2023 CALIFORNIA LEGISLATIVE SUMMARY

September 18, 2023

As expected, the California Legislature was quite active following the return from summer recess in August 2023, and leading up to the September 14th end of session. Indeed, the Legislature passed several bills that were signed into law, including a law (SB 699) extending California's already robust prohibitions on covenants not to complete in the employment context. These new laws all take effect on January 1, 2024 and are discussed below.

Not surprisingly, the Legislature also passed a number of significant employment bill that have been presented to Governor Gavin Newsom for signature or veto by October 14, 2023. We have identified the "Top Twelve" proposed employment law changes that could have the most significant impact on California employers. These bills would:

1. Expand the law against **non-compete agreements** (SB 699 and AB 1076)
2. Increase **paid sick leave** from 24 hours/3 days to 40 hours/5 days (SB 616)
3. Mandate five days of **leave for reproductive loss** (SB 848)
4. Prohibit discrimination on the basis **of family caregiver status** (AB 524)
5. Require creation, implementation, and training re: **workplace violence protection plans** (SB 553)
6. Significantly expand California's **Worker Adjustment and Retraining Act** (CalWARN) (AB 1356)
7. Require employers to provide notices to remote employees about **disability accommodation rights** before mandating return to in-person work (SB 731)
8. Expand COVID-19 **rehire requirements for displaced workers** (SB 723)
9. Empower **local governments to enforce various employment laws** (SB 16 and AB 594)
10. Prohibit employer **inquiries about prior cannabis use** (SB 700)
11. Expand **retaliation protections** (SB 497)
12. Increase the statewide **minimum wage**

The new laws, our "Top 12" pending issues, and the remaining other employment bills are all discussed herein.

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TOP TWELVE POSSIBLE EMPLOYMENT LAW CHANGES

1. New Law Strengthens Prohibition on Non-Compete Agreements and More Changes Possible (SB 699 and AB 1076)

One already enacted law (SB 699) and a second pending bill (AB 1076) would expand California's law against non-compete agreements in diverse ways. Existing law (Business and Professions Code sections 16600 to 16607) voids every contract that restrains anyone from engaging in a lawful trade or business, with certain specific exceptions. However, there are concerns that despite these rules, many California employers continue to have their employees sign noncompete clauses and pursue frivolous noncompete litigation, which has a chilling effect on employee mobility, suppresses wages, and reduces entrepreneurship and innovation. Thus, the new law specifies that it is a violation of law to require employees to enter into void noncompete agreements and would impose various penalties for such violations. As discussed below, each law would also make different additional changes to the law.

- **Expansion of Law Against Non-Compete Agreements (SB 699) [*Passed and Signed into Law]***

This new law goes into effect January 1, 2024 and expands California's existing law against non-compete agreements (Business and Professions Code sections 16600 to 16607) in several respects.

First, new Business and Professions Code section 16608 clarifies that an employer is prohibited from entering into a contract that presents an employee or prospective employee with any void non-compete agreement and specifies that an employer may not attempt to enforce such a contract. It provides that it is a civil violation for an employer to enter into an agreement that the employer knows or reasonably should know is prohibited. An employee, former employee, or prospective employee may bring a civil action for injunctive relief and/or actual damages, along with attorney's fees and costs to remedy the violation.

Second, the new law adds section 16600.5 to the Business and Professions Code to establish that any contract that is void is unenforceable regardless of where and when the contract was signed. It expressly prohibits an employer or former employer from attempting to enforce a contract that is void as a restraint on trade regardless of whether the contract was signed and the employment was maintained outside of California. Although the text of the statute does not explain precisely what this means, the legislative findings and the author's statements in the bill analysis indicate that the law is intended to reach two scenarios. This law appears intended to cover employees who work for California-based employers, even if they live and work outside California. And the law is intended to cover people who seek employment in California, even if they signed a non-compete agreement while living outside of California and working for a non-California employer. Thus, it may be an attempt to prohibit a non-California employer from enforcing a non-compete agreement against a former employee who seeks employment with a California company.

➢ **Clarification/Expansion of Law Against Non-Competes (AB 1076)**

Like SB 699, this bill seeks to clarify and expand the prohibition on non-compete agreements. First, this bill would codify the holding of *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, that existing law voids the application of any non-compete agreement in the employment context that does not satisfy an exception in the law. This does not change the law but is simply a declaration of existing law.

Second, like SB 699, this bill would make it unlawful to include a noncompete clause in an employment contract or to require an employee to enter into a non-compete agreement, if the agreement does not satisfy an exception set forth in the statute. However, this bill specifies that a violation would be unfair competition under the Unfair Competition Law (Bus. & Prof. Code section 17200). This broad prohibition would apply even in favor of persons who are not parties to the contract but would otherwise be restrained by the noncompete clause.

AB 1076 would also require employers to affirmatively notify affected employees about these provisions. Accordingly, by February 14, 2024, the employer would need to notify all current employes and any former employee employed after January 1, 2022 that is subject to a non-compete provision that does not fall within a narrow exemption for enforceability purposes, that the non-compete provision is void. This notice would need to be in writing and be an "individualized communication" (suggesting that a general notice to all employees would not suffice) and need to be delivered to the employee's or former employee's last known address and email address.

2. <u>Paid Sick Leave Increases (SB 616)</u>

This bill would amend California's Paid Sick Leave law (Labor Code section 245 *et seq.*) to (1) increase the number of paid sick leave days by amending Labor Code section 246, effective January 1, 2024; and (2) increase protections for workers covered by collective bargaining agreements.

First, citing lessons learned from the recent COVID-19 pandemic, this bill would increase the amount of required sick leave from 24 hours or 3 days up to 40 hours or five days:

- SB 616 would increase the employer's authorized limitation to five days or 40 hours and would change the definition of "full amount of leave" to mean five days or 40 hours. (It would also make corresponding changes to the sick leave accrual rate for individual providers of in-home support services and waiver personal care services).
- SB 616 would require that employees have no less than 24 hours of accrued sick leave by the 120th calendar day and 40 hours or five days of accrued sick time by the 200th calendar day of employment, or in each calendar year or in each 12-month period.
- While employers are not currently required to provide additional paid sick days if they have a paid leave or paid time off policy (usable for the same purposes as paid sick leave) if the employee may earn up to 24 hours or three days off within 120 days of employment, SB 616 would keep that requirement in place but also require that an employee to have at least 40 hours or five days of sick leave or paid time off within 200 days of employment.

- Further, while employers may presently limit an employee's total accrual of paid sick leave to 48 hours or six days, provided an employee's right to accrue and use paid sick leave is not otherwise limited, SB 616 would increase these accrual thresholds for paid sick leave to 80 hours or 10 days.

Second, the bill would extend certain protections of the Paid Sick Leave Law (including the provision of paid sick days for certain purposes, prohibitions on retaliation, and prohibition on requiring an employee to find a replacement worker for paid sick days) to employees covered by collective bargaining agreements.

Responding to concerns California's various municipal paid sick leave laws present compliance challenges, this bill would partially (but not entirely) preempt local paid sick leave provisions on certain subjects. For instance, SB 616 would preempt local ordinances conflicting with Labor Code section 246, subdivision (g) [regarding pay out of unused sick leave], subdivision (g) [lending paid sick leave], subdivision (h) [written notices of paid sick leave available], subdivision (l) [calculating paid sick leave pay], subdivision (m) [advance notice provisions] and subdivision (n) [payday rules]. However, this bill would *not* preempt any other aspect of local ordinances regarding paid sick leave. Thus, to the extent a local ordinance requires the provision of *more* sick leave, or requires a different method of accrual, or provides for earlier entitlement to paid sick leave, or has different carryover rules, those local ordinances would remain in effect.

Several recent attempts to increase California's Paid Sick Leave law to allow five days/40 hours of paid sick leave have stalled (e.g., AB 555 in 2020 and AB 995 in 221), but this issue has been identified as a legislative priority by organized labor.

3. <u>Reproductive Loss Leave Proposed (SB 848)</u>

In 2022, California enacted a new law (AB 1949, codified at Government Code section 12945.7) allowing employees to take up to five days of bereavement upon the death of a family member. This bill would incorporate much of the same framework in a new Government Code section 12945.6 allowing employees to take "reproductive loss leave." Employers with five or more employees would be required to allow an employee who has been employed for 30 or more days to take up to five days leave following a "reproductive loss event." Reproductive loss event, in turn, will be defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction. The law includes detailed definitions of the events giving rise to "reproductive loss event" and the people to whom the leave is applicable:

Qualifying Event	Definition	Person(s) to Whom Applicable
Miscarriage	A miscarriage.	The person having the miscarriage, that persons' current spouse or domestic partner, or another individual if the person would have been a parent of a child born as a result of the pregnancy.
Unsuccessful Assisted Reproduction	An unsuccessful round of intrauterine insemination or of an assisted reproductive technology procedure.	The individual, the individual's current spouse or domestic partner, or another individual, if that individual would have been a parent of a child born as a result of the pregnancy.
Failed Adoption	The dissolution/breach of an adoption agreement with the birth mother/legal guardian, or adoption is not finalized because another party contests it.	A person who would have been a parent of the adoptee if the adoption had been completed.
Failed Surrogacy	The dissolution or breach of a surrogacy agreement, or a failed embryo transfer to the surrogate.	A person who would have been a parent of a child born as a result of the surrogacy.
Stillbirth	A stillbirth.	The person who was pregnant, that person's current spouse or domestic partner, or another individual, if that person would have been a parent of a child born as a result of the pregnancy that ended in stillbirth.

As mentioned, this time off is modeled upon the recently enacted bereavement leave statute. Accordingly, this time off would be unpaid (unless the employer's policies provide paid leave or the employee chooses to use vacation, personal leave, accrued and available sick leave or compensatory time off). The time off need not be consecutive, and generally must be completed within three months of the qualifying event. However, if prior to or immediately following a reproductive loss event, the employee is on or chooses to go on leave pursuant to California's Pregnancy Disability Leave (PDL) or California Family Rights Act (CFRA) provisions (Government Code sections 12945 or 12945.2 respectively) or any other leave entitlement under state or federal law, the employee must complete their reproductive loss leave within three months of the end date of the other leave. This time off will also be considered separate and distinct from any other leave authorized by the Government Code (e.g., CFRA, bereavement leave, pregnancy disability leave, etc.).

However, unlike the bereavement leave statute, this bill does not presently appear to give employers authority to request documentation of the situation creating the need for leave. Employers would be prohibited from retaliating against employees who have taken reproductive loss leave or provided information or testimony regarding their own or another person's reproductive loss leave in an

enforcement action regarding these rights and would be required to maintain the confidentiality of employees requesting reproductive loss leave.

The bill specifies that if an employee experiences more than one reproductive loss leave event within a 12-month period, the employer is not obligated to grant total amount of reproductive loss leave in excess of 20 days within a 12-month period.

4. **Prohibition of Discrimination on the Basis of Family Caregiver Status (AB 524)**

This bill would amend the Fair Employment and Housing Act (FEHA) to preclude discrimination or harassment based upon an employee's "family caregiver status." "Family caregiver status" is defined to mean being a person who provides direct care to a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or with respect to an existing employee, any individual previously identified by the employee as a "designated person" for purposes of CFRA leave under Government Code section 12945.2. The bill would make it an unlawful employment practice to discriminate against or harass an employee on the basis of family caregiver status.

This bill is a narrower version of AB 2182, which stalled in 2022 after passing two committee votes. In an effort to address prior concerns, this version does not impose any explicit obligation on employers to accommodate an employee's family caregiver responsibilities, and it states that nothing in the law shall be interpreted as creating any new obligation for an employer to provide special accommodations because of family caregiver status, including with respect to absenteeism, benefits, leave, scheduling, or work performance, but shall not diminish any right otherwise provided under the law or any other state, local, or federal law.

5. **Workplace Violence Restraining Orders and Prevention Plans (SB 553)**

This bill would take several steps to expand protections against workplace violence. First, the bill would amend the Workplace Violence Safety Act (codified at Code of Civil Procedure section 527.8), effective January 1, 2025. The law currently authorizes employers to seek a temporary restraining order (TRO) and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been carried out at the workplace. Starting January 1, 2025, SB 553 would also allow a collective bargaining representative to seek such restraining orders and injunctions, including on behalf of employees who are not represented by the collective bargaining representative if the person serves as a collective bargaining representative for at least one person working for the employer. Recognizing concerns that employers may inadvertently create additional concerns for employees outside the workplace by seeking a TRO, the bill specifies that before seeking such an order, the employer or collective bargaining representative will need to provide the employee who has suffered unlawful violence or a credible threat of violence, an opportunity to decline to be named in the TRO. If the employee declines to be named, the employer will still have the ability to seek a TRO on behalf of other employees at the workplace and, if appropriate, other employees at other workplaces of the employer.

While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this bill would also specify that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

Second, the bill would amend the California Occupational Safety and Health Act's (CalOSHA) requirement that an employer establish, implement, and maintain an effective injury prevention program (Labor Code section 6401.7) by requiring that – starting July 1, 2024 – most employers also have a workplace violence prevention plan. The bill would create Labor Code section 6401.9 to detail the requirements of the workplace violence prevention plan. This bill would essentially enact CalOSHA's Draft Multi-Industry Standard for workplace violence prevention. (Available at: (Workplace Violence Prevention in General Industry - Advisory Meetings (ca.gov)) Earlier drafts of the bill would have imposed much more burdensome requirements on employers, but recent amendments aligned the bill more closely with CalOSHA's rulemaking effort.

This new requirement would apply to any employer with one or more employees and the state and any subdivision of the state, *except* (1) health care facilities covered by the healthcare workplace violence regulations (8 Cal. Code Regs. § 3342) and other employers that comply with those standards; (2) Department of Corrections and Rehabilitation facilities; and (3) law enforcement agencies, all as defined in the bill. Additionally, this workplace violence prevention plan requirements would *not* apply to employees teleworking from a location of the employee's choice, which is not under the control of the employer *or* to places of employment where there are less than 10 employees working at any given time and that are not accessible to the public, if the location is in compliance with the Illness and Injury Prevention rules. All of these exemptions could be overruled by CalOSHA, if it issues an order for any exempt employer to comply with the rules.

SB 553 requires covered employers to:

- Establish, implement, and maintain an effective workplace violence protection plan. The bill lists the elements that must be included in the plan, including but not limited to procedures for the employer to accept and respond to reports of workplace violence and to prohibit retaliation against employees who make such a report, procedures to respond to actual or potential workplace violence emergencies, procedures to identify and evaluate workplace violence hazards, procedures to correct workplace violence hazards, and procedures for post incident response and investigation.
- Record information in a violent incident log about every workplace violence incident. There is a detailed list of the information that must be included in such a log.
- Review the effectiveness of the plan and revise it as needed at least annually.
- Provide training to employees at least annually that addresses a list of topics, including the workplace violence prevention plan, how to report workplace violence incidents, and workplace violence hazards specific to the employees' jobs, the corrective measures the employer has implemented, and strategies to avoid physical harm.

- Maintain records of workplace violence hazard identification, evaluation, and correction for at least five years, and make all such records available to employees and their representatives upon request for examination and copying.

This is not an exhaustive summary of the requirements of the bill. If it passes, employers should carefully consider whether they are covered and, if so, begin working on compliance before July 1, 2024, when the law would become operative.

6. <u>CalWARN Act Changes (AB 1356)</u>

This bill would make a number of changes to California's version of the Worker Adjustment and Retraining Act (CalWARN, Labor Code section 1400, *et seq.*) including regarding the length of notice required, the definitions of those affected, and the use of severance agreements. The author states these changes are intended to provide affected workers more time to prepare for mass layoffs, to expand CalWARN protections to reflect increased employer usage of contractor employees, and to preclude employers from obtaining releases premised solely upon what CalWARN already requires employers to provide.

➢ **CalWARN Expanded to Labor Contractors and Temporary Employees**

The bill's primary concern appears to be that employers are increasingly relying upon contracted workers who are not presently entitled to CalWARN's protections, leaving them vulnerable to sudden layoffs or plant closures. Accordingly, AB 1356 would expand the definition of "employer" in Labor Code section 1400.5 to include a client employer of a labor contractor. "Labor Contractor" would also now be defined to mean an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

It would also expand the definition of "employee" to include a person employed by a labor contractor and performing labor with the client employer for at least six months of the 12-month period and for at least 60 hours preceding the date on which notice is required. However, while labor contractor employees would generally be included within these CalWARN requirements, they would not be included if the labor contractor employed them to fulfill the needs of a temporary project with a defined end date and the employees are laid off because of the completion of the temporary employment contract. This "temporary employment contract" exclusion would only apply when there has been no prior history of renewal or extension of the temporary employment contract.

Applying these same concerns, the bill would narrow the current "seasonal employment" exception from CalWARN coverage (Labor Code section 1400.5(g)(2)) to only apply when the season is complete and the employees were hired with the understanding that their employment was seasonal and temporary.

➢ **CalWARN Notice Changes**

In addition to expanding to whom CalWARN notices must be provided, AB 1356 will also amend how much notice is required and under what circumstances. Specifically, it would amend Labor Code section 1401 to increase from 60 days to 75 days the period for employers to provide required notices regarding a mass

layoff, relocation, or termination (as defined in section 1400) before the order takes effect. (This change would create another material difference from the federal WARN Act requiring 60 calendar days advance notice of a worksite closing).

Regarding these pre-layoff notices, AB 1356 would also modify the requirement for when notices must be sent to local officials. Presently Labor Code section 401 requires these advance notices to be sent to the affected employees, the Employment Development Department, and to local entities (i.e., the local workforce investment board and chief elected officials). AB 1356 would modify the *local* notice requirements to apply only to terminations, relocations or mass layoffs impacting 50 or more employees at a single location.

The bill would change the definition of "covered establishment" for purposes of determining whether the CalWARN triggering thresholds are met. The current law defines a "covered establishment as any industrial or commercial facility or part thereof that employes, or has employed within the preceding 12 months, 75 or more persons. The new bill would revise this definition to remove the reference to "industrial or commercial facility," and simply state that a covered establishment is "place of employment." It would also specify that a "covered establishment" may be a single location or a group of locations, including *any facilities* located in the state of California.

The bill would also revise the definition of "mass layoff" to include a layoff of 50 or more employees at *or reporting to* a covered establishment. This appears aimed at resolving any confusion as to whether the layoff of remote workers "counts" in determining applicability of the law.

The bill would also expand the remedies and increase the liability for failure to provide the required notices. For instance, in light of the new 75-day notice period, it would make a conforming change to 75 days for the calculation of the employer's liability if the notice is not provided. Second, a proposed new subsection to Labor Code section 1402 appears to require that labor contractor employees are entitled to the same amount of backpay and the value of the cost of any lost benefits, because it specifies that the labor contractor shall remit the payment provided by the client employer in the full amount calculated pursuant to the damages subdivision of Section 1402.

- **Severance Agreement Prohibitions**

Lastly, the bill attempts to prohibit employers from violating CalWARN (including by not providing employees advance notice) and then including the resulting statutory penalties or wages as consideration in a separation agreement. Accordingly, it would expressly prohibit and render void any general release, waiver of claims or non-disparagement or nondisclosure agreements conditioned on the employer's payment of amounts for which the employer is liable under section 1402. The bill would also specify that any employer who includes such a general release, waiver of claims, or nondisparagement or nondisclosure agreements as a condition of such payments will be subject to a civil penalty up to $500 per violation. Second, employers required to provide notice under section 1401 would be prohibited from offering a separate agreement containing a general release, waiver of claims or non-disparagement or nondisclosure agreement unless it is offered in exchange for consideration in addition to which the

employee is already entitled under section 1402 and states in clear and unequivocal language that the consideration being offered is in addition to anything of value to which the individual already is entitled under Section 1402. Any non-complying agreement would be deemed void and unenforceable.

7. Mandatory Notice Before Requiring Remote Employees Return to In-Person Work (SB 731)

This bill is intended to address concerns that post-pandemic return-to-the-office directives will unduly impact disabled individuals who have benefitted from remote work arrangements, and to ensure these individuals are aware of their rights to request reasonable accommodations for their disabilities. Accordingly, it would amend the FEHA to require employers to provide all employees working from home with at least 30 calendar days' advance notice before requiring the employee to return to work in person. This notice will need to be written and sent by mail or email. An employee may not be required to return to work in person unless the employer provides notice in accordance with these requirements.

This notice will also need to advise the employees of their accommodation rights by specifically including at least the following language: "You have the right to ask your employer to allow you to continue working remotely as an accommodation if you have a disability. Your employer is required to engage in a timely, good faith, interactive process to determine if there are effective reasonable accommodations for your disability, including working remotely. If you are able to perform all of your essential job functions while working remotely, your employer must grant your request unless it would create an undue hardship for your employer, an alternative reasonable accommodation is available, or you do not meet the definition of disability under the law. You can learn more about your rights at https://calcivilrights.ca.gov/accommodation/."

This bill does not alter the process by which employers are supposed to respond to such requests or the legal standard for evaluating such accommodation requests; to the contrary, it specifies that it does not diminish an employer's obligations or an employee's rights regarding reasonable accommodation. In addition, the bill clarifies that if a person is already working from home as a reasonable accommodation at the time a notice is provided regarding a return to in-person work, that person does not need to reenter the interactive process, and the bill does not authorize an employer to remove or change an existing reasonable accommodation.

8. Rehiring of Displaced Workers (SB 723)

In April 2021, California enacted SB 93, which created rehire rights for employees in the hospitality and business services industries who had been laid off for reasons related to the COVID-19 pandemic. The bill was codified in a new section 2810.8 of the Labor Code and was set to expire December 31, 2024. This new bill (SB 723) would amend Section 2810.8 to extend the expiration date to December 31, 2025, expand the group of affected employees, and create a rebuttable presumption that a layoff is due to the COVID-19 pandemic.

As a reminder, Section 2810.8 applies to the following businesses (which are defined in detail in the statute): hotels, private clubs, event centers, airport hospitality operations, airport service providers, and building services. The bill does not change the definition of covered businesses but would change the definition of "laid-off employee." Currently, the law applies to employees who were employed for at least

6 months in the 12 months preceding January 1, 2020. The new bill would expand this definition to include employees who were employed for at least 6 months and whose most recent separation from active service occurred on or after March 4, 2020. In addition, the existing law applies to employees who lose their jobs due to a reason related to the COVID-19 pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason. This bill would create a presumption that any separation due to lack of business, reduction in force, or other economic nondisciplinary reason is due to a reason related to the COVID-19 pandemic, unless the employer establishes otherwise by a preponderance of the evidence.

This bill would not change the substantive requirements of Section 2810.8 with respect to laid-off employees (offering re-hire to laid-off employees pursuant to a specified procedure and giving laid-off employees five business days in which to accept or decline the offer; written notice to laid-off employees if the employer declines to recall the laid-off employee on grounds of lack of qualifications; retaining records; non-retaliation). However, because of the new definition of "laid-off employee," the scope of the statute's rehire obligation would be dramatically increased to cover a broader range of employees. Moreover, covered employers would need to take care to determine whether they have evidence to demonstrate that a layoff is *not* related to COVID-19 before choosing not to comply with the bill's rehire requirements.

9. Alternative Enforcement of Labor Code Provisions (AB 594)

Citing claims that employers continue to engage in wage theft and that existing resources are insufficient to protect workers, this bill would provide several alternative Labor Code enforcement mechanisms. First, it would authorize a "public prosecutor" (e.g., the Attorney General, a district attorney, city attorney, county counsel, etc.) to pursue civil or criminal actions for certain Labor Code violations or to enforce certain Labor Code provisions without specific direction from the Division of Labor Standards Enforcement (DLSE). This expanded enforcement authority would *not* extend to the workers' compensation law, the Agricultural Labor Relations Act, the Private Attorneys General Act, the regulation of apprenticeship or pre-apprenticeship, or occupational health and safety law. The public prosecutor would be limited to redressing violations within their geographic jurisdiction unless the public prosecutor has statewide authority or enforcement authority pursuant to Business & Professions Code section 17204 (regarding competition). Any money recovered by public prosecutors would be applied first to payments due to affected workers. All civil penalties recovered would be paid to the General Fund of the state. Public prosecutors would also be entitled to also recover reasonable attorneys' fees and expert costs to the extent the Labor Commissioner would be entitled to such fees, and to seek injunctive relief to prevent continued Labor Code violations.

A public prosecutor would be required to provide a 14-day notice to the DLSE prior to prosecuting an action (although failure to do so would not be a defense to the action), and the DLSE would have the right to intervene unless the public prosecutor has statewide authority or authority pursuant to Business & Professions Code section 17204.

The public prosecutor's right to pursue Labor Code violations would expire January 1, 2029.

Second, any arbitration agreement between the employer and its employees that purported to limit representative actions or to mandate private arbitration would be deemed inapplicable to the authority of the public prosecutor or the Labor Commissioner to enforce the Labor Code. Further, any appeal of a denial of a motion to compel arbitration or other court proceedings shall not stay enforcement actions by the public prosecutor or the Labor Commissioner.

Third, in 2011, California enacted SB 459 (codified in Labor Code section 226.8), creating a procedure for the Labor and Workforce Development Agency or a court to examine potential willful misclassification of an individual as an independent contractor instead of an employee. This bill would amend that section to authorize the Labor Commissioner or a public prosecutor to enforce these provisions through specified methods, including by issuing a citation or filing a civil action. If the Labor Commissioner or a public prosecutor recovered damages payable to an affected employee, the employee could recover either these damages or could enforce the penalties under the Private Attorneys General Act (PAGA), but not both for the same violation.

10. Prohibition on Inquiring about an Applicant's Prior Cannabis Use (SB 700)

In 2022, California enacted a new law (AB 2188, set to take effect January 1, 2024), precluding discrimination based upon an applicant's or employee's use of cannabis off the job and away from the workplace, or based upon a drug-screening test revealing non-psychoactive cannabis metabolites (as opposed to THC revealing active impairment). This bill would further amend new Government Code section 12954 in two ways:

- First, SB 700 would preclude employers from requesting information from an applicant relating to the applicant's prior use of cannabis. Notably, while AB 2188 had stated that its limitations on drug-testing or employment decisions regarding non-workplace usage would not apply in certain circumstances (i.e., in building and construction trades or where required by enumerated federal laws), SB 700 only exempts applicants for positions requiring a federal government background investigation or security clearance from its broad prohibition on inquiries about prior cannabis usage; it would not exempt the building and construction trades from this new rule.
- Second, SB 700 would prohibit an employer from inquiring about or using information about a person's prior cannabis use obtained as part of their criminal history unless the employer is permitted to do so under Government Code section 12952 (which places strict limits on the use of criminal history in hiring) or other state or federal law.

11. Expansion of Retaliation Protections (SB 497)

This bill would amend multiple Labor Code provisions to expand protections against retaliation and/or increase the statutory penalties available. For instance, it would amend the current retaliation protections in Labor Code section 98.6 (dealing with wage-related complaints) and Labor Code section 1197.5 (Equal Pay Act complaints) to state that any adverse actions taken within 90 days of a complaint will create a rebuttable presumption of retaliation in favor of the employee. Further, while California's general whistleblowing provision (Labor Code section 1102.5) presently authorizes a civil penalty up to $10,000 for each violation, this bill would allow up to $10,000 to be awarded to each employee who was retaliated

against for each violation, in addition to any other remedies. In assessing the penalty, the Labor Commissioner would be instructed to consider the nature and seriousness of the violation, including the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace.

12. Statewide Minimum Wage Increases to $16.00 on January 1, 2024

Enacted in 2016, SB 3 implemented a series of annual increases to the statewide minimum wage until reaching $15.00 per hour (codified at Labor Code section 1182.12). However, Section 1182.12 also contains provisions requiring further minimum wage increases if the Consumer Price Index exceeds certain enumerated levels, which it has over the last several years. Accordingly, the statewide minimum wage will increase to $16.00 per hour for all employers, regardless of the number of employees, on January 1, 2024. The minimum salary threshold necessary to maintain an employee's exempt status will also increase to $66,560 annually and to $5,546.57 per month on January 1, 2024.

On July 1, 2023, a number of California cities or counties (including Los Angeles, San Francisco, and Berkeley) increased their minimum wage, including often dramatically above the state minimum wage, and many more will do so on January 1, 2024. A complete list of these city and county-level minimum wage increases in California is available at https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/#s-2.

ADDITIONAL PENDING BILLS

Harassment/Discrimination/Retaliation

Expanding the Prohibition Against Ancestry Discrimination (SB 403)

This bill would amend numerous California civil rights statutes (including the FEHA and the Unruh Act) to further define and expand the current prohibitions against discrimination based on "ancestry." Specifically, it would add a new definition for "ancestry," to include "lineal descent, heritage, caste or any inherited social status." In turn, "caste" would be defined as "an individual's perceived position in a system of social stratification on the basis of inherited status," and would also include factors such as "inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation and discrimination; and social exclusion on the basis of perceived status."

The bill also states that, as with other protected classifications, a person alleging ancestry discrimination may do so in combination with discrimination based upon other protected characteristics.

These changes would be deemed declarative of existing law and shall not mean that "ancestry" discrimination does not already include discrimination on the basis of lineal descent, heritage, parentage, caste or any other protected characteristics.

When originally introduced, this bill proposed to include "caste" as a separate protected classification but was subsequently amended to include "caste" within the existing protection for "ancestry."

Privilege for Communications re: Complaints of Sexual Assault, Harassment, or Discrimination (AB 933)

Civil Code section 47, subdivision (c) presently provides qualified or conditional privilege protection against a defamation claim for a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence, as well as communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment.

AB 933 is motivated by the author's concern that this protection is not broad enough and should cover any communications made by an individual who has experienced an incident of sexual assault, harassment, or discrimination, regardless of whether they have filed any formal complaint. The bill was prompted, at least in part, by the case of a lobbyist who publicly accused an Assemblymember of sexual assault, and who was later sued for defamation by another Assemblymember.

Accordingly, this bill would add a new section 47.1 to the Civil Code. It would specify that a communication made by an individual, without malice, regarding an incident of sexual assault, harassment, or discrimination would be privileged under Section 47. The bill specifies that this rule shall apply only to an individual that has, or at any time had, a reasonable basis to file a complaint of sexual assault, harassment, or discrimination, regardless of whether the complaint was filed. Further, it defines the privileged "communication" as "factual information related to an incident of sexual assault, harassment, or discrimination experienced by the individual making the communication" including but not limited to sexual assault; sexual harassment under various statutory provisions (including the FEHA and the Unruh Act), discrimination or retaliation for reporting sexual harassment, and cyber sexual bullying under the Education Code, amongst others. Notably, this protection extends beyond communications regarding sexual assault and sexual harassment to cover communications relating to *all* workplace harassment or discrimination, failure to prevent workplace harassment or discrimination, and retaliation for reporting workplace harassment or discrimination.

To further safeguard against defamation claims regarding the types of allegations in this new privilege, AB 933 would also specifically authorize a prevailing defendant (i.e., the speaker accused of making a defamatory statement) to recover their reasonable attorneys' fees and costs plus treble damages for any harm caused as well as potentially punitive damages under Civil Code section 3294.

<u>Leaves of Absence/Time Off/Accommodation Requests</u>

Religious and Cultural Observances for State Employees (SB 461)

Existing law (Government Code section 19854) provides state employees with one personal holiday per year. This bill would provide that a state employee may elect to receive eight hours of holiday credit for observance of a holiday or ceremony of the employee's religion, culture, or heritage in lieu of receiving eight hours of personal holiday credit. This section shall only apply to a bargaining unit that has met and conferred with the Department of Human Resources in the ordinary process and timeline for negotiating and renegotiating the bargaining unit's collective bargaining agreement.

Extension of Mediation Program for Small Employers (AB 1756)

Existing law (Government Code section 12945.1) created a mediation pilot program for small employers with between 5 and 19 employees. Before an employee can sue their employer over the employee's right to family or medical leave (California Family Rights Act leave) and/or bereavement leave, the employee must first ask the Civil Rights Department (CRD) for a "right-to-sue notice." Under the mediation pilot program, when an employee requests a right-to-sue notice against an employer with 5 to 19 employees in connection with a CFRA leave claim and/or bereavement leave claim, the parties are informed about their right to participate in no-cost mediation of the claim, and either the employer or employee can request to participate in mediation before the case may proceed to court. The program was set to expire January 1, 2024. This bill would extend the deadline to January 1, 2205.

Human Resources/Workplace Policies

Changes to Wage Theft Prevention Act Notices (AB 636)

Existing law – the "Wage Theft Prevention Act" (Labor Code section 2810.5) requires employers to provide a written notice to employees at the time of hiring with certain specified information. This bill would require the notice to include information about the existence of a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, that was issued within 30 days before the employee's first day of employment, which may affect their health and safety during employment.

In addition, the bill would require that any notice given to employees admitted under the federal H-2A agricultural visa program must include more detailed information, including information about pay rates, frequency of pay, rest periods, meal breaks, compensation for travel time, and many more topics. The bill contemplates that the Labor Commissioner would provide a template for such disclosures.

Expansion of Workplace Temporary Restraining Orders (SB 428)

Enacted in 1994 (ABX 68, and codified at Code of Civil Procedure section 527.8), the Workplace Violence Safety Act authorizes employers to seek a temporary restraining order and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been carried out at the workplace. Citing concerns that employers should be able to seek such protections before the conduct escalates to violence, this bill would also allow employers to seek a TRO and injunction on behalf of an employee who has suffered "harassment" *starting January 1, 2025.* The bill's authors note that individuals already may seek a TRO on their *own* behalf based on harassment under Code of Civil Procedure section 527.6, and this bill would allow employers to seek restraining orders on behalf of employees who are subject to harassment due to their job responsibilities. For purposes of this bill, "harassment" is defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose," and the "course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress."

Recognizing concerns that employers may inadvertently create additional issues for employees outside the workplace by seeking a TRO (such as an employee who is facing domestic violence at home and whose abusive partner appears at their workplace and engages in harassment), the bill specifies that before seeking such an order, the employer will need to provide the employee who has suffered the harassment, unlawful violence or a credible threat of violence an opportunity to decline to be named in the temporary restraining order. If the employee declines to be named, the employer will still have the ability to seek a temporary restraining order on behalf of other employees at the workplace and, if appropriate, other employees at other workplaces of the employer.

While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this bill would also specify that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

To address concerns TRO's or injunctive relief targeting harassment might abridge free speech, particularly in the public employer context, an employer seeking such relief would be required to provide "clear and convincing" evidence that an employee suffered harassment, that great or irreparable harm would result to an employee, that the course of conduct served no legitimate purpose, and that the order would not impermissibly restrict constitutionally-protected speech or activities (as opposed to simply "reasonable proof" for unlawful violence or threats of violence).

As noted, the bill would be effective January 1, 2025.

Employer Electronic Notification Requirements of Employee Benefits (AB 1355)

This bill would allow California employers the option to provide certain required documents to employees via email, but only if the recipient has opted into receipt of electronic statements. The bill would separately allow electronic distribution of: (1) required notifications regarding various tax credits, including the federal and California earned income tax credit and (2) information about unemployment benefits claims, but only if the employee or unemployed individual affirmatively, and in writing or by electronic acknowledgement, opts in to receipt of electronic statements or materials. With respect to the notice of unemployment benefits, if an electronic acknowledgment is used, it must meet certain specified requirements, including creating a record of the employee's agreement to electronic delivery and providing information about how to revoke the consent to electronic receipt.

The bill does not specify whether employees must specifically opt into receipt of each type of document, or whether a generic opt-in to receipt of electronic messages would suffice.

The bill would prohibit an employer from discriminating or retaliating against an employee who does not opt into receipt of electronic statements or materials.

The changes made by the bill would remain effective only until January 1, 2029.

Human Trafficking Notice – Pediatric Care Facilities (AB 1740) [*Passed and Signed into Law]*

Existing law requires specified businesses (including airports, hotels, etc.) to post a notice from the Department of Justice relating to slavery and human trafficking. This new law extends the posting requirement to facilities that provide pediatric care, effective January 1, 2024.

Wage and Hour

Health Care Worker Minimum Wage (SB 525)

Citing staffing shortages in the healthcare industry, particularly post pandemic, this bill is intended to set the highest minimum wage ($25.00 per hour) in the nation for "covered healthcare employees." It establishes this new healthcare specific minimum wage with various phase-in schedules based upon a classification system using factors such as health care facility size, type of facility and the governmental payor mix percentage. Each of these definitions and criteria are quite complicated with specific definitions so such employers should consult SB 525's specific language to assess its applicability. Broadly speaking, the minimum wage reaches $25.00 per hour for large hospitals and health systems in 2026, for other hospitals in 2028, and for hospitals that are rural or have a high government payer mix by no later than 2033. Following the implementation of these various phased in minimum wage increases, the minimum wage for health care workers would also be adjusted annually with the Director of Finance calculating by August 1st the lesser of either 3.5 percent or the changes in the Consumer Price Index. The result of these changes would then be rounded to the nearest ten cents and take effect on the following January 1st.

For purposes of this new minimum wage, "covered health care employee" is defined broadly as "an employee of a health care facility employer who provides patient care, health care services, or services supporting the provision of health care." The definition continues that this "includes, but is not limited to, employees performing work in the occupation of a nurse, physician, caregiver, medical resident, intern or fellow, patient care technician, janitor, housekeeping, staff person, groundskeeper, guard, clerical worker, nonmanagerial administrative worker, food service worker, gift shop worker, technical and ancillary services worker, medical coding and medical billing personnel, scheduler, call center and warehouse worker, and laundry worker, regardless of formal job title."

"Covered health care employee" also includes "contracted or subcontracted employees" if (1) the employee's employer contracts with the health care facility, or with a contractor or subcontractor to the health care facility employer, to provide health care services or services supporting the provision of health care; and (2) the health care facility employer directly or indirectly, or through an agent or any other person, exercises control over the employee's wages, hours or working conditions. It also provides that "covered health care employee" includes all employees performing contracted or subcontracted work primarily on the premises of a health care facility to provide health care services or services supporting the provision of health care.

Along with this broad definition of "covered health care employee," SB 525 also specifically identifies the following categories that are not included within this definition: (1) employment as an outside salesperson; (2) any work performed in the public sector where the primary duties performed are not health care services; (3) delivery or waste collection work on the health care facility premises where the

delivery or waste collection worker is not an employee of any person that owns, controls or operates a covered health care facility; and (4) medical transportation services in or out of a covered health care facility, provided that the medical transportation services worker is not an employee of any person that owns, controls or operates a covered health care facility.

It would further require that to qualify as exempt from the payment of minimum wage and overtime, an employee paid on a salary basis must earn a monthly salary equivalent of at least 150% of the health care worker or 200% of the applicable minimum wage, whichever is greater, for full-time employment.

SB 525 would require the Department of Health Care Access and Information to publish by January 31, 2024, a list of hospitals falling within the various classifications noted above for determining the appropriate minimum wage phase-in schedule. It would also provide, until January 31, 2025, a process for hospitals excluded from that list to request classification. By January 1, 2024, the Department of Industrial Relations to develop a waiver system to allow a covered health care facility to apply for a temporary pause or an alternative phase in schedule of these minimum wage requirements.

Lastly, SB 525 would preempt any ordinance, regulation, or administrative action applicable to a covered health care facility relating to wages or compensation for covered health care workers and would prohibit any such local ordinances from being enacted.

Repeal and Replace the Fast Food Council Law re: Health, Safety, and Wages (AB 1228)

In 2022, the Legislature passed, and the Governor signed, AB 257, a first-in-the nation law that was touted by its proponents as a step toward sectoral bargaining, in which workers and employers negotiate compensation and working conditions on an industrywide basis. The law established the Fast Food Council within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards on wages, working hours, and other working conditions for fast food workers. However, a referendum quickly qualified for the November 2024 ballot to repeal that law, and the law is on hold until after the election.

This bill (AB 1228) would repeal the Labor Code sections created by AB 257 on January 1, 2024 *if* the referendum is withdrawn by that date. The bill would also again establish the Fast Food Council under slightly different conditions. The bill's author indicates that this bill reflects an agreement between the proponents of AB 257 and the supporters of the referendum.

Like the existing law, this law would apply to fast food restaurants, but the definition of such in this bill appears to be broader than that set forth in the existing law. This bill would apply to establishments that are part of a chain of 60 or more establishments *nationally* (existing law applies to chains of 100 or more) that share a common brand or standards, and that primarily provide food or beverages for immediate consumption either on or off the premises to customers who order or select items and pay before eating, with items prepared in advance, with limited or no table service. As with the existing law, this bill would exempt bakeries that produce bread for sale as a stand-alone menu item on the premises and restaurants located within "grocery establishments," as defined.

As with existing law, this bill would create a Fast Food Council to operate until January 1, 2029. The composition of the Fast Food Council would be slightly different under this bill than under the existing law. Under the new bill, the Council would have nine voting members comprised of representatives of the fast-food restaurant industry, fast food restaurant franchisees or restaurant owners, employees, advocates for employees, and one unaffiliated member of the public (this is new under the pending bill), all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council would also include two nonvoting members: a representative of the DIR and a representative of the Governor's Office of Business and Economic Development. (These two members would be voting members under the existing law.)

Like the existing law, this bill would authorize the Council is authorized to establish minimum standards for fast-food workers, including setting minimum wages and developing standards for working hours and other conditions related to health, safety, and welfare. Decisions by the Council shall be made by a vote of at least five of the Council members, meaning decisions could be made over the objection of the two representatives of the fast-food industry and the two representatives of fast-food franchisees or owners. The Council would not be allowed to make standards that are less beneficial than existing standards, rules, or regulations, but would be able to take account of regional differences.

Unlike the existing law, the Council would not have sole authority to promulgate standards under this bill, but would instead involve the Labor Commissioner, the Occupational Safety and Health Standards Board, or the Civil Rights Council, as applicable, which would issue, amend, or repeal standards, rules and regulations developed by the Council pursuant to existing Administrative Procedure Act rulemaking provisions (except for standards regarding the minimum wage). The new bill would also remove the provision of the existing law that would have submitted the Council's standards to the Legislature for possible repeal.

This bill differs slightly from the existing law regarding minimum wages. This bill would specify that the hourly minimum wage for fast food restaurant employees shall be $20 per hour, effective April 1, 2024. (Existing law specifies that the council shall not establish a minimum wage greater than $22 per hour for 2023.) Like the existing law, this bill would provide that the Council could increase the minimum wage in subsequent years by not more than 3.5% *or* the rate of change of the non-seasonably adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers. Unlike existing law, this bill would put an expiration date on the Council's authority to increase minimum wages – it states the Council could not establish a minimum wage for any date after the 2029 calendar year, although the Council could provide advice to any appropriate state agencies regarding minimum wages that would take effect on or after January 1, 2030.

As with existing law, this bill would not permit the Council to promulgate new paid time off benefits or regulations regarding predictable scheduling. The standards set by the Council will not supersede those provided for in a collective bargaining agreement if the agreement expressly provides for wages, hours of work and working conditions that are better than the minimum standards established by the Council.

This bill would also protect employees from retaliation and, in a provision that differs from existing law, would define the Fast Food Council as a "government agency" for purposes of Labor Code section 1102.5, which prohibits an employer from preventing an employee from disclosing information to a government agency if the employee has reasonable cause to believe the information discloses specified violations of the law.

Compensable Time for Obtaining Food Handling Cards (SB 476)

California's Retail Food Code requires a food handler to obtain a food handler card within 30 days of hire and to maintain a valid food handler card for the duration of their employment as a food handler. This bill would require the employer to consider the time it takes for the employee to complete the training and examination as compensable "hours worked," for which the employer shall pay. In addition, pursuant to Section 2802 of the Labor Code, the employer would be required to pay the employee for any necessary expenditures or losses associated with obtaining the food handler card. Employers would also be required to relieve the employee of all other work duties while the employee is taking the training course and examination. Employers would also be prohibited from conditioning employment on the applicant or employee having an existing food handler card.

The State Department of Public Health will be required, by January 1, 2025, to publish on its website a link to the website of ANSI-accredited food handler training programs. Local public health organizations would also be required to post a link to this page on their internet website.

Extension of Joint and Several Liability for Property Services to Public Entities (AB 520)

To address concerns about wage theft in the property service and long-term care industries, in 2015 the California Legislature enacted SB 588 making businesses that contract for services in the property services or long-term care industries jointly and severally liable for certain wage and hour violations by the vendor actually employing the individuals doing the work. This bill would further extend this joint and several liability to public entities (other than the state) that contract for such services in the property service or long-term care industries.

Payroll Records for Public Works Projects (AB 587)

Existing law requires each contractor and subcontractor on a public works project to keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the contractor or subcontractor in connection with the public work. Existing law specifies that any copy of records made available to a Taft-Hartley trust fund for the purposes of allocating contributions to participants be marked or obliterated only to prevent disclosure of an individual's full social security number, as specified.

This bill would require that any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund or joint labor-management committee must be provided on forms provided by the Division of Labor Standards Enforcement or contain the same information as in the DLSE

forms. The bill would specify that copies of electronic certified payroll records do not satisfy payroll records requests made by Taft-Hartley trust funds and joint labor-management committees.

Layoffs/Establishment Closures

Expanded Obligations to Notify and Rehire Workers Laid Off Due to Closure of a "Chain" Establishment (SB 627)

Entitled the Displaced Worker Retention and Transfer Rights, this bill would impose new obligations on an employer operating a chain of establishments upon closure of an establishment in the chain. For purposes of this law, a "chain" is a business in California that has 100 or more establishments nationally that share a common brand and are owned and operated by the same parent company. A "chain employer" would be defined as any person, including a corporate office or executive, who directly or indirectly or through an agent or any other person, owns and operates a chain and employs or exercises control over the wages, hours, or working conditions of workers. A "chain employer" would *not* include a franchisee that owns and operates fewer than 100 establishments but *would* include a franchisee that owns and operates 100 or more establishments nationally under an agreement with one franchisor.

For purposes of this bill, a "covered worker" is a person whose primary place of employment is at the covered establishment subject to closure, who is employed directly by the employer, and who has worked for the employer for at least 6 months before the date of the closure; however, this law does *not* cover managerial, supervisor, or confidential workers, or temporary/seasonal workers. (The bill does not define "confidential worker," but it appears to be a reference to the notion of "confidential employee" under the Federal Labor Relations Act [an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations, 5 U.S.C.A. § 7103].)

This bill would not apply to employees covered by a collective bargaining agreement if the agreement expressly waives the requirements of this bill in clear and unambiguous terms.

The bill would impose several obligations on a chain employer who closes an establishment in the chain, resulting in layoffs of covered workers:

1. The chain employer must give a "displacement notice" to covered workers and any exclusive representative 60 days before the expected date of closure, including specified information. A chain employer would not be required to give the displacement notice if (a) the closure is necessitated by a physical calamity or act of war or (b) the chain employer was actively seeking capital or business to avert the closure and if certain statutorily enumerated conditions apply.
2. The chain employer must provide all covered workers with the opportunity to transfer to a location of the chain within 25 miles of the closed establishment as positions become available for one year after the closure. This would not require a chain employer to alter or terminate the employment of any worker, fail to promote any worker, or displace any worker at a location where the opportunity to transfer is offered. There are specific requirements regarding maintaining a preferential list of workers and deadlines and methods for providing notice of job

openings. And a chain employer that is a franchisee with 100 or more establishments would only be required to make an offer to transfer to a location within 25 miles of the covered location that the franchisee owns and operates under an agreement with one franchisor.

3. The chain employer must retain specified records for each covered worker for three years, including name, job classification, date of hire, contact information, and copies of written notices and communications.
4. The chain employer must not retaliate against workers for seeking to enforce their rights under this section.

A laid-off worker would be authorized to file a complaint with the Division of Labor Standards Enforcement for violation of these new rules, seeking transfer and reinstatement, front pay or back pay, and the value of benefits the covered worker would have received. Any employer, agent of the employer, or other person who violates or causes to be violated these rules would be subject to a civil penalty of $100 for each worker whose rights are violated and an additional sum payable as liquidated damages in the amount of $500 **per worker per day** continuing until the violation is cured, which shall be recovered by the Labor Commissioner, and paid, upon appropriation by the Legislature, to the worker as compensatory damages.

Notably, "chain employer" is defined to include any person, *including a corporate officer or executive*, who directly or indirectly owns or operates a chain and employs or exercises control over the wages, hours, or working conditions of workers; and the penalties could specifically be imposed on any person who violates these rules. Therefore, this bill could impose personal liability on corporate officers, executives, or other individuals who fail to comply with the new requirements in connection with closures.

While the DLSE will have exclusive authority to enforce this new section, this law would not preclude an employee's ability to sue for wrongful termination, and it would not preempt local ordinances providing greater worker protections.

Changes to Protections for Grocery Workers Upon Change in Control of Grocery Establishment (AB 647 and SB 725)

Existing law imposes requirements on grocery employers upon change in control of a grocery establishment, including requiring that the incumbent employer provide the successor employer with a list of eligible grocery workers within 15 days, and that the successor maintain a preferential hiring list, hire from that list for 90 days, and retain eligible workers for at least 90 days. (Labor Code section 2500 *et seq.*) There are two pending bills that would make different changes to strengthen employee protections under the law.

- **Grocery Workers (AB 647)**

AB 647 would expand the protections for grocery workers upon a change in control, but would also exempt from all the protections of the law certain small grocery employers.

First, AB 647 would expand the definition of "grocery establishment," specifying that "distribution centers" owned and operated by a grocery establishment and used to distribute goods from its owned stores, shall be considered a grocery establishment, regardless of the distribution center's square footage.

Second, the bill would specify that in addition to a list of workers, the incumbent grocer must provide the successor with cell phone numbers and e-mail addresses for eligible workers. If the incumbent employer does not provide the information within 15 days, the successor employer may obtain the information from a collective bargaining representative.

Third, the bill would prohibit retaliation against a person seeking to enforce rights under the law, including employees who mistakenly but in good faith, allege noncompliance by the employer of these protections.

Fourth, the bill would create an enforcement mechanism for violations of this law. An employee, collective bargaining representative, or nonprofit corporation would be able to bring a civil action and recover hiring and reinstatement rights, front pay or back pay, the value of benefits the employee would have received, punitive damages, and attorneys' fees and costs. Before an employee or employee representative brings a civil action, the employee would be required to provide written notice to the employer, and the employer would have 33 days to cure the alleged violation. In addition, the bill provides that the Labor Commissioner may enforce these provisions, and an employer, agent of any employer, or other person who violates the law or causes the law to be violated is subject civil penalties of $100 for each employee whose rights are violated and liquidated damages of $100 per employee, per day until the violation is cured, not to exceed $1,000 per employee. The liquidated damages shall be recovered by the Labor Commissioner and paid to the employee as compensatory damages.

And finally, the bill would exempt certain incumbent grocery employers and successor grocery employers from all the requirements of the law (Labor Code sections 2500-2522) based on their total nationwide employment. Specifically, it would add Labor Code section 2517 to provide that the law does not apply if the *sum total* number of grocery workers employed nationwide by *both* the incumbent grocery employer and the successor grocery employer is less than 300.

- **Grocery Workers (SB 725)**

First, this bill would revise the definitions in Labor Code Section 2502. It would add purchase, acquisition, or disposition of all or substantially all of the cash on hand to the definition of "change in control," which would trigger the protection of the statute. In addition, the bill would specify that consolidation, merger, or reorganization *by the incumbent* grocery employer would also be a "change in control." It would also add distribution centers to the definition of "grocery establishment." SB 725 would also change the definition of "successor grocery employer" to specify that the successor may be the same entity as an incumbent employer when a change in control occurs but the covered employer remains the same.

Next, SB 725 would add Labor Code section 2507 to provide that if a successor grocery employer will operate 20 or more grocery establishments after the change in control, and if that successor grocery employer does not hire an eligible grocery worker following a change in control and does not retain such worker for at least 90 days following the change in control or the worker's employment commencement

date, the successor employer shall pay "a dislocated grocery worker allowance" of one week of pay for each full year of employment with the incumbent employer, payable at a defined rate of compensation (unless a collective bargaining agreement provides for a greater amount of severance). The dislocated grocery worker allowance would not need to be paid if the worker quit or was discharged for cause.

However, new Labor Code section 2517 would exempt certain incumbent grocery employers and successor grocery employers, based upon their total nationwide employment, from these requirements. Specifically, the requirements discussed above will not apply to an incumbent grocery employer and the successor grocery employer executing the transfer document with that incumbent grocery employer if the sum of both of the following is less than 300: (1) the number of grocery workers employed, immediately prior to the change in control, by the incumbent grocery employer across that employer's grocery establishments nationwide; and (2) the number of grocery workers employed, immediately prior to the change in control, by the successor grocery employer across that employer's grocery establishments nationwide. This section would also define "grocery establishment" and "grocery worker" specifically for this new section only, with "grocery establishment" including grocery establishments in other states, and "grocery worker" meaning an individual whose primary pace of employment is at a grocery establishment owned, controlled, or operated by the incumbent or successor grocery employer.

Notice of Acquisition of Retail Grocery Stores and Retail Drug Stores (AB 853)

As mentioned above regarding AB 647 and SB 725, California already has "grocery establishment" specific rules regarding worker retention and preferential rehire eligibility following a change in control. (Labor Code section 2500, *et seq.*) This bill is motivated by concern that increasing consolidation retail chain grocery stores and pharmacies potentially affects the supply and affordability of food and medicine and the supply of experienced retail workers and pharmacy workers in California.

Based on these public health and safety concerns, this bill would add several sections to the California Corporations Code and require any person planning to acquire any voting securities or assets of a retail grocery firm or retail drug firm, as defined, to provide written notice (under penalty of perjury) to the California Attorney General at least 180 days before the acquisition becomes effective. This requirement would apply only if the Acquiring party is required to provide notice of the merger or acquisition to the Federal Trade Commission (FTC) or the United States Department of Justice (DOJ) pursuant to the federal Hart-Scott-Rodino Antitrust Improvements Act, or if the Acquiring party is acquiring more than 20 retail drug firms or retail grocery firms. The notice would be required to include certain information. If the acquiring party is required to file notice with the FTC or the DOJ under the Hart-Scott-Rodino Antitrust Improvements Act, the notice shall contain the same information required under that act and any implementing regulations. If the acquiring party is not required to file notice with the FTC or DOJ, the notice shall contain information including (1) any plans or proposals to liquidate the retail grocery or retail drug firm, to sell its assets or merge or consolidate it, or to make any other material changes in its businesses or corporate structure or management; (2) information required to assess the competitive effects of the proposed acquisition, including factors affecting the supply of experienced grocery workers, including wages, benefits, and unemployment; and (3) information required to assess economic and

community impact of any planned divestiture or store closures, including but not limited to possible impacts on unemployment. The bill would instruct the Attorney General to charge the acquiring party a filing fee to review and analyze the notice under the section based on the size of the transaction. The bill would authorize the Attorney General to seek an order temporarily staying or preliminarily enjoining the acquisition if they need additional time to analyze the competitive effects of the acquisition. And the Attorney General would be entitled to seek injunctive relief for violation of the law, along with attorney's fees and civil penalties of up to $20,000 for each day of noncompliance with the requirements of the new law.

Public Sector/Labor Relations

Expansion of Unemployment Insurance to Cover Workers on Strike [SB 799]

While Unemployment Insurance Code section 1262 presently provides that an employee is ineligible for unemployment insurance benefits if they left work due to a trade dispute, this bill would codify case law to clarify that this limitation would not apply if the individual left work because of a "lockout" (as defined in Labor Code section 1132.8). Moreover, while employees presently remain ineligible during the entire trade dispute (except in a lockout), this bill would restore eligibility for unemployment insurance benefits after the first two weeks of absence due to a trade dispute. In other words, an employee who voluntarily left work to strike would be eligible for unemployment insurance benefits after two weeks.

A similar bill in 2019 (AB 1066) passed the Assembly but stalled by one vote in the Senate.

Public Sector Employee Support for Labor Disputes (AB 504)

Citing the right of public employees to show solidarity with other striking employees, this bill would expand public employees' rights to honor a strike or picket line. The bill applies only to "public employees," defined as persons employed by public agencies of counties, cities, districts, and other political subdivisions of the state, but does not apply to *state* employees. The bill provides that it would not be unlawful or a cause for discipline for a public employee to refuse to enter property that is the site of a primary strike, perform work for an employer involved in a primary strike, or go through or work behind a primary strike line. It would also prohibit an employer from directing an employee to take such actions and would authorize recognized employee organizations to inform employees of these rights and encourage them to exercise those rights. Any provision in a public employer policy or a collective bargaining agreement that limits or waives these rights would also be void as against public policy, but the parties would need to negotiate over this bill's provisions if they conflict with a CBA entered into before January 1, 2024.

These new provisions, however, would not apply to certain employees of public employees (i.e., those subject to Labor Code section 1962 [i.e., firefighters prohibited from refusing to cross picket lines] or various peace officers subject to certain provisions of the Penal Code.) It would also not alter existing law relating to strikes by "essential employees," presumably to allow the Public Employment Relations Board to seek injunctive relief to enjoin essential employees from striking.

Legislative Employees Allowed to Organize (AB 1)

Entitled the Legislature Employer-Employee Relations Act, this bill would authorize certain employees of the California Legislature to unionize. Similar bills have been introduced multiple times but stalled.

Paid Parental Leave for California State University Employees (AB 1123)

This bill would add section 89519.3 to the Education Code and would grant leaves of absence to "employees" of California State University (as defined in Government Code section 3562). Employees would be entitled to a leave of absence with pay for one semester of an academic year, or an equivalent duration, in a one-year period commencing on the date leave is first taken, following the birth of a child or placement of a child with an employee for adoption or foster care. The leave would be required to be taken without interruption unless otherwise agreed to by mutual consent between the employee and an appropriate administrator, and only working days will be charged against the leave of absence. (This bill is similar to AB 2464, which was vetoed in 2022).

State Provided Benefits

Expansion of Paid Faily Leave to Add Responsibilities for a Child in Loco Parentis and Remove Restrictions (AB 575)

Existing law (Unemployment Insurance Code sections 3301, *et seq.*) provides up to 8 weeks of paid leave under the state disability insurance program for prescribed purposes, including to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. This bill would, commencing February 1, 2025, expand the program to provide benefits to workers who take time off work to bond with a minor child within one year of assuming responsibilities of a child in loco parentis.

Existing law provides that a worker is not eligible for these benefits if another family member is ready, willing, and able and available for the same period of time in a day that the individual is providing care. This bill would delete the restriction for periods of disability commencing on or after February 1, 2025.

Finally, existing law authorizes an employer to require a worker to take up to 2 weeks of earned but unused vacation leave before receiving benefits under the disability insurance program. The new bill would also delete this provision for periods of disability commencing on or after February 1, 2025.

Extension of Authorization to Deposit Workers' Compensation Disability Indemnity Payments in Prepaid Cards (AB 489) [*Passed and Signed into Law]*

Existing law allows an employer to deposit disability indemnity payments in a prepaid card account for employees who have workers' compensation injuries (with the employee's written consent). That law is set to expire January 1, 2024. This new law extends the authorization for this program to January 1, 2025.

Miscellaneous

Cal-OSHA Protections Extended to Household Domestic Workers (SB 686)

While California law requires every employer to provide a safe and healthful workplace for employees, "domestic workers" have historically been excluded from occupational safety and health laws. In 2021, SB 321 was enacted requiring the formation of an advisory committee to discuss policies to protect the health and safety of privately funded household domestic service employees, including drafting voluntary industry-specific guidelines to educate household domestic service employers and workers.

This bill adopts this committee's recommendations, including to remove the household domestic serve exception and thereby applying all OSHA provisions to domestic workers and their employers (except in very narrow statutorily enumerated exceptions [e.g., publicly funded, or family daycare homes].) By January 1, 2025, Cal/OSHA will be required to adopt industry guidelines consistent with Safety Committees voluntary guidelines to assist household domestic service employers on their legal obligations under existing occupational safety and health laws that apply to household domestic service employees. By January 1, 2025, household domestic service employers will be required to comply with all applicable occupational safety and health regulations.

Court Cases Not Automatically Stayed Following Denial of Arbitration Motion (SB 365)

The California Arbitration Act (Code Civ. Proc. Section 1294(a)) allows a party to appeal an order dismissing or denying a petition to compel arbitration. Existing law generally stays the proceedings in the trial court while an order is being appealed, subject to specified exceptions (Code Civ. Proc. Section 916). This bill would provide that notwithstanding the general rule, an appeal of an order dismissing or denying a petition to compel arbitration does not *automatically* stay the trail court proceedings, thereby giving the superior court the discretion to decide whether or not to stay the trial court proceedings pending appeal. Notably, the U.S. Supreme Court recently held that when a federal district court denies a motion to compel arbitration, the district court *must* stay its proceedings pending appeal of that decision pursuant to the Federal Arbitration Act (9 U.S.C. § 16.) *Coinbase, Inc. v. Bielski* (2023) 143 S. Ct. 1915. It is not yet clear whether, if SB 365 passes, California state courts considering motions to compel arbitration under agreements governed by the Federal Arbitration Act would consider themselves nonetheless bound by the *Coinbase* decision to stay the proceedings in the trial court pending appeal.

Workplace Readiness/Work Permits (AB 800)

This bill is intended to inform and educate young people about their rights as workers, including their explicit rights as employed minors, as they enter the workforce.

Pursuant to that goal, this bill would require the week of each year that includes April 28th to be known as "Workplace Readiness Week" and would require secondary schools to educate pupils on their rights as workers on specified topics during that week (including child labor, wage and hour protections, workers compensation, retaliation protections, the right to organize a union, the labor movement's role in winning

various specified employee protections, and state-approved apprenticeship programs). This would be mandatory for students in grades 11 and 12 and optional for other grades.

The bill would also require that any minor seeking a signature on a work permit must receive a document clearly explaining basic labor rights extended to workers. The bill would encourage the University of California Labor Center to produce, with input from bona fide labor organizations, a draft template of the document to be provided to minors, including translations in Spanish, Chinese, Tagalog, Vietnamese and Korean.

Proposed Standard to Require Women's Restrooms (AB 521)

This bill is motivated by the concern that women and nonbinary individuals are underrepresented in the trades, and that one barrier they face is access to clean and secure restrooms on construction jobsites. This bill would require the Occupational Safety and Health Standards Board to draft a rulemaking proposal to consider a regulation to require at least one single-user toilet facility at all construction jobsites, designed for employees who self-identify as female or nonbinary. The deadline for submitting the proposal would be December 1, 2025.

LOCAL ORDINANCES

Los Angeles Enacts "Freelance Worker Protections" Ordinance

In recent years, several cities (e.g., Minneapolis, New York, and Seattle) have enacted local ordinances regulating freelance workers. Effective July 1, 2023, the City of Los Angeles joined this club by enacting the "Freelance Worker Protections Ordinance," which its authors state is intended to ensure that "freelance workers are treated fairly and receive the compensation they are due."

Broadly speaking, this ordinance applies to work performed in the City of Los Angeles by a "freelance worker" for a "hiring entity" pursuant to a written or oral contract entered into or after July 1, 2023 that is valued at $600 or more, either by an individual job or cumulative jobs in a calendar year. A "freelance worker" is defined as an individual or entity composed of no more than one person that is hired by a "hiring entity" to provide services in exchange for compensation. A "hiring entity" is defined as being regularly engaged in a business or commercial activity but does not include entities that hire app-based drivers for transportation or delivery services.

In light of the stated goal of ensuring freelance workers are timely compensated, the ordinance requires hiring entities to provide freelance workers with a written contract for all agreements valued at $600 or more, either by itself or combined with previous oral or written agreements between the parties in a calendar year. This written contract must include at least the following: (1) the name, mailing address, phone number and email address for both the hiring entity and the freelance worker; (2) an itemization of all services to be provided by the freelance worker, the value of services to be provided pursuant to the contract, and the rate and method of compensation; and (3) the date by which the hiring entity must pay the contracted compensation or the manner by which such date will be deterring. Hiring entities must

also provide full payment by the date specified in the written contract, or no later than 30 days after work is completed if no date is specified.

The ordinance also requires both hiring entities and freelance workers to retain records (including contracts and payment records) for four years and prohibits a hiring entity from retaliating against a freelance worker for exercising their rights under this ordinance.

The ordinance also outlines various remedies for potential violations and authorizes a freelance worker to file a civil lawsuit or to file a complaint with the Bureau of Contract Administration. The full text of the ordinance is available at: https://clkrep.lacity.org/onlinedocs/2021/21-0107_ord_draft_02-21-23.pdf.

STATE REGULATORY CHANGES

Proposed New Indoor Heat Regulations

CalOSHA has proposed new regulations that would apply when the temperature reaches 82 degrees in indoor work areas. The regulation would *not* apply to places of employment where employees are teleworking from a location of the employee's choice. The regulations are detailed, and potentially affected employers should review them carefully. The following is a summary of the key obligations the regulations would impose:

- Written Prevention Program – Employers must establish, implement, and maintain a written indoor heat illness prevention program with numerous requirements, including procedures for accessing water, close observations, cool down areas, and emergency response measures.
- Training – Employers must provide training to employees and supervisors.
- Water – Employers must provide access to water, as specified.
- Cool-Down Areas – Employers must provide access to cool-down areas, at temperatures below 82 degrees, blocked from direct sunlight, and shielded from other high radiant heat sources.
- Additional Rest Periods – Employers must allow and encourage employees to take preventative cool-down rest periods and monitor employees taking such rest periods for symptoms of heat-related illness.
- Observation Obligation – Employers need to closely observe new employees during a 14-day acclimation period, as well as employees working during a heat wave where no effective engineering controls are in use.

The regulations will likely be voted on in early 2024. For more information on the status and to review the text of the regulation itself, visit CalOSHA's website: Heat Illness Prevention in Indoor Places of Employment (ca.gov)

FEDERAL REGULATORY CHANGES

Proposed Regulations re: Pregnancy Accommodations

On June 27, 2023, the federal Pregnant Workers Fairness Act (PWFA) went into effect. And in August, the Equal Employment Opportunity Commission issued a proposed regulation implementing the PWFA. The

public comment period is still open, and the regulations may change before being finalized, but employers may wish to review the proposed regulations to understand how the EEOC may interpret the law.

For more information about the PWFA, see our Special Alert here. In sum, the PWFA increases employers' obligations to make reasonable accommodations for qualified employees affected by pregnancy, childbirth, or related medical conditions nationwide. Because California Employers are already obligated to grant reasonable accommodations to employees affected by pregnancy, childbirth, or a related medical condition, the federal law is not likely to significantly alter California employers' obligations. However:

- California's reasonable accommodation obligation is explicitly tied to medical advice, while the federal law obligates employers to grant reasonable accommodations when to *known* limitations. The proposed regulation would further explain the definition of "known limitations," and would emphasize that the limitation may be a modest, minor, and/or episodic impediment or problem.

- In addition, the federal law explicitly provides that a person may be entitled to reasonable accommodation in limited circumstances when they *cannot* perform the essential functions of the job for a temporary period. The proposed regulation defines "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future," and "in the near future" means generally within forty weeks but seeks comment on whether it should be interpreted to mean *one year*.

The Regulations, if implemented, will provide more detailed definitions of the terms in the statute and examples of scenarios that may merit accommodation and the types of accommodation that may be required under the law. To review the proposed regulation in detail and track implementation, visit the EEOC's website here.

Proposed Increase in the Salary Threshold for Overtime Exemption

On August 30, 2023, the Department of Labor (DOL) announces a proposed update to the regulations implementing the federal overtime pay requirements. The proposed regulations would increase the salary threshold for the federal overtime exemption to $1,059 per week (or $55,068 annually) from the current level of $684 per week ($35,568 per year). It would also increase the salary threshold for the Highly Compensated Employee exemption to $143,988 per year. Finally, the rule would automatically update these earnings thresholds every 3 years based on current wage data. The proposal would *not* change the duties test. The DOL has published updated FAQs about the proposed rule here. The proposed regulation will be open to public comment for 60 days before the DOL publishes the final rule.

Note that even if this new *federal* proposal goes into effect, the salary threshold for the overtime exemption in *California* will still be higher: as of January 1, 2024, it will be $66,560 per year or $5,546.57 per month.

NOVEMBER 2024 BALLOT

Initiative to Raise the Minimum Wage

This ballot measure seeks to increase the minimum wage by $1.00 per year until it reaches $18.00 per hour and then to increase the minimum wage annually to adjust for inflation. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

Initiative to Repeal PAGA

This ballot measure seeks to repeal the Private Attorneys General Act, which allows employees to file lawsuits on behalf of themselves and other employees to recover monetary penalties for certain state employment law violations. The Labor Commissioner would retain the authority to enforce these laws and impose penalties. The initiative would require the legislature to provide funding for Labor Commissioner enforcement. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

Initiative Challenging the 2022 Law Authorizing Creation of a Fast-Food Industry Council

This ballot measure seeks to repeal 2022 Assembly Bill 257, which created a fast food industry council to establish sector-wide minimum standards on wages, working hours, and other working conditions for fast food restaurant workers. This initiative has qualified for the ballot, and AB 257 is on hold until after the November 2024 election. As noted in connection with AB 1228, this initiative may be withdrawn by its proponents if AB 1228 becomes law.

If you have questions about how these proposed bills may affect your business, please contact us.

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