CALIFORNIA LEGISLATIVE SUMMARY

SEPTEMBER 6, 2022

The deadline for the California Legislature to pass bills expired on August 31, 2022, and as expected, a number of employment-related bills were forwarded to Governor Gavin Newsom to sign or veto.

Notably, Governor Newsom has already signed into law several bills, including a first in the nation-type law creating a fast food industry council with the ability to set "minimum standards," including a minimum wage up to $22 per hour and additional standards for safety, hours, and working conditions (AB 257).

Additional bills that have been passed by the legislature but not yet acted on by the Governor include those that would:

- Extend California's COVID-19 Supplemental Paid Sick Leave benefits until December 31, 2022 (AB 152).
- Preclude discrimination against employees or applicants for cannabis usage away from the workplace and limit the drug screening employers can consider (AB 2188).
- Revive previously time-barred sexual harassment and wrongful termination claims related to sexual assaults under certain circumstances (AB 2777).
- Entitle employees to up to five days of bereavement leave (AB 1949).
- Amend the California Family Rights Act and Paid Sick Leave Law to allow time off to care for a "designated person" (AB 1041).
- Extend until January 1, 2024, the period under which employers must provide written notices of COVID-19 exposure (AB 2693).
- Implement new requirements regarding pay scale disclosures and amend the recently enacted Pay Data Reporting requirements (SB 1162).
- Require employers to allow the public to access employee restrooms under certain circumstances (AB 1632).

Notably, the California Legislature failed to extend the so-called "employment" and "business to business" records exemptions from the California Consumer Privacy Act, meaning these exemptions remain scheduled to expire on December 31, 2022.

Looking ahead, Governor Newsom has until September 30, 2022, to sign or veto any of the bills passed by the California legislature. Accordingly, below is an overview of the employment bills already enacted followed by those currently on Governor Newsom's desk.

TABLE OF CONTENTS FOR NEW LAWS AND PENDING BILLS

NEW LAWS ALREADY ENACTED

California

Statewide Minimum Wage Increases to $15.50 on January 1, 2023

Enacted in 2016, SB 3 implemented a series of annual increases to the statewide minimum wage until reaching $15.00 per hour. Presently, the statewide minimum wage is $15.00 per hour for employers with 26 or more employees, and $14.00 per hour for employers with 25 or fewer employees (with the minimum wage for these smaller employers scheduled to increase to $15.00 per hour on January 1, 2023).

However, SB 3 also contains provisions requiring further minimum wage increases if the Consumer Price Index exceeds certain enumerated levels, which it has over the last year. Accordingly, the statewide minimum wage will increase to $15.50 per hour for all employers, regardless of the number of employees, on January 1, 2023. The minimum salary threshold necessary to maintain an employee's exempt status will also increase to $64,480 annually and to $5,373.33 per month on January 1, 2023.

On July 1, 2022, a number of California cities or counties (including Los Angeles, San Francisco, and Berkeley) increased their minimum wage, including often dramatically above the state minimum wage. A complete list of these city and county-level minimum wage increases in California is available at https://www.govdocs.com/california-minimum-wage/.

Fast Food Industry Regulations (AB 257)

Touted by its proponents as a step toward sectoral bargaining, in which workers and employers negotiate compensation and working conditions on an industrywide basis, this law – the Fast Food Accountability and Standards (Fast) Recovery Act – establishes the Fast Food Council within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards on wages, working hours, and other working conditions for fast food workers.

The law applies to fast food restaurants, defined as establishments that are part of a chain of 100 or more establishments *nationally* that share a common brand or standards, and that primarily provide food or beverages for immediate consumption either on or off the premises to customers who order or select items and pay before eating, with items prepared in advance, with limited or no table service. The law exempts bakeries that produce bread for sale as a stand-alone menu item on the premises and restaurants located within "grocery establishments," as defined.

The Council will have ten members comprised of representatives of fast-food restaurant franchisors, franchisees, employees, advocates for employees, and the government, all to be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee. The Council is authorized to establish minimum standards for fast-food workers, including setting minimum wages and establishing standards for working hours and other conditions related to health, safety and welfare. (The Council will not be allowed to make any rules until the DIR receives a petition approving the creation of the council signed by at least 10,000 California fast food restaurant employees. Decisions by the Council shall be made by a vote of at least six of the Council members, meaning decisions could be made over the objection of the two representatives of fast-food franchisors and the two representatives of fast-food franchisees. The legislature would have the ability to pass legislation to prevent a standard, repeal or amendment proposed to be adopted by the Council.

The law specifies that the council shall not establish a minimum wage greater than $22 per hour for 2023, and that the minimum wage shall not increase in later years by more than 3.5% *or* the rate of change of the nonseasonably adjusted Consumer Price Index for Urban Wage Earners and Clerical Workers. The law states that even after the Council ceases to be operative on January 1, 2029, the minimum wage for fast food restaurant employees would continue to increase by the lesser of these amounts every year. The Council will not be permitted to promulgate new paid time off benefits or regulations regarding predictable scheduling. The standards set by the Council will not supersede those provided for in a collective bargaining agreement if the agreement expressly provides for wages, hours of work and working conditions that are better than the minimum standards established by the Council.

The law also makes it unlawful for a fast food restaurant operator to discharge or discriminate or retaliate against any employee because the employee made a complaint or disclosed information (or the restaurant operator believes the employee disclosed or may disclose information) regarding employee or public health and safety; the employee instituted, testified in, or participated in a proceeding relating to employee or public health or safety or any Council proceeding; or the employee refused to perform work in a fast food restaurant because the employee had reasonable cause to believe the practices or premises of the fast food restaurant would violate any specified worker and public health and safety laws, regulations or orders, or would pose a substantial risk to the health and safety of the employee, other employees, or the public. The law creates a private right of action for violation of this provision and allows treble damages for lost wages and work benefits, along with

attorney's fees and costs and reinstatement of employment. There is a rebuttable presumption of unlawful discrimination or retaliation if a fast-food restaurant operator discharges or takes any other adverse action against one of its employees within 90 days following the date the operator had knowledge of the employee's protected action.

DFEH Acting in Public Interest (AB 2662)

This law declares that in enforcing the FEHA, the Department of Fair Employment and Housing represents the state and effectuates the declared public policy of California to protect the rights of all persons to be free from unlawful discrimination and other FEHA violations. It is intended to be declarative of existing law and to codify the holding in *Department of Fair Employment and Housing v. Cathy's Creations, Inc*. (2020) 54 Cal.App.5th 404, 410.

Electronic Application for Work Sharing Program Extended (AB 1854)

Existing unemployment compensation law deems an employee unemployed in any week if the employee works less than their usual weekly hours of work because of the employer's participation in a work sharing plan that meets specified requirements, pursuant to which the employer, in lieu of a layoff, reduces employment and stabilizes the workforce. This new law extends indefinitely an alternative process adopted during the COVID pandemic, allowing these work sharing plans to be submitted and approved electronically.

Expansion of Businesses Required to Post Human Trafficking Notice (AB 1661)

Existing law requires specified businesses and other establishments, including, among others, airports, rail stations, certain medical facilities, and hotels, to post a notice, as developed by the Department of Justice, which contains information relating to slavery and human trafficking, and imposes penalties for failing to comply. This new law also requires businesses providing hair, nail, and skin care (as defined) to post the notice.

Remote Work for Finance Lender Employees (AB 2001)

While California's Financing Law (CFL) presently precludes finance lenders from transacting business at a location other than that identified in its license, this bill would authorize licensees under the CFL to designate employees who could work at a "remote location" (as defined) provided certain criteria are met (e.g., prohibiting consumer's personal information from being stored at the remote location unless stored on an encrypted device or encrypted media, as defined). In effect, it would codify the COVID-19 requirements issued by the Department of Financial Protection and Innovation to enable finance lender employees to work remotely during the initial stages of the pandemic.

Local Ordinances

San Francisco Public Health Emergency Leave

In June, San Francisco voters passed Proposition G, creating a new Public Health Emergency Leave Ordinance, which will be operative on October 1, 2022. The new ordinance applies to employers with more than 100 employees worldwide. It covers employees who perform work within the City and County of San Francisco for those employers. The ordinance provides up to 80 hours of **paid** leave per year (with the actual leave calculation differing for employees who are full or part time and on a fixed or variable schedule). The Public Health Emergency Leave is *in addition* to any paid time off, including paid

sick leave under the San Francisco Paid Sick Leave Ordinance. The leave is available only during a public health emergency, defined as a local or statewide health emergency related to any contagious, infectious or communicable disease, declared by the City's local health officer or the state health officer *or* an Air Quality Emergency (a day when the Bay Area Air Quality Management District issues a "Spare the Air Alert"). Leave may be taken if the covered employee is unable to work or telework due to any of the following:

(1) The recommendations or requirements of an individual or general federal, state, or local health order (including an order issued by the local jurisdiction in which an Employee or a Family Member the Employee is caring for resides) related to the Public Health Emergency.
(2) The Employee, or a Family Member the Employee is caring for, has been advised by a Healthcare Provider to isolate or quarantine.
(3) The Employee, or a Family Member the Employee is caring for, is experiencing symptoms of and seeking a medical diagnosis, or has received a positive medical diagnosis, for a possible infectious, contagious, or communicable disease associated with the Public Health Emergency.
(4) The Employee is caring for a Family Member if the school or place of care of the Family Member has been closed, or the care provider of such Family Member is unavailable, due to the Public Health Emergency.
(5) An Air Quality Emergency, if the Employee is a member of a Vulnerable Population and primarily works outdoors.

Employers of health care providers and emergency responders may limit the leave as specified in the Ordinance. The Ordinance specifies that employees who assert their rights to receive Public Health Emergency Leave are protected from retaliation. Covered employers will be required to post a notice, which you can access here. There are detailed requirements for the implementation of this leave, which you can review here.

PENDING BILLS

Harassment/Discrimination/Retaliation

Protections for Non-Work-Related Marijuana Usage and Testing Limitations (AB 2188)

This bill addresses concerns that some employer drug testing focuses on the presence of so-called "nonpsychoactive cannabis metabolites" that do not indicate actual impairment at work as opposed to simply revealing an employee may have smoked marijuana at some point and away from the workplace. It is also intended to encourage employers to rely more on testing for tetrahydrocannabinol (THC), which measures active impairment or psychoactive effects. Accordingly, it would amend the FEHA to preclude discrimination against an employee or applicant based upon (a) the person's use of cannabis off the job and away from the workplace (but it would not prohibit "scientifically valid" pre-employment drug screening conducted through methods that do *not* screen for nonpsychoactive cannabis metabolites) ; or (b) an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. Given the bill's purpose, while it limits testing for nonpsychoactive cannabis metabolites, it does not limit THC testing.

To address employer concerns raised with prior versions, this bill would not permit employees to possess, be impaired by or to use cannabis at work, nor would it affect an employer's rights or

obligations to maintain a drug and alcohol-free workplace, as specified under Health and Safety Code section 11362.45 or any other rights or obligations of an employer specified by federal law or regulation. This bill would not apply to employees in the building and construction trades or applicants or employees in positions that require a federal background investigation or security clearance. Additionally, the bill would not preempt state or federal laws requiring applicant or employee testing for controlled substances, or how this testing occurs, including laws and regulations requiring applicant or employee testing as a condition of receiving federal funding or federal licensing-related benefits.

If enacted, the new rules would become operative on January 1, 2024.

Revival of Sexual Assault and Other Claims (Including Wrongful Termination and Sexual Harassment) Arising Out of the Assault (AB 2777)

Entitled the Sexual Abuse and Cover Up Accountability Act, this bill would address concerns that victims of sexual assault may need additional time to pursue legal claims by modifying the statute of limitations for two types of sexual assault claims.

The first change would involve claims of adult sexual assault and addresses concerns that a recent extension of the relevant statute of limitations to 10 years was insufficient to revive otherwise stale claims. For background, in 2019, California enacted AB 1619 extending the statute of limitations for sexual assault from two to ten years. However, AB 1619 did not expressly state that it was intending to revive otherwise time-barred claims. Thus, AB 2777 would provide that any sexual assault claim (as defined) based upon conduct that occurred after January 1, 2009 (ten years preceding AB 1619) and commenced after January 1, 2019, which would have been barred solely because of the statute of limitations, is timely if filed by December 31, 2026.

The second change has greater potential applicability to employers and involves damages suffered because of a cover up of sexual assault occurring on or after a victim's 18th birthday, which could include "related claims" including wrongful termination and sexual harassment. For such claims that would otherwise be barred because the statute of limitations expired before January 1, 2023, it would allow such claims to be revived if filed between January 1, 2023, and December 31, 2023. This provision could theoretically apply to *any* time-barred covered claim and does not have a limit on the age of the claims that may be revived.

To qualify for this claim revival, a plaintiff would be required to allege all of the following: (a) they were sexually assaulted; (b) one or more entities are legally responsible for damages arising out of this alleged conduct; and (c) the entity or entities (including their agents, officers or employees) engaged in or attempted to engage in a "cover up" of a *previous instance* of sexual assault by an alleged perpetrator of such abuse.

For purposes of this new law, "cover up" would mean a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to this behavior from being public or disclosed to the plaintiff, including the use of non-disclosure or confidentiality agreements.

As noted, if revival occurs, it will apply to any "related claims" arising out of the sexual assault, including for wrongful termination and sexual harassment, except for claims (a) litigated to finality in a court of

competent jurisdiction before January 1, 2023, or (b) that have been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

Notably, this bill had originally proposed reviving any claims arising from "inappropriate conduct" of a sexual nature, but subsequent amendments limited this revival to claims arising from a sexual assault.

Retaliation Protections Related to Emergency Conditions (SB 1044)

This bill responds to media reports of employees killed or injured during recent natural disasters (e.g., warehouse employees affected the December 2021 tornado outbreak, or domestic workers forced to work during California's fire outbreaks), or during "active shooter" situations. Accordingly, it would preclude employers from taking or threatening adverse action against employees who refuse to report to or who leave a workplace within the affected area because the employee reasonably believed the worksite was unsafe due to an "emergency condition" (as defined below) This particular provision would *not* apply to various statutorily enumerated employers and employees, including first responders, disaster service workers, health care workers, employees working on a military base or in the defense industrial base sector, utility workers, licensed residential care facilities and certain "depository institutions" (as defined).

A broader provision would prohibit all employers, in the event of an emergency condition, from preventing employee access to their mobile devices or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety (except in very narrow specifically enumerated occupations).

For purposes of this bill, an "emergency condition" would mean the existence of either (1) conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act; or (2) an order to evacuate a workplace, a worker's home, or the school of a worker's child due to natural disaster or a criminal act. Emergency condition, however, would not include a health pandemic.

A "reasonable belief that the workplace or worksite is unsafe" would be defined to mean "that a reasonable person, under the circumstances known to the employee at the time, would conclude that there is a real danger of death or serious injury if that person enters or remains on the premises." For these purposes, the existence of any health and safety regulations specific to the emergency condition and an employer's compliance or noncompliance with those regulations shall be a relevant factor if this information is known to the employee at the time of the emergency condition or the employee received training on the health and safety regulations mandated by law specific to the emergency condition.

As in other time-off contexts, an employee will be required, when feasible, to notify the employer of the state of emergency or emergency condition requiring the employee to miss or leave work. If such notice is not feasible, the employee shall notify the employer of these conditions as soon as possible afterwards.

The bill specifies it is not intended to apply when the emergency conditions that pose an imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker's home have ceased.

Lastly, it provides that employers shall have the right to cure alleged violations that could be brought pursuant to PAGA.

DFEH to Recognize Businesses that Prevent Customer Harassment (AB 2448)

California's Unruh Civil Rights Act (Civil Code section 51 *et seq.*) prohibits business establishments from discriminating (i.e., withholding services or denying accommodations) based on specified characteristics, including sex, race, religion, sexual orientation, medical condition, national origin, or immigration status. This bill would require the Civil Rights Department within the Department of Fair Employment and Housing to develop a pilot program by January 1, 2025, recognizing businesses that create safe and welcoming environments free from discrimination and harassment of customers. To qualify for such recognition, business would need to meet the department's to-be-determined criteria, but which may include: (1) demonstrating compliance with the Unruh Act generally; (2) offering additional training to educate and inform employees or build skills; (3) information the public of their right to be free from discrimination and harassment; (4) outlining a code of conduct for the public encouraging respectful and civil behavior; and (5) any other actions designed to prevent and respond to harassment or discrimination, regardless of the perpetrator's identity. This recognition, however, would not establish or be relevant to any defense of potential claims against the employer.

Notably, this bill had originally proposed requiring businesses to undertake numerous additional affirmative actions to prevent third-party harassment of customers, including annual training of supervisory and non-supervisory employees.

Human Resources/Workplace Policies

Changes Regarding Pay Scale Postings and Annual Pay Data Reporting (SB 1162)

Pay equity concerns have been a primary legislative focus recently, and this law would update several recently enacted laws regarding pay scales and pay data reporting.

- Pay Scale Posting

Labor Code section 432.3 presently requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant after the applicant has completed an initial interview with the employer. This bill would require employers with 15 or more employees to post the pay scale within any job posting. Employers with 15 or more employees would also be required to provide the pay scale to a third party engaged to announce/post/publish a job posting, and the third party must include the pay scale in the job posting. Employers with fewer than 15 employees would still be required to provide the pay scale to an applicant upon reasonable request. While section 432.3 presently only requires employers provide such pay scales to "applicants," this bill would also require employers, upon reasonable request, to provide pay scale information to current employees in connection with the employee's current position. For purposes of this new requirement, "pay scale" means a salary or hourly wage range.

Employers would also be required to maintain records of a job title and wage rate history for each employee for the duration of employment plus three years after the end of employment. The Labor Commissioner would be entitled to inspect these records.

The bill would allow aggrieved individuals to file a civil action or a written complaint with the Labor Commissioner, establish a civil penalty of $100 to $10,000 per violation, and create a rebuttable presumption in favor of an employee's claim if an employer fails to keep required records. The bill provides that no penalty shall be assessed for a first violation of the requirement to provide pay scale to

applicants if the employer demonstrates that all job postings for open positions have been updated to include the pay scale as required by this section.

- Annual Pay Data Reporting

In 2020, California enacted SB 973 requiring private employers with 100 or more employees to file an annual Employer Information Report (EEO-1) pursuant to federal law and to submit a pay data report to the DFEH, including the number of employees by race, ethnicity, and sex in specified job categories. SB 973 allowed employers to comply with this new reporting requirement by submitting an EEO-1 to DFEH containing the same or substantially similar pay data information.

As often happens in California, SB 1162 would amend these new reporting requirements in several respects:

- While private employers with 100 or more employees must annually submit a pay data report to DFEH, this bill would also require employers with 100 or more employees to submit a separate pay data report for employees hired through labor contractors (with the data supplied by the labor contractor), and to disclose on the pay data report the ownership names of all labor contractors used to supply employees. The bill's author states this expansion to include labor contractor-related hiring is to combat employers trying to circumvent the current pay data reporting limited to employees, and to expand the information collected when assessing pay equity issues. For purposes of this new law, a "labor contractor" means an individual or entity that supplies, either with or without contract, workers to perform labor within the client employer's usual course of business.
- The pay data report would also now be required to include median and mean hourly rates for each combination of race, ethnicity, and sex within each job category.
- Employers would no longer be permitted to submit an EEO-1 in lieu of a pay data report.
- This bill would impose new civil penalties of $100 per employee on an employer who fails to file the required report for a first offense, and $200 per employee for subsequent violations, but would allow for apportionment of penalties if an employer is unable to submit a complete and accurate report because a labor contractor has not provided necessary pay data.
- It would require these reports be due by the second Wednesday of May of each year (beginning in May 2023) rather than the current March 31st deadline.

Public Access to Employee Restrooms (AB 1632)

Since 2005, 17 states have passed laws requiring businesses to allow members of the public experiencing a medical emergency to use employee-only restrooms. AB 1632 would enact a similar requirement in California.

Accordingly, places of business open to the public for the sale of goods and that have a toilet facility for their employees would need to permit certain individuals who are lawfully on the business' premises to use that toilet facility during business hours, even if the business does not normally allow public usage of the employee restrooms. Such access would need to be provided if all of the following conditions are met: (1) the individual requesting access has an "eligible medical condition" or uses an ostomy bag; (2) three or more employees are working onsite when the employee requests access; (3) the employee toilet facility is not located in an employee changing area or an area where access would create an obvious health/safety risk to the requesting individual or an obvious security risk to the place of

business; (4) use of the employee toilet facility would not create an obvious risk or safety risk to the requesting individual; and (5) a public restroom is not otherwise immediately accessible.

"Eligible medical condition" would be defined as Chron's disease, ulcerative colitis, other inflammatory bowel disease, irritable bowel syndrome, or another medication condition that requires immediate access to a toilet facility.

Businesses would be permitted to require the individual to present reasonable evidence of an eligible medical condition or the use of an ostomy device. Such evidence would include a signed statement issued to the requesting individual by a physician, nurse practitioner or physician assistant on a form to be developed by California's State Department of Public Health. Businesses also would not be required to make any physical changes to the employee toilet facility to comply with this bill, and these employee toilet facilities would not be considered "places of public accommodation" for purposes of state disability law.

The Public Health Department would be solely responsible for enforcing these provisions (i.e., there would be no private civil action allowed), and violations would result in civil statutory penalties up to $100 per violation. Places of businesses would only be civilly liable for willful or grossly negligent violations. Employees of a business would not be subject to civilly liable, nor could they be discharged or subjected to other disciplinary action by their employer for any violations of these new access requirements, unless the employee's actions are contrary to an expressed policy developed by their employer pursuant to this section.

New Requirements Regarding Employee Parking (AB 2206)

To combat air pollution and promote alternative transportation, Health and Safety Code section 43845 presently requires that in certain "air basins designated as a nonattainment area," employers with 50 or more employees that provide a parking subsidy to employees must also offer a "parking cash out program" to employees that do not use this parking. However, employers have expressed difficulty calculating and paying out this subsidy since many commercial leases simply bundle parking with other lease services rather than separately designating the cost of parking spots. This commercial practice has also made it difficult for the state agencies to enforce the law's requirements.

To address these problems and to further publicize a somewhat unknown law, this bill would revise the definitions of "parking cash-out program," "parking subsidy" and "the market rate cost of parking," and impose two new record retention requirements upon employers.

Simply summarized, "parking cash out program" would mean an employer-funded program under which the employer provides a cash allowance to eligible employees that is equal to or greater than the "parking subsidy" the employer would otherwise pay to provide the employee with a parking spot. In turn, "parking subsidy" would be defined as "the difference between the price charged to the employee for the use of a parking space not owned by the employer and made available to that employee and the 'market rate cost of parking.'"

The definition of "market rate cost of parking" is quite detailed but broadly speaking would be an amount no less than if the parking were obtained by an individual unaffiliated with the property on which the parking is provided or by the employer through a transaction for the closest publicly available parking within one quarter mile of the employee's workplace. If the market rate cost of parking cannot

be established using this formula, then it would alternatively be defined as an amount that is the monthly or daily price for use of a parking space located within one-quarter mile of the place of employment, as evidenced by a public offer such as a printed or public advertisement, or a listing price such as on a smartphone app, available to the public for that parking spot within the previous six months.

Notably, employers would now be required to maintain for at least four years appropriate evidence of its efforts to establish the marking rate cost of parking or relevant parking offers used to determine market rate costs.

Where the "market rate cost of parking" can be determined, the market value for parking subsidy purposes would be capped at $350 per month. If the market value of a parking space cannot be established, the value shall be assumed to be the greater of the lowest-priced transit serving the site or $50 per month.

If the employer provides a parking subsidy to an employee, the employer would also now be required to maintain a record of its communications informing that employee of their right to receive the cash equivalent of the parking subsidy.

As before, the parking cash-out program may require the employee certify they will comply with the employer's guidelines to avoid neighborhood parking problems, and that failure to comply will disqualify the employee from the parking cash-out program.

Background Checks Involving Date of Birth and Driver's License Information in Court Records (SB 1262)

Background check companies typically use an individual's date of birth or driver's license information to effectively locate information related to an applicant or employee when performing a background check through court records, and to avoid the risk of returning information about another person with the same name. However, a recent California appellate court decision in *All of Us or None of Us v. Hamrick* (2021) 64 Cal.App.5th 751, held that California Rule of Court 2.507 precluded electronic access to such information in court records. Responding to concerns that this interpretation would complicate background checks and potentially lead to unverifiable "false hits" based on common names, this bill would specifically authorize searches and filtering of publicly accessible court records based on a criminal defendant's driver's license number or date of birth, or both.

Sealing of Criminal Records Regarding Felony Convictions (SB 731)

Like many states, California has recently enacted several laws designed to remove employment barriers related to an applicant's arrest records or criminal convictions. These laws include California's "ban the box" law (AB 1008 [2017]), which generally limited an employer's ability to inquire about conviction history until after a conditional employment offer is made, and its automatic relief law (AB 1076 [2019]), which requires the state Department of Justice (DOJ) to affirmatively review and seal criminal record information related to certain convictions (generally misdemeanors).

This bill would expand these protections in several regards, with overall goals of sunsetting certain records and allowing automated sealing of other records. First, it would expand the court's discretionary power to provide expungement relief to all felonies except those that require registration as a sex offender, where certain conditions are met. Second, it would expand automatic arrest record relief – i.e., where the state DOJ reviews and seals records rather than requiring an applicant to petition for

such relief – to most felony offenses provided certain criteria are present (e.g., there is no indication criminal proceedings have been initiated, at least three calendar years have elapsed since the arrest date and no conviction occurred, or the arrestee was acquitted of any charges arising from that arrest).

Third, it would expand automatic conviction relief – where the state DOJ reviews records and grants relief without requiring a petition for relief – to convictions for non-violent, non-serious felonies that do not require sex offender registration provided certain criteria are present (e.g., completion of all terms of incarceration, probation, mandatory supervision, post-release community supervision, and parole, and a period of four years has elapsed during which the defendant was not convicted of a new felony offense). This form of conviction relief would have some limited implications (for example, it would not relieve a person of the obligation to disclose a criminal conviction in an application for employment as a peace officer and would not make a person eligible to provide defined in-home supportive services), and the prosecuting attorney or probation department may petition to prevent the relief based on a showing of a substantial threat to public safety.

In addition, the bill would specify that these various forms of conviction relief do not apply to teacher credentialing or employment in public education, except that the bill would prohibit denial of a credential based on a record of conviction for possession of specified controlled substances that is more than five years old and from which relief was granted.

This bill would not necessarily impose new affirmative duties upon employers, except to the extent it would further limit the information they can seek out and/or consider during background checks.

Creation of Ultrahigh Heat Standard and Revision of Wildfire Smoke Standard (AB 2243)

The California Occupational Safety and Health Act of 1973 (OSHA) requires employers to comply with certain safety and health standards, including a heat illness standard to prevent heat-related illness in outdoor places of employment and a standard for workplace protection from wildfire smoke. This bill would require the Division of Occupational Safety and Health to submit a rulemaking standard to *consider* revising the heat illness standard to require employers to provide a copy of the Heat Illness Prevention Plan to all new employees upon hire and upon training required by 8 C.C.R. § 3395, but no more than twice per year to each employee. The bill would also require a rulemaking proposal to consider revising the wildfire smoke standard regarding farmworkers to reduce the existing air quality index threshold at which respiratory protective equipment becomes mandatory for farmworkers. Finally, the bill would require the division to consider developing or revising regulations related to additional protections related to acclimatization to higher temperatures. The bill would require the division to submit these rulemaking proposals before December 1, 2025 and require the standards board to consider adopting revised standards before December 1, 2025.

Creation of Advisory Committees Re: Extreme Heat and Humidity (AB 1643)

This bill would require the Labor and Workforce Development Agency to establish an advisory committee to study the effects of heat on California's workers and to recommend the scope of a study that addresses prescribed topics related to data collection, certain economic losses, injuries and illnesses, and methods of minimizing the effect of heat on workers. The bill would authorize the advisory committee to contract with academic institutions or other researchers to issue a report no later than January 1, 2026.

Employee and Subcontractor Compliance with Workplace Safety Requirements at Live Events (AB 1775)

This bill applies to "contracting entities," defined as bodies that contract with an entertainment events vendor to set up, operate, or tear down a live event at a public events venue – including state or county fairgrounds, state parks, the University of California, or California State University. Contracting entities would need to require an entertainment events vendor to certify for their employees and subcontractors' employees that those individuals have complied with specified training, certification, and workforce requirements, including those employees involved in setting up, tearing down, or the operation of a live event at the venue have completed proscribed OSHA training. The bill provides that the new requirements shall be enforced by the issuance of a citation and notice of civil penalty.

Establishing "Juneteenth" as a State Holiday (AB 1655)

This bill would add June 19, known as "Juneteenth," as a state holiday and would authorize state employees to elect to take time off with pay, with specified exemptions.

COVID-19-Related Proposals

Extension of COVID-19 Supplemental Paid Sick Leave and Related Grants to Small Businesses or Nonprofits (AB 152)

In February 2022, California enacted SB 95 reinstating California's COVID-19 Supplemental Paid Sick Leave (SPSL) for the period January 1, 2022, through September 30, 2022. The 2022 COVID-19 SPSL law applies to all California employers who employ more than 25 employees and to all employees who are "unable to work or telework" for any of the specified qualifying reasons. Full-time employees are entitled to a maximum of 80 hours of COVID-19 SPSL leave. For more information regarding the original 2022 COVID-19 SPSL law, please see WTK's Special Alert here or the California Department of Industrial Relations "Frequently Asked Questions" here.

AB 152 would make several changes. First, and most importantly, it would extend the 2022 COVID-19 SPSL provisions from September 30, 2022 to December 31, 2022.

Second, it makes some changes related to testing. Presently, if an employee is receiving additional COVID-19 SPSL, then an employer may require the employee to submit to a second diagnostic test on or after the fifth day after the first positive test that entitled the employee to the additional COVID-19 SPSL and provide documentation of those results. This bill would further authorize the employer to require, if the second diagnostic test for COVID-19 is also positive, to submit to a third diagnostic test within no less than 24 hours and requires the employer to provide the second and third diagnostic tests at no cost to the employee. Finally, while the employer presently has no obligation to provide COVID-19 SPSL to an employee who refuses to submit documentation of test results confirming COVID-19 infection, this bill would also authorize the employer to deny COVID-19 SPSL to an employee who refuses to submit to these tests.

The bill would also establish a grant program to provide reimbursement for COVID-19 SPSL costs incurred in 2022 (up to a maximum of $50,000) for to specified small businesses and nonprofit organizations that have 26 to 49 employees and meet other defined requirements.

Extended Employer Notice Requirements Regarding COVID-19 Exposure and Expanded Cal-OSHA Powers (AB 2693)

In 2020, California enacted new mandatory employer notification requirements related to potential COVID-19 exposures in the workplace. (AB 685, codified at Labor Code section 6409.6 and 6325.) Specifically, if an employer or a representative of the employer receives a "notice of potential exposure to COVID-19," the employer must provide statutorily enumerated notices within one business day of the notice of potential exposure, and potentially may also have to provide separate notice to local public health agencies within 48 hours. Cal-OSHA also can prohibit employer access to and usage of portions of the worksite that may constitute an imminent hazard to employees due to potential COVID-19 exposure. These requirements are set to expire on January 1, 2023.

The new bill would extend some of these requirements through January 1, 2024, but reduce the notification requirements and provide an alternative option to post a notice in the workplace. Notably, the bill would allow employers who receive notice of potential exposure to place a notice in all place where notices of workplace rules are customarily posted stating: (1) the dates on which an employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period; (2) the location of the exposure, including the department, floor, building, or other area; (3) contact information for employees to receive information regarding COVID-19-related benefits; (4) contact information for employees to receive the CDC cleaning and disinfection plan and Cal-OSHA COVID-19 prevention program. The notice must be posted within one business day from when the employer receives notice of potential exposure and remain posted for not less than 15 calendar days. If the employer posts other workplace notices on an existing employee portal, the notice shall be posted on the portal. Alternatively, the employer may provide written notice to all employees who were on the premises at the same time as the confirmed case of COVID-19 (as was required under the prior version of the statue), but need not provide to all employees who were on the premises information about COVID-19-related benefits, the cleaning and disinfection plan, or the prevention plan. Employers would be required to keep a log of all the dates the notice was posted.

The bill would remove the requirement to notify the local public health agency in the case of a COVID-10 "outbreak." The bill *would* still require the employer to provide written notice to any exclusive representative of confirmed cases of COVID-19 and of employees who had close contact with the confirmed cases within one business day. The bill would remove the requirement for the State Department of Public Health to make publicly available information about COVID-19 outbreaks.

Extension of Presumption of Workers' Compensation Coverage for COVID-19 (AB 1751)

On September 17, 2020, California created a rebuttable presumption of workers' compensation coverage for employees who contracted a COVID-19-related illness under certain circumstances, with slightly different rules depending on whether the workplace exposure occurred before or after July 6, 2020. (SB 1159, codified at Labor Code sections 3212.86, 3212.87, and 3212.88.) The original law is set to expire January 1, 2023. This new bill would extend the rules regarding the rebuttable presumption of coverage through January 1, 2024.

Leaves of Absence/Time Off/Accommodation Requests

Bereavement Leave Proposed Again (AB 1949)

An emerging criticism of the California Family Rights Act (CFRA) and the Family Medical Leave Act is that they provide time off to care for a seriously sick family member but provide no time off to the employee in the event the family member passes away.

Accordingly, this bill would require employers to provide up to five days of bereavement leave following the death of an employee's "family member" (e.g., spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law). This bill would apply to private employers with five or more employees and to any state or civil subdivision of the state (e.g., counties and cities), and employees would need to have been employed at least 30 days prior to the commencement of the leave to be eligible. However, it would not apply to employees covered by a collective bargaining agreement that contains specially enumerated provisions, including bereavement leave.

The days of bereavement leave would not need to be consecutive but must be completed within three months of the date of the person's death. For most employers, this bereavement leave may be unpaid (unless the employer has an existing bereavement leave policy requiring paid time off), but an employee may use otherwise accrued or available vacation, personal leave, or compensatory time off. If an employer has an existing leave policy providing less than five paid days of bereavement leave, the employee would still be entitled to five days of bereavement leave, consisting of the number of days of paid leave under the policy and the remaining days of unpaid bereavement leave under this new law.

For permanent state employees, the first three days of bereavement leave would be paid, and those employees would be entitled to request an additional two days without pay, but without the current requirement that these two additional days only apply for out-of-state deaths.

Notably, although this new law would be codified in a new section (Government Code section 12945.7) immediately after the statute creating CFRA, bereavement leave would be considered separate and distinct from time off under the CFRA.

If requested by the employer, an employee would need to provide within 30 days of the first day of the leave documentation of the person's death, including a death certificate or a published obituary or written verification of death, burial, or memorial service from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency. Employers would need to maintain the confidentiality of employees requesting this leave and to treat any documentation obtained as confidential and not disclose it except where required by law.

Because this new right would be codified at new Government Code section 12945.7, employees who believe they have been discriminated or retaliated against (or denied available time off) would presumably be entitled to the same remedies available for violations of the CFRA and/or the FEHA. However, alleged violations of this new section against smaller employers (i.e., with between five and nineteen employees) would also be subject to the recently created mediation pilot program for CFRA claims against such smaller employers.

Similar bills (including AB 2999 in 2020 and AB 95 in 2021) have stalled. However, several other states (e.g., Oregon and Maryland) and the City of Pittsburgh have recently enacted bereavement leave laws, suggesting this may be an emerging trend.

Expanded Entitlement under CFRA and Paid Sick Leave for "Designated Persons" (AB 1041)

In 2020, California expanded the CFRA not only to apply to almost all employers (i.e., with five or more employees) but also materially expanded the individuals for whom leave could be taken to provide care (i.e., adding siblings, grandparents, grandchildren and parents-in-law). Concerned that the statutory focus upon "nuclear family" relationships for leave purposes ignores modern realities and so-called "chosen families," this bill would now amend the CFRA again to expand when the time-off provisions could be used. In this regard, it would follow the lead of several states (Oregon, Connecticut, New Jersey, and Colorado) and at least eight localities (including Los Angeles) that allow paid sick time or paid family and medical leave to cover "designated persons."

Specifically, it would amend CFRA's definition of family care and medical leave to include a "designated person," defined as "an individual related by blood or whose association with the employee is the equivalent of a family relationship." An employee would be able to designate this individual at the time the employee requests family care and medical leave, but the employer may limit the employee to one designated person per 12-month period of family care and medical leave.

It would similarly amend the definition of "family member" in California's Paid Sick Leave law (Labor Code section 245.5(c)) to include a "designated person." As with the proposed CFRA changes discussed above, an employee could designate that person at the time they request to use paid sick days, while the employer could limit the employee to one designated person per 12-month period of paid sick days.

Paid Parental Leave for California State University Employees (AB 2464)

New Education Code section 89519.3 would entitle California State University "employees" (as defined in Government Code section 3562) to a leave of absence with pay for one semester of an academic year, or an equivalent duration, in a one-year period following the birth of a child or placement of a child with an employee for adoption or foster care The leave would need to be taken in consecutive periods unless otherwise agreed to by mutual consent between the employee and an appropriate administrator, and only working days would be charged against the leave of absence.

Pay and Benefits for State Employees for National Guard Drills (SB 984)

Presently, state employees who are members of reserve military units and the National Guard are entitled to an unpaid leave of absence to attend scheduled reserve drill periods or to perform other inactive duty reserve obligations. This bill would recast those provisions to instead require that employee members of reserve military units and the National Guard required to perform inactive duty obligations, other than inactive and active duty training drills periods (as specified), be granted military leave of absence without pay as provided by federal law. It would also allow employee members that attend or perform inactive duty obligations, other than inactive and active duty training drill periods, to elect to use vacation time or accumulated compensatory time off to attend those other obligations.

Government Code section 19775.1 presently provides that an employee who is granted short-term military leave of absence for active military duty, but not for inactive duty, and how for at least a year prior had a continuous state service of at least one year, is entitled to their salary or compensation for the first 30 calendar days of active duty served during the absence. This bill would also entitle an employee to receive their compensation for short-term military leave of absence for National Guard active duty and inactive duty training drill periods.

Wage & Hour

Extension of Meal and Rest Period Requirements to Employees of Public Hospitals (SB 1334)

Existing law requires an employer to provide specified meal and rest periods to employees of private sector hospitals and provides a remedy of one hour of premium pay for missed meal and rest breaks, while excepting employees in the public sector from these requirements. This bill would apply to employees who provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health setting and who are employed by the state, political subdivisions of the state, municipalities, and the regents of the University of California. Employees would be entitled to one unpaid 30-minute meal period on shifts over 5 hours and a second unpaid 30-minute meal period on shifts over 10 hours (with the same waiver and on-duty provisions allowed in Wage Orders 4 and 5), as well as a rest period based on the total hours worked daily at the rate of 10 minutes net rest time per 4 hours worked or major fraction thereof. Employers would be required to pay one hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Extended Exemption from "ABC Test" for Commercial Fishers (AB 2955)

This bill would extend from January 1, 2023, to January 1, 2026, the exemption from the so-called "ABC Test" for employee classification purposes for commercial fishers working on an "American vessel" (as defined). During this period, these relationships would continue to be governed by the multifactor *Borello* test for purposes of determining whether the fisher is an employee or an independent contractor.

Public Sector/Labor Relations

Penalties and Potential Liability for Discouraging Union Membership (SB 931)

Government Code section 3550 currently prohibits a public employer from deterring or discouraging employees or applicants from becoming members of an employee organization, authorizing representation by an employee organization, or authorizing dues or fees to an employee organization. This bill would authorize an employee organization to bring a claim before the Public Employment Relations Board alleging violation of these rules and would establishing a civil penalty up to $1000 for each affected employee, not to exceed $100,000 in total, to be deposited in the General Fund. The Board would be instructed to consider the employer's annual budget, the severity of the violation, and any prior history of violations in assessing the penalty. The bill would instruct the Board to award attorney's fees and costs to a prevailing employee organization unless the Board finds the claim was frivolous, unreasonable, or groundless when brought, or the employee organization continued to litigate after it clearly became so.

New Labor Relations Rules for Agricultural Employers (AB 2183)

Existing law creates the Agricultural Labor Relations Board and requires it to certify the results of a secret ballot election by employees in a collective bargaining unit to designate a collective bargaining representative. This bill would permit agricultural employees to authorize a labor organization to be certified as the exclusive bargaining representative of a bargaining unit through either a "labor peace election" or a "non-labor peace election," depending on whether an employer enrolls and agrees to a labor peace election. Every agricultural employer would have the option to indicate whether they agree to a labor peace compact each year. A "labor peace compact" would be defined as an agreement to

make no statements for or against union representatives, to voluntarily allow labor organization access, not to engage in any captive audience messaging, not to disparage the union, and not to express any preference for one union over another. A labor peace compact would not prohibit an employer from communicating truthful statements to employees about workplace policies or benefits, provided that such communications make no reference to any union or protected concerted activity.

A labor peace election would allow employees to make a choice regarding union representation through a mail ballot election, with specific rules set forth in the bill. A non-labor peace election would allow a labor organization to become the exclusive representatives for agricultural employees via a petition alleging that a majority of the employees in the bargaining unit wish to be represented by the organization, with specific requirements set forth in the bill.

The bill would also create civil penalties for employers who commit unfair labor practices of up to $10,000. The bill would also require an employer who appeals or petitions for writ of review of any order of the board involving make-whole, backpay or other monetary awards to employees to post an appeal bond in the amount of the entire economic value of the order.

State-Provided Benefits

Increase Paid Family Leave Benefits (SB 951)

To address concerns the current Paid Family Leave benefits paid by the state Disability Fund are insufficient to enable many lower wage workers to take family leave, this bill would increase the weekly benefits from 60% to up to 70% of an employee's wages or 90% of an employee's wages, depending on their wage rate (subject to certain caps). These increased benefits would begin January 1, 2025. The bill would also remove a limitation on workers' contributions to the Unemployment Compensation Disability Fund on January 1, 2024. This is a modified version of AB 123, which passed the Legislature in 2021 but was vetoed by Governor Newsom.

Pilot Program Regarding Unemployment Assistance for Undocumented Workers (AB 2847)

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, 2026, the "Excluded Workers Pilot 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. The bill would make individuals eligible to receive $300 per week for each week of unemployment between January 1, 2024, and December 31, 2024, 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.

Treatment by Licensed Clinical Social Workers under Workers' Compensation (SB 1002)

Existing workers' compensation law requires employers to provide medical services reasonably required to cure or relieve an injured worker from the effects of covered injuries. This bill would expand the meaning of medical treatment to include the services of a licensed clinical social worker (LCSW) and would authorize an employer to provide an employee with access to an LCSW. The bill would authorize medical provider networks to add LCSWs to the physician providers listing and would prohibit an LCSW form determining disability, as specified. A licensed clinical social worker would be authorized to treat or evaluate an injured worker only upon referral from a physician.

Changes to Workers' Compensation Liability Presumptions, Coverage, and Penalties (SB 1127)

Existing law provides that if an employer does not reject liability within 90 days after receiving an injured employee's claim form, an injury is presumed compensable under the workers' compensation system. This bill would reduce that period to 75 days for certain injuries for law enforcement or first responders. In addition, the bill would increase the number of compensable weeks for specified firefighters and peace officers for illness or injury related to cancer from 104 weeks to 240 weeks. Finally, the bill would increase the penalty for unreasonably rejecting specified claims for law enforcement or first responders from the current amount (25% of the unreasonably delayed or refused claim or a minimum of $10,000) to five times the amount of the benefits unreasonably delayed, up to a maximum of $50,000.

Miscellaneous

Cal/WARN Changes, Including as Applied to Call Center Relocations (AB 1601)

As with many other federal statutes, California has its own version of the federal Worker Adjustment and Retraining Act (Cal/WARN Act [Labor Code section 1400, *et seq.*]) with both similarities to and differences from its federal counterpart. This bill would amend the Cal/WARN Act to authorize certain notice requirements concerning a mass layoff, relocation or termination of employees, including "call center" employees. It would also grant the Labor Commissioner the authority to investigate an alleged violation, order appropriate temporary relief to mitigate a violation pending completion of a full investigation or hearing, and issue a citation in accordance with certain procedures.

It would also prohibit a call center employer from ordering a relocation of its call center, or one or more of its facilities or operating units within a call center unless it complies with CalWARN-type notice requirements (e.g., notice to the affected employees, the EDD, the local workforce investment board, and the chief elected official of each city and county government within which the relocation/ass layoff occurs). It would also establish remedies if a call center employer failed to provide such notices. Call center employers who appear on the EDD's relocation list that failed to provide such notices will be ineligible for state grants, state-guaranteed loans, or tax benefits for five years after the date that the list is published. Such call center employers would also be ineligible to claim a tax credit for five taxable years beginning on and after the date the EDD's list is published.

Worker Protections for Direct Patient Care Providers Regarding Technology (AB 858)

This bill would provide that "technology" (as defined) shall not preclude a worker providing direct patient care from exercising independent clinical judgment regarding patient care or acting as a patient advocate. It would also prohibit employer retaliation against patient care workers who request to

override health information technology and clinical practice guidelines and allow employees to file a complaint with the Labor Commissioner against the general acute care hospital employer.

Such general acute care hospitals would also be required to notify all workers who provide direct patient care (and their union representatives, if applicable) before implementing new information technology that may materially affect the workers or their patients and require employers to provide adequate training on such new technology. General acute care hospitals would also be required to allow workers providing direct patient care to provide input in the implementation process for new technology impacting patient care delivery. It would also specify that its provisions do not allow the override of any physician orders.

This bill further provides that the Private Attorneys General Act would not apply to violations of these new requirements unless otherwise agreed to by the employer and a labor organization.

A very similar bill (AB 2604) was introduced in 2020 but stalled due to the pandemic-related shutdown of the Legislature.

PROPOSED FEDERAL REGULATIONS

Proposed Rule Regarding I-9 Document Verification

Employers have an obligation to verify an employee's identity and authorization to work in the United States and must complete a federal Form I-9 to document that verification. Prior to the COVID-19 pandemic, employers were required to physically examine the documentation presented by new employees as part of this verification process. Starting on March 20, 2020, Immigration and Customs Enforcement (ICE) announced that employers who were operating remotely could instead inspect the Form I-9 documents remotely and then obtain copies of the documents within three business days but would have to physically examine the documents once normal in-person operations resumed. This guidance was periodically extended as the COVID-19 national emergency continued, and in April 2021, ICE updated the guidance to state that employer only needed to conduct in-person examination of documentation for employees who physically reported to work on a regular basis, and that workers who worked exclusively in a remote setting due to COVD-19 were exempted from physical examination of their documents until they undertook non-remote work on a regular basis. These flexibilities have been extended to October 31, 2022.

On August 18, 2022, ICE published a proposed rule that would create a framework under which DHS could pilot various options, respond to emergencies similar to the COVID-19 pandemic, or implement permanent flexibilities. The proposed rule would not directly authorize remote document examination, but ICE indicated it is exploring alternative options, including the possibility of making permanent some of the current COVID-related flexibilities. ICE also proposes making changes to the Form I-9 to add a box that the employer would check to indicate if alternative procedures were used.

ICE is soliciting public comments on this proposed rule, which may be submitted up to October 17, 2022. You can access the proposed rule and more information here.