California Legislative Developments

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LEGISLATIVE RECAP

The deadline for the California Legislature to advance bills expired on August 31st, and as expected, there were quite a few employment-related bills considered. In fact, seven employment-related bills have already been passed by the Legislature and signed by Governor Jerry Brown with most taking effect January 1, 2015.

The California Legislature also passed and forwarded to Governor Jerry Brown another seventeen employment-related bills, including bills that would:

- require employers provide up to three days of paid sick leave annually (AB 1522);
- amend the Fair Employment and Housing Act (FEHA) to prohibit discrimination or harassment against unpaid interns or volunteers (AB 1443);
- amend FEHA to prohibit discrimination against individuals with drivers licenses issued to undocumented workers (AB 1660);
- require employers discuss "abusive conduct" in sexual harassment training currently required under AB 1825 (AB 2053);
- make employers liable for wage and workers' compensation issues for employees provided by labor contractors (AB 1087);
- preclude employers from advertising in a manner suggesting that unemployed applicants need not apply (AB 2271); and
- enact new regulations regarding "foreign labor contractors" who recruit foreign workers to California (SB 477).

Governor Brown has until September 30, 2014 to sign or veto these bills.

Listed below, largely by subject matter, are the state-wide employment-related bills that have been signed into law and will become effective January 1, 2015, unless otherwise noted, followed by the bills currently being reviewed by Governor Brown. An update on several municipal-related developments (e.g., San Diego's Minimum Wage/Paid Sick Leave Ordinance and San Francisco's Commuter Benefits Ordinance) follows the state-level developments.

NEW CALIFORNIA EMPLOYMENT LAWS ENACTED IN 2014

Rest and Recovery Periods are 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 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.

This law specifically states it is declarative of existing law, and therefore is immediately effective and applies retroactively.

Waiting Time Penalties 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 did not previously 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 law amends 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.

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 law amends 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.

The "Child Labor Protection Act" (AB 2288)

Known as the Child Labor Protection Act of 2014, this bill enacts a new Labor Code provision (section 1311.5) to provide additional remedies for violations of California's laws regarding employment of minors. For instance, 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 applies retroactively.

This law also authorizes 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 law imposes a civil penalty of $25,000 to $50,000 for each violation involving minors less than 12 years of age.

"Immigration-Related" Retaliation Protections Clarified (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."

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 law

amends 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.

Employers May Report Workplace Injuries via Email Rather than Telegraph (AB 326)

Although Labor Code section 6409.1 has long required employers to immediately notify the Division of Occupational Safety and Health of an employee's serious injury, illness or death, this section had not been updated recently, and so it required the employer to provide this notice via telephone or telegraph. This new law amends section 6409.1 to enable the employer to make such reports via telephone or email, and it deletes language authorizing the use of a telegraph.

EMPLOYMENT BILLS SENT TO GOVERNOR JERRY BROWN

Discussed below are the employment bills that recently passed the California Legislature and must be signed or vetoed by Governor Jerry Brown before September 30, 2014:

Paid Sick Leave Bill (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. If enacted, California would be the second state (Connecticut is the other) to implement paid sick leave state-wide.

Accrual and Usage Rules

After July 1, 2015, employees who work in California for thirty or more days within a year from the commencement of employment 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 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 year of employment, employers may limit an employee's use of paid sick leave to 24 hours, or three days, in each year of employment. However, no accrual or carry-over is required if the full amount of sick leave is received at the beginning of each year. An employer also has no obligation to allow an employee's total accrual of paid sick leave to exceed 48 hours or

six days, provided that an employee's rights to accrue and use paid sick leave under this section are not otherwise limited. This six-day accrual limit appears intended to ensure the employee has their full sick leave rights both for the instant year and the beginning of the next year.

One of the bigger concerns about this proposed law was its potential impact employers on who are already providing an equal amount of sick time of paid time off. Proposed section 246(e) attempts to address this concern by stating that an employer does not need to provide "additional" paid sick days if it meets certain requirements. Specifically, the employer is exempted from providing additional paid sick days if (a) it has a paid leave policy or paid time off policy, (b) the employer makes available an amount of leave that may be used for the same purposes and under the same conditions as specified in this new law, and (c) the employer's policy does either of the following: (1) it satisfies the accrual, carry over and use requirements of this new law; or (b) it provides no less than 24 hours or three days of paid sick leave, or equivalent paid leave or paid time off, for employee use for each year of employment or calendar year or 12-month basis. Notably, unlike the exemptions provided to this entire new law for certain groups (discussed below), this particular exemption seems to apply only to the provision of "additional" time off, but does not exempt employers from other aspects of this new law (i.e., notices, posters, record-keeping, etc.).

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. In that instance, the rehired employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring.

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 a (1) 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.

An employee may determine how much paid sick leave they need to use, but an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave. In response to employer concerns sick leave is more unpredictable than many other leaves (e.g., FMLA, etc.), this bill requires employees to provide "reasonable" advance notification if the need for paid sick leave is foreseeable. Where the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for leave as soon as practicable.

Employee's using paid sick leave shall be compensated at the employee's normal rate during regular hours of work. If the employee in the 90 days of employment before taking accrued sick leave had different hourly pay rates, was paid by commission or piece

rate, or was a nonexempt salaried employee, then the rate of pay shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Employers Covered by and Exempted from this New Law

Likely one of the more controversial aspects of this new law is its scope. For instance, unlike Connecticut's Paid Sick Leave law which applies only to employers with more than 50 employees and San Francisco's Paid Sick Leave Ordinance which exempts smaller employers from certain obligations, this new law would apply to almost all employers regardless of size, many public employers, the state, and municipalities.

Notably, however, 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.

Responding to the State of California's concern about costs, an amendment inserted at the eleventh-hour would also exempt a provider of in-home supportive services under specified sections of the Welfare and Institutions Code.

Finally, certain individuals employed in the airline industry and covered by the federal Railway Labor Act are exempted provided they receive compensated time-off at least equal to this new law.

Notice, Posting and Record-Retention Rules

This new law also furthers a recent trend of new California laws that enact substantive rights and impose administrative responsibilities, although arguably in less expansive form due to last-minute amendments proposed by human resources organizations.

For instance, this law amends Labor Code section 2810.5 to require employers to provide at the time of hiring written information about this new law. Specifically, this law requires that the notice employers have been required to provide since 2012 concerning pay-related information now also include language advising employees of their right to accrue and use paid sick leave, their right to be free from retaliation, and their right to file a complaint. Fortunately, this particular Labor Code section generally requires the Labor

Commissioner to develop a template employers may use, so presumably the Labor Commissioner will develop an updated form. An earlier but-since deleted provision of this law would have required employers to essentially develop and distribute written notice in at least five languages but was silent as to what the notice would have been required to say or when it needed to be distributed.

An employer will also be required to display in a conspicuous place in each workplace of the employer a poster notifying employees of these paid sick leave rights. The Labor Commissioner will be responsible for preparing this poster. Employers who willfully violate the posting requirements will be subject to a civil penalty of not more than $100 per offense.

Employers will also be required to provide employees with written notice that identifies the amount of paid sick leave available, or paid time off an employee provides in lieu of sick leave, for use on either the employee's itemized wage statement required under Labor Code section 226 or in a separate writing provided on the designated pay date with the employee's payment of wages. An employee alleging failure to provide such notice shall be entitled to the penalties specifically enumerated under this law (discussed below) rather than under Labor Code section 226.

New Labor Code section 247.5 would also require employers to retain, for at least three years (rather than the five years originally proposed), 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 under Labor Code section 1174, or by an employee under Labor Code section 226. Troublingly, and in another example of a recent trend in California, this section provides that 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. In other words, an employer cannot simply prevail by satisfying the preponderance of the evidence standard traditionally used, but must satisfy the much more rigorous "clear and convincing" standard traditionally reserved for punitive damages purposes but which has begun to be tucked into new Labor Code amendments by plaintiff's attorneys.

Retaliation Protections and Enforcement

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.

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 sum in the form of an administrative penalty to an employee whose rights were violated. Where paid sick leave is unlawfully withheld, the employee shall recover the dollar value of the paid sick days withheld, or $250 multiplied by three, whichever is greater, but not to exceed an aggregate penalty of $4,000. If a paid sick leave-related violation results in "other" harm to the employee or person, the administrative penalty shall include a sum of $50 for each day that the violation occurred or continued, not to exceed $4,000.

If the employer fails to promptly comply, the Labor Commissioner may take "appropriate" enforcement action to ensure compliance, including filing a civil action. In such instances, the violating employer may be ordered to pay up to the state of California $50 for each day a violation occurs of continues.

Employees or other persons may report suspected violations to the Labor Commissioner, and 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.) Subdivision (b) to Labor Code section 245 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.

Lastly, proposed section 249, subdivision (d), specifies this bill establishes "minimum" requirements for paid sick days and does not preempt, limit or otherwise affect the applicability of any other law or ordinance that provides greater accrual of use of paid sick days. California employers already must consider slightly different variations in San Francisco and, unless stayed by referendum, San Diego shortly, and this legislative invitation for municipalities to enact still-broader versions suggests employers may soon need to have multiple versions of their paid sick leave policies.

As mentioned, this bill appears considerably broader than that enacted in Connecticut and previously proposed for the state of California (although prior versions would have required additional paid sick leave [e.g., five or nine days rather than three].) However, Governor Brown has already signaled his support for this bill, suggesting it will be enacted.

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.

This bill faces no opposition and is likely to be signed into law.

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

In 2013, California enacted AB 60 which created new Vehicle Code section 12801.9 authorizing 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.

This law would amend the Fair Employment and Housing Act (FEHA, Government Code section 12940 *et seq.*) to prohibit discrimination against an individual because he or she holds or presents a drivers license issued under Vehicle Code section 12801.9, except as specified. This bill would amend Government Code section 12926 with new subdivision (v) to specify that national origin discrimination includes discrimination on the basis of possessing a driver's license issued under Vehicle Code section 12801.9. This bill also prohibits a governmental authority or its agent from discriminating against an individual because he or she holds or presents a specified license.

This bill also makes corresponding amendments to Vehicle Code section 12801.9 to provide that it will be a FEHA violation 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 the employer and the employer's requirement is otherwise permitted by law. This bill specifies that Vehicle Code section 12801.9 shall not be construed to limit or expand an employer's authority to require a person to possess a driver's license.

Similarly, 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.

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.

Proposed new subsection (k) to section 12801.9 provides that a license pursuant to this section shall not be used to consider an individual's citizenship or immigration status, or as a basis for an investigation, arrest, citation or defense.

FEHA Protections for Unpaid Interns and Volunteers (AB 1443)

This bill amends the FEHA 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.

This bill unanimously passed the Legislature and is likely to be enacted into law.

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 FEHA to prohibit "abusive conduct" unrelated to an already protected criterion.

This bill appears largely unopposed and is likely to be enacted.

Sexual Harassment Training for Farm Labor Contractors (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 Commission 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 the above-mentioned criteria exists.

This bill 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 received sexual harassment prevention training. 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. The sexual harassment training requirements are very similar to the currently-required AB 1825 training for private employers, including that the FLC maintain these harassment training records 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.

Arbitration Agreements Targeted (AB 2617)

Employers often utilize arbitration agreements regarding employment disputes for various reasons, including to more expeditiously resolving 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 waive certain rights under the Ralph Civil Rights Act or the Bane Civil Rights Act, including pursuing a civil action or contacting state agencies such as the Department of Fair Employment and Housing. This bill would also prohibit businesses from refusing to contract with individuals who refused to waive such legal rights. 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.

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.

“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. Citing a concern about protecting workers in the “subcontracted economy,” 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 workers supplied by that labor contractor for: (1) the payment of wages; and (2) the failure to secure valid workers compensation coverage. This bill would further prohibit a client employer from shifting to the labor contractor any legal duties or liabilities to provide a safe workplace with respect to workers supplied by the labor contractor. Despite this shared responsibility, a worker or their representative could not file a civil action against the client employer until after providing thirty days notice of violations of any shared obligations. This bill would prohibit the client employer or the labor contractor from taking any adverse action against any worker for providing notification of violations or filing a civil action.

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: (a) a business entity 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; (b) a business entity with five or fewer workers supplied by a labor contractor or labor contractors to the client employer at any given time; or (c) the state or any political subdivision of the state of California.

Proposed subsection (p) also delineates specific instances where liability may not be imposed against certain client employers, including certain motor carriers, non-motor carriers (as specified), cable operators and motor clubs (as specified). Section 2810.3 also 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.

“Labor” would have the same definition as under Labor Code section 200, meaning any labor, work or service rendered or performed under contract, subcontract, partnership, station plan or other agreement if the labor to be paid for is performed personally by the person demanding payment. However, “worker” would apply only to non-exempt employees.

"Labor contractor" means an individual or entity those 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 does not include, however, (a) a bona fide non-profit community-based organization that provides services to workers; (b) a bona-fide labor organization or apprenticeship program; (c) a motion picture payroll services company; or (d) a third-party who is a party to an employee leasing arrangement, as defined and with certain exceptions.

"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.

This complicated bill faces stiff opposition and it is unclear whether it will be enacted.

Prevailing Wage Determinations (SB 266)

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.

This was originally introduced as "urgency" legislation, meaning in would have applied retroactively, but this language was recently omitted meaning it would now take effect on January 1, 2015.

Prohibition against Employers Advertising that Unemployed Applicants "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, beginning July 1, 2015, 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 did not face particularly strong opposition, but Governor Brown vetoed a similar bill (AB 1450) in 2012.

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."

Notably also, in response to employer-provided concerns that led to the vetoing of a similar bill last year (SB 516), this definition states "'[f]foreign 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 in 2013.

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 sections 6319, 6320 and 6625 to specify that reconsideration of a decision by the Occupational Safety and Health Appeals Board (OSHAB) involving a serious violation, a repeat serious violation, or a willful serious violation unless the employer demonstrates by a preponderance of the evidence that a stay or suspension will not adversely affect employee health or safety. The employer must also request such a stay or suspension of abatement by filing a written, verified petition with supporting declarations within 10 days after the issuance of the order or decision.

This bill is similar, but not identical, to AB 1165, which Governor Brown vetoed in 2013.

Retaliation Protections for Employees Enrolled in the Medi-Cal Program (AB 1792)

Citing the impact poorly-paid employees have on the state budget, this bill would, until January 1, 2020, require the Employment Development Department (EDD) to collaborate with other specified state agencies to publish a list of employers with employees that are enrolled in the Medi-Cal program. The EDD's report will also determine and publish the total average cost of state and federally-funded benefits provided to each identified employer's employees. This bill would define "employer" to mean an organization "that employ[s] 100 or more beneficiaries of the Medi-Cal program.

This bill would also add Government Code section 13084 prohibiting employers from: (1) discharging, discriminating, or retaliating against an employee who enrolls in Medi-Cal; (2) refusing to hire a beneficiary of Medi-Cal; or (3) disclosing to any person that an employee receives or is applying for Medi-Cal, unless authorized by state or federal law.

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.

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 Employment Development Department (EDD) determinations. 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.

This bill unanimously passed the Legislature and is likely to be enacted.

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. Certain state-operated hospitals would be exempt from these requirements.

MUNICIPAL DEVELOPMENTS

San Diego Business Community Pursuing Referendum of and Stay upon Ordinance to Increase Minimum Wage and Require Paid Sick Leave

Status Update

As discussed in the August newsletter, the San Diego City Council recently overrode Mayor Kevin Faulconer's veto of the ordinance increasing the minimum wage and requiring paid sick leave for employees working within the City of San Diego (adding Article 9, Division 1, sections 39.0101 through 39.0115, to Chapter 3 of the San Diego Municipal Code). . The San Diego business community is presently seeking to obtain by September 17, 2014 the 34,000 signatures needed to require a city-wide referendum on this ordinance. If obtained, the referendum would occur in June 2016, effectively staying this ordinance until at least that point. The San Diego business community has recently prevailed in two referendum efforts suggesting it has a decent chance of at least obtaining the signatures needed to hold a referendum and stay implementation of this ordinance.

In the interim, however, and since this Ordinance will take effect in less than four months unless stayed, an overview of its key provisions are provided below.

The Ordinance's Key Provisions Summarized

If enacted, the ordinance would apply to employees who perform at least two hours of work within the City of San Diego during one or more calendar weeks of the year, and qualify for payment of a minimum wage under California law. It would not apply to an employee who is: authorized by the Labor Code to be paid less than minimum wage; employed under a publicly subsidized summer or short-term youth employment program; or a student employee, or camp or program counselor of an organized camp as defined in the Labor Code. It also would not apply to independent contractors.

The City of San Diego's geographic limits, by zip code, may be found on the City's website at the City Council button.

Proposed Minimum wage: The new minimum wage would apply for each hour worked within the City of San Diego and the hourly rate will be as follows (except if the California or federal minimum wage is greater, then that greater wage will be matched):

- Starting January 1, 2015: $9.75;
- Starting January 1, 2016: $10.50;
- Starting January 1, 2017: $11.50; and
- Starting January 1, 2019, and each year after: an increase by the amount corresponding to the prior year's increase in the cost of living (per Consumer Price Index).

***Proposed Earned Sick Leave*:** Employees would accrue one hour of sick leave for every thirty hours worked within the City of San Diego, but employers would not be not required to provide more than forty hours in a benefit year, defined as a consecutive twelve-month period as determined by the employer (except to allow accrual of sick leave and carry-over of unused leave to the following year), or in less than one-hour increments for a fraction of an hour worked. Notably, while the contemplated state sick leave law would permit employers to cap sick leave usage at twenty-four hours and sick leave accrual at forty-eight hours, the San Diego Ordinance would require employers to permit forty hours usage and does not appear to allow employers to cap sick leave accruals. Earned sick leave must be compensated at the same hourly rate or other measure of compensation as the employee earns from employment. Employers who provide paid sick leave, vacation or personal time-off that meets the requirements of this section are not required to provide additional sick leave.

Earned sick leave would begin to accrue at the start of employment, or on April 1, 2015, whichever is later. Employees would be entitled to use sick leave on the 90th day after the start of employment, or on July 1, 2015, whichever is later. Employees not covered by overtime law are assumed to work forty hours each work week, unless their regular workweek is less, and then it accrues based upon that regular work week. Employers may set a minimum increment for the use of sick leave not to exceed two hours.

Earned sick leave may be used:

- if the employee is physically or mentally unable to perform their duties;
- to seek diagnosis or treatment for a medical condition;
- for other medical reasons such as pregnancy or a physical exam;

- to provide care to a family member [child, spouse (including domestic partner), parent, grandparent, grandchild, sibling, or spouse's child or parent] with a medical condition, or needing diagnosis or treatment for a medical condition;

- for time away from work necessary due to domestic violence, sexual assault or stalking, including for medical attention, counseling, relocation or legal services; or

- due to a closure of the workplace or child's school based on a public health emergency as declared by a public official.

Employers may require reasonable notice of the need to use sick leave, meaning as soon as practicable if the leave is not foreseeable, and advance notice not to exceed seven days where foreseeable. For an absence exceeding three days, employers may require documentation signed by a licensed health care provider that the amount of leave is needed, but not specifying the nature of the medical condition.

Other requirements: The City of San Diego will provide employers with notices to post in the workplace regarding the earned sick leave and minimum wage ordinance by April 1, 2015, and in subsequent years. Employers must also provide at time of hire or by April 1, 2015 (whichever is later), written (or accessible electronic) notice of the employer's name, address and phone number and the requirements of the ordinance in English, and in the employee's primary language if spoken by at least 5% of the workforce at the employee's job site and translated into ballot materials by the San Diego County Registrar of Voters.

Records documenting employee wages, and the accrual and use of sick leave, must be retained for three years.

It will be unlawful for any employer to retaliate against an employee for exercising any right provided under the ordinance. Any employee who reasonably and in good faith reports a violation of the ordinance to the employer, or a governmental agency that enforces wage and hour law applicable to the employer, is protected under the ordinance.

The City Council will designate an Enforcement Office to enforce the ordinance and to receive and adjudicate complaints. The City or any person claiming harm from a violation of the ordinance may bring an action in court against the employer and seek all remedies available, including but not limited to, back pay, liquidated damages of double back pay, (unspecified) equitable damages for wrongfully denied sick leave, reinstatement, injunctive relief, and reasonable attorneys' fees and costs to any prevailing plaintiff (including the City). A complaint to the Enforcement Office is not a prerequisite to bringing a private action.

Employers who violate the ordinance shall be subject to a civil penalty of $1,000 per violation, except that failure to comply with notice and posting requirements is subject to

a civil penalty of $100 for each employee not given proper notice, up to a maximum of $2,000.

For additional details, please see the following link: http://dockets.sandiego.gov/sirepub/cache/2/ctv5vdqma5pq4hohrijjv0hs/7020620801201401425052.PDF

San Francisco's Commuter Benefits Program takes Effect September 30th

As a reminder, pursuant to the Bay Area Commuter Benefits Program (Air District Regulation 14, Rule 1), San Francisco Bay Area employers with 50 or more full-time employees (as defined) within the Bay Area Quality Management District must register and offer commuter benefits to their employees by September 30, 2014. Under this program, employers must offer one of four Commuter Benefit options, as follows:

Option 1: Allow employees to exclude their transit or vanpool costs from taxable income, to the maximum amount, as allowed by federal law (currently $130 per month);

Option 2: Employer-provided transit subsidy (or transit pass) or vanpool subsidy up to $75 per month;

Option 3: Employer-provided free or low cost bus, shuttle or vanpool service operated by or for the employer; or

Option 4: An employer-provided commuter benefit that is as effective in reducing single occupant vehicles as Options 1-3.

Additional information about the program, the options, how to register and what notices are required, are available at the Commuter Benefits Program website: https://commuterbenefits.511.org/. An "Employer Guide" is also available at: https://commuterbenefits.511.org/docs/employer_guide.pdf.