



# CALIFORNIA LEGISLATIVE DEVELOPMENTS

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## **WILSON TURNER KOSMO LLP LEGISLATIVE REPORT MAY 2014**

### **LEGISLATIVE RECAP**

Like the weather, California's legislative session is heating up as we approach the May 30<sup>th</sup> deadline for bills to pass their chamber of origin, and a number of key initial committee votes have occurred providing further clarity into which bills will likely proceed. Unfortunately, but not altogether unexpectedly, bills to provide increased flexibility under California's rigid alternative workweek schedule process (AB 2448) or to provide a "cure" period before facing a PAGA representative action for minor wage statement discrepancies (AB 2079) failed along party-line votes at the committee stage.

In contrast, a number of bills that would expand current laws or provide additional remedies continue to proceed or are scheduled for upcoming votes, including the following:

- AB 1522 which would require all employers provide up to three days of paid sick leave annually;
- AB 2030 which would require employers provide paid time off for employees to attend school or day-care related events;
- SB 404 and AB 1443 which would amend FEHA to prohibit discrimination based on "familial status" or against unpaid interns, respectively;
- AB 2053 which would require 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;
- SB 935 which would raise California's minimum wage beyond the just-enacted raises in AB 10, to \$13.00 hourly by 2017;
- AB 2416 which would allow employees to file liens against an employer's real or personal property in wage disputes;
- AB 2688 which would provide a partial affirmative defense to employers who rely upon DLSE opinion letters;
- AB 2271 which would preclude employers from advertising in a manner suggesting that unemployed applicants need not apply; and
- AB 2604 which would increase penalties in the workers' compensation context.

Listed below, largely by subject matter, are the bills that may affect private sector employers, that we are currently tracking.

## **PENDING CALIFORNIA BILLS**

### **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. This bill would apply to all employers regardless of size, including public employers, the state, and municipalities.

Employees who work in California for seven 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.

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 at least the same rate, 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 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 90 days of an employee engaging in a protected legal activity (as defined).

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, the Attorney General, or an employee would be able to file a civil action in court against the employer or any person violating this article. A prevailing employee 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.

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 (which the Labor Commissioner will create) in a conspicuous place notifying employees of these paid sick leave rights. 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 has passed the Assembly's Labor and Employment and Judiciary Committees, but no hearing has been scheduled in the Appropriations Committee. Notably, a recent fiscal report suggested this bill would result in substantial ongoing costs to the Department of Industrial Relations, and would impose significant costs to the state and local governments through paid sick leave accruals for in-home supportive services employees.

### **Bill Proposing Individual Alternative Workweek Schedules Dies in Committee (AB 2448)**

While California authorizes so-called "alternative workweek schedules," whereby non-exempt employees can work up to ten hours daily without receiving overtime (*see* Labor Code section 510), as a practical matter, it is often difficult to obtain the requisite two-thirds work unit approval for such schedules. Known as the Workplace Flexibility Act of 2014, this bill would have enacted Labor Code section 511.5 to permit an individual non-exempt employee to request an "employee-selected flexible work schedule," providing for workdays up to ten hours within the forty-hour workweek, and would have allowed employers to implement this schedule without the obligation to pay overtime compensation for the ninth and tenth hours in a workday.

In short, this bill would have allowed individual employees to request such schedules without requiring the employers to follow the complicated "work unit approval" pursuant to section 510. In this regard, the bill would essentially have utilized a procedure similar to that used in two other states requiring daily overtime (Alaska and Nevada).

Employers still would have been required to pay overtime at the rate of one-and-a-half times the regular rate for daily hours worked in excess of ten hours, and weekly hours worked in excess of forty hours. Employers also would have been required to pay double-time for work performed in excess of twelve hours per workday, and in excess of eight hours on a fifth, sixth, or seventh day in the workweek.

Either the employee or employer would have been able to discontinue this "employee-selected flexible work schedule" at any time by giving written notice to the other party. Such a request would have been effective the first day of the next pay period, or the fifth day after the notice was given if there were fewer than five days before the start of the next pay period, unless otherwise agreed to by the employer and the employee.

This bill also contained some safeguards to ensure employers did not force employees into working more than eight hours a day. For instance, new section 511.5 would have required that any such schedule be requested by the employee in writing. Employers could have informed employees they were willing to consider such employee requests,

but employers could not have induced a request by promising an employment benefit or threatening an employment detriment.

This bill would not have applied to any employee covered by a collective bargaining agreement or employed by the state, a county, or any political subdivision, since those entities already have the ability to contract for such flexible work schedules.

*Status:* This bill died on a party-line 5-2 vote in the Assembly's Labor and Employment Committee on April 23, 2014.

### **Paid Time Off Proposed for School or Day Care Visits (AB 2030)**

Labor Code section 230.8 presently requires employers with more than 25 employees at the same location to provide up to 40 hours annually (and up to 8 hours in a single month) for specified employees (i.e., parent, guardian, or grandparents with custody) to participate in the child's school or day care activities. Section 230.8 also presently requires an employee to utilize existing vacation, personal leave, or compensatory time off for purposes of such a planned absence, and also authorizes an employee to utilize time off without pay for this purpose, to the extent the employer makes such time off available.

Seemingly, this bill would materially amend this section by requiring employers to provide such time off without loss of pay. In this regard, it would prohibit employers from requiring employees to use existing vacation, personal leave, or compensatory time off for these purposes (unless otherwise provided for by a collective bargaining agreement entered into before January 1, 2015), or from being required to use time off without pay for those purposes. This bill would also eliminate a current restriction prohibiting employees who are accorded vacation during the same period of time in the calendar year as all other permanent, full-time employees from using that accrued vacation benefit at any other time for school or day care activities.

*Status:* This bill is pending in the Assembly's Labor and Employment Committee, but the hearing was cancelled at the author's request and has not yet been rescheduled.

### **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.

*Status:* This bill unanimously passed the Assembly's Labor and Employment and Appropriations Committees.

**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%) 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% 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.

*Status:* This bill has passed the Assembly's Labor and Employment Committee, but is currently in the suspense file in the Appropriations Committee.

**"Familial Status" Protections for FEHA (SB 404)**

Originally introduced in 2013, this bill would include "familial status" to the list of protected categories under the Fair Employment and Housing Act (FEHA) for which the right to seek, obtain, and hold employment cannot be denied. If enacted, "familial status" would be defined as "an individual who provides medical or supervisory care to a family member." "Family member" would also be broadly defined to include a child, parent, spouse, domestic partner, or parent-in-law, as defined in specified statutes. (This bill had originally proposed including siblings, grandparents, and grandchildren in the definition of "family member," but these were omitted in a subsequent amendment.)

The bill's author states this bill is intended to correct a discrepancy (the FEHA presently prohibits "familial status" discrimination in housing but not employment), and to prevent discrimination against employees for family caregiving responsibilities unrelated to work. Similarly, the bill's proponents argue that this proposed amendment is simply an anti-discrimination measure, and does not call for any employee entitlements or any additional leave related to family responsibilities. Opponents argue this bill is overbroad as it applies to nearly every employee, and, because it amends the FEHA (which applies to all employers with more than five employees), it potentially burdens small employers with costly litigation.

This bill is similar to several prior versions that either failed passage (AB 1001 [in 2009] and AB 1999 [in 2012]) or that passed but were vetoed (AB 836 [vetoed by then-Governor Schwarzenegger]).

*Status:* This bill is a holdover from a 2013 bill that passed the Senate and several Assembly committee votes, before stalling. There has not been much activity on this bill in 2014, but given its prior status, it could be revived fairly quickly.

#### **FEHA Protections for Unpaid Interns (AB 1443)**

This bill would amend Government Code section 12940(c), which presently prohibits discrimination against apprentice training programs, to also preclude discriminating against an unpaid intern on the basis of any legally protected classification (e.g., race, religion, disability, etc.). It would also amend subsection (j) to prohibit harassment against an unpaid intern because of a legally protected classification. This bill is in response to several court rulings in other jurisdictions suggesting interns are not employees for purposes of harassment and discrimination laws.

*Status:* This bill appears unopposed and has unanimously passed the Assembly's Labor and Employment, Judiciary, and Appropriations Committees.

#### **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 has passed the Assembly's Labor and Employment and Appropriations Committees and a full floor vote is expected soon.

### **FEHA Settlement Agreements Targeted (SB 1407)**

Citing a concern that employers are routinely forcing employees to waive the FEHA's protections by signing "inconspicuous" releases or as a condition of receiving compensation already owed, this bill would invalidate any release of FEHA claims unless the release is knowing and voluntary (as defined). Specifically, this bill would add section 12964.5 to the Government Code and generally invalidate any waiver or release of FEHA claims unless various enumerated criteria similar to those required for age-related releases are present. For instance, the release would need to be a negotiated agreement, in conspicuous writing, specifically mentioning the FEHA. Additionally, the employee would need to be advised to consult an attorney, the employee would have at least 21 days to review the agreement, and, after executing the agreement, the employee would have 7 days to revoke his or her consent. This section would also define "release of claims" to include requiring individuals to execute a statement that they do not possess any claims or injuries against the employer. It would also specify that a valid waiver would not affect the ability of the Department of Fair Employment and Housing (DFEH) to prosecute any claim or to prevent an individual from filing a charge or participating in a DFEH investigation.

This bill is similar to AB 1715, which was vetoed by then-Governor Schwarzenegger.

**Status:** This bill has passed the Senate's Judiciary Committee and a full floor vote is expected soon.

### **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 rather than litigating them. 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's Judiciary Committee, and a full floor vote is expected in May 2014.

### **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 also prohibit employers from: (1) discharging, discriminating, or retaliating against an employee who enrolls in a public assistance program, or (2) refusing to hire a beneficiary of a public assistance program. Non-compliant employers would be subject to a criminal penalty.

*Status:* This bill has passed the Assembly's Insurance and Labor and Employment Committees, and is pending in the Appropriations Committee.

### **Amendments to "Immigration-Related" Retaliation Protections (AB 2751)**

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 would amend 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.

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. This bill would clarify that the licenses to be affected would be "specific to the business location or locations where the unfair immigration-related practice occurred."

*Status:* This bill passed the Assembly's Labor and Employment Committee and a full floor vote is expected shortly.

## **Farm Labor Contractors Required 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 wide-ranging bill would attempt to address several concerns in the agricultural industry.

First, this bill would attempt to reduce the reported prevalence of inappropriate sexual conduct towards agricultural employees. Thus, this law would prohibit the Labor Commissioner from issuing a FLC license to any person who, within the preceding 3 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 3 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 3 years of his or her employment with the applicant, to have committed sexual harassment of an employee.

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 part of the licensing process cover laws and regulations concerning workplace sexual harassment, and that the annual mandatory 8 hours of educational classes be increased to 12 hours and include sexual harassment training. An applicant for an FLC license would also be required to execute a written statement attesting that their supervisory employees have been trained in the prevention of sexual harassment.

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’s Labor and Industrial Relations Committee, and is scheduled to be heard in the Appropriations Committee on May 19, 2014.

## **Additional Minimum Wage Increases Proposed (SB 935)**

In 2013, the Legislature passed and Governor Brown approved AB 10, increasing California’s hourly minimum wage to \$9.00 on July 1, 2014, and to \$10.00 on January 1, 2016. Perhaps in response to President Obama’s proposal to increase the federal minimum wage to \$10.10 and to minimum wage increases in over a dozen states, this bill would again increase California’s minimum wage in three separate increments over the next three years. Specifically, it would increase 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 be 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. (An earlier version of AB 10 had included proposed annual future adjustments based on CPI, but this was deleted by amendment before final passage.)

These minimum wage increases would apply to all industries, including private and public employment.

*Status:* This bill passed the Senate's Labor and Industrial Relations Committee but was recently placed on the suspense file in the Appropriations Committee, likely due to a report suggesting the bill's significant fiscal impact (e.g., the burden on the Department of Industrial Relations to annually update the minimum wage posters).

### **Senate Passes Bill Clarifying that 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.) This bill would amend section 226.7 to specify that any rest or recovery period 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 bill further provides that this amendment would be declarative of existing law, thus applying retroactively.

*Status:* This bill passed the Senate by a fairly wide margin, and is now pending in the Assembly, but has not been assigned to a committee.

### **Waiting Time Penalties Proposed for Final Wage Violations under CBA (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 is pending in the Senate, but has not been assigned to a committee.

### **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's Labor and Employment Committee and a full 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's Labor and Employment and Judiciary Committees, and is pending in the Appropriations Committee.

### **Bill Proposing Cure Period for Wage Statement Violations under PAGA Fails Passage (AB 2079)**

California's Labor Code Private Attorneys General Act of 2004 (PAGA, codified at Labor Code section 2699 *et seq.*) authorizes aggrieved employees to file civil actions seeking the recovery of a civil penalty for Labor Code violations. PAGA also provides that for certain enumerated Labor Code provisions, the employer is entitled to a right to cure the violation before an action may be brought by an employee. This bill would have amended PAGA (specifically Labor Code section 2699.5) to allow an employer to cure a violation of the wage statement law (Labor Code section 226(a)) before a PAGA action could be brought. This bill was intended to address situations where employees were

filing PAGA representative actions for very minor deviations in the employer's name on a wage statement that did not confuse the employee.

**Status:** This bill failed passage on a party-line vote in the Assembly's Labor and Employment Committee.

### **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 Prevention Act, this bill would enact a new Chapter in the Labor Code (section 3000 *et seq.*) authorizing an employee to record and enforce a wage lien upon real and personal property of an employer or a property owner (as specified) for wages, other compensation, and related penalties owed the employee. This bill would also prescribe requirements relating to the recording and enforcement of the wage lien, as well as its cancellation and removal. Proponents argue this bill simply ensures employees have an effective mechanism to collect future wage judgments, but opponents argue that, as drafted, the bill's provision for a lien would potentially freeze assets prior to a judgment even being awarded.

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

**Status:** Despite considerable opposition, this bill passed the Assembly's Labor and Employment and Judiciary Committees on party-line votes, and is scheduled to be heard in the Appropriations Committee on May 14, 2014.

### **Partial Affirmative Defense Proposed for Relying Upon DLSE Guidance (AB 2688)**

The Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations (DIR) is generally charged with enforcing employment statutes and regulations in either administrative actions or through litigation. An employer who violates employment statutes or regulations may face administrative sanctions, civil fines, civil penalties, and criminal penalties. Some common employer laments are that many of California's Labor Code provisions are not clearly drafted, and the controlling interpretation of these regulations may change from administration to administration. This bill responds to several of these concerns by proposing new Labor Code section 98.73, which would, until 2019, provide a partial affirmative defense to employers who, in good faith, relied upon the DLSE's guidance.

Under this section, employers who requested, obtained, and complied with an opinion letter from the DLSE would not be liable for costs or subject to punishment for a

violation of an employment statute or regulation if they demonstrate they were acting in good faith when the violation occurred. To establish this good faith defense, the employer would need to prove that it: (1) previously sought an opinion letter or enforcement policy from the DLSE; (2) relied upon and conformed to the applicable opinion letter or enforcement policy published by the DLSE; and (3) provided true and correct information to the DLSE in seeking the opinion letter or enforcement policy. This partial affirmative defense would apply even if after the alleged violation or omission occurred, the opinion letter or enforcement policy relied upon had been modified, rescinded, or deemed invalid, but this defense would not apply to violations occurring after such a nullification.

An employer satisfying these elements would be immune from certain civil and criminal penalties and costs, but would still be required to make restitution for lost wages to the employee. An employer asserting such a defense would also be required to post an undertaking with the reviewing court or administrative body in an amount equal to the reasonable estimate of alleged unpaid wages resulting from the employer's reliance upon the DLSE's advice.

If enacted, this defense would apply to all actions and proceedings that commence on or after January 1, 2015, and the bill would expire by its own terms on January 1, 2019.

*Status:* This bill passed the Assembly's Judiciary Committee, and is pending in the Assembly's Labor and Employment Committee. It has recently undergone significant amendment and further amendments are contemplated before the next Committee hearing.

#### **Employer Recovery of Attorneys' Fees and Costs in Wage Statement Litigation (AB 2095)**

Labor Code section 226 requires employers to provide itemized wage statements containing statutorily enumerated information, and, if an employer fails to do so, authorizes employees to file civil actions and to recover damages or penalties, as well as attorneys' fees and costs. Section 226 presently does not contain any language authorizing prevailing employers to recover their attorneys' fees or costs, even in bad faith actions. This bill would amend section 226(h) and entitle prevailing employers to recover their reasonable attorneys' fees and costs if the court determines the action was brought in bad faith. This bill is intended to curb lawsuits by employees involving very minor discrepancies on a wage statement, but no actual damages or confusion to an employee (e.g., slight deviation in employer name listed).

*Status:* This bill passed the Assembly's Labor and Employment Committee, but failed passage in the Judiciary Committee.

### **Additional Penalties for Employers who Frustrate Labor Commissioner Proceedings (SB 919)**

This bill proposes certain procedural changes regarding Labor Commissioner investigations to dissuade employers from potentially not cooperating. For instance, whereas Labor Code section 98(a)(3) previously required employers who were aware of a Labor Commissioner claim to notify the Commissioner of any address change with 10 days, this bill would require employers who fail to do so to pay treble the costs incurred by the party attempting to serve the employer at the new address. Secondly, while section 98(f) had previously precluded a default from being entered against an employer, this bill would provide the Labor Commissioner the discretion to enter a default against an employer who has willfully evaded service of process if certain enumerated factors are present.

*Status:* This bill has been assigned to the Rules Committee, but no hearing is scheduled and this bill may have stalled.

### **Prohibition Against Employers Advertising that “Unemployed Need Not Apply” (AB 2271)**

This bill would limit 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 (a) publishing advertisements suggesting an individual’s current employment is a job requirement; or (b) 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 obtaining information regarding an individual’s employment, including recent relevant experience, or from having knowledge of a person’s “employment status,” or from inquiring about the reasons for an individual’s unemployment, or 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 prohibit 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's Labor and Employment Committee, and is pending in the Appropriations Committee.

### **Senate Unanimously Passes Bill Regulating Foreign Labor Contractors (SB 477)**

To address human trafficking concerns, the California Senate recently unanimously passed this bill to expand and strengthen the regulations of "foreign labor contractors" who recruit foreign workers to relocate to California. Notably, "foreign labor contracting activity" is 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' does 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, would 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 \$75,000 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.

*Status:* This bill has unanimously passed the Senate and is currently pending in the Assembly's Labor and Employment Committee, but no hearing has been scheduled.

### **Bill Regarding Disclosure of Criminal Convictions to Public Employers Fails Passage (AB 2535)**

In 2013, California enacted a new provision (Labor Code section 432.9) to take effect on July 1, 2014, limiting a public employer's ability to inquire about criminal convictions until after it determines an applicant meets the minimum employment qualifications for the position. This bill would further amend section 432.9 to require a public entity, after determining the applicant meets the minimum employment requirements, to have the applicant make a written disclosure as to whether the applicant has been convicted of a misdemeanor or a felony. In other words, rather than simply allowing the public employer to request such information, this bill would compel the public employer to do so.

**Status:** This bill unanimously failed passage in the Assembly's Judiciary Committee.

### **Assembly Unanimously Passes Amendments Regarding Cal-WARN Notices (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 is now pending in the Senate, where passage seems likely.

### **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 320.3 to the Unemployment Insurance Code to preclude unemployed individuals from being deemed ineligible for a week in which they commenced a training or education program under specified conditions. Specifically, the individual will need to have notified the Employment Development Department (EDD), who would be permitted to investigate

this program, and to have made certain certifications on the continued claim form (e.g., he or she was able and willing to work at the same time he or she commenced the training program).

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 is pending in the Senate's Labor and Industrial Relations Committee.

### **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 expand 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 require a California court to report convictions of those state laws to the EDD.

*Status:* This bill unanimously passed the Assembly and is pending in the Senate where passage seems likely.

### **Expanded Deadlines to Appeal EDD Determinations (SB 1314)**

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

*Status:* This bill unanimously passed the Senate's Labor and Industrial Relations Committee and is scheduled to be heard in the Appropriations Committee on May 12, 2014.

### **Changes Proposed for an Employer's Quarterly Unemployment Insurance Contributions (AB 2191)**

This bill would slightly amend the timing of the requisite employer contributions to California's Unemployment Insurance Fund, and also lessen the amount of the penalty if an employer paid less than the requisite amount in a particular quarter. Specifically, this bill would amend Unemployment Insurance Code section 1110 to authorize employers, with certain exceptions, to pay the quarterly required employer contributions in an amount that is at least 25% of the estimated total annual contribution amount required. It would also require, upon annual reconciliation, that if an employer paid in a quarter less than the 25% of the actual annual employer contribution amount required, the 10% penalty would apply only to the difference between the 25% and what was actually paid. This bill is intended to provide employers the same flexibility as businesses and individuals who pay estimated income taxes in equal quarterly installments, and to avoid requiring employers to pay a disproportionate amount in the first fiscal quarter.

*Status:* This bill is pending in the Assembly's Insurance Committee, but the hearing was recently cancelled by the bill's author.

### **EDD to Conduct Annual Reviews to Prevent Identity Theft (AB 1663)**

This bill would require the Employment Development Department (EDD) to annually review the information in its unemployment insurance base wage file to identify instances in which multiple names are associated with a single social security number. Under proposed new section 322.5 to the Unemployment Insurance Code, whenever the EDD discovers 10 or more names associated with a single social security number, it would be required to notify the Department of Justice about this incidence of potential identity theft.

*Status:* This bill failed passage in the Assembly's Insurance Committee.

### **Changed Rules Concerning "Tips" for Employment Tax Purposes (AB 2080)**

California and federal law require employers to make specified payments and withholdings from wages paid for employment to the EDD, and employers must also file reports of wages with the EDD. This bill would, for taxable years beginning on or after January 1, 2015, exclude tips (as defined) from gross income for the purposes of the Personal Income Tax Law. It would also exclude tips from the definition of wages paid for employment for the purposes of income tax withholding, unemployment insurance, and the employment training tax.

*Status:* This bill is pending in the Assembly's Revenue and Taxation Committee, but appears to have been placed in the suspense file.

### **“Client Employers” to Share Legal Responsibility 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 all legal responsibility and liability for certain obligations.

For purposes of this bill, “client employer” would be defined as an individual or entity that obtains or is provided workers to perform labor or services within the usual course of business of the individual or entity from a labor contractor. However, “worker” would apply only to non-exempt employees. Such client employers would share with the labor contractor all legal responsibility and liability for the payment of wages, as well as any failure to report and pay all required employer contributions, and any failure to obtain valid workers’ compensation coverage.

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 required to verify compliance with state laws.

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.

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

### **Increased Penalties for Delayed Workers’ Compensation Penalties (AB 2604)**

California’s Workers’ Compensation laws presently provide that when required payment of an award has been unreasonably delayed or refused, the Workers’ Compensation Appeals Board may order this award to be increased up to 25% or \$10,000, whichever is less. This bill would amend Labor Code section 5814 to provide that the Appeals Board may, in such circumstances, order that the award be increased up to the greater (rather than the lesser) of 25% or \$10,000. Section 5814 would also enumerate several factors for the Board to consider when deciding a penalty amount, including the amount of the original award, the reason for and length of the delay, and whether the employer has previously violated this section.

*Status:* This bill is pending in the Assembly’s Judiciary Committee, but the hearing was cancelled by the bill’s author.

### **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's Insurance Committee and is pending in the Appropriations Committee.

### **Job Displacement Benefits in Workers' Compensation Cases (AB 1749)**

In 2012, California enacted Labor Code section 4658.7 which amended the Workers' Compensation system to provide supplemental job displacement benefits in the form of a nontransferable voucher for specified expenses (e.g., education-related retraining or skill enhancement) for injured workers with a permanent partial disability. This bill would amend section 4658.7 to require the Workers' Compensator Director to report to the Legislature's Insurance Committee before January 1, 2016, regarding the extent to which employees who received these benefits obtained employment related to that education or training.

*Status:* This bill is pending in the Assembly's Insurance Committee, but no hearing has been scheduled.

### **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:* The Assembly's Labor and Employment Committee approved this bill and it is pending in the Appropriations Committee, but no hearing is scheduled.

### **“Child Labor Protection Act” Proposed (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 is pending in the Senate, where passage seems likely.

### **Wage and Penalty Assessments for Prevailing Wage Violations (AB 1741)**

California has enacted prevailing wage laws for certain industries and contracts, and the Labor Commissioner is empowered to issue a civil wage and penalty assessment to a contractor or subcontractor, or both, if the Labor Commissioner determines they have violated these laws regulating public work contracts or prevailing wage laws. Labor Code section 1742.1 presently requires these contractors or subcontractors to deposit the full amount of the assessment or notice to the Department of Industrial Relations (DIR) within 60 days, or face liquidated damages. This bill would amend section 1742.1 to specify that a contractor, subcontractor, or surety may deposit this assessment with the DIR in the form of cash or a bond.

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

### **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.

*Status:* This bill overwhelmingly passed the Senate and is pending in the Assembly, but has not been assigned to a committee.

### **Electronic Registration for Car Washes (AB 2063)**

California's Labor Code regulates the employment practices of car washes, including providing specific recordkeeping requirements that employers of car washers must implement regarding hours, wages, and working conditions. It also requires employers of car washers to post a surety bond, to register with the Labor Commissioner, and to pay a specified registration fee, as well as an annual fee, or be subject to a specified civil fine.

This bill would amend a number of these Labor Code provisions (e.g., sections 2054 through 2057, and section 2016) to enable these employers to submit their application for registration, fees, and supporting documentation on-line and to require the Labor Commissioner to develop a form and procedure for on-line registration.

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

### **Workplace Violence Prevention Plans for Hospitals (SB 1299)**

The California Occupational Safety and Health Act of 1973 imposes 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, 2015, 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.

***Status:*** This bill passed the Senate's Labor and Industrial Relations Committee and is scheduled to be heard in the Appropriations Committee on May 12, 2014.