temporary lactation location is used only for lactation purposes while an employee expresses milk; and (4) the temporary lactation location otherwise meets California requirements concerning lactation accommodation.

Similarly, it would provide that an agricultural employer (as defined) will comply with this

section if it provides an employee wanting to express milk with a private, enclosed, and shaded, including, but not limited to, the air-conditioned cab of a truck or tractor.

Status: Overwhelmingly passed the Legislature. This bill appears likely to be enacted, including since it contains fewer requirements than SB 937.

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."

It would also clarify that this new law would not prohibit employers required by state, federal or

local law to conduct criminal background checks for employment purposes, or to restrict employment based on criminal history from complying with these requirements. It would also allow an employer to seek or request an applicant's criminal history that has been obtained pursuant to procedures otherwise provided for under federal, state or local law. Finally, it would also specify that it would apply to an employer, regardless of whether a public agency or private individual or corporation.

Status: Narrowly passed the Legislature despite some bi-partisan opposition.

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

This bill would require that by no later than the close of the 2019 calendar year, 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 the close of the 2021 calendar year, 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.

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."

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

Status: Passed the Legislature on essentially party-line votes. This bill appears heavily opposed.

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, new Labor Code section 1019.3 would create a state law equivalent with new penalties and requirements to combat so-called "document servitude." Accordingly, it

would provide that violations of this prohibition would be a misdemeanor and subject the employer to a $10,000 penalty, in addition to any otherwise available civil or criminal penalty. The Labor Commissioner would also be authorized to issue a citation if it determines a violation has occurred.

Like many other recent employment laws, there would also be a new posting requirement concerning these new protections. Employers would need to post a notice conspicuously at the place of work if practicable, or otherwise where it can be seen as employees come and go to their places of work, or at the office or nearest agency for payment kept by the employer. This notice shall specify 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. The notice shall also include the following specific language: "If your employer or anyone is controlling your movement, documents, or wages, by using direct or implied threats against you or your family, or both, you have the right to call local or federal authorities, or the National Human Trafficking Hotline at 888-373-7888.

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 the following information: (1) the employee's right to retain their immigration and identification documents and the employer's inability to take these documents except for employment eligibility verification purposes; (2) the employee's right to be paid the mandatory minimum wage established by law or agreed to in an employment contract, whichever is higher; (3) the right to live where the employee chooses and that the employee does not have to live at any place designated by the employer; (4) the right not to be subject to debt bondage in lieu of being paid wages owed to the employee; and (5) the right to call local or federal authorities, or the national Human Trafficking Hotline at 888-373-7888 if the employer or anyone else is controlling the employee's movement, documents or wages, or using direct or implied threats against the employee or the employee's family. The DLSE will make this notice available in English and the 12 languages most commonly spoken in California by non-English speaking people or people with limited English language proficiency.

The employer would be required to provide copies of the Worker's Bill of Rights to all employees, with the timing of this delivery depending on whether the employee is hired before or after July 1, 2019. For employees hired on or after July 1, 2019, employers must provide this notice prior to verifying an employee's employment authorization. For employees hired before July1, 2019, employers must provide the document to each employee after the DLSE makes it available.

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. The employer may comply with the language requirement either by providing the document in the language understood by the employee or, if the DFEH has not made available a version in the language understood by the

employee, by having the document interpreted for the employee in the language the employee understands.

Unrelatedly, this bill would also make several changes to the Labor Code protections for property service workers (Labor Code section 1420 et seq.). Specifically, it would clarify the definition of "employer" under existing provisions, specify how an employer must attest to the DLSE it has provided required sexual violence/harassment prevention training programs for business registration purposes, and expand the record retention requirements to require employers retain for three years the names, addresses, periods of work and compensation paid to all covered workers.

Status: Passed the Legislature with some bi-partisan support.

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 Legislature with some bi-partisan support and has been sent to Governor Brown.

Inspection of Payroll Records (SB 1252)

Although Labor Code section 226 states that employers must permit an employee to inspect or copy certain payroll-related records, some employers were apparently requiring the employees to make their own copies, notwithstanding the statute's language authorizing the employer to charge the employee for the actual copying costs incurred by the employer. This bill would amend section 226 to clarify that the employee has the right to inspect or "receive a copy" of these records, meaning the employer must make the copies if the employee requests. As a reminder, the failure by an employer to permit the employee to inspect or receive a copy of these records within the statutory deadline entitles the employee to receive a $750 penalty from the employer.

This bill states it is declaratory of existing law, meaning it would take effect immediately and apply retroactively.

Status: Unanimously passed the Legislature. This bill appears unopposed and likely to be enacted.

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 Legislature and appears unopposed.

Domestic Worker Enforcement Pilot Program (AB 2314)

This bill would require the 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 of labor standards in the domestic work industry. The program would include education and training for domestic work employees regarding minimum wage, overtime, sick leave, recordkeeping, wage adjudication and retaliation.

Status: Passed the Legislature on essentially party-line votes.

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 Legislature. It appears unopposed and likely to be enacted.

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

This bill would expand California's "paid family leave" provisions beginning January 1, 2021 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 Legislature. 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 and motels, but not 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, 2019 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 Legislature. This bill appears unopposed.

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.

It would also create new mediation and conciliation timeline requirements for appealing or

disputing a final decision of the ALRB. Specifically, it would provide that within 60 days of an ALRB order adopting the collective bargaining provisions in a mediator's report, either party or the board may file an action for enforcement despite any pending legal challenge. It would also require immediate implementation of an ALRB order adopting a mediator's report by the parties regardless of any pending legal challenges. It would also require a party seeking to stay a final ALRB order to present clear and convincing evidence of success on appeal and irreparable harm to either an appellant or petitioner.

Status: Narrowly passed the Legislature despite some bi-partisan opposition. This bill appears heavily opposed.

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, in 2016 the United States Department of Labor adopted the Improve Tracking of Workplace Injuries and Illnesses Act, but 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.

It would also clarify that an OSHA "occurrence" for record-keeping violations continues until the violation is corrected, the division discovers the violation or the duty to comply with the requirement is no longer applicable.

Status: Passed the Legislature on party-line votes.