



CALIFORNIA LEGISLATIVE DEVELOPMENTS

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LEGISLATIVE SUMMARY

Not surprisingly perhaps, a flurry of activity occurred as the Legislature prepared for the summer recess starting July 3rd.

First, and perhaps most importantly, a number of bills enacted in 2013 finally took effect on July 1, 2014. These included employment-related bills that:

- increased California's minimum wage to \$9.00 (AB 10);
- expanded California's Paid Family Leave benefit program (SB 770);
- enacted new limits on public employers concerning criminal background checks (AB 218);
- amended the procedures for Work Sharing Plans used to avoid lay-offs (AB 1392); and
- modified the criteria for employees to pre-designate a personal physician in worker's compensation proceedings (SB 863).

The Legislature also passed and Governor Jerry Brown signed into law two employment-related bills from the 2014 session. The first bill (SB 1360) is immediately effective and clarifies that time spent during legally-required rest and recovery periods counts as hours worked and shall not be deducted from an employee's wages. The second bill (AB 2751) takes effect January 1, 2015 and makes several clean-up-type changes to last year's bills (AB 263 and SB 666) regarding immigration-related retaliation (i.e., it clarifies the \$10,000 penalty is payable to the employee, etc.). The Legislature also unanimously passed the "Child Labor Protection Act" (AB 2288), which modifies the statute of limitations and penalties for wage-related claims involving minors, and Governor Brown will likely sign it soon.

Not unexpectedly, a number of employment bills that previously passed the first legislative chamber have now also passed initial committee votes in the second legislative chamber. Some of the more significant employment bills that continue to move through the legislative process include:

- AB 1522 which would require all employers provide up to three days of paid sick leave annually;
- AB 1443 which would amend FEHA to prohibit discrimination or harassment against unpaid interns or volunteers;
- AB 2053 which would require that employers discuss "abusive conduct" in sexual harassment training currently required under AB 1825;
- SB 1407 and AB 2617 which would impose new requirements for FEHA-related settlement agreements and essentially prohibit arbitration agreements for employment claims, respectively;
- AB 1660 which would make it a FEHA violation for employers to discriminate against employees who possess a driver's license issued to an undocumented resident;

- AB 2416 which would allow employees to file liens against an employer's real or personal property in wage disputes; and
- AB 2271 which would preclude employers from advertising in a manner suggesting that unemployed applicants need not apply.

Somewhat surprisingly, however, the Assembly's Labor and Employment Committee voted down a bill (SB 935) that would have increased California's minimum wage to \$13.00 by 2017.

Looking ahead, the Legislature will return from recess on August 4th, and will be extremely busy considering bills before the August 31st deadline to send bills to the Governor for signature or veto. Listed below, largely by subject matter, are the bills that may affect private sector employers we are currently tracking.

LAWS THAT TOOK EFFECT JULY 1, 2014

First Part of Two-Step Minimum Wage Increase Takes Effect (AB 10)

In 2013, California passed a law (AB 10) increasing California's hourly minimum wage from \$8.00 to \$9.00 effective July 1, 2014, and increasing again to \$10.00 on January 1, 2016. The first part of this minimum wage increase took effect as scheduled on July 1st, and since there are significant penalties for failure to pay the minimum wage, employers should review their pay records and practices to ensure compliance.

While this hourly minimum wage increase most directly impacts non-exempt employees, it also has implications for other employees, including:

1. One requirement to meet the California executive, administrative or professional exemptions from overtime is that the employee receives a monthly salary that is no less than two times minimum wage for full-time employment. The current monthly minimum is \$2,774. As of July 1st, this minimum monthly salary requirement increased from \$2,773 to \$3,120 (and will increase to \$3,467 in January 2016.) Similarly, the minimum annualized salary has now increased from \$33,280 to \$37,440 (and will increase again to \$41,600 in January 2016.)
2. One requirement for inside commissioned salespersons to be exempt from overtime is that the salesperson's total earnings result in an effective hourly rate that is one and one-half times the state minimum wage. As of July 1st, this minimum rate increased from \$12.00 per hour to the current \$13.50 per hour (and will increase to \$15.00, effective January 1, 2016.)
3. Employers are generally required to provide and maintain the tools needed for employees to perform their jobs. Employees may be asked to furnish their own hand tools if they receive at least twice the minimum wage. As of July 1st, this

increased from \$16.00 per hour to \$18.00 (and will increase to \$20.00 per hour on January 1, 2016).

4. Employers must also ensure they are now displaying updated posters or notices concerning this increased minimum wage. An updated version of the Department of Industrial Relations' "Official Notice" for the 2014 and 2016 minimum wage increases is available at: <http://www.dir.ca.gov/iwc/MW-2014.pdf>

As discussed below, a bill proposing to further increase California's minimum wage (SB 935) failed passage in the Assembly's Labor and Employment Committee.

Expanded Basis to Receive "Paid Family Leave" Benefits Now Effective (SB 770)

Since 2004, California has provided up to six weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or adoption of the child. (See Insurance Code § 3301). While often referred to as "paid family leave," this program is funded by additional worker contributions to the Unemployment Compensation Disability Fund and essentially provides "wage replacement" benefits during an already-provided leave.

Last year, California enacted SB 770, which took effect on July 1, 2014, and enables employees to also receive these partial-wage-replacement benefits to care for seriously ill grandparents, grandchildren, siblings or parents-in-law, as defined. Please note, this change does not provide new bases for employees to take leave from their employer, but simply expands the types of leaves for which employees can seek wage replacement benefits if their leave is approved.

New Limits in Effect for When - But Not Whether - Public Employers May Conduct Criminal Background Checks (AB 218)

To reduce employment barriers to individuals who have previously been convicted of a crime, in 2013, California enacted a law (AB 218) imposing new conditions concerning when - but not whether - a state or local agency may obtain an applicant's criminal history. This bill took effect July 1st and amends Labor Code section 432.7 to generally prohibit a state or local agency from inquiring about criminal convictions until after the applicant's qualifications for the position have been determined to meet the position's requirements. It also specifies that a state or local agency would be permitted to conduct a criminal history background check after the applicant has been deemed to meet the position's requirements.

These new conditions do not apply to positions for which a state or local agency is required by law to conduct a criminal history background check; to any position within a criminal justice agency (as defined by Penal Code section 13101); or to any individual working for a criminal justice agency on a contract basis or on loan from another

government agency.

As a reminder, these so-called “Ban the Box” initiatives have been enacted or are being considered in many municipalities and other states, and many propose to enact similar limitations on the ability of private employers, not just public employers, to consider criminal history information. For example, and as a reminder, San Francisco has passed the Fair Chance Ordinance, which enacts new restrictions on a private employer’s ability to obtain and use criminal history information. This Ordinance applies to employers with more than 20 employees, regardless of the employees’ locations, and takes effect August 13, 2014. More information about the Fair Chance Ordinance is available on the website of the City and County of San Francisco Office of Labor and Standards Enforcement at:

<http://sfgsa.org/index.aspx?page=6615>.

Pre-designation of Physicians in Workers Compensation Proceedings (SB 863)

In 2012, California enacted a law (SB 863) amending numerous workers’ compensation-related provisions. While a number of these amendments became effective in January 2013, on July 1, 2014, new requirements took effect concerning an employee’s ability to pre-designate a personal physician or medical group for work-related injuries or illnesses. More information about these new requirements is available on the Department of Industrial Relations’ website at:

<http://www.dir.ca.gov/DIRNews/2014/2014-16.pdf>.

Changes Regarding Work Sharing Plans Used by Employers to Avoid Layoffs (AB 1392)

California and federal law allows employers to participate in the work sharing unemployment compensation benefits program which makes employees eligible to receive a reduced amount of unemployment compensation benefits if their work hours are reduced by more than ten percent. For example, employers have used these programs to effectuate a 20 percent reduction of the workforce by reducing full-time employees to four-day workweeks rather than laying off 20 percent of its employees.

In 2013, California enacted a law (AB 1392) amending California Unemployment Insurance Code section 1279.5 regarding work-sharing plans enacted after July 6, 2014. More information about these changes, as well as the general procedure to obtain the requisite approval from the California Employment Development Department for plans enacted prior to July 5, 2014 and after July 6, 2014, is available at

http://www.edd.ca.gov/Unemployment/Work_Sharing_Program.htm.

NEW BILLS SIGNED INTO LAW

New Law Clarifies Rest and Recovery Periods are to be Counted as Hours Worked (SB 1360)

Labor Code section 226.7 presently precludes employers from requiring employees to work during any meal, rest, or recovery period, and to pay an additional hour of pay at the employee's regular rate of pay for each workday such a meal, rest, or recovery period is missed. (In 2013, California enacted SB 435 adding the language regarding "recovery periods" to the then-existing version of section 226.7.) Responding to concerns that employers were not sure if rest or recovery periods needed to be paid, this law amends section 226.7 to specify that rest or recovery periods required under state law shall be counted as hours worked for which there shall be no deduction from wages. The bill's proponents state that this language was mistakenly omitted from SB 435 during the 2013 legislative session.

Status: This bill has been signed into law, and because it specifically states it is declarative of existing law, it is immediately effective and likely applies retroactively.

Clarifying Amendments Enacted Regarding "Immigration-Related" Retaliation Protections (AB 2751)

This "clean up" bill makes relatively-minor changes to several measures enacted last year to protect immigrant workers against unlawful retaliation. For instance, in 2013, California enacted AB 263 and SB 666 which, in turn, enacted Labor Code section 1019, prohibiting employers from engaging in various "immigration-related practices" against persons who had exercised certain rights protected under state labor and employment laws. These immigration-related practices included threatening to file or filing a false police report. This bill expands this particular provision to also include the threatening to file or the filing of a false report or complaint with any state or federal agency, not just the police.

Newly-enacted section 1019 also authorizes the court to order, upon application of a party or upon its own motion, the appropriate government agencies to suspend certain business licenses held by the violating party for prescribed periods based on the number of violations. These amendments clarify that the licenses to be affected would be "specific to the business location or locations where the unfair immigration-related practice occurred," rather than potentially state-wide.

Last year's bills also added subsection (b)(3) to Labor Code section 98.6 to authorize a \$10,000 penalty against an employer per employee for each violation. Since last year's amendment did not specify to whom this penalty would be awarded, this new law specifies these penalties shall be "awarded to the employee or employees who suffered the violation."

In 2011, AB 22 enacted Labor Code section 1024.5 limiting an employer's ability to use consumer credit reports, and in 2013 AB 263 enacted Labor Code section 1024.6 prohibiting employers from retaliating against employees who update their "personal information." Because AB 263 did not define "personal information," this law further amends section 1024.6 to specify that employers may not discharge or discriminate against employees who update their personal information "based on a lawful change of

name, social security number or federal employment authorization document.” Responding to employer concerns, these amendments also specify that “an employer’s compliance with this section shall not serve as the basis for a claim of discrimination, including any disparate treatment claim.”

Status: In contrast to last year’s bills which passed along strictly party-line votes, these clean up amendments enjoyed considerable support and will take effect January 1, 2015.

CURRENTLY PENDING BILLS

Paid Sick Leave Bill Continues to Advance (AB 1522)

Known as the Healthy Workplaces, Healthy Families Act of 2014,” this bill would implement a number of new Labor Code provisions (section 245 *et seq.*) requiring employers to provide paid sick leave for their employees. This bill would apply to all employers regardless of size, including public employers, the state, and municipalities.

After July 1, 2015, employees who work in California for thirty or more days in a calendar year would accrue paid sick leave at a rate of no less than one hour for every 30 hours worked. Exempt employees would be deemed to work 40 hours per week for accrual purposes, unless their normal workweek schedule is less than 40 hours, in which case they would accrue paid sick leave based upon that normal workweek.

Employees would be entitled to use accrued paid sick days beginning on the 90th calendar day of employment, after which they may use paid sick days as they are accrued. Employers would also have the discretion to lend paid sick days to an employee in advance of accrual, and employers could not require employees to locate a replacement worker to cover days on which an employee uses paid sick days.

While accrued paid sick days shall carry over to the following calendar year, employers may limit an employee’s use of paid sick leave to 24 hours, or three days, in each calendar year. Employers would not be required to compensate employees for unused sick days upon employment ending, but they would be required to reinstate the previously unused balance if they rehired the employee within one year.

Employees would be entitled to use paid sick time for preventive care for themselves or a family member, as well as for the diagnosis, care, or treatment of their or their family member’s existing health condition. For purposes of this bill, “family member” means (1) a child (as defined), (2) parent (as defined), (3) spouse, (4) registered domestic partner, (5) grandparent, (6) grandchild, or (7) sibling. The employer shall also provide paid sick days for an employee who is a victim of domestic violence, sexual assault, or stalking, as discussed in Labor Code sections 230 and 230.1.

The bill states it is not intended to preclude employers from implementing more generous policies. Also, an employer shall not be required to provide additional sick pay under this bill if the employer already has a paid leave or paid time off policy that permits

accrual at the same rate or more, and the accrued time is to be used for the same purposes and under the same conditions as in this bill.

Like many other recent Labor Code amendments, this bill also contains carve-outs for employees covered by collective bargaining agreements (CBAs) with certain provisions. Specifically, this bill would not apply to employees covered by CBAs that expressly provide for the wages, hours of work, and working conditions of employees, as well as for paid sick days (with final and binding arbitration for any disputes regarding paid sick days), premium wage rates for all overtime, and a regular hourly rate of not less than 30 percent more than the state minimum wage.

Similarly, construction industry employees covered by a CBA with these provisions would also not be covered by this bill if the CBA was entered into before January 1, 2015, or if the CBA expressly waives the requirements of “this article” in clear and unambiguous terms.

This bill would also prohibit discrimination or retaliation against employees for using accrued sick days, or for filing a complaint regarding any sick day policy violation. However, similar to last year’s protections against “immigration-related practices” (AB 263), this bill would create a rebuttable presumption of unlawful retaliation if an employer takes an adverse employment action (including denying the right to use sick days) within 30 days of an employee (1) filing a complaint with the Labor Commissioner or in court alleging violations of this article; (2) cooperating with an investigation or prosecution of an alleged violation of this article; or (3) opposing a policy, practice or act that is prohibited by this article. (A proposed 90-day presumption was reduced to the current 30-day presumption in a recent amendment).

Under Labor Code section 248.5, the Labor Commissioner would be entitled to enforce this article by awarding reinstatement, back pay, and payment of sick days unlawfully withheld, plus the payment of an additional (currently unspecified) sum in the form of an administrative penalty to an employee whose rights were violated. Where paid sick leave was unlawfully withheld, the employee shall recover the greater of \$250 or the dollar value of the paid sick days withheld, multiplied by three. To encourage such reporting, the Labor Commissioner would be permitted to keep the reporting employee’s identifying information confidential.

The Labor Commissioner or the Attorney General would be able to file a civil action in court against the employer or any person violating this article. The Labor Commissioner or Attorney General would be entitled to appropriate legal and equitable relief, including reinstatement, back pay, the payment of sick days improperly withheld, and liquidated damages of \$50 to each employee for each violation each day, plus reasonable attorneys’ fees and costs. (A provision authorizing employees to file civil actions was deleted by recent amendment while another amendment clarifies that these administrative actions would be maintained on “behalf of the aggrieved,” suggesting any penalties would ultimately be awarded to the employee.) Another recent amendment which would add

section 245(b) clarifies that the provisions of this new article “are in addition to and independent of any other rights, remedies or procedures under any other law.

New Labor Code section 247 would also require the employer to provide employees written notice of these paid sick leave rights in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean, as well as any other language spoken by at least 5 percent of its employees. An employer will also be required to display a poster in a conspicuous place notifying employees of these paid sick leave rights. The Labor Commissioner will be responsible for preparing this written notice and the required poster. Employers who willfully violate the notice and posting requirements will be subject to a civil penalty of not more than \$100 per offense.

New Labor Code section 247.5 would also require employers to retain, for at least five years, records documenting the hours worked, paid sick days accrued, and paid sick days used by each employee. These records may be inspected by the Labor Commissioner or by an employee, and if an employer fails to maintain adequate records, it shall be presumed that the employee is entitled to the maximum number of hours accruable under this new article, unless the employer proves otherwise by clear and convincing evidence.

Lastly, this bill would amend Labor Code section 226 to require employers to include on the itemized wage statements accompanying paychecks, the “paid sick leave accrued and used” during each pay period.

This bill is very similar to bills that have repeatedly been introduced but stalled, although this version is less far-reaching, as it only requires three days of sick leave per year rather than up to nine days of annual sick leave.

Status: This bill passed the Assembly along a party-line vote, and has similarly already passed the Senate’s Labor and Industrial Relations and Judiciary Committees. It is scheduled to be heard in the Senate’s Appropriations Committee on August 4th, and since it appears to be a legislative priority but one that faces significant opposition, further amendments seem likely.

Time Off for Emergency Rescue Personnel (AB 2536)

Labor Code section 230.3 prohibits an employer from discharging or in any manner discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. Section 230.3 presently defines “emergency rescue personnel” to include an officer, employee, or member of a political subdivision of the state, or of a sheriff’s department, police department, or a private fire department. This bill would expand this definition of “emergency rescue personnel” to include an officer, employee, or member of a disaster medical response entity sponsored or requested by the state.

This bill would also require an employee who is a health care provider (as defined by the Business and Professions Code) to notify their employer at the time they become

designated as an emergency rescue personnel, and when the employee is notified they will be deployed because of that designation.

Status: This bill unanimously passed the Assembly and the Senate’s Labor and Industrial Relations Committee, and likely will soon pass the Senate’s Appropriations Committee and ultimately be enacted into law.

Revised CFRA Eligibility Definition for Public and Private School Employees (AB 1562)

This bill would amend the California Family Rights Act’s (CFRA) definition of an eligible employee, and make several changes specific to public or private school employees. For instance, under amended Government Code section 12945.2, private or public school employees would be eligible for CFRA leave if they worked 1,250 hours in the preceding 12-month period, or completed at least 60 percent of the hours of service that a full-time employee is required to perform during the previous 12-month period. This new alternative definition is intended to reflect the practical reality that many school employees work a school year rather than a traditional calendar year, and would have to work a much higher percentage of hours (i.e., nearly 95 percent) than non-educational employees to otherwise qualify.

While CFRA generally requires that employers reinstate employees at the same or comparable position, there are several narrow exceptions, including in subsection (r), involving salaried employees who are among the highest paid 10 percent of the employees employed within 75 miles of the worksite at which that employee is employed. This bill would amend subsection (r) to specify that it does not apply to public or private school employees.

Lastly, this bill would designate an eligible employee as an “entitled” employee and amends CFRA to replace the word “eligible” with “entitled” wherever it appears.

Status: This bill passed the Assembly largely along a party-line vote and is pending in the Senate. It has passed the Senate’s Labor and Industrial Relations Committee and is currently on the Appropriations Committee’s “suspense file” to study some financial impact concerns raised by the Department of Fair Employment and Housing.

FEHA Protections for Unpaid Interns and Volunteers (AB 1443)

This bill preemptively amends the Fair Employment and housing Act (FEHA, Government Code section 12940 *et seq.*) in response to several court rulings in other jurisdictions suggesting interns or volunteers are not employees for purposes of harassment and discrimination laws.

For instance, it would amend Government Code section 12940(c), which presently prohibits discrimination in apprentice training programs, to also preclude discriminating on the basis of any legally protected classification (e.g., race, religion, disability, etc.) in

an unpaid internship or another limited duration program to provide unpaid work experience for that person.

It would also amend subsection (j) to prohibit harassment against unpaid interns or volunteers because of a legally protected classification. Lastly, it would extend the existing religious belief accommodation requirements to unpaid interns and volunteer workers.

Status: This bill unanimously passed both the Assembly and the Senate's Judiciary Committee and is now pending in the Senate's Appropriations Committee where passage seems likely.

FEHA Prohibition Proposed against Discriminating Against Employees Because of Drivers Licenses Issued to Undocumented Citizens (AB 1660)

In 2013, California enacted AB 60 which authorized the Department of Motor Vehicles to issue an original driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law. AB 60 had also amended the California Unruh Act (Civil Code section 51 *et seq.*) to prevent business establishments from discriminating against individuals who hold or present such driver's licenses.

Amongst other things, this bill would amend Vehicle Code section 12801.9 to make it a violation of the Fair Employment and Housing Act for an employer or covered person to discriminate against a person holding or presenting a driver's license issued pursuant to that section. It would also make it a FEHA violation for an employer or covered person to require a person to present a driver's license, unless possessing a driver's license is required by law or is necessary to perform the position's duties.

However, recent amendments clarify that this bill would not affect an employer's rights or obligations to obtain information required under federal law to determine identity and authorization to work. These amendments also provide that actions taken by an employer that are required by the federal Immigration and Nationality Act would not violate this law. (Note: these proposed amendments to FEHA are presently proposed in the Vehicle Code and it remains to be seen if corresponding changes will be proposed to the FEHA itself (Government Code section 12940 *et seq.*).

This bill would also specify that driver's license information obtained by an employer shall be treated as private and confidential; and exempt from disclosure under the California Public Records Act; and shall not be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.

Status: This bill has passed the Assembly, and has passed the Senate's Judiciary Committee and has been referred to the Appropriations Committee. The recent amendments resolving an employer's ability to comply with federal requirements without

violating this bill seems to have addressed the opposition's primary concern so the odds of passage have increased.

AB 1825 Training to Include Prevention of "Abusive Conduct" (AB 2053)

In 2004, California enacted AB 1825, which requires employers with more than 50 employees to provide at least two hours of sexual harassment training for supervisors located in California. Under Government Code section 12950.1, employers must provide this training within six months of an employee's assumption of a supervisory position, and once every two years thereafter.

This bill would amend section 12950.1 to require that this training include the prevention of "abusive conduct." Newly proposed subsection (g)(2) would define abusive conduct as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." It further specifies that such abusive conduct "may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." The bill specifies that "a single act shall not constitute abusive conduct, unless especially severe and egregious."

Notably, this bill only would require such "abusive conduct" prevention training within the already required AB 1825 harassment training, and it does not otherwise amend the Fair Employment and Housing Act to prohibit "abusive conduct" unrelated to an already protected criterion.

Status: This bill passed the Assembly, and unanimously passed the Senate's Labor and Industrial Relations Committee and will be heard in the Senate's Appropriations Committee on August 4, 2014, and will likely pass.

FEHA Settlement Agreements Must be Knowing and Voluntary (SB 1407)

Citing a concern that employers are routinely forcing employees to waive the Fair Employment and Housing Act's (FEHA) protections by signing "inconspicuous" releases or as a condition of receiving compensation already owed, this bill would add Government Code section 12964.5 to invalidate any release of FEHA claims unless the release is knowing and voluntary.

While earlier versions of this bill enumerated various requirements to ensure releases were knowing and voluntary, including requiring that employees have 21 days to review the agreement and seven days to revoke an executed agreement, these requirements were deleted by amendment. Thus, in its current form, this bill simply states releases of FEHA claims must be "knowing and voluntary" without any further specific written requirements for a release. Presumably, the release would need to specifically reference FEHA claims and could not be in exchange for monies already owed.

Status: This bill passed the Senate and unanimously passed the Assembly’s Judiciary Committee, and a full Assembly floor vote is expected shortly.

Arbitration Agreements Targeted (AB 2617)

Employers often utilize arbitration agreements regarding employment disputes for various reasons, including to more expeditiously resolve such disputes, to lower the costs of such disputes, and to avoid the potential for runaway jury verdicts. This bill would amend Civil Code sections 51.7, 52, and 52.1 to prohibit businesses from requiring an individual to agree to arbitrate future disputes regarding violations of the Ralph Civil Rights Act or the Bane Civil Rights Act. This bill would apply to any contracts entered into, modified, or extended after January 1, 2015.

Similar bills have previously stalled during the legislative process, and since this bill singles out arbitration agreements in contravention of the Federal Arbitration Act, it will likely be judicially challenged even if enacted.

Status: This bill passed the Assembly and the Senate’s Judiciary Committee along party-line votes, and a full floor vote in the Senate is expected shortly.

Retaliation Protections for Employees Enrolled in Public Assistance Programs (AB 1792)

Citing the impact poorly-paid employees have on the state budget, this bill would require the Employment Development Department to collaborate with other specified state agencies to compile and publish a list of employers with employees that are enrolled in public assistance programs. This bill would define “employer” to mean an organization “that employ[s] 50 or more beneficiaries in this state.” This bill would also add Government Code section 13084 prohibiting employers from: (1) discharging, discriminating, or retaliating against an employee who enrolls in a public assistance program; (2) refusing to hire a beneficiary of a public assistance program; or (3) disclosing to a non-governmental entity that an employee receives or is applying for public benefits.

Status: This bill passed the Assembly and the Senate’s Health Committee on party-line votes and will be heard in the Senate’s Appropriations Committee on August 4, 2014.

Farm Labor Contractors to Undergo Sexual Harassment Training (SB 1087)

California presently has detailed laws regulating “farm labor contractors” (FLC) and the procedures for them to obtain the requisite licenses. (*See* Labor Code section 1682 *et seq.*) This bill amends numerous provisions relating to FLC’s generally, including several specific provisions to address concerns about wide-spread sexual abuse of female migrant farm workers recently detailed in the documentary “Rape in the Fields.”

First, this law would prohibit the Labor Commissioner from issuing a FLC license to any person who, within the preceding three years, has been found by a court or an administrative agency to have committed sexual harassment of an employee. It would also prohibit an FLC license from being issued to any person who, within the preceding three years, employed any supervisory employee he or she knew or should have known had been found by a court or an administrative agency within the preceding three years of his or her employment with the applicant to have sexually harassed an employee. The employer would be deemed not to have knowledge of harassment by any supervisory employee if that supervisory employee executes a Labor Commissioner form averring that the person has not been found to have committed sexual harassment within the preceding three years. This particular provision shall not take effect until the Labor Commissioner prepares and posts on its website this attestation form.

In addition to denying an FLC license, the Labor Commissioner would also be entitled to revoke, suspend, or refuse to renew an FLC license if either of these criteria is met.

It would also require that the mandatory written examination portion of the licensing process cover laws and regulations concerning workplace sexual harassment, and that the annual mandatory eight hours of educational classes be increased to nine hours and include at least one hour of sexual harassment training.

An applicant for an FLC license would also be required to execute written statements that the Labor Commissioner shall provide, attesting that their employees have been trained in the prevention of sexual harassment. Supervisory employees would need to receive training for two hours each calendar year, while non-supervisory employees would need to be trained at time of hire and every two years. A recent amendment outlines requirements for this sexual harassment training that are very similar to the currently-required AB 1825 training for private employers, including that the FLC maintain records of this harassment training for three years.

Secondly, this bill seeks to increase the ability of the Division of Labor Standards Enforcement (DLSE) to enforce applicable laws. Accordingly, this bill proposes increased funding for FLC enforcement and verification, and aims to increase bonding requirements, increase wage and hour reporting, and increase penalties for violations.

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

Waiting Time Penalties Proposed for Final Wage Violations for Unionized Theatrical Employees (AB 2743)

While Labor Code section 201 sets forth the general rule regarding the payment of final wages, the Labor Code also enumerates alternative final pay rules for particular industries due to the unique nature of those industries. Labor Code section 203, which authorizes waiting time penalties for failure to comply with these final pay rules, generally cross-references both section 201 and these more specific final pay statutes. However, and

likely due to a legislative drafting error, Labor Code section 203 does not presently cross-reference section 201.9, which governs final pay for employees at live theatrical and concert events that are subject to a collective bargaining agreement. This bill would amend section 203 to include section 201.9 as one of the specific final pay statutes to which waiting time penalties apply if final wages are not paid in accordance with the applicable Labor Code section.

Status: This bill passed the Assembly and the Senate’s Labor and Industrial Relations Committee, and is now pending in the Senate’s Appropriations Committee where passage seems likely.

Longer Statute of Limitations for Recovering Liquidated Damages for Unpaid Wages (AB 2074)

California law permits an employee to pursue a civil action to recover unpaid wages or compensation, and Labor Code section 1194.2 permits a successful employee to also recover liquidated damages equal to the unpaid wages plus interest in civil actions regarding minimum wage violations. Responding to recent cases suggesting that actions for recovery of penalties must be filed only within one year, whereas actions to recover unpaid wages have a three-year statute of limitations, this bill would amend section 1194.2 to specify that the statute of limitations to pursue liquidated damages is the same as in an action for wages from which the liquidated damages arise.

Status: This bill passed the Assembly, and the Senate’s Labor and Industrial Relations and Judiciary Committees, and a Senate floor vote is expected shortly.

Penalties for Minimum Wage Violations to Include Waiting Time Penalties (AB 1723)

Labor Code section 1197.1 presently enumerates various statutory penalties against employers who fail to pay the legally-required minimum wage; specifically, it authorizes employees to recover a civil penalty (as specified), restitution of wages, and liquidated damages. While the Labor Code presently provides three mechanisms to pursue such violations (e.g., through a “Berman Hearing” before the Labor Commissioner, through a civil action, or through a Labor Commissioner citation), section 1197.1 presently authorizes waiting time penalties under section 203 only for the first two mechanisms (i.e., not for Labor Commissioner citations). This bill would amend section 1197.1 to harmonize these three recovery mechanisms and authorize waiting time penalties in all three scenarios if an employer failed to timely pay wages of a resigned or discharged employee.

Status: This bill passed the Assembly and the Senate’s Labor and Industrial Relations Committee and will be heard by the Senate’s Appropriations Committee on August 4, 2014.

Employee Liens against Employer Property (AB 2416)

California law presently permits specified classes of laborers who contribute labor, skill, or services to a work of improvement, the right to record a mechanic's lien upon the property improved by their efforts. California law also generally authorizes employees to file claims against their employers through the Division of Labor Standards Enforcement for unpaid wages, although it does not authorize such employees to obtain a lien (akin to a mechanic's lien) for such wages owed.

Known as the California Wage Theft Recovery Act, this bill would enact a new and very detailed chapter in the Labor Code (section 3000 *et seq.*), authorizing non-exempt employees to record and enforce a wage lien upon real and personal property of an employer or a property owner (as specified) for unpaid wages, other compensation, and related penalties owed the employee. This bill would also prescribe very detailed requirements relating to the obtaining, recording and enforcement of the wage lien.

This bill faces significant opposition and has undergone and continues to undergo amendment. Recent amendments have outlined procedures (in proposed new Labor Code section 3005.5) for the employer or property owner to release the notice of lien if the employer makes certain specified contentions (e.g., that the wages have been paid, etc.) and would require a certain notification to be made under penalty of perjury. A proposed amendment to section 3001(d) would prohibit a lien from attaching if the employer receives a court or Labor Commissioner order that the employee does not have a reasonable likelihood of success on the wage claims. Other amendments clarify that the lien cannot be filed against the primary residence of an individual employer and authorize the employer to recover reasonable attorneys' fees and a penalty up to \$1,000 in bad faith actions. Another amendment would clarify that an employee cannot record a lien based upon a claim permanently extinguished by an employee's failure to timely file a claim.

Proponents argue this bill closely tracks a similar successful wage lien statute in Wisconsin and simply ensures employees have an effective mechanism to collect future wage judgments. Opponents argue that, as drafted, the bill's provision for a lien would potentially freeze assets prior to a judgment even being awarded, and would create third-party market disruptions since other individuals or commercial entities may have liens. To test the efficacy or negative impacts of this bill, it would require the Department of Industrial Relations to issue a report to the legislature by January 1, 2019, concerning its effects.

This bill is similar to prior versions that have stalled in the legislative process.

Status: This bill faces considerable opposition, but has passed the Assembly, and recently passed the Senate's Judiciary and Labor and Industrial Relations Committee on party-line votes. It is scheduled to be heard in the Senate's Appropriations Committee on August 4, 2014, and its ultimate prospects are not clear given the amount of opposition and the complicated nature of this bill.

Prohibition against Employers Advertising that “Unemployed Need Not Apply” (AB 2271)

This bill responds to concerns about discrimination against the unemployed by limiting an employer’s ability to screen applicants based on “employment status,” which is defined as an “individual’s present unemployment, regardless of length of time that the individual has been unemployed.” Specifically, this bill would prohibit an employer, unless based upon a bona fide occupational qualification, from: (1) publishing advertisements suggesting an individual’s current employment is a job requirement; or (2) affirmatively asking an applicant to disclose orally or in writing his or her current employment status until the employer has determined that the applicant meets the minimum employment qualifications for the position, as stated in the published notice for the job. The law would impose fairly similar prohibitions upon employment agencies or persons who operate Internet websites for posting positions in California.

The proposed bill would not prohibit employers or employment agencies from publishing job advertisements setting forth the lawful qualifications for the job, including but not limited to the holding of a current and valid professional or occupational license. It also would not prohibit advertisements for job vacancies stating that only applicants who are currently employed by that employer will be considered (so-called “internal” hiring).

In addition, the bill would not prohibit employers, employment agencies, or website operators from: (1) obtaining information regarding an individual’s employment, including recent relevant experience; (2) from having knowledge of a person’s “employment status;” or from inquiring about the reasons for an individual’s unemployment; or (3) from refusing to offer employment to a person because of the reasons underlying an individual’s employment status. In other words, this bill seems to allow employers to consider the reasons for an individual’s unemployment but prohibits them from initially screening out applicants simply because they are unemployed.

This bill would authorize civil penalties of \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation, enforceable by the Labor Commissioner.

This bill appears very similar to AB 1450, which Governor Brown vetoed in 2012.

Status: This bill passed the Assembly and recently passed the Senate’s Labor and Industrial Relations and Appropriations Committees. It is scheduled to be heard in the Senate’s Appropriations Committee on August 4, 2014, and does not appear to face much opposition.

New Foreign Labor Contractor Requirements Proposed to Combat Human Trafficking (SB 477)

To address human trafficking concerns, this bill would expand and strengthen the regulations of “foreign labor contractors” who recruit foreign workers to relocate to

California. Notably, “foreign labor contracting activity” would be specifically defined as “recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker’s employment in California, including when that activity occurs wholly outside the United States.” Also of note, in response to employer-provided concerns that led to the vetoing of a similar bill last year (SB 516), this definition states “[f]oreign labor contracting activity’ would not include the services of an employer, or employee of an employer, if those services are provided directly to foreign workers solely to find workers for the employer’s own use.” However, in exchange for this general exemption for direct recruiting activities, California employers who use foreign labor contractors would be prohibited from using contractors not registered with the Labor Commissioner. They would also be required to disclose which employees are working with the contractor, and would be required to consent to California’s jurisdiction in the event of a future suit.

“Foreign labor contractors” covered by this bill would be required to register with the Labor Commissioner by July 1, 2016, and pay a registration fee set by the Department of Industrial Relations to support the ongoing costs of the program. These contractors would also be required to post a surety bond between \$25,000 and \$150,000 before the Labor Commissioner can renew or register a foreign labor contractor. Such contractors would also be required to disclose specified information to foreign workers, in a language they can comprehend, regarding the terms and conditions of the proposed work in California. This bill would also authorize civil penalties of \$1,000 to \$25,000 for violations of these provisions, and allow an aggrieved person or the Labor Commissioner to seek injunctive relief.

This bill is very similar to SB 516 which Governor Brown vetoed, seemingly in large part because the fees generated would be insufficient to cover the program’s costs.

Status: This bill unanimously passed the Senate, and recently unanimously passed the Assembly’s Labor and Employment and Judiciary Committees, and is now pending in the Assembly’s Appropriations Committee. This bill does not appear to face significant opposition, and a similar bill passed the Legislature in 2013, but it is uncertain if Governor Brown will sign this year’s version if it again makes it to his desk.

Cal-WARN Notice Requirements (AB 1543)

California’s version of the Worker Adjustment and Retraining Notification Act (Cal-WARN, Labor Code section 1401 *et seq.*) prohibits employers from ordering a mass layoff, relocation, or termination (as defined) without first providing 60 days written notice to affected employees and certain government agencies and officials. Specifically, Labor Code section 1401 presently requires these advance notices be provided to the Employment Development Department (EDD), the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.

This bill would amend Labor Code section 1401 to require the EDD to forward a copy of this notice to the Governor's Office of Business and Economic Development. It would also require the EDD and the Governor's Office of Business and Economic Development to post the notice on their respective websites. This requirement is intended to assist the Governor regarding economic strategy and to help improve job creation and retention.

Status: This bill unanimously passed the Assembly and the Senate's Labor and Industrial Relations Committee and is pending in the Senate's Appropriations Committee.

Unemployment Insurance Eligibility for Training Periods (AB 1556)

While California's Unemployment Insurance Code presently prohibits an unemployed individual from being disqualified for benefits solely because he or she is a student, it previously contained no similar protection for individuals who commence a training or education program. This bill addresses this omission by adding new section 1253.92 to the Unemployment Insurance Code to preclude unemployed individuals who are meeting specified requirements and applying for continued unemployment compensation from being scheduled for an eligibility determination for a week in which they commenced or are participating in a training or education program under specified conditions.

While Unemployment Insurance Code section 316 presently requires that standard information employee pamphlets be printed in English and Spanish, this bill would instead require these pamphlets to be printed in English and the seven other most commonly used languages amongst participants in unemployment and disability insurance programs. It would also require the EDD to ensure its website provides information about unemployment insurance benefits in the seven languages, other than English, most commonly used by unemployment insurance applicants and claimants.

Status: This bill passed the Assembly and the Senate's Labor and Industrial Relations Committee and is now pending in the Senate's Appropriations Committee.

Expanded Deadlines to Appeal Employment Development Department Determinations (SB 1314)

This bill would amend multiple Unemployment Insurance Code sections to extend, beginning July 1, 2015, the deadline from 20 days to 30 days to appeal or seek reconsideration of various determinations by the Employment Development Department (EDD). For instance, it would amend section 1328 to extend the deadline to challenge an EDD determination regarding the eligibility for UEI benefits to 30 days. This bill would also amend Unemployment Insurance Code section 1334 to extend the period before an administrative law judge determination is final from 20 to 30 days, unless a further appeal is initiated to the California Unemployment Insurance Appeals Board.

Status: This bill unanimously passed the Senate and the Assembly's Insurance Committee and is now pending in the Assembly's Appropriations Committee.

“Client Employers” to Share Certain Legal Responsibilities with Labor Contractors (AB 1897)

Labor Code section 2810 presently prohibits a person or entity from entering into a contract or agreement for labor or services with specified types of contractors (e.g., construction, farm labor, garment, janitorial, security guard, or warehouse contractor) if the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws. This bill would enact a new section, Labor Code section 2810.3, requiring a “client employer” to share with the labor contractor legal responsibility and liability for certain obligations.

Specifically, client employers would share with the labor contractor all civil legal responsibility and civil liability for: (1) the payment of wages to workers provided by a labor contractor; (2) the obligation to provide a safe work environment required under Labor Code section 6300; and (3) the failure to secure valid workers compensation coverage. (Recent amendments deleted language that client employers would also have shared responsibility for reporting wage-related reporting requirements or tax withholdings). Despite this shared responsibility, a worker or their representative could not file a claim against the client employer until after providing thirty days notice of violations of any shared obligations.

For purposes of this bill, “client employer” would be defined as a business entity, regardless of form, that obtains or is provided workers to perform labor or services within the usual course of business from the labor contractor. “Client employer” does not include business entities with a workforce of less than 25 workers, including those hired directly by the client employer and those obtained from or provided by, any labor contractor, and five or fewer workers supplied by a labor contractor at any given time. It also would not include state or any political subdivision of the state, and “labor contractor” would not include certain non-profits, labor organizations or motion picture payroll services companies. However, “worker” would apply only to non-exempt employees. “Usual course of business” is defined as the regular and customary work of a business, performed within or upon the premises or worksite of the client employer.

This bill would also require a client employer or labor contractor to provide to a requesting enforcement agency or department, and make available for copying, information within its possession, custody or control required to verify compliance with state laws. Recent amendments clarify this would not require the disclosure of any information that is not otherwise required to be disclosed by employers upon request by a state enforcement agency or department.

This bill would prohibit client employers from attempting to contract around these provisions, such as by shifting these responsibilities solely to the labor contractor, but the employer and labor contractor would be able to contract regarding certain remedies, including indemnification for the other party’s violations of this section.

Lastly, recent amendments clarify this section will not impose individual liability on a homeowner for labor or services performed at the home, nor shall it impose liability on an employer for the use of a bona fide independent contractor.

Status: This bill passed the Assembly on a party-line vote and has also passed the Senate's Judiciary and Labor and Industrial Relations Committees on party-line votes. It is scheduled to be heard in the Senate's Appropriations Committee on August 4, 2014.

The Legislature Passes Expedited Workers' Compensation Proceedings Involving Illegally Uninsured Employers (AB 1746)

California's Workers' Compensation system requires the administrative director to establish a priority conference calendar for cases in which the employee is represented by an attorney and the disputed issues are employment or injury (as specified). This bill would slightly amend Labor Code section 5502 to require that cases in which the employee is or was employed by an illegally uninsured employer and the disputed issues are employment or injury (as specified), be placed on this priority conference calendar.

Status: This bill unanimously passed the Assembly and Senate and will be sent to Governor Brown for signature or veto.

Changes in Abatement Period Pending Appeal for Serious Violations (AB 1634)

Presently, the Division of Occupational Safety and Health (DOSH) may issue a citation or notice of proposed penalty to an employer it determines to be in violation of safety-related laws, and this citation shall identify a period to abate (i.e., to fix) the alleged violation. The employer may appeal the citation to the Occupational Safety and Health Appeals Board, and there is presently no requirement to fix the violation while the appeal is pending.

This bill would amend Labor Code section 6600 to specify that employer appeals related to serious violations, a repeat serious violation, or a willful serious violation would generally not stay the abatement period identified in a citation. However, it would also authorize the DOSH, if requested, to stay the abatement period pending an appeal if it determines the stay will not adversely affect the health and safety of employees.

The bill's proponents argue these amendments will ensure serious safety remedies are not delayed pending a potentially lengthy appeal, while opponents argue it basically forces employers to remedy an alleged violation even though the issue has not yet been fully adjudicated.

This bill is similar, but not identical, to AB 1165, which Governor Brown vetoed in 2013. It also appears modeled upon a bill enacted in Washington State in 2011.

Status: This bill passed the Assembly on a party-line vote, and passed the Senate’s Labor and Industrial Relations Committee and is pending in the Senate’s Appropriations Committee.

Legislature Passes “Child Labor Protection Act” (AB 2288)

Known as the Child Labor Protection Act of 2014, this bill would enact a new Labor Code provision (section 1311.5) to provide additional remedies for violations of California’s laws regarding employment of minors. For instance, it would provide that the statute of limitations for claims related to the employment of minors shall be tolled until the individual allegedly aggrieved by the unlawful employment practice reaches 18 years of age. The bill specifies that this provision is declarative of existing law, meaning it would apply retroactively.

The bill would also authorize individuals who are discriminated or retaliated against because they filed a claim alleging a child labor violation to receive treble damages in addition to any other legal remedies available. Lastly, while Labor Code section 1288 presently identifies certain “classes” of violations resulting in statutorily-enumerated penalties, this bill would impose a civil penalty of \$25,000 to \$50,000 for each violation involving minors less than 12 years of age.

Status: This bill unanimously passed the Assembly and Senate and has been sent to Governor Brown for signature or veto.

“Emergency” Legislation Proposed Concerning Prevailing Wage Determinations (SB 266)

Originally introduced in 2013, this bill is intended to address concerns that the lengthy delays in determining whether a project is a public work for prevailing wage purposes potentially negatively impacts workers’ abilities to pursue wage-related claims through the Labor Commissioner. Accordingly, this bill would amend Labor Code section 1741.1 to require the body awarding the public work contract to furnish, within 10 days after receipt of a written request from the Labor Commissioner, a copy of the valid notice of completion for the public work, or a document evidencing the awarding body’s acceptance of the public work on a particular date, whichever occurs later.

The bill would also require the awarding body to notify the appropriate office of the Labor Commissioner if, at the time of receipt of the Labor Commissioner’s written request, there has been no valid notice of completion filed by the awarding body in the office of the county recorder and no document evidencing the awarding body’s acceptance of the public work on a particular date. If the awarding body fails to timely furnish the Labor Commissioner with the applicable documents, the bill would require that the period for service of assessments be tolled until the Labor Commissioner’s receipt of the applicable document.

A recent amendment states this bill is “urgency” legislation and, if enacted, would be immediately effective.

Status: This bill overwhelmingly passed the Senate and has passed the Assembly’s Labor and Employment Committee and been referred to the Assembly’s Appropriations Committee.

Workplace Violence Prevention Plans for Hospitals (SB 1299)

“The California Occupational Safety and Health Act of 1973 impose safety responsibilities on employers and employees, including the requirement that an employer establish and maintain an effective injury prevention program.” This bill would enact Labor Code section 6401.8 requiring the Occupational Safety and Health Standards Board, by July 1, 2016, to enact standards obligating specified types of hospitals (e.g., acute care, acute psychiatric) to adopt a workplace violence prevention plan as part of the hospital’s injury and illness prevention plan. A recent amendment specifies that certain state-operated hospitals would be exempt from these requirements.

Status: This bill passed the Senate, and has passed the Assembly’s Health Committee and been referred to the Assembly’s Appropriations Committee.

BILLS THAT FAILED PASSAGE

In June, several bills were voted down in committee suggesting they are dead for this year, although some potentially may resurface in the future. These bills include:

Additional Minimum Wage Increase Stalls in Assembly (SB 935)

Even though California passed a two-step minimum wage increase in 2013 (AB 10), this bill would have further increased California’s minimum wage in three separate increments over the next three years. Specifically, it would have increased California’s hourly minimum wage to \$11.00 by January 1, 2015, to \$12.00 by January 1, 2016, and to \$13.00 by January 1, 2017. After January 1, 2018, the minimum wage would also have been annually adjusted based on the California Consumer Price Index (CPI). Notably, while the rate could be adjusted upwards, it could not be adjusted downwards, even if the CPI was negative for the preceding year.

Although this bill passed the Senate on a party-line vote, it failed passage in the Assembly’s Labor and Employment Committee.

Senate Committee Rejects Additional Grounds for Disqualification for Unemployment Insurance Benefits (AB 2362)

Unemployment Insurance Code section 2362 presently provides for the forfeiture of, and ineligibility for, unemployment insurance benefits for certain time periods for individuals convicted of willfully making a false statement or omitting material facts to obtain or

increase any unemployment insurance benefit or payment. This bill would have expanded section 2362 to similarly disqualify individuals convicted “under specified forgery, grand theft, and false claims provisions in state law or a federal mail fraud provision for those acts or omissions.” It would also have required a California court to report convictions of those state laws to the EDD.

Although this bill unanimously passed the Assembly, it failed passage in the Senate’s Labor and Industrial Relations Committee.