2023 CALIFORNIA LEGISLATIVE SUMMARY

May 8, 2023

While "April showers bring May flowers," in Sacramento "April votes bring May clarity" regarding the 2023 Legislative session. Specifically, the expiration of the key April deadline for substantive committee votes culled out many pending bills while also indicating which bills have the initial support to move forward. As expected, a significant number of employment bills overcame this initial hurdle, and a number of bills experienced significant amendments in doing so.

We have identified the "Top Ten" proposed employment law changes that – if enacted– would have the most significant impact on California employers. These bills would:

1. Increase **paid sick leave** from 24 hours/3 days to 56 hours/7 days (SB 616)
2. Mandate five days of **leave for reproductive loss** (SB 848)
3. Prohibit discrimination on the basis **of family caregiver status** (AB 524)
4. Repeal and replace California's **Fair Chance Act** with a sweeping set of new rules limiting employer consideration of conviction history for applicants and employees (SB 809)
5. Require creation, implementation, and training re: **workplace violence protection plans** (SB 553)
6. Expand the law against **non-compete agreements** (AB 747, SB 699 and AB 1076)
7. Significantly expand California's **Worker Adjustment and Retraining Act** (CalWARN) (AB 1356)
8. Require employers to provide notices to remote employees about **disability accommodation rights** before mandating return to in-person work (SB 731)
9. Expand **rehire requirements for displaced workers** beyond COVID-19 context (SB 723)
10. Impose new restrictions on use of **artificial intelligence tools in employment decision-making** (AB 331)

While these and a number of other bills moved forward, a number of other bills did not survive key votes, although some may resurface in 2024 since it is a two-year legislative cycle. Bills that did not survive include a paid sick leave increase paired with statewide preemption provisions (SB 881), amended PAGA notice requirements (SB 330) and individualized alternative workweek scheduling (SB 703).

Looking ahead, there will be considerable legislative activity in May in light of the June 2nd deadline for bills to be passed in their house of origin. We will update these developments in upcoming newsletters.

In the interim, this newsletter outlines our "Top 10" pending issues, describes other pending employment bills, organized by subject matter, and briefly outlines the issues expected to be included on the 2024 ballot.

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TOP TEN PROPOSED EMPLOYMENT LAW CHANGES

1. Paid Sick Leave Increases (SB 616)

This bill would amend California's Paid Sick Leave law (Labor Code section 245 *et seq.*) to (1) increase the number of paid sick leave days by amending Labor Code section 246, effective January 1, 2024; (2) increase protections for workers covered by collective bargaining agreements; and (3) require unpaid sick leave for railroad employees.

First, citing lessons learned from the recent COVID-19 pandemic, this bill would increase the amount of required sick leave from 24 hours or 3 days up to 56 hours or seven days:

- SB 616 would increase the employer's authorized limitation to seven days or 56 hours and would change the definition of "full amount of leave" to mean seven days or 56 hours. (It would also make corresponding changes to the sick leave accrual rate for individual providers of in-home support services and waiver personal care services).
- SB 616 would require that employees have no less than 56 hours or 7 days of accrued sick time by the 280th calendar day of employment, or in each calendar year or in each 12-month period.
- While employers are not currently required to provide additional paid sick days if they have a paid leave or paid time off policy (usable for the same purposes as paid sick leave) if the employee may earn up to 24 hours or three days off within nine months of employment, SB 616 would increase these amounts to 56 hours or seven days of sick leave or paid time off.
- Further, while employers may presently limit an employee's total accrual of paid sick leave to 48 hours or six days, provided an employee's right to accrue and use paid sick leave is not otherwise limited, SB 616 would increase these accrual thresholds for paid sick leave to 112 hours or 14 days.

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

Third, in response to a lawsuit in which the Ninth Circuit concluded that California's Paid Sick Leave Law is preempted by federal law with respect to railroad employees, the bill would exclude railroad carriers and their employees (as defined by federal law, 45 U.S.C. § 351(a)) from the general provisions of the Paid Sick Leave Law and would instead require railroad employers to allow their railroad employees to take at least seven days of *unpaid* sick leave annually. This would not supersede any labor agreement that exists as of January 1, 2024 if the agreement provides for any number of days of paid sick leave annually, at least seven days of unpaid sick leave annually, and the use of paid or unpaid sick leave does not result in any points, demerits, or other disciplinary citations under any attendance policy.

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

Status: Passed the Senate Labor Committee on a party-line vote and is pending in the Senate Appropriations Committee.

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

In 2022, California enacted a new law (AB 1949, codified at Government Code section 12945.7) allowing employees to take up to five days of bereavement upon the death of a family member. This bill would

incorporate much of the same framework in a new Government Code section 12945.6 allowing employees to take "reproductive loss leave." Employers with five or more employees would be required to allow an employee who has been employed for 30 or more days to take up to five days leave following a miscarriage, unsuccessful assisted reproduction, failed adoption, failed surrogacy, diagnosis negatively impacting pregnancy, diagnosis negative impacting fertility or childbirth.

New Government Code section 12945.7 would include detailed definitions for "assisted reproduction," "diagnosis negatively impacting fertility," "diagnosis negatively impacting pregnancy," "failed adoption," "failed surrogacy," "miscarriage" and "unsuccessful assisted reproduction." Notably, these definitions specify that they apply to affected spouses or domestic partners or persons who would have been a parent to a child who would have been adopted or born as a result of the pregnancy or surrogacy.

As mentioned, this time off is largely modeled upon the recently enacted bereavement leave statute. Accordingly, this time off would be unpaid (unless the employer's policies provide paid leave or the employee chooses to use vacation, personal leave, accrued and available sick leave or compensatory time off), need not be consecutive, must be completed within three months of the qualifying event and would be considered separate and distinct from any other leaves authorized by the Government Code (e.g., CFRA, bereavement leave, pregnancy disability leave, etc.). However, unlike the bereavement leave statute, this bill does not presently appear to give employers authority to request documentation of the situation creating the need for leave. Employers would be prohibited from retaliating against employees who have taken reproductive loss leave, or provided information or testimony regarding their own or another person's reproductive loss leave in an enforcement action regarding these rights, and would be required to maintain the confidentiality of employees requesting reproductive loss leave.

Status: Overwhelmingly passed the Senate Labor and Judiciary Committees and is pending in the Senate Appropriations Committee.

3. <u>Prohibition of Discrimination on the Basis of Family Caregiver Status (AB 524)</u>

This bill would amend the Fair Employment and Housing Act (FEHA) to preclude discrimination or harassment based upon an employee's "family caregiver status." "Family caregiver status" is defined to mean "a person who contributes to the care of one or more family members." In turn, "family member" would mean spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or any other individual related by blood or whose association with the employee is the equivalent of a family relationship. (The bill does not define what it would mean to "contribute to the care of" one of these family members.) The bill would make it an unlawful employment practice to discriminate against or harass an employee on the basis of family caregiver status.

This bill is a narrower version of AB 2182, which stalled in 2022 after passing two committee votes. Unlike AB 2182, this version does not impose any explicit obligation on employers to accommodate an employee's family caregiver responsibilities, although it remains to be seen whether, if this bill is enacted, an employer's failure to grant scheduling requests or remote work requests for employees with family caregiver status might be interpreted to be prohibited discrimination in the terms, conditions, or privileges of employment.

Status: Passed the Assembly Judiciary and Labor Committees on party-line votes and is pending in the Assembly Appropriations Committee.

4. <u>Fair Chance Act Amendments Regarding Conviction History Information (SB 809)</u>

In 2018, California enacted the Fair Chance Act (AB 1008, codified at Government Code section 12952) enacting new limits upon employer consideration of applicant conviction history and detailing the procedures regarding when and how such information could be obtained and considered. Citing various findings that formerly incarcerated individuals continue to struggle in finding employment, this bill would materially amend the Fair Chance Act. These changes include restructuring its provisions generally (i.e., spreading its provisions over multiple statutory sections versus the current one section), identifying new protections and requirements regarding applicants, enacting analogous protections and requirements for current employees, requiring new posting/record retention and training requirements, and enacting new enforcement provisions. This bill is very detailed and overarching so the reader should consider the bill's text for further details and expect numerous amendments moving forward, but here are some of the key points.

- *Statutory Restructuring*

As mentioned, SB 809 begins by restructuring the current Fair Chance Act, taking most of the provisions in current Government Code section 12952 and spreading and expanding them over a series of new Government Code sections commencing with 12954.2.01. It also provides that current section 12952 will cease to be operative after December 31, 2023 (when SB 809 and its newly renumbered provisions would take effect), although the prior provisions could still continue to be enforced.

- *Procedures Regarding "Applicants"*

SB 809 begins by modifying the protections for "applicants," including initially by specifying that "applicant" includes any individual applying not only for employment, but also transfer or promotion.

While the Fair Chance Act currently enumerates four unlawful employment practices regarding the consideration of conviction history for applicants, SB 809 expands this list to the following eight unlawful employment practices:

- Using any employment advertisement, solicitation or publication that states any limitation or specification regarding conviction history, even if no adverse action is taken (this limitation specifically precludes phrases such as "no felonies," "background check required," or "must have a clean record" but does not apply if the limitation or specification used by the employer is required by law and the employer has no legal discretion to ignore or modify that limitation or specification);
- Including on any application for employment, transfer or promotion, before a conditional offer of employment, a question that directly or indirectly asks the applicant about conviction history;
- Inquiring into, asking about or considering directly or indirectly the applicant's conviction history until after a conditional offer of employment, transfer, or promotion has been made;

- Ending an interview, rejecting an applicant or otherwise terminating the employment, transfer or promotion application process based on conviction history information provided by the applicant or learned from any other source until after a conditional offer of employment, transfer or promotion has been made;
- Requiring self-disclosure of an applicant's conviction history at the time of, or any time after, a conditional offer of employment, transfer or promotion;
- Inquiring into, considering, distributing, disseminating, obtaining or using any arrest or conviction history information from social media, the internet or any source (but this would not restrict employers from requiring or requesting social media to comply with federal or state law or regulations);
- Inquiring into (directly or indirectly), considering, distributing or disseminating information while conducting a conviction history background check that employers cannot presently obtain or consider (e.g., arrests not resulting in convictions, referrals to or participation in pre-trial or post-trial diversion programs, sealed/dismissed/expunged convictions); or
- Interfering with, restraining or denying the exercise of any rights provided under the Fair Chance Act (including as amended by SB 809).

While current section 12952 specifies its limitations do not apply in certain situations (i.e., where federal or state law require inquiry about or consideration of such information), SB 809 would retain but recast this general principle, including tightening its application to "particular convictions" (as defined below) and instilling new notice requirements. Accordingly, new section 12954.4.02 would provide that employers would be permitted to ask about or seek information regarding or take adverse employment action based upon an applicant's "particular conviction" if federal law or regulation or state law prohibit the employer from hiring an applicant who has that particular conviction. "Particular conviction" would mean "a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both expressly based on that specific criminal conduct or category of criminal offenses."

However, if an applicant notifies in writing the otherwise exempt employer within five business days of their being rejected based upon that particular conviction that they are disputing the accuracy of the conviction history report and are obtaining supporting evidence, then the employer must allow the applicant an additional ten business days to provide the additional documents and information that would demonstrate they are eligible for the position.

Lastly, new section 12952.4.02 would specify that employers seeking to claim the federal Work Opportunity Tax Credit or other incentives for hiring individuals with conviction history are not exempt from these new limitations but would outline specific procedures such employers could follow to obtain the conviction history information to qualify for the incentive (e.g., completing IRS form 8850 or DOL form 9061, etc.).

- *Individualized Assessment Process (and Potential Reassessment Process)*

As under current law, employers intending to deny a position of employment, transfer or promotion solely or in part because of the applicant's conviction history must make an "individualized assessment" of

whether the applicant's conviction history has a direct and adverse relationship with the specific job duties, considering all of the following: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and completion of the sentence; and (3) the nature and duties of the job sought. Notably, SB 809 would also now create a rebuttable presumption that there is no such direct and adverse relationship if either of the following apply: (1) the applicant has completed a sentence for the conviction (however, "completion of a sentence" will not include parole, probation, supervised release, and any other form of supervision); or (2) the applicant has obtained a license, certificate, authorization or any other similar credential from a licensing, regulatory or other governmental agency or board that is required for the position sought.

While the Fair Chance Act previously did not require this individualized assessment be in writing, SB 809 would not only require it be in writing but also that the employer provide the written assessment to the applicant along with the notice of preliminary decision rejecting the applicant. It would also require the written assessment to demonstrate that one or more of the specific elements of the nature and gravity of the offense or conduct in the applicant's conviction history has a direct and adverse relationship to one or more specific elements in the nature of the job held or sought.

If the employer makes a preliminary decision that the applicant's conviction history is disqualifying, the employer must notify the applicant in writing of this preliminary decision, providing particular enumerated information regarding the information considered and the employer's reasoning (including the new requirement to provide the written individualized assessment discussed above). Largely as before, an applicant must be allowed at least five business days to respond to the notice before a final decision may be made. However, if the applicant notifies the employer in writing that it disputes the accuracy of the conviction history information relied upon and is obtaining contrary evidence, the applicant must be provided ten additional business day (rather than the current five business days) to respond to the notice. SB 809 would also add that the applicant would have the choice whether to provide any such documentation or information, and that the employer cannot disqualify the applicant for failing to provide any specific type of evidence or documents.

As before, if the applicant provides additional information, the employer must consider this information, but SB 809 would require the employer to conduct a second individualized assessment regarding whether the conviction history has a direct and adverse relationship with the specific job duties that justify denying the applicant the position, taking into account all such documents and information submitted by the applicant. If the employer makes a final decision to deny an application solely or in part upon the applicant's conviction history, the employer must notify the applicant in writing with all of the following information: (1) the employer's reasoning for making the final denial or disqualification; (2) any existing procedure with the employer for the applicant to challenge the decision or request reconsideration; and (3) the right to file a complaint with the DFEH.

- *New Fair Chance Act Protections for "Employees" Relating to Pre-Employment Arrests or Conviction History*

While the Fair Chance Act and current section 12952 had focused on "applicants," SB 809 would add new section 12954.2.05 applicable to "employees." It would preclude employers from taking adverse action

against any employee on the basis of any pre-employment arrest or conviction history unless the employer provides all of the following to the employee:

- Notice of the qualifying arrest or conviction history that is the basis for the adverse action;
- A copy of any arrest or conviction history;
- A written individualized assessment stating the direct and adverse relationship between the employee's arrest or conviction history and specific duties of the job; and
- An explanation of the employee's right to respond to the notice (including the ability to submit information challenging the employer's information) and the deadline by which to respond.

As with applicants (discussed above), the employee would have at least five business days to respond before a final decision is reached, and if the employee responds within that period the employee shall have ten additional business days to respond to the notice with information challenging the accuracy of the employer's information. If the employee submits such information, the employer must conduct a second individualized assessment, and if it makes a final decision to take the adverse action based on the conviction history, it must provide the same information to the employe that it would provide to an applicant following the second individualized assessment. Notably, this new section would provide that is will not be an adverse action for an employer to temporarily suspend, with pay, an employee while the employer is complying with this section's requirements.

- *Posting and Notice Guidelines*

SB 809 would also impose new posting obligations, requiring the employer to post a clear and conspicuous notice regarding this law and Labor Code section 432.7 "at every workplace, jobsite and other location under the employer's control and visited by applicants or employees" and include it in any job posting, solicitation or advertisement seeking applicants for employment. These notices would need to be in English, Spanish and any language spoken by at least 10 percent of the employees at the workplace, jobsite or other location at which it is posted.

Employers would also be required to affirmatively note in all solicitations or advertisements that they will consider qualified applicants with conviction histories consistent with this law and other federal, state and local laws.

Employers intending to conduct conviction background checks for employment purposes would also need to include both of the following in any job posting, solicitation, advertisement or application: (1) a list of specified job duties of the position for which a conviction may have a direct and adverse relationship and potentially result in an adverse action; and (2) a list of all laws and regulations that impose restrictions or prohibitions for employment on the basis of any conviction, if any.

Any materials required by these notice provisions would need to comply with the notice and certification requirements of Civil Code section 1786.16 regarding investigative consumer reports. SB 809 would also amend Civil Code section 1786.16 regarding consumer reports and require the disclosure provided to the "consumer" also include either (1) all of the specific job duties of the position for which a conviction may have a direct and adverse relationship that has the potential to result in an "adverse employment action;"

or (2) all laws and regulations that impose restrictions or prohibitions for employment on the basis of conviction, if any.

- *Record Retention and Inspection Requirements*

SB 809 would also impose record retention and inspection requirements. For instance, employers would be required to retain all records and documents related to an applicant's employment, transfer or promotion application and any written assessments and reassessments for four years following the receipt of an applicant's employment application. Employers would also be required, upon request, to provide access to these records and documents to the DFEH in any administrative enforcement action, or to the applicant.

- *Regulations and Enforcement*

The Civil Rights Department (CRD) will be required to issue rules and regulations regarding when an employer's action constitutes a violation justifying civil penalties under these new rules, including whether the new penalties would be issued on a per policy, per practice or per applicant or employee basis. The civil penalties contemplated would also be in addition to any other penalty or remedy provided by law and would not affect the right of individuals to seek their own recovery. Accordingly, Individuals would also be entitled to pursue an action to recover civil penalties under SB 809, with the penalty amount depending upon the number of employees and whether there have been prior violations. These penalty and enforcement provisions are quite detailed but would allow the penalties to be split between the complainant and the CRD, with the CRD's portion being deposited into a special enforcement fund.

Status: Passed the Senate Judiciary Committee on a party-line vote and is pending in the Senate Appropriations Committee.

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

This bill would take several steps to expand protections against workplace violence. First, the bill would amend the Workplace Violence Safety Act (codified at Code of Civil Procedure section 527.8). The law currently authorizes employers to seek a temporary restraining order and injunction on behalf of employees who suffer unlawful violence or a creditable threat of violence (as defined) that can reasonably be construed to have been carried out or to have been carried out at the workplace. SB 553 would also allow a collective bargaining representative to seek such restraining orders and injunctions, including on behalf of employees who are not represented by the collective bargaining representative if the person serves as a collective bargaining representative for at least one person working for the employer. While presently section 527.8 precludes any court order prohibiting constitutionally protected speech or activities, this bill would also specify that any such order also cannot abridge labor-related protections in the National Labor Relations Act or the California Government Code.

Second, the bill would amend the California Occupational Safety and Health Act's requirement that an employer establish, implement, and maintain an effective injury prevention program (Labor Code section 6401.7) by requiring that every employer also have a workplace violence prevention plan

maintained at all times in all of the employer's facilities. The bill would create Labor Code section 6401.9 to detail the requirements of the workplace violence prevention plan. Notably, this new requirement would apply to any employer with one or more employees and the state and any subdivision of the state. In part, this new section of the Labor Code would effectively extend 2017 workplace violence regulations that currently affect only healthcare settings (8 Cal. Code Regs. § 3342) to *all* employers. This bill goes even further than the existing regulations applicable to healthcare settings – it includes a broad definition of "workplace violence" that encompasses not only the threat or use of physical force against an employee, but *also* conduct that seriously alarms, annoys, or harasses an employee, that serves no legitimate purpose, and that has a high likelihood of resulting in psychological trauma or stress, regardless of whether the employee sustains an injury, including, but not limited to, verbal harassment based at least in part on one or more actual or perceived characteristics identified in the hate crime statute (Section 422.55 of the Penal Code). CalOSHA is currently working on a Draft Multi-Industry Standard for workplace violence prevention. (Workplace Violence Prevention in General Industry - Advisory Meetings (ca.gov)) If it passes, SB 553 – which goes much farther than the draft standard – would seem to replace that rulemaking effort. However, employers should note that even if SB 553 fails, CalOSHA will presumably continue its work on workplace violence prevention regulations.

SB 553 has lengthy and detailed requirements for the workplace violence prevention plan, including a list of twelve elements (many with subparts) that must be included in the plan, including but not limited to procedures for the employer to accept and respond to reports of workplace violence and to prohibit retaliation against employees who make such a report, assessment procedures to identify and evaluate risk factors, procedures to correct workplace violence hazards in a timely manner, and procedures for post incident response and investigation.

Additionally, the bill would require the employer to record information in a violent incident log about every incident, post incident response, and workplace violence injury investigation required to be performed as part of the workplace violence prevention plan. There is a detailed list of the information that must be included in such a log.

The bill would also require the employer to establish and implement a system to review, at least annually and in conjunction with employees and their collective bargaining representatives, if any, the effectiveness of the workplace violence prevention plan. The employer would also be required to correct any "problems" found during the review and to update the workplace violence prevention plan if necessary.

Next, the bill would require the employer to provide effective training to employees that addresses the workplace violence risks that employees may reasonably anticipate to encounter in their jobs. The employer would be required to have an effective procedure for obtaining the active involvement of employees and their collective bargaining representatives, if any, in developing the training materials, participating in training sessions, and reviewing and revising the training program. All employees of the employer would be required to receive the training in person, during work time, at the workplace, and in an atmosphere designed to provide an opportunity for interactive questions and answers with a

person knowledgeable about the workplace violence prevention pan. The bill includes a list of the specific topics that must be included in the training and specifies that employees must receive the training when the workplace violence prevention plan is first established or when an employee is newly hired and at least annually thereafter, and at any time when new equipment or work practices are introduced or a new or previously unrecognized workplace violence hazard has been identified.

The bill would require records of workplace violence hazard identification, evaluation, and correction to be created and maintained in accordance with specified law for various periods of time, and all records must be made available to employees and their collective bargaining representatives upon request for examination and copying.

Finally, employers would not be allowed to prohibit an employee from, or to take punitive or retaliatory action against an employee for, seeking assistance and intervention from local emergency services or law enforcement when a violent incident occurs.

Status: Passed the Senate Labor and Judiciary Committees and is pending in the Senate Appropriations Committee.

6. <u>Expansion of Law Against Non-Compete Agreements (AB 747, SB 699, and AB 1076)</u>

There are three pending bills that would all expand California's law against non-compete agreements in different ways. Existing law (Business and Professions Code sections 16600 to 16607) voids every contract that restrains anyone from engaging in a lawful trade or business, with certain specific exceptions. However, as one of the pending bills makes clear, there are concerns that despite these rules, many California employers continue to have their employees sign noncompete clauses and pursue frivolous noncompete litigation, which has a chilling effect on employee mobility, suppresses wages, and reduces entrepreneurship and innovation. Thus, all three of these bills would specify that it is a violation of law to require employees to enter into void noncompete agreements and would impose various penalties for such violations. Each law would also make different additional changes to the law. While it is unclear which path – if any – the legislature may take to revise the law against noncompete agreements, it appears there is broad interest in doing so.

- **Expansion of Law Against Non-Competes and Additional Limitations on Employment Agreements (AB 747)**

This bill would change California's rules regarding "non-compete" agreements, choice of law in employment agreements, and employee payment for specified work-related training.

First, this bill would expand and strengthen California's existing law against non-compete agreements (Business and Professions Code sections 16600 to 16607) in several ways.

- This bill would narrow the exception for people with an ownership interest in a business. Existing law authorizes a person selling their ownership interest in a business to agree to refrain from carrying on a similar business within a specified geographic area. This bill would modify the

definition of "ownership interest" to require the partnership interest, membership interest, or capital stock to be more than 10% of the total, thus limiting the number of people who fall within the exception.

- The bill would also add section 16608 to the Business and Professions Code, prohibiting employers from entering into a contract or imposing a contract term requiring someone to pay a debt for education-related expenses or employment-related expenses after termination of employment. However, an employer would be able to require an employee to pay for training-related costs if they are incurred pursuant to a union-affiliated apprenticeship program, and an employer may require an employee to pay the cost of maintaining professional licensure required by the state. The bill specifies that it shall not be construed to limit or prohibit any loan repayment assistance program or loan forgiveness program provided by a federal, state, or local governmental agency.
- In addition, the bill would add section 16609 to the Business and Professions Code, prohibiting employers from imposing any penalty, fee, or cost on an employee or independent contractor for terminating the employment relationship, including, but not limited to, replacement hire fee, retraining fee, reimbursement for immigration or visa-related cosets, liquidated damages, lost goodwill or lost profits.
- Existing law voids certain non-compete agreements but does not impose penalties on employers who include such void provisions in contracts. This bill would add section 16610 to the Business and Professions Code to expressly provide that an employer that enters into, attempts to enter into, or seeks to enforce a contract in violation of the law against restraints on trade (including non-compete agreements, contracts requiring payment of a debt, and imposition of costs upon termination of employment) would be liable for actual damages and an additional penalty of $5,000 per employee or prospective employee in a civil action brought by the employee or prospective employee. The employee or prospective employee could also seek injunctive relief and recover attorneys' fees and costs. For purposes of this law, "employee" includes employees and independent contractors. The Attorney General would also be authorized to bring an action enforcing the law.
- Further, this bill would add Section 6090.5.5 to the Business and Professions Code, providing that attorneys may be subject to suspension, disbarment or other discipline if they enter into a contract that requires a debtor to pay for a debt if the debtor's employment or work relationships with the employer is terminated.
- The bill would also add another enforcement mechanism for the rule against contracts requiring employees to pay debts upon termination of employment. Specifically, the bill would add Section 926 to the Labor Code. This new section would authorize the Labor Commissioner to enforce new Business and Professions Code section 16608, including by issuing a citation against an employer collecting civil penalties, and filing a civil action. This new section would also allow a person, including a local government or employee representative, to bring a civil action on behalf of the person or other persons similarly situate to enforce the section.

Second, the law would further limit employers' and employees' ability to enter into an employment contract that is governed by a law other than California law. Existing law (Labor Code section 925)

prohibits an employer from requiring a California employee to agree to a contract that specifies employment claims would be adjudicated outside of California or deprives the employee of the substantive protection of California state law, *unless* the employee is individually represented by counsel in negotiating the terms of the agreement. This bill would amend section 925 to provide that an employee is not considered "individually represented by legal counsel" if the attorney was paid for by, or was selected based upon the suggestion of, the employer.

Status: Passed the Assembly Labor and Employment Committee and the Assembly Judicial Committee on party-line votes and is pending on the Assembly Floor.

- **Expansion of Law Against Non-Compete Agreements (SB 699)**

Like AB 747, this bill would expand California's existing law against non-compete agreements (Business and Professions Code sections 16600 to 16607). However, SB 699 would take a different approach.

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

Second, and like AB 747, this bill would clarify that an employer is prohibited form entering into a contract that presents an employee or prospective employee with any void non-compete agreement and would specify that an employer may not attempt to enforce such a contract (in a new section 16608 to the Business and Professions Code). The bill would specify that if an employer enters into an agreement that the employer knows or reasonably should know is prohibited commits a civil violation, and the Attorney General or employee may bring an action to enforce the section. An employee or prospective employee could bring an action for injunctive relief and for the recovery of actual damages and penalties, along with attorneys' fees and costs.

Status: Unanimously passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

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

Like AB 747 and SB 699, this bill seeks to clarify and expand the prohibition on non-compete agreements but is less specific than either. First, this bill would codify the holding of *Edwards v. Arthur Andersen LLP*

(2008) 44 Cal.4th 937, that existing law voids the application of any non-compete agreement in the employment context that does not satisfy an exception in the law. This does not change the law but is simply a declaration of existing law.

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

AB 1076 would also require employers affirmatively notify affected employees about these provisions. Accordingly, by February 14, 2024, the employer would need to notify any employee employed after January 1, 2021 that is subject to a non-compete provision that does not fall within a narrow exemption for enforceability purposes, that the non-compete provision is void. This notice would need to be in writing and via an "individualized communication," suggesting that a general notice to all employees would not suffice.

Status: Unanimously passed the Assembly Labor and Employment Committee and is pending in the Assembly Appropriations Committee.

7. Cal-WARN Act Changes (AB 1356)

This bill would make a number of changes to California's version of the Worker Adjustment and Retraining Act (CalWARN, Labor Code section 1400, *et seq.*) including regarding the length of notice required, the definitions of those affected, and the use of severance agreements. For instance, it would increase from 60 days to 90 days the period for employers to provide required notices regarding a mass layoff, relocation or termination (as defined in section 1400) before the order takes effect. It would also preclude employers from utilizing compliance with CalWARN in connection with a severance agreement and waiver of an employee's right to claims.

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

It would also change the definition of "employer" to include a client employer of a labor contractor, and the definition of "employee" to include a person employed by a labor contractor and performing labor with the client employer for at least six months of the 12-month period preceding the date on which notice is required. "Labor Contractor" would mean an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

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

The bill would also expand the remedies and increase the liability for failure to provide the required notices. For instance, in light of the new 90-day notice period, it would make a conforming change to 90 days for the calculation of the employer's liability if the notice is not provided. Second, a proposed new subsection to Labor Code section 1402 appears to require that labor contractor employees are entitled to the same amount of backpay and the value of the cost of any lost benefits, because it specifies that the labor contractor shall remit the payment provided by the client employer in the full amount calculated pursuant to the damages subdivision of Section 1402.

Lastly, it would make several changes regarding the use of severance agreements in the context of a mass layoff, relocation or termination. First, it would expressly prohibit and render void any general release, waiver of claims or non-disparagement or nondisclosure agreements conditioned on the employer's payment of amounts for which the employer is liable under section 1402. The bill would also specify that any employer who includes such a general release, waiver of claims, or nondisparagement or nondisclosure agreements as a condition of such payments will be subject to a civil penalty up to $500 per violation. Second, employers required to provide notice under section 1401 would be prohibited from offering a separate agreement containing a general release, waiver of claims or non-disparagement or nondisclosure agreement unless it is offered in exchange for consideration in addition to which the employee is already entitled under section 1402 and states in clear and unequivocal language that the consideration being offered is in addition to anything of value to which the individual already is entitled under Section 1402. Any non-complying agreement would be deemed void and unenforceable.

Status: Passed the Assembly Labor and Employment Committee and the Assembly Judiciary Committee on party-line votes and is pending on the Assembly Floor.

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

This bill is intended to address concerns that the post-pandemic return-to-the-office directives will unduly impact disabled individuals who have benefitted from remote work arrangements, including by ensuring these individuals are aware of their rights to request reasonable accommodations for their disabilities. Accordingly, it would amend the FEHA to require employers to provide employees working remotely pursuant to an agreement or an employer policy with at least 30 days advance notice before recalling those employees to work in person.

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

of disability under the law. You can learn more about your rights at https://calcivilrights.ca.gov/accommodation/."

This bill does not presently alter the process by which employers are supposed to respond to such requests or the legal standard for evaluating such accommodation requests.

Status: Unanimously passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

9. Rehiring of Displaced Workers (SB 723)

In April 2021, California enacted SB 93, which created rehire rights for employees in the hospitality and business services industries who had been laid off for reasons related to the COVID-19 pandemic. The bill was codified in a new section 2810.8 of the Labor Code and was set to expire December 31, 2024. This new bill (SB 723) would amend Section 2810.8 to remove the expiration date and remove the requirement that affected employees were laid off due to COVID-19. Thus, under the new bill, covered employees would have a *permanent* right to recall for practically *any* layoff or reduction in force.

As a reminder, Section 2810.8 applies to the following businesses (which are defined in detail in the statute): hotels, private clubs, event centers, airport hospitality operations, airport service providers, and building services. The bill does not change the definition of covered businesses, but would change the definition of "laid-off employee" to mean any employee who was employed by the employer for 6 months or more and whose most recent separation from active employment occurred on or after March 4, 2020, and was a result of a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, nondisciplinary reason.

This bill would not change the substantive requirements of Section 2810.8 with respect to laid-off employees (offering re-hire to laid-off employees pursuant to a specified procedure and giving laid-off employees five business days in which to accept or decline the offer; written notice to laid-off employees if the employer declines to recall the laid-off employee on grounds of lack of qualifications; retaining records; non-retaliation). However, because of the new definition of "laid-off employee," the scope of the statute's rehire obligation would be dramatically increased – it could conceivably cover *any* layoff or reduction in force, and not only those related to COVID-19. Moreover, it would apply indefinitely into the future. And because of the new definition, this bill would require employers to offer rehire to any employee laid off after March 4, 2020, regardless of the date a new position becomes available (even if it is decades after the original layoff).

Status: Passed the Senate Labor Committee on a party-line vote and is pending in the Senate Appropriations Committee.

10. Restrictions on the Use of Artificial Intelligence and Automated Decision Tools (AB 331)

This bill is a part of recent trend reflecting increased concern regarding the use of artificial intelligence (AI) and Automated Decision Tools (ADTs) in ways that may discriminate against workers, students, participants in the criminal justice system, and other users of public services. The bill would create a new

chapter in the Business and Professions Code to regulate ADTs and impose requirements on both the users of such tools and the developers of such tools. While employers who use ADTs *are* covered by this bill, the scope of the proposed new law is not limited to the employment context. California employers thus may also need to consider possible impacts of this bill on their use of ADTs with respect to consumers and other members of the public in addition to their employees.

- *What is an Automated Decision Tool?*

The bill defines and Automated Decision Tool (ADT) as a system or service that uses artificial intelligence and which has been specifically developed and marketed to make, or be a controlling factor in making, consequential decisions. "Artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing a real or virtual environment.

"Consequential decisions" are defined to be decisions or judgments that have a legal, material, or similarly significant effect on an individual's life relating to the impact of, access to, or the cost, terms, or availability of a number of things, including:

  - Employment, worker management, or self-employment, including but not limited to pay or promotion, hiring or termination, and automated task allocation;
  - Education;
  - Housing or lodging and essential utilities;
  - Family planning and health care or health insurance;
  - Financial services;
  - The criminal justice system;
  - Legal services and voting; and
  - Access to benefits or services or assignment of penalties.

- *Who Would Have New Obligations Under this Bill?*

This bill would apply to both "Deployers" and "Developers" of ADTs. A "Deployer" is a person, partnership, state or local government agency, or corporation that uses an ADT to make a consequential decision. A "Developer" is a person, partnership, state or local government agency, or corporation that designs, codes or produces an ADT or substantially modifies AI for the purpose of making, or being a controlling factor in making, consequential decisions.

Thus, because of the breadth of the definitions of "Deployer" and "Consequential Decision," this new bill apparently would apply to (among others) *any* employer in California who uses an ADT to make practically any decision about any aspect of employment or worker management.

- *Obligation to Perform Impact Assessment*

All Developers and all Deployers who have at least 25 employees or use an ADT that impacts more than 999 people per year would be required to prepare an annual "impact assessment" for any ADT they use or develop. The first such assessments would require to be completed by January 1, 2025. The bill includes detailed lists of the elements of the "impact assessments," which include (but are not limited to): a statement of the purpose of the ADT and its intended benefits, uses, and deployment contexts; a description of the ADT's outputs and how they are used in making consequential decisions; a summary of the data collected and processed by the ADT; an analysis of the potential adverse impacts on the basis of sex, race, color, ethnicity, religion, age, national origin, limited English proficiency, disability, veteran status, or genetic information from the Deployer's use of the ADT; and a description of the safeguards implemented to address reasonably foreseeable risks of algorithmic discrimination from the use of the ADT. "Algorithmic discrimination" would be defined to mean the condition in which an ADT contributes to unjustified differential treatment or impacts disfavoring people based on their actual or perceived race, color, ethnicity, sex, religion, age, national origin, limited English proficiency, disability, veteran status, genetic information, reproductive health, or any other classification protected by state law.

In addition, Developers would be required to provide a statement to a Deployer regarding the intended uses of the ADT and documentation regarding, among other things, the known limitations of the ADT, including any reasonably foreseeable risks of algorithmic discrimination arising from its intended use. In its impact statement, the Deployer would be required to describe the extent to which their use of the ADT is consistent with or varies from the Developers' statement of intended use.

Developers and Deployers would be required to provide the impact assessments to the Civil Rights Department (CRD) within 60 days of completion. A violation of this section would result in an administrative fine up to **$10,000 *per day*.** The CRD would be authorized to share impact assessments with other state entities.

- *Prohibition on Algorithmic Discrimination*

The bill would specifically prohibit the use of an ADT in a manner that results in algorithmic discrimination. It would also specify that starting January 1, 2026, a person may bring a civil action against a deployer for violation of this section. The plaintiff would have the burden of proof to demonstrate the use of the ADT resulted in algorithmic discrimination that caused actual harm to the person bringing the action. In addition to any other remedy at law, a prevailing plaintiff could recover compensatory damages, declaratory relief, and attorneys' fees and costs.

Employers should note that even without this bill becoming law, it is possible that use of AI or an ADT could lead to a discrimination claim. In May 2022, the federal Equal Employment Opportunity Commission and Department of Justice issued guidance regarding the use of algorithms and artificial intelligence to assess job applicants and employees and warned that use of AI may violate the Americans with Disabilities Act. (The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov) and Guidance Document: Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring

(ada.gov)) And in March 2022, California's Fair Employment and Housing Counsel issued proposed amendments to the regulations implementing the Fair Employment and Housing Act which would regulate the use of Automated Decision Systems in employment and specifically define the ways in use of such systems could constitute unlawful discrimination. (AttachB-ModtoEmployRegAutomated-DecisionSystems.pdf (ca.gov))

- *Disclosure/Notification Obligations*

All Developers and all Deployers (regardless of the number of employees) would be required to notify any natural person that is the subject of a consequential decision that an ADT is being used to make, or will be a controlling factor in making, the consequential decision. The disclosure must be made at or before the time the ADT is used to make a consequential decision. And the disclosure would be required to include a statement of the purpose of the ADT, contact information for the deployer, and a plain language description of the ADT that includes a description of any human components and how any automated component is used to inform a consequential decision.

- *Accommodation Requirement*

If a consequential decision is made *solely* based on the output of an automated tool, a Deployer (regardless of the number of employees) would be required to accommodate a natural person's request to *not* be subject to the ADT and to be subject to an alternative selection process or accommodation *if technically feasible*.

- *Creation of Governance Programs*

All Developers and all Deployers who have at least 25 employees or use an ADT that impacts more than 999 people per year would be required to establish, document, implement, and maintain a governance program with reasonable administrative and technical safeguards to map, measure, manage, and govern the reasonably foreseeable risks of algorithmic discrimination associated with the use or intended use of an ADT. The bill includes specific requirements for the governance program, including designation of at least one employee to be responsibility for overseeing and maintaining the governance program and compliance with the new law, conducting an annual and comprehensive review of policies, practices, and procedures to ensure compliance, and maintaining results of an impact assessment for at least two years.

- *Required Policy*

Every Developer and Deployer would be required to make *publicly available*, in a readily accessible manner, a clear policy with a summary of the types of ADTs in use or made available to others, and how the Deployer or Developer manages the reasonably foreseeable risks of algorithmic discrimination.

- *Enforcement and Potential Penalties/Liability*

In addition to the penalties for failure to submit an impact assessment and civil actions brought by persons injured by algorithmic discrimination, Deployers and Developers would be subject to civil actions brought

by the state Attorney General, a district attorney, county counsel, city attorney, or city prosecutor for any violation of the new law, in which a court could award injunctive relief, declaratory relief, and attorney's fees and costs. Deployers and Developers would have an opportunity to cure violations before an action could be brought for injunctive relief. Prior to commencing an action for injunctive relief, the public attorney must provide 45 days' written notice, and the Deployer or Developer could avoid suit by curing the noticed violation and providing a statement under penalty of perjury.

Status: Passed the Assembly Privacy and Consumer Protection and Judiciary Committees on party-line votes and is pending in the Assembly Appropriations Committee.

ADDITIONAL PENDING BILLS

Harassment/Discrimination/Retaliation

Expansion of Retaliation Protections (SB 497)

This bill would amend multiple Labor Code provisions to expand protections against retaliation and/or increase the statutory penalties available. For instance, it would amend the current retaliation protections in Labor Code section 98.6 (dealing with wage-related complaints) and Labor Code section 1197.5 (Equal Pay Act complaints) to state that any adverse actions taken within 90 days of a complaint will create a rebuttable presumption of retaliation in favor of the employee. Further, while California's general whistleblowing provision (Labor Code section 1102.5) presently authorizes a civil penalty up to $10,000 for each violation, this bill would allow up to $10,000 to be awarded to each employee who was retaliated against for each violation, in addition to any other remedies. In assessing the penalty, the Labor Commissioner would be instructed to consider the nature and seriousness of the violation, including the type of violation, the economic or mental harm suffered, and the chilling effect on the exercise of employment rights in the workplace.

Status: Passed the Senate Labor and Judiciary Committees on party-line votes and is pending in the Senate Appropriations Committee.

Local Enforcement of the Fair Employment and Housing Act (SB 16)

While Government Code section 12993 presently provides that the Civil Rights Division (CRD) is solely responsible for enforcing the FEHA, this bill is intended to address concerns the CRD is underfunded and often unable to enforce the claims received. Accordingly, it would clarify that the FEHA does not limit or restrict efforts by local entities (including cities, counties, and political subdivisions) to enforce state law prohibiting discrimination against classes of persons covered by the FEHA. It would also direct the CRD to promulgate regulations governing local enforcement of the FEHA and to require local jurisdictions to proceed according to these regulations if they choose to pursue local enforcement of the FEHA. These forthcoming regulations would be intended to ensure consistent application of employment discrimination law, protect complainants against inadvertent loss of federal or state legal claims and avoid duplication of investigatory work.

Status: Passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

Prohibition Against Caste Discrimination (SB 403)

Citing concerns about widespread "caste discrimination" in certain parts of the world that the author believes has spread to work, school and places of worship in California, this bill would amend numerous California civil rights statutes (including the FEHA and the Unruh Act) to preclude discrimination based on "caste." For FEHA purposes, Government Code section 12926 would define caste as "an individual's perceived position in a system of social stratification on the basis of inherited status." This would be further defined to include factors such as "inability or restricted ability to alter inherited status; socially enforced restrictions on marriage, private and public segregation and discrimination; and social exclusion on the basis of perceived status." These changes would be deemed declarative of existing law and therefore apply retroactively if enacted, in part because the bill also notes these protections may already be included within other civil rights statutes protections (including FEHA's prohibition on race, ancestry and religious discrimination).

Status: Unanimously passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

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

In 2022, California enacted a new law (AB 2188, set to take effect January 1, 2024), precluding discrimination based upon an applicant's or employee's use of cannabis off the job and away from the workplace, or based upon a drug-screening test revealing non-psychoactive cannabis metabolites (as opposed to THC revealing active impairment). This bill would further amend new Government Code section 12954 to preclude employers from requesting information from an applicant for employment relating to the applicant's prior use of cannabis, although the bill would not prohibit an employer from inquiring about an applicant's criminal history *if* otherwise permitted by law. Notably, while AB 2188 had stated that its limitations on drug-testing or employment decisions regarding non-workplace usage would not apply in certain circumstances (i.e., in building and construction trades or where required by enumerated federal laws), SB 700 only exempts applicants for positions requiring a background investigation or security clearance from its broad prohibition on inquiries about prior cannabis usage; it would not exempt the building and construction trades from this new rule.

Status: Passed the Senate Judiciary and Labor Committees on party-line votes and is pending in the Senate Appropriations Committee.

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

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

AB 933 is motivated by the author's concern that this protection is not broad enough and should cover any communications made by an individual who has experienced an incident of sexual assault,

harassment, or discrimination, regardless of whether they have filed any formal complaint. The bill was prompted, at least in part, by the case of Pamela Lopez, a lobbyist who publicly accused Assemblymember Matt Dababneh of sexual assault, and who was later sued for defamation by Assemblymember Dababneh.

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

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

Status: Passed the Assembly with bi-partisan support and is pending in the Senate.

Veterans' Hiring Preference for Private Employers (SB 73)

While the FEHA presently allows employers to grant a hiring preference in favor of Vietnam War-era veterans and as a defense against sex discrimination claims, this bill (entitled the Voluntary Veterans' Preference Employment Policy Act) would update and expand this exemption for almost all veterans (regardless of when served) and as a defense against all FEHA discrimination claims.

Such a hiring preference would be deemed not to violate any state or local equal employment opportunity law, including the FEHA, if used uniformly and not established for purposes of or having the effect of unlawfully discriminating against any group protected by the FEHA, including against veterans who are members of any other FEHA-protected classification.

"Veterans" would be defined as any person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and was discharged or released under conditions other than dishonorable.

Employers adopting such a preference policy would need to annually report to the Civil Rights Department the number of veterans hired in that reporting year under this policy and any demographic information

the department requires. An employer's failure to submit this report would nullify the preference's protections for those hiring decisions.

Employers with a veterans' preference employment policy would be permitted to accept the following as proof of an individual's status as a veteran: (1) a DD Form 214, Member-4; (2) a current and valid driver's license with the word "veteran" printed on its face; or (3) a current and valid identification card with the word "veteran" printed on its face.

A similar bill (SB 665) unanimously passed the Legislature in 2021 before being vetoed by Governor Newsom, and similar preference laws have been enacted in nearly 40 states.

Status: Passed the Senate Judiciary and Veterans and Military Affairs Committees and is pending in the Senate Appropriations Committee.

Workgroup to Address Californians with Disabilities in Connection with Workforce and Employment (AB 222)

This bill addresses a concern that the Americans with Disabilities Act and state laws for the protection of people with disabilities are outdated. The bill would require the Civil Rights Department to convene a workgroup to make recommendations to the Legislature for the development of disability laws and policies related to workforce and employment, including ensuring that all sectors of California's labor, workforce, and employment are covered by civil rights laws to the maximum extent possible, and improving the effective enforcement of civil rights laws in California's workplaces. The workgroup would be required to submit a report to the Legislature by July 1, 2025, and the Legislature would be required to hold public hearings within one year of submission of the report.

Status: Unanimously passed the Assembly Judiciary Committee and is pending in the Assembly Appropriations Committee.

Evaluation of Gender Discrimination in State Agencies (AB 549)

This bill would require all state agencies, in consultation with the Commission on the Status of Women and Girls, to conduct an evaluation of their own departments to ensure the state does not discriminate against women through the allocation of funding and delivery of services. State agencies would be required to report their findings and recommendations on January 1, 2025, and every 2 years thereafter.

Status: Passed the Assembly Judiciary Committee and is pending in the Assembly Appropriations Committee.

Utility Worker Protections (SB 705)

This bill is motivated by concern that utility workers, who provide essential services to California residents and businesses, have experienced open hostility and threats since the 2017-2018 wildfires and 2019 power shutoffs. Accordingly, the bill would require the Public Utilities Commission (PUC) to work with electrical corporations, gas corporations, and the unions representing impacted workers to develop and

conduct a five-year public campaign to raise awareness and understanding around the harassment of utility workers and contractors in the state. The commission would be required to evaluate the effectiveness of the campaign each year and publish an annual report on its website. However, implementation of these provisions would be contingent upon the PUC receiving sufficient funding for his campaign.

Status: Passed the Senate Energy, Utilities and Communications Committee and is pending in the Senate Appropriations Committee.

Leaves of Absence/Time Off/Accommodation Requests

Increased Paid Sick Leave for Healthcare Employees (AB 1359)

While California's paid sick leave requirements are generally enumerated in Labor Code section 245 *et seq.*, this bill would add new Labor Code section 246.6 establishing an entitlement to "health care worker sick leave." Employees of covered health care facilities (as defined) would be entitled to "health care worker sick leave," which means three days or 24 hours of *paid* leave and an *additional* four days of leave per year, which may be unpaid. If a covered health care facility has a paid leave policy or paid time off policy, an employee would be entitled to use any available accrued paid leave during the four additional days of leave. The bill would allow heath care worker sick leave to carry over to the following year unless the full amount of health care worker sick leave is received at the beginning of each year of employment, calendar year, or 12-month period. The bill would prohibit covered health care facilities from limiting an employee's use of accrued health care worker sick leave. The bill would specify that even if an employee is covered by a Collective Bargaining Agreement, the employer would still need to comply with the Paid Sick Leave law and this new health care worker sick leave law. But employers would not be prohibited from providing a more generous paid sick leave or paid time off policy.

An "employee of a covered health facility" is specifically defined to include nineteen different types of clinics, facilities or worksites (including with cross-references to various Health and Safety Code definitions), so health care employers should review these closely to determine if they apply.

Status: Passed the Assembly Labor and Employment Committee on a party-line vote and is pending in the Assembly Appropriations Committee.

Religious and Cultural Observances for State Employees (SB 461)

This bill would amend Government Code section 19853 regarding specified and personal holidays for state employees. While presently a state employee who works on a state holiday may elect to receive eight hours of straight time pay and eight hours of holiday credit, SB 461 would allow the employee to elect to receive eight hours of holiday credit for religious or cultural observance in lieu of personal holiday credit for at least 23 specifically enumerated cultural or heritage celebrations (e.g., Yom Kippur, Diwali, Eid al-Fitr, etc.).

Status: Unanimously passed the Senate Labor Committee and is pending on the Senate Floor.

Human Resources/Workplace Policies

Prohibiting Mandatory Employee Attendance at Certain Employer-Sponsored Meetings (SB 399)

Entitled the "California Worker Freedom from Employer Intimidation Act," this bill would enact new Labor Code section 1137 to preclude employers from requiring employees to attend employer meetings regarding certain topics and create new remedies for violations of these prohibitions. Specifically, it would prohibit employers from requiring employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is intended to communicate the employer's opinion about religious matters, political matters or certain rights guaranteed by the United States or California Constitutions.

"Political matters" would be defined as "matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political or **labor organization**." "Religious matters" would be defined as "matters relating to religious affiliation and practice and the decision to join or support any religious organization or association." The rights guaranteed by the United States and California Constitutions would include, but not be limited to, the rights of freedom of speech, freedom of association and freedom of religion.

This bill would not prohibit the following: (1) employers or their agents from communicating to employees information the employer is required by law to convey, but only to the extent of that legal requirement; (2) employers or their agents from communicating information that is necessary for employees to perform their job duties; or (3) higher education institutions or their agents from meeting with or participating in communications with employees that are part of coursework, any symposia or an academic program at that institution.

This prohibition also would not apply to the following: (1) religious entities (as enumerated) with respect to speech on religious matters to employees who perform work connected with the activities of the religious entity; (2) a political organization or party with respect to communication of the employer's political tenets or purposes; or (3) an educational institution requiring a student or instructor to attend lectures on political or religious matters that are part of the institution's regular coursework.

The Division of Labor Standards Enforcement will be responsible for enforcing this section and responding to employee complaints. However, employees who have been subjected or threatened to be subjected to discharge, discrimination or retaliation or other adverse action for refusing to attend a prohibited employer-sponsored meeting may bring a civil action for damages, punitive damages, and reasonable attorneys' fees. In such actions, an employee or their exclusive representative may also petition for injunctive relief. Because the bill creates a new section of the Labor Code, it could also lead to PAGA liability.

Status: Passed the Senate Labor and Judiciary Committees on party-line votes and is pending in the Senate Appropriations Committee.

Student Loan Repayment Assistance under California Tax Code (AB 509)

While California and federal law presently allow employers to annually provide up to $5,250 of payments for an employee's ongoing educational assistance that is exempted from state and federal income taxes, this bill would change the definition of "educational assistance" to include payments for educational loans incurred by the employee for their own education. In this regard, it is like the recent provisions in the federal Coronavirus Aid, Relief and Economic Security (CARES) Act that enable employers to provide tax-favored repayment assistance for existing student loan debt that would not be considered income for federal income tax purposes. It would apply to payments made by an employer on behalf of a student from January 1, 2024 and before January 1, 2026.

Similar bills have been introduced on several occasions, including AB 2478 (2017), AB 152 (2019), and AB 1729 (2022), which passed the Tax and Revenue Committee before stalling.

Status: Pending in the Assembly Revenue and Tax Committee.

Changes to Wage Theft Prevention Act Notices (AB 636)

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

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

Status: Passed the Assembly Labor and Employment and Appropriations Committees on party-line votes and is pending on the Assembly Floor.

Expansion of Workplace Temporary Restraining Orders (SB 428)

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

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

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

Status: Passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

Domestic Violence Prevention Posters (SB 526)

This bill would require the Department of Industrial Relations to develop and prepare a poster regarding domestic violence prevention that employers *may* display in their workplaces and make it available to employers for download on the internet. The poster would be made available in English, Spanish, and any non-English language spoken by a substantial number of the public served by the department, as defined. The bill does not purport to *require* employees to display the anticipated poster.

Status: Passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Employer Electronic Notification Requirements of Employee Benefits (AB 1355)

This bill would allow California employers the option to provide certain required documents to employees via email, but only if the recipient has opted into receipt of electronic statements. The bill would separately allow electronic distribution of: (1) required notifications regarding the federal and California earned income tax credit and (2) information about unemployment benefits claims, but only if the employee or unemployed individual affirmatively, and in writing or by electronic acknowledgement, opts in to receipt of electronic statements or materials.

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

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

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

Status: Unanimously passed the Assembly Insurance Committee and is pending in the Assembly Appropriations Committee.

Limitations on Downloading Social Media Programs on State-Owned Devices (SB 74)

Echoing similar proposals at the federal level to limit state employees from downloading "Tik Tok," this bill would prohibit applications for social media platforms from being downloaded on state-owned or state-issued devices if certain conditions are met. Broadly speaking, these conditions would include that an "entity of concern" or a "country of concern" (as defined) owns, directly or indirectly controls, or holds 10 percent or more of the voting shares of the social medial company that owns the application. The bill would define "counties of concern" as any country identified by the International Traffic in Arms Regulation. It would also exclude state-issued or state-owned electronic devices if used for official state purposes, including communications to the public, cybersecurity research, and law enforcement activities.

Status: Passed the Senate Governmental Organization Committee and is pending in the Senate Appropriations Committee.

Human Trafficking Notice – Pediatric Care Facilities (AB 1740)

Existing law requires specified businesses (including airports, hotels, etc.) to post a notice from the Department of Justice relating to slavery and human trafficking. This bill would extend the posting requirement to facilities that provide pediatric care.

Status: Unanimously passed the Assembly Judiciary Committee and the Assembly Appropriations Committee and is pending on the Assembly Floor.

Wage and Hour

Health Care Worker Minimum Wage (SB 525)

While the current statewide minimum wage is $15.00 an hour, this bill would establish, beginning January 1, 2024, a special minimum wage for health care workers of $25.00 per hour for hours worked in covered health care employment, as defined. It would further provide that the health care worker minimum wage constitutes the state minimum wage for covered health care employment for all purposes under the Labor Code and the Industrial Welfare Commission Wage Orders and would be enforceable either by the Labor Commissioner or by the covered worker in a civil action.

It would further require that to qualify as exempt from the payment of minimum wage and overtime, an employee paid on a salary basis must earn a monthly salary equivalent of at least two times the health care worker minimum wage for full-time employment. This industry-specific minimum wage would also be adjusted annually with the Director of Finance calculating by August 1st the greater of either 3.5 percent or the changes in the Consumer Price Index. The result of these changes would then be rounded to the nearest ten cents and take effect on the following January 1st.

For purposes of this new minimum wage, "covered health care employment" would be defined as either (1) all work performed on the premises of any health care facility, regardless of the employer's identity; or (2) all paid work providing health care services (as defined) performed for any person that owns, controls, or operates a covered health care facility, regardless of location. It would not include, however,

employment as an outside salesperson, any work performed in the public sector where the primary duties performed are not health care services, or delivery work on the health care facility premises where the delivery worker is not an employee of any person that owns, controls or operates a covered health care facility.

"Health care services" would also be broadly defined to mean "patient care-related services, including nursing, caregiving, services provided by medical residents, interns or fellow, technical and ancillary services, janitorial work, housekeeping, groundskeeping, guard duties, business office clerical work, food services, laundry, medical coding and billing, call center and warehouse work, scheduling, and gift shop work, but only where such services directly or indirectly support patient care." Lastly, "covered health care facility" would be specifically defined to include twenty-one different types of clinics, hospitals or facilities, so a potentially affected health care provider should consult this list contained in proposed Labor Code section 1182.14(b)(2).

Status: Passed the Senate Labor Committee on a party-line vote and is pending in the Senate Appropriations Committee.

Alternative Enforcement of Labor Code Provisions (AB 594)

Citing claims that employers continue to engage in wage theft and that existing resources are insufficient to protect workers, this bill would provide several alternative Labor Code enforcement mechanisms. First, it would authorize a "public prosecutor" (e.g., a district attorney, city attorney, county counsel, etc.) to pursue civil or criminal actions for certain Labor Code violations or enforce certain Labor Code provisions, and without specific direction from the state agency (e.g., DLSE, etc.). This expanded enforcement authority would *not* extend to the workers' compensation law or occupational health and safety law. The public prosecutor would be limited to redressing violations within their geographic jurisdiction, unless the public prosecutor is in a city with a population in excess of 750,000 or is otherwise authorized to enforce the Labor Code statewide. (It appears this would allow public prosecutors in Los Angeles, San Diego, San Jose, and San Francisco to attempt to redress Labor Code violations statewide.) Public prosecutors would also be entitled to also recover reasonable attorneys' fees and expert costs, and to seek injunctive relieve to prevent continued Labor Code violations.

Any arbitration agreement between the employer and its employees that purported to limit representative actions or to mandate private arbitration would be deemed inapplicable to the public prosecutor's authority. Further any appeal of the arbitration motion denial or other court proceedings shall not stay the public prosecutor's enforcement actions.

Secondly, in 2011, California enacted SB 459 (codified in Labor Code section 226.8), creating a procedure for the Labor and Workforce Development Agency or a court to examine potential willful misclassification of an individual as an independent contractor instead of an employee. This bill would create an alternative process (to be codified in new Labor Code section 226.9) authorizing the Labor Commissioner to issue determinations regarding such willful misclassification and the issuance of a civil penalty via a citation. For purposes of issuing, contesting and enforcing judgments for these Labor Commissioner citations, the same procedures in current Labor Code section 1197.1 would apply. However, AB 594 would also entitle an

employee, for the same violation, to recovery under this new provision or by enforcement of a civil penalty under the Private Attorneys General Act (PAGA). The Labor Commissioner would be authorized to enforce these provisions by informal hearing or in a civil suit.

Status: Passed the Assembly Labor and Employment and Judiciary Committees on party-line votes and is pending in the Assembly Appropriations Committee.

Recommendation re: Linking Minimum Wage and Housing Costs (SB 352)

The proponents of this bill posit that a minimum wage earner would have to work more than two full-time jobs to afford a one-bedroom apartment in most major markets in California. The bill would require several state government officials to examine housing costs by county, regionally and in the state and create a formula to determine how much the local minimum wage must be for a full-time minimum wage worker to afford a decent standard of living, including appropriate housing and basic expenses. The California Workforce Development Board would also annually recommend to the Legislature the minimum wage needed for these purposes, and to annually adjust figures to account for inflation.

Status: Passed the Senate Labor Committee and the Senate Housing Committee on party-line votes and is pending in the Senate Appropriations Committee.

Working Group to Recommend Minimum Wage Levels (AB 1516)

While historically the Legislature has determined minimum wage levels – including via SB 3 (enacted in 2016) that raised the current statewide minimum wage to $15 an hour – this bill would require the Labor and Workforce Development Agency to convene a working group to study minimum wage-related topics in California. Comprised of representatives from the Labor Commissioner's office, the EDD, organizations representing low-wage or immigrant workers, and organizations advocating for the rights of incarcerated workers, this working group would be tasked with providing recommendations to the Legislature by July 1, 2024 regarding raising the minimum wage.

Status: Passed the Assembly Labor and Employment Committee on a party-line vote and is pending in the Assembly Appropriations Committee.

Compensable Time for Obtaining Food Handling Cards (SB 476)

California's Retail Food Code requires a food handler to obtain a food handler card within 30 days of hire and to maintain a valid food handler card for the duration of their employment as a food handler. This bill would require the employer to pay the employee for any cost associated with the employee obtaining a food handler card, including the time it takes for the employee to complete the training, the cost of the food handler certification program, and the time it takes to complete the certification program. Employers would also be required to relieve the employee of all other work duties while the employee is taking the training course and examination. Employers would also be prohibited from conditioning employment on the applicant or employee having an existing food handler card.

The State Department of Public Health will be required, by January 1, 2025, to publish on its website a list of all certified food handler training programs along with the costs. Local public health organizations would also be required to post a link of this page on their internet website or provide the same list on their internet website.

Status: Passed the Senate Health Committee and is pending in the Senate Appropriations Committee.

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

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

For work awarded on or after January 1, 2024 where property services labor is performed in buildings owned or leased by public entities by individuals who are not employees of that public entity, the public entity will be required to allow representatives from a collective bargaining unit representing property service workers to have access to the workers within that building to provide training regarding, amongst other things, workers' rights, workplace health and safety and sexual harassment. For purposes of this section, "property services" would mean janitorial, security guard, valet parking, landscaping, and gardening services.

***Status*:** Unanimously passed the Assembly and is pending in the Senate.

Payroll Records for Public Works Projects (AB 587)

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

This bill would require any copy of records made available for inspection by, or furnished to, a multiemployer Taft-Hartley trust fund or joint labor-management committee be provided on forms provided by the Division of Labor Standards Enforcement or contain the same information as those forms. The bill would specify that copies of electronic certified payroll records do not satisfy payroll records requests made by Taft-Hartley trust funds and joint labor-management committees.

Status: Unanimously passed the Assembly with bi-partisan support and is pending in the Senate.

Layoffs/Establishment Closures

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

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

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

1. The chain employer must give a "displacement notice" to covered works and their exclusive representative 60 days before the closure takes effect, including specified information. A chain employer would not be required to give the displacement notice if the closure is necessitated by a physical calamity or act of war or the chain employer was actively seeking capital or business to avert the closure, if certain conditions apply.
2. The chain employer must provide all covered workers the opportunity to transfer to a location of the chain within 25 miles of the closed establishment as positions become available for one year after the closure. This would not require a chain employer to alter or terminate the employment of any worker or displace any worker at a location within 25 miles of the covered establishment. There are specific requirements regarding maintaining a preferential list of workers and deadlines and methods for providing notice of job openings. And a chain employer that is a franchisee with 100 or more establishments would only be required to make an offer to transfer to a location within 25 miles of the covered location that the franchisee owns and operates under an agreement with one franchisor.
3. The chain employer must retain specified records for each covered worker for three years, including name, job classification, date of hire, contact information, and copies of written notices and communications.
4. The chain employer must not retaliate against workers for seeking to enforce their rights under this section.

For purposes of this bill, a "covered worker" is a person whose primary place of employment is at the covered establishment subject to closure, who is employed directly by the employer, and who has worked for the employer for at lest 6 months before the date of the closure; however, this law does *not* cover managerial, supervisor, or confidential workers, or temporary/seasonal workers. (The bill does not define "confidential worker.")

This bill would not apply to employees covered by a collective bargaining agreement under certain circumstances, including that the agreement expressly waives the requirements of this bill in clear and unambiguous terms.

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

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

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

Status: Passed the Senate Labor and Judiciary Committees on party-line votes and is pending in the Senate Appropriations Committee.

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

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

- **Grocery Workers (AB 647)**

First, AB 647 would add and change some key definitions. It would specify that the "eligible grocery workers" under the law include workers at the grocery establishment with at least six months' tenure at the establishment *and* separated employees who were employed by the incumbent employer for 6 months out of the last 12 months and whose most recent separation was due to change in control, lack of business, reduction in force, transfer more than 15 miles from the employee's residence, or another economic nondisciplinary reason. Further, it adds distribution centers to the definition of "grocery establishment."

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

Third, bill would also extend the preferential hiring period for eligible grocery workers to 120 days, and states that if a separated employee is offered a position more than 15 miles from their place of residence, they have the right to refuse the offer and retain a right to recall without loss of seniority prior to the hiring of any new employees for one year after the separation of employment. The bill would extend the period for which the successor employer shall retain each eligible grocery worker hired pursuant to this law to at least 120 days, during which period they shall not discharge eligible grocery workers without cause.

Fourth, the bill would prohibit retaliation against a person seeking to enforce rights under the law.

And finally, the bill would create an enforcement mechanism for violations of this law. An employee, collective bargaining representative, or nonprofit corporation would be able to bring a civil action and recover hiring and reinstatement rights, front pay or back pay, the value of benefits the employee would have received, punitive damages, and attorneys' fees and costs. (A prevailing employer could recover attorneys' fees upon a court finding that the lawsuit was frivolous.) The bill specifies that the Division of Labor Standards Enforcement shall enforce the section, and an employer, agent of any employer, or other person who violates the law or causes the law to be violated is subject civil penalties of $100 for each employee whose rights are violated and liquidated damages of $500 per employee, **per day** until the violation is cured. The liquidated damages shall be recovered by the Labor Commissioner and paid to the employee as compensatory damages. Further, the bill would make a controlling private fund and any holder of an active interest of a controlling private fund (a person who directly or indirectly owns, controls, or holds the power to vote 20% or more of the outstanding voting interests of the fund) jointly and severally liable for all liabilities of any affiliate of each grocery establishment.

Status: Passed the Assembly Judiciary Committee on a party-line vote and is pending in the Assembly Appropriations Committee.

- **Grocery Workers (SB 725)**

First, like AB 747, this bill would also revise the definitions in Labor Code Section 2502. It would add purchase, acquisition, or disposition of all or substantially all of the cash on hand to the definition of "change in control," which would trigger the protection of the statute. In addition, the bill would specify that consolidation, merger or reorganization *by the incumbent* grocery employer would also be a "change in control." Like AB 747, this bill would also add distribution centers to the definition of "grocery establishment." SB 725 would also change the definition of "successor grocery employer" to specify that the successor may be the same entity as an incumbent employer when a change in control occurs, but the covered employer remains the same.

Next, SB 725 would add Labor Code section 2507 to provide that if a successor grocery employer does not hire an eligible grocery worker following a change in control and does not retain such worker for at least 90 days following the change in control or the worker's employment commencement date, the successor employer shall pay severance of one week of pay for each full year of employment with the incumbent employer, payable at a defined rate of compensation (unless a collective bargaining agreement provides for a greater amount of severance). Severance would not need to be paid if the worker quit or was discharged for cause. This rule could be superseded by a collective bargaining agreement if the waiver is explicitly set forth in the agreement in clear and unambiguous terms.

Status: Passed the Senate Labor Committee and is pending on the Senate Floor.

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

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

Based on these public health and safety concerns, this bill would add several sections to the California Corporations Code and require any person planning to acquire any voting securities or assets of a retail grocery firm or retail drug firm, as defined, to provide written notice (under penalty of perjury) to the California Attorney General at least 180 days before the acquisition becomes effective. The notice would be required to include information including (1) any plans or proposals to liquidate the retail grocery or retail drug firm, to sell its assets or merge or consolidate it, or to make any other material changes in its businesses or corporate structure or management; (2) information required to assess the competitive effects of the proposed acquisition, including factors affecting the supply of experienced grocery workers, including wages, benefits, and unemployment; and (3) information required to assess economic and community impact of any planned divestiture or store closures, including but not limited to possible impacts on unemployment. The bill would authorize the Attorney General to seek an order temporarily staying or preliminarily enjoining the acquisition if they need additional time to analyze the competitive effects of the acquisition.

Status: Passed the Assembly Judiciary Committee on a party-line vote and is pending in the Assembly Appropriations Committee.

<u>Public Sector/Labor Relations</u>

Legislative Employees Allowed to Organize (AB 1)

This bill would authorize employees of the California Legislature to unionize. Similar bills have been introduced multiple times but stalled.

Status: Passed the Assembly Public Employment and Retirement Committee and is pending in the Assembly Appropriations Committee.

Extending Overtime Requirements to Legislative Employees (SB 276)

This bill would extend California daily overtime requirement (codified in Labor Code section 510) to employees (but not "Members") of the California Legislature.

Status: Unanimously passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

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

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

Status: Passed the Assembly Higher Education Committee and is pending in the Assembly Appropriations Committee.

Public Sector Employee Support for Labor Disputes (AB 504)

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

These new provisions, however, would not apply to certain employees of public employees (i.e., those subject to Labor Code section 1962 [i.e., firefighters prohibited from refusing to cross picket lines].)

Status: Passed the Assembly Public Employment and Retirement Committee and the Assembly Judiciary Committee and is pending in the Assembly Appropriations Committee.

State Provided Benefits

Expansion of Paid Family Leave to Care for a Seriously Ill "Designated Person" (AB 518)

Existing law (Unemployment Insurance Code sections 3301, *et seq.*) provides up to 8 weeks of paid leave under the state disability insurance program for prescribed purposes, including to care for a seriously ill family member. Existing law defines "family member" as child, spouse, parent, grandparent, grandchild, sibling or domestic partner. This bill would expand benefit eligibility to individuals who take time off work to care for a seriously ill "designated person."

This change would be similar to the 2022 amendment to California Family Rights Act (AB 1041), which expanded the definition of family to include a single designated person related by blood or whose association with the employee is the equivalent of a family relationship.

Status: Unanimously passed the Assembly Insurance Committee and is pending in the Assembly Appropriations Committee.

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

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

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

Finally, existing law authorizes an employer to require a worker to take up to 2 weeks of earned but unused vacation leave before receiving benefits under the disability insurance program. The new bill would delete this provision.

Status: Unanimously passed the Assembly Insurance Committee and is pending in the Assembly Appropriations Committee.

COVID-19 Regulatory Compliance Credit (SB 375)

This bill would allow an employer to claim a COVID-19 regulatory compliance credit for the 2023 and 2024 calendar years. For employers with 100 or more employees, the credit would l not exceed $50 per employee; and for employers with fewer than 100 employees, the credit will not exceed $100 per employee. This amount would be credited against employee personal income tax withholding amounts required to be remitted to the Employment Development Department but does not alter the employee's tax liability.

Status: Passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Public Posting of Information Regarding Timeframes for Handling Unemployment Claims (AB 337)

This bill would require the Employment Development Department to post on the department's internet website information about timeframes for processing unemployment insurance claims, issuing a first payment when the department does not request additional or clarifying information, and making final determinations of eligibility benefits. (This bill is similar to AB 1821, which stalled in the assembly in 2022.)

Status: Unanimously passed the Assembly Insurance Committee and is pending in the Assembly Appropriations Committee.

Extension of Authorization to Deposit Workers' Compensation Disability Indemnity Payments in Prepaid Cards (AB 489)

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

Status: Unanimously passed the Assembly and is pending in the Senate.

Unemployment Assistance for Undocumented Workers (SB 227)

Existing law prohibits payment of unemployment compensation benefits to a person who is not a citizen or national of the United States, unless that person is lawfully admitted for permanent residence, was lawfully present for the purposes of performing work, or was permanently residing in the United States under color of law.

This bill would establish, until January 1, 2027, the "Excluded Workers Program" to provide income assistance to excluded workers who are not eligible for state or federal unemployment benefits. The bill would apply to individuals who reside in California and who performed at least 93 hours of work or earned at least $1,300 in gross wages over the course of three calendar months (which do not need to be consecutive) for work performed in California within the 12 months preceding their application for benefits or the calendar year preceding their application for benefits. Eligibility would be based on self-attestation and submission of specified documentation to establish proof of work history or a credibility interview. Eligible individuals would be able to receive $300 per week for each week of unemployment between January 1, 2025, and December 31, 2025, up to a maximum of 20 weeks. The bill would require a separate appropriation by the Legislature of sufficient funds to carry out the program. (A similar law [AB 2847] passed the Legislature in 2022 but was vetoed by Governor Newsom.)

Status: Passed the Senate Labor and Government and Finance Committees and is pending in the Senate Appropriations Committee.

Miscellaneous

Increased Liability and Responsibility for Fast Food Franchisors (AB 1228)

This bill would impose upon fast food restaurant franchisors increased liability and responsibility for compliance with employment laws by their franchisees. A similar provision was originally included in the 2022 bill creating the Fast Food Industry Council (AB 257) but was removed through the amendment process before the bill became law. (Implementation of AB 257 is now suspended pursuant to a referendum petition.)

The new bill would apply to fast food restaurant franchisors and franchisees. "Fast food restaurant" is defined to mean any establishment in California that is part of a chain of 100 or more establishments nationally that share a common brand or standardized operations, and that regularly provide food or beverages for immediate consumption to consumers who pay before eating with limited or no table service. (This is the same definition applicable to the Fast Food Industry Council law.) The bill would:

- Declare that a fast food restaurant franchisor shares with is franchisee all civil legal responsibility and civil liability for the franchisee's violations of specified laws, including California's Unfair Business Practices Act, the Fair Employment and Housing Act, and many sections of the Labor Code.

- Specify that all the listed laws may be enforced directly against the franchisor to the same extent they may be enforced against the franchisee (including by a civil lawsuit), after the franchisor has been given 30 days written notice of the alleged violation of the law and an opportunity to cure the alleged violation. A franchisor would not be subject to an enforcement action or lawsuit if it cured the alleged violation by ensuring that its franchisee is in compliance with the law and any workers against whom a violation was committed are made whole.

- Forbid a franchisee from waiving these protections or agreeing to indemnify its franchisor.

- Allow franchisees to sue franchisors for monetary or injunctive relief if the terms of a fast food restaurant franchise prevent or create a substantial barrier to the franchisee's compliance with the specified laws, including because the franchise does not provide for funds sufficient to allow the franchisee to comply with the law. The bill specifies that any changes in the terms of a franchise that increase the costs of the franchise would create a rebuttable presumption of a substantial barrier to compliance with the specified laws.

Status: Passed the Assembly Labor and Employment Committee and the Assembly Judiciary Committee on party-line votes and is pending in the Assembly Appropriations Committee.

Labor Trafficking Unit within the DLSE and/or Civil Rights Department (AB 235 and AB 380)

These two similar bills would each establish a Labor Trafficking Unit to coordinate with other state enforcement agencies. AB 235 would situate the unit within the Civil Rights Department (CRD), while AB 380 would place it in the Division of Labor Standards Enforcement (DLSE). Both bills would give the unit(s)

authority to receive and investigate complaints alleging labor trafficking and to take steps to prevent labor trafficking. The unit(s) would also receive evidence from the Division of Occupational Safety and Health regarding possible labor trafficking and would coordinate with other agencies and refer cases for potential civil and criminal actions relating to labor trafficking violations. The unit(s) would also annually submit a report to the Legislature regarding their activities, including the number of complaints received and the number of complaints referred.

It is unclear whether the bills' authors intend to establish only a single Labor Trafficking Unit in the CRD *or* the DLSE or whether they intend to establish two such units to coordinate with each other. However, it is notable that AB 380 is similar to AB 1820 (2022), which was vetoed by Governor Newsom. His veto message stated that the CRD – not the DLSE – would be the appropriate location for a Labor Trafficking Unit.

Status: Both AB 235 and AB 380 unanimously passed the Assembly Labor and Employment and Public Safety Committees and are pending in the Assembly Appropriations Committee.

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

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

This bill essentially adopts this committee's recommendations, including to remove the household domestic serve exception and thereby applying all OSHA provisions to domestic workers and their employers (except in very narrow statutorily enumerated exceptions [e.g., publicly funded, or family daycare homes].) By July 1, 2024, Cal/OSHA will be required to adopt industry guidelines consistent with Safety Committees voluntary guidelines to assist household domestic service employers on their legal obligations under existing occupational safety and health laws that apply to household domestic service employees. By January 1, 2025, household domestic service employers will be required to comply with all applicable occupational safety and health regulations.

Status: Passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Public Availability of Labor Statistics (SB 335)

Existing law requires the Department of Industrial Relations to publish an annual report containing statistics on state work injuries and occupational diseases and fatalities and requires the report to be made available to the public. This bill specifies that the report shall be submitted to the Legislature and the Governor.

Status: Passed the Senate and is pending in the Assembly.

Workplace Rights Curricula to be Developed (SB 864)

This bill would require the California Workforce Development board to assist the Governor with partnering with the Labor Commissioner to develop workplace rights curricula to be provided to all individuals receiving individualized career services, supportive services, or training services through the California workforce system. The training would cover topics including wage theft, sexual harassment, discrimination, right to organize, and health and safety. Each local workforce development board would then need to ensure that the training is provided, and state-provided career services would be required to include this workplace rights training.

Status: Unanimously passed the Senate Labor, Public Employment and Retirement Committee and is pending in the Senate Appropriations Committee.

Change in Court Rules regarding Arbitration (SB 365)

Existing law allows a party to appeal an order dismissing or denying a petition to compel arbitration. Existing law generally stays the proceedings in the trial court while an order is being appealed, subject to specified exceptions. This bill would prohibit a California trial court from staying proceedings during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration. (The U.S. Supreme Court is currently considering the same issue under the Federal Arbitration Act in the case *Bielski v. Coinbase*.)

Status: Passed the Senate Judiciary Committee on a party-line vote and is pending in the Senate Appropriations Committee.

Requirements for Call Centers Contracting with State Agencies (AB 1381)

This bill would require, beginning January 1, 2025, state agencies that contract with a private entity specifically for call center services to provide public or customer service for that or another state agency shall ensure that by January 1, 2026, 90% of the call center work is conducted in California. However, this change would not apply to contracts entered into before January 1, 2025 and does not apply to contracts for programs or other services that are not call centers. For state agencies contracting with private entities for programs or other services, including no-fee contacts, in which call center customer support services are included but the contract is not specifically for call center support services, the agency shall prioritize the work being conducted in California and require that at least 50% of call center jobs are in California (increasing to 75% for contracts entered into, renewed or extended after January 1, 2027).

These new requirements would authorize temporary exceptions allowing non-California call center usage in the event of a disaster, or for overflow periods not to exceed 48 hours, or for previously approved periods approved by the state agency to accommodate seasonable needs and avoid unreasonable, short-term costs for the state.

Status: Passed the Assembly Labor and Employment Committee and is pending in the Assembly Appropriations Committee.

California Workforce Pay for Success Program (SB 382)

This bill would establish the California Workforce Pay for Success Program. Upon appropriation of funds, this bill would provide for contracts with non-profit organizations that provide job training and workforce services to individuals with employment barriers.

Status: Passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Workplace Readiness/Work Permits (AB 800)

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

Pursuant to that goal, this bill would require the week of each year that includes April 28th to be known as "Workplace Readiness Week" and would require secondary schools to educate pupils on their rights as workers on specified topics during that week (including the right to organize a union, the history of the labor movement, and the labor movement's role in winning various specified employee protections). This would be mandatory for students in grades 11 and 12 and optional for other grades.

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

Status: Passed the Assembly Education and Labor Committees and is pending in the Assembly Appropriations Committee.

Employer Tax Credits for Childcare or Qualified Plan Payments (SB 533)

In recent sessions, the California Legislature has briefly considered bills that would require certain employers to provide or finance childcare for their employers. Rather than require employers to provide childcare, this bill would allow an employer tax credit between 2024 and 2029 for 30% of the costs of startup expenses for childcare programs or constructing a childcare facility to be used primarily by the children of the taxpayer's employees or by the children of employees of tenants leasing commercial or office space in a building owned by the taxpayer. It would also allow a similar tax credit for these same tax years for costs paid or incurred by the taxpayer for contributions to a qualified care plan made on behalf of any qualified dependent of the taxpayer's qualified employees (up to $360 for each qualified dependent per taxable year.

Status: Pending in the Senate Governance and Finance Committee.

Disclosure of Company Beneficial Owners (SB 594)

Existing law (Corporations Code sections 1502 and 2117) requires domestic corporations and foreign corporations to annually file a statement with the Secretary of state, containing information including the names and complete business ore residence addresses of the directors, chief executive officer, secretary,

and chief financial officer. This bill would require those corporations to also provide the names and addresses of any "beneficial owner."

Existing law (Corporations Code section 17702.09) also requires a limited liability company and a foreign LLC registered to transact business in California to biennially file a statement containing the name and address of any manager(s) and the chief executive officer, or, if no manager has been appointed, the names and addresses of the members. This bill would require disclosure of the name and address of any beneficial owner.

In both cases, "beneficial owner" would be defined as any natural person for whom, directly or indirectly and through any contract arrangement, understanding, relationship or otherwise, either of the following applies: (1) the person exercises "substantial control" (as defined) over the entity; or (2) the person owns 25% or more of the equity interest of the corporation.

This information would be made publicly available by the Secretary of State.

Although this bill is not solely directed to employers as such, the bill is motivated in part by the author's concern that use of anonymous LLCs allows employers to skirt laws meant to protect workers.

Status: Passed the Senate Banking and Judiciary Committees on party-line votes and is pending in the Senate Appropriations Committee.

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

This bill is motivated by the concern that women are underrepresented in the trades, and that one barrier faced by women is access to clean and secure restrooms on jobsites. This bill would require the Division of Occupational Safety and Health to submit a rulemaking proposal to consider a regulation to require at least one women's designated restroom at any construction jobsite with two or more required water closets. The deadline for submitting the proposal would be December 1, 2025.

Status: Unanimously passed the Assembly Labor and Employment Committee and is pending in the Assembly Appropriations Committee.

NOVEMBER 2024 BALLOT

Initiative to Raise the Minimum Wage

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

Initiative to Repeal PAGA

This ballot measure seeks to repeal the Private Attorneys General Act, which allows employees to file lawsuits on behalf of themselves and other employees to recover monetary penalties for certain state

employment law violations. The Labor Commissioner would retain the authority to enforce these laws and impose penalties. The initiative would require the legislature to provide funding for Labor Commissioner enforcement. This initiative has received the requisite number of signatures and is set to be qualified for the November 2024 election unless withdrawn by the proponent.

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

This ballot measure seeks to repeal 2022 Assembly Bill 257, which created a fast food industry council to establish sector-wide minimum standards on wages, working hours, and other working conditions for fast food restaurant workers. This initiative has qualified for the ballot, and AB 257 is on hold until after the November 2024 election.

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

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