CALIFORNIA LEGISLATIVE DEVELOPMENTS

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LEGISLATIVE SUMMARY

After returning from summer recess, the California Legislature scrambled to pass bills before the September 15th deadline and send them to Governor Brown. Not unexpectedly, given the Legislature's current political composition, a number of significant employment bills cleared this hurdle and have been sent to the Governor, including bills that would:

- Prohibit employers from inquiring about salary history during the hiring process (AB 168);
- Require larger employers to collect and publish information concerning gender pay differences for exempt employees (AB 1209);
- Preclude employers from inquiring about criminal convictions until after a conditional offer of employment and impose new limitations upon and disclosure requirements for considering criminal convictions (AB 1008);
- Require employers with more than 20 employees to provide up to 12 workweeks of parental leave (SB 63);
- Prohibit employers from allowing federal immigration agencies access to worksites unless certain conditions are met (AB 450);
- Prohibit employers from discriminating based on an employee's reproductive health decisions (AB 569);
- Require that the currently mandated sexual harassment training for supervisors be expanded to include gender identity, gender expression and sexual orientation (SB 396);
- Expand the Labor Commissioner's powers when investigating retaliation complaints, including allowing pre-determination injunctive relief (i.e., temporary restraining orders) (SB 306); and
- Require employers to provide written copies of their Illness and Injury Prevention Program upon request by an employee or their representative (AB 978).

There were also several bills that stalled late in the process, including bills that would have created whistleblower protections for legislative employees (AB 403) and increased California's overtime exemption level to the $47,476 level proposed in the now-stalled Department of Labor Regulations (AB 1565). Since AB 1565 did not pass, California's minimum wage and salary basis level will continue to increase under the current schedule following SB 3's enactment in 2016, meaning that on January 1, 2018, the minimum wage will increase to $11.00 for employers with 26+ employees and to $10.50 for employers with 25 or fewer employees (and the salary basis test for those employers will increase to $45,760 and to $43,680 respectively).

Governor Brown now has until October 15, 2017 to sign or veto any of these bills.

A summary of the bills awaiting the Governor's attention is below, and unless otherwise indicated, any enacted bill would take effect January 1, 2018:

PENDING STATEWIDE BILLS

New Rules for Employers Facing Federal Immigration Authorities (AB 450)

Work-related immigration topics have been a particular legislative priority recently, and this wide-

ranging bill continues that trend and highlights the current tension between California and the federal government related to immigration. Amongst other things, it would limit California employers from voluntarily complying with federal immigration authorities, impose new notice requirements, and enact many new statutory penalties.

For instance, while federal immigration laws presently allow federal immigration agencies access to non-public portions of an employer either through a warrant or the employer's consent, these new provisions would essentially remove the employer's ability to provide consent and require a warrant or subpoena. Accordingly, new Government Code section 7285.1 would, "except as otherwise required by federal law," prohibit private or public employers or their agents from providing voluntary consent to an immigration enforcement agent access to enter non-public areas of a place of labor without being provided a judicial warrant. However, this section would not prohibit employers or their agents from taking immigration enforcement agents to a nonpublic area, where employees are not present, for purposes of verifying whether the federal government immigration enforcement agent has a judicial warrant, provided the employer does not provide consent to search nonpublic areas in the process.

Similarly, new Government Code section 7285.2 would, "except as otherwise required by federal law," prohibit a private or public employer or their agents from providing voluntary consent to an immigration enforcement agent to access, review or obtain the employer's employee records without a subpoena or judicial warrant. This section would also permit the employer or their agent to challenge the subpoena's validity in a federal district court. However, recent amendments clarify section 7285.2 would not apply to I-9 Employment Eligibility Verification forms if the employer has been provided a Notice of Inspection.

Both new sections would authorize the California Labor Commissioner to recover civil penalties ranging from $2,000 to $5,000 for a first violation and $5,000 up to $10,000 for each subsequent violation. For both sections, the penalties would not apply if the immigration enforcement agent obtained otherwise unauthorized access without the consent of the employer or the person in control of the place of labor. For purposes of assessing the penalties under both sections, "violation" would mean each incident when it is found a violation occurred without regard to the number of employees, the number of immigration enforcement agents involved in the incident, or the number of locations affected or employment records accessed/reviewed/obtained in a day.

For both sections, the Labor Commissioner or the California Attorney General would have the exclusive authority to enforce through a civil action, and any penalties recovered shall be deposited in the Labor Enforcement and Compliance Fund.

This bill would also require the employer to provide various notices related to immigration enforcement activity in the workplace, with several of these notices being sent to advise employees of their rights, and several of these notices being sent to the Labor Commissioner to allow it to track and respond to workplace immigration enforcement activity within California.

For instance, new Labor Code section 90.2 would require employers that receive a notice of inspection of I-9 records or other employment records by an immigration agency to post notice of this impending inspection. This notice would need to be posted within 72 hours of receiving notice of

the inspection in the language the employer normally uses to communicate employment-related information to employees. This notice would need to include: (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice; (3) the nature of the inspection, if known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

Notably, the Labor Commissioner will be required by July 1, 2018 to develop and publish on its website a template posting that employers may use to inform employees regarding an impending I-9 form inspection by a federal immigration agency. Notably also, while earlier versions of AB 450 required the employer to affirmatively deliver written notice to each employee, it now only requires that the notice is posted although employers would also need to provide, upon reasonable request, a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms.

Once again except as required by federal law, the employer's notice obligations would continue after the inspection is concluded. Within 72 hours of receiving notice regarding the results of the records inspection, the employer would need to provide to each current "affected employee," and to their "authorized representative," a copy of the written immigration agency notice that provides the results of the inspection of I-9 Employment Eligibility Verification forms or other employment records. Within this same 72 hour period, the employer would also to prove to the "affected employee" and their "authorized representative" written notice of the employer's and affected employee's obligations arising from the results of this inspection. This notice shall relate to the affected employee only and would need to be hand-delivered at the workplace if possible, and if not, by mail and email, if the employer knows the employee's email address, and to the employee's authorized representative. This notice must contain the following information: (1) a description of all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee; (2) the time period for correcting any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; and (4) the employee's right to be represented during this meeting.

For purposes of this section, an "affected employee" would mean an employee identified during the immigration agency inspection as either lacking work authorization or whose work authorization documents have been identified as being deficient. An "authorized representative" would mean an exclusive collective bargaining representative.

As with Government Code sections 7285.1 and 7285.2, employers who fail to provide the notices required under section 90.2 would be subject to civil penalties payable to the Labor Commissioner ranging from $2,000 to $5,000 for the first violation, and from $5,000 to $10,000 for each subsequent violation. However, unlike the statutory penalties in proposed new Labor Code sections 90.1 and 90.2 against employers who provide improper access, these statutory penalties would not be required if the federal agency had specifically directed the employer not to provide notice to an affected employee.

Notably, while earlier versions of AB 450 also required the employer to provide advance notice of inspection to the Labor Commissioner, these requirements have been deleted by amendment.

In 2016, the Legislature enacted SB 1001 and new Labor Code section 1019.1 prohibiting employers

from engaging in various actions while determining the employment eligibility of an applicant or employee (e.g., refusing documents that appear reasonably genuine, requiring more or different documents, etc.). AB 450 would enact new Labor Code section 1019.2 to prohibit employers or their agents from re-verifying the employment eligibility of a current employee at a time or in a manner required under federal law. As with section 1019.1, new section 1019.2 would authorize the Labor Commissioner to recover civil penalties up to $10,000. However, it would also provide that an employer's actions that violate new section 1019.2 could not also form the basis for liability or a penalty under current section 1019.1.

Perhaps anticipating future legal challenges, AB 450 would provide its provisions are severable so that if any particular provision were invalidated, the remainder would still take effect.

Similarly, in an effort to prevent conflict with federal law, proposed new Government Code section 7285.3 and subsection (f) in new Labor Code section 90.2 and subsection (c) in new Labor Code section 1019.2 would clarify that these new provisions shall not restrict or limit an employer's compliance with a memorandum of understanding governing the use of the federal E-Verify system.

Status: Passed the Assembly and Senate along largely party-line votes, and is being sent to Governor Brown.

Job-Protected "Parental Leave" (SB 63)

Entitled the New Parent Leave Act, this bill would add new Government Code section 12945.6 to require, beginning January 1, 2018, employers with 20 or more employees to provide up to 12 workweeks of job-protected parental leave for an employee (male or female) to bond with a new child within one year of the child's birth, adoption or foster care placement.

Unlike the California Family Rights Act (CFRA, Government Code section 12945.2) and the Family Medical Leave Act (FMLA), which apply only to employers with more than 50 employees, this bill would define "employer" as either: (a) an entity employing 20 or more persons "to perform services for a wage or salary;" or (b) the state of California or any of its political or civil subdivisions, except for specified school districts. However, as with CFRA and the FMLA, an employee would need to have worked more than 12 months for the employer, and to have worked at least 1,250 hours during the previous 12-month period.

Notwithstanding the definition of "employer" noted above, this bill states that it would be an unlawful employment practice to deny up to 12 weeks of parental leave to an employee who meets the hours and time-worked requirements and "works at a worksite in which the employer employs at least 20 employees within 75 miles."

The bill also specifies that employees eligible for "parental leave" are also entitled to take leave under Government Code section 12945 (pregnancy disability, childbirth and related conditions) if otherwise qualified for such leave. However, this new law would not apply to an employee subject to both the CFRA and the FMLA.

As with CFRA, an employer shall be deemed to have refused to provide this job-protected leave unless, on or before the leave's commencement, the employer guarantees reinstatement in the same or comparable position. This bill would also authorize the employee to use accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer during this parental leave. The basic minimum duration of the leave shall be two weeks, but an employer would be permitted to grant requests for additional occasions of leave lasting fewer than two weeks.

Employers would also be required to maintain and pay for an eligible employee's medical coverage under a group health plan for the duration of the parental leave, not to exceed 12 weeks over the course of a 12-month period, commencing on the date the parental leave begins, and at the level and conditions that would have existed if the employee continued working. However, as with CFRA, an employer would be authorized to recover these premiums if an employee failed to return from leave under certain conditions.

Also as with CFRA, in situations where both parents are employed by the same employer, the employer may limit the overall leave to the maximum amount a single employee could use, and may but is not required to grant simultaneous leave to both parents.

This bill would also make it an unlawful employment practice for any employer to refuse to hire, discharge, fine, suspend, expel or discriminate against an individual for either exercising their right to parental leave, or giving information or testimony about their or another employee's parental leave in an inquiry or proceeding related to rights guaranteed under this section. It would also be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of any right provided under this section.

The bill also provides this leave shall run concurrently with parental leave taken under Education Code section 44977.5 for certain certificated school employees.

This section also provides that to the extent regulations implementing the CFRA are not inconsistent with this new leave, they shall be incorporated by reference to further implement this new leave.

Lastly, in response to Governor Brown's veto message of a very similar bill (SB 654), this bill would also require the Department of Fair Employment and Housing (DFEH) to create a "parental leave mediation pilot program" that would remain in effect until January 1, 2020. Once enacted after necessary funding is obtained, this program would enable employers to request mediation within 60 days of a right-to-sue notice being issued, in which case the employee cannot pursue any civil remedies until after the mediation is completed and the statute of limitations for all related claims shall be tolled. However, this mediation program would be voluntary, and either party would have the ability to withdraw by notifying the mediator or the DFEH that they believe further mediation would be fruitless.

Status: Passed the Senate and Assembly on party-line votes and is being sent to Governor Brown. This bill is fairly similar to last year's version that Governor Jerry Brown vetoed, except that this year's version proposes 12 weeks of leave compared to six, and also contains the mediation program he suggested.

Prohibition on Salary History Inquiries (AB 168)

This bill would add new Labor Code section 432.3 to preclude employers from relying upon an applicant's salary history information as a factor in determining whether to offer employment to an applicant or what salary to offer the applicant. It would also preclude employers from inquiring orally or in writing, personally or through an agent, about salary history information of an applicant, including about compensation and benefits. However, this section would not preclude an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer, and if that voluntary disclosure occurs, this section would not prohibit the employer from considering or relying upon that voluntarily disclosed information in determining the salary for that applicant. This section would also incorporate last year's amendments to California's Equal Pay Act (Labor Code section 1197.5) to make clear that prior salary history, by itself, cannot justify any disparity in compensation based on gender, race or national origin.

If enacted, this new section would also require employers, upon reasonable request, to provide an applicant the pay scale for a position. These new requirements would apply to all employers, including state and local government employers and the Legislature.

Similar prohibitions on salary history inquiries have already passed in several states (Massachusetts, Oregon, and the District of Columbia), and several large cities (Philadelphia and New York City) and are pending in other states and municipalities, including San Francisco.

Status: Passed the Assembly and Senate with some bi-partisan support, and will likely be sent to Governor Brown after the Assembly concurs in Senate amendments. Governor Brown vetoed a similar bill (AB 1017) in 2015.

Gender Pay Differential Reporting Requirements (AB 1209)

Reflecting the ongoing legislative focus on potential gender-related pay differentials, this bill would enact new Labor Code section 2810.7 and impose new reporting obligations on employers that are required to file a statement of information with the Secretary of State and have more than 500 employees in California. Specifically, beginning July 1, 2019 and biennially thereafter, those employers would need to collect information relating to both the difference between the median and mean wages of male and female exempt employees located in California by each job classification or title. Employers would need to similarly collect information relating to the difference between the median and mean wages of male and female board members located in California. Employers would also need to collect information regarding the number of employees considered to make the determinations regarding the difference in mean and median salary information identified above.

Beginning July 1, 2020 and biennially thereafter, and in the manner and form required, employers would also need to submit this collected information to the California Secretary of State. The employer would also need to categorize the information submitted to the Secretary of State consistent with Labor Code section 1197.5 presumably meaning the employer must explain the basis for any differentials in the information submitted. However, this section would also provide that a gender wage differential is not, by itself, a violation of section 1197.5, and does not limit the

employer's ability to demonstrate the basis of a wage differential. The Secretary of State shall publish this information on a publicly-available website once appropriate funding is obtained and procedures are established.

Status: Passed the Assembly and Senate on largely party-lines votes, and has been sent to Governor Brown.

Public Employers Subject to Equal Pay Act Violations (AB 46)

California's Equal Pay Act (Labor Code section 1197.5 *et seq.*) has recently been a legislative focus with amendments in 2015 materially altering its definitions and exceptions (SB 358) and in 2016 to expand its protections to preclude impermissible wage differentials for employees of different races or ethnicity for substantially similar work (SB 1063). This bill would again amend the Equal Pay Act to clarify that "employer" means both public and private employers, but that public employers would be exempted from the statutory and misdemeanor penalties identified in Labor Code section 1199.

Status: Overwhelmingly passed the Assembly and Senate and is has been sent to Governor Brown.

"Ban the Box" Bill (AB 1008)

The topic of when and how employers may consider criminal convictions continues to be a hot topic, both nationally and in California. For instance, in 2013, California enacted a law (AB 218) and added Labor Code section 432.9 precluding state agencies and cities from inquiring about or using information related to criminal conviction history except in specified instances. Similarly, in 2014 and 2016 the cities of San Francisco and Los Angeles, respectively, enacted "Fair Chance" Ordinances limiting how and when employers could consider criminal conviction information regarding applicants. The Fair Employment and Housing Council recently issued final regulations regarding "Consideration of Criminal History in Employment Decisions" which took July 1, 2017.
https://www.dfeh.ca.gov/files/2017/03/FinalText-CriminalHistoryEmployDecRegulations.pdf

Against this backdrop, AB 1008 would amend the FEHA to preclude most employers from inquiring about an applicant's criminal record or conviction history until after a conditional employment offer is made, and would impose new notice and disclosure requirements if this information is sought.

Specifically, new Government Code section 12952 would preclude employers with five or more employees from including on employment applications any question seeking the disclosure of an applicant's conviction history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made. It would also preclude the consideration, distribution or dissemination of the following specific items during any background checks: (a) arrests not followed by conviction (except where the applicant is seeking employment at specified health facilities or where after an arrest the applicant is out on bail or released on their own recognizance pending trial); (b) referrals to or participation in a pretrial or post-diversion program; or (c) convictions that have been sealed, dismissed, or expunged pursuant to law. It would also prohibit employers from interfering with or restraining the exercise of any right provided under this new section.

Before denying a position based upon an applicant's conviction history, the employer would also need to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position. In doing so, employers would need to consider all of the following: (a) the nature and gravity of the offense; (b) the time that has passed since the offense and completion of any sentence; and (c) the nature of the job held or sought. This bill also provides that employers may, but are not required to, commit the results of this individualized assessment to writing.

If an employer makes a preliminary decision the applicant's conviction history disqualifies them from employment, the employer must provide written notice of this preliminary decision to the applicant. While the employer may, but is not required to, justify or explain the employer's reason for making this preliminary decision, the notice must contain all of the following: (a) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer; (b) a copy of the conviction history report, if any; and (c) an explanation of the applicants right to respond to the employer's preliminary decision before it becomes final and the deadline for doing so. The notice in new subsection (c) would need to inform the applicant they may challenge the accuracy of the conviction history that is the basis for rescinding the offer or submit evidence of rehabilitation or mitigating circumstances, or both.

The applicant will then have at least five business days to respond before a final employment decision can be made. If within the five business days, the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report at issue and is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have five additional business days to respond to the notice.

Employers would need to consider the applicant's response before making a final decision. If an employer makes a final decision to deny an applicant in whole or in part upon prior conviction history, the employer must notify the employee in writing of the following: (a) the final denial or disqualification; (b) any existing procedure the employer has for the applicant to challenge this decision; and (c) the right to file a complaint with the DFEH. As with the original notice regarding a preliminary decision to rescind, the employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification.

New section 12952 would not apply in the following specifically enumerated exceptions contained in proposed subsection (d): (1) for a position with a state or local agency required to conduct a conviction history background check; (2) for a position with a criminal justice agency, as defined in Penal Code section 13101; (3) for a position as a Farm Labor Contractor (as defined in Labor Code section 1685); and (4) for a position where an employer or agent is required by state, federal or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history, including the Securities Exchange Act.

This bill would further provide that "conviction" shall have the same meaning as defined in paragraphs (1) and (3) of subdivision (a) of current Labor Code section 432.7. It would further provide that notwithstanding that exception, "conviction history" includes an arrest not resulting in conviction for the specific, limited purposes enumerated in section 432.7 when an employer is a health facility (as

defined) or an arrest for which an individual is out on bail or his or her own recognizance pending trial.

This bill would also repeal current Labor Code section 432.9, recently added in 2013, which governs when state or local agencies may inquire about criminal convictions. These issues would now be governed by the FEHA and the Government Code rather than the Labor Code.

Lastly, this bill specifies that it would not affect the rights and remedies afforded by any other law, "including any local ordinance[s]," which is potentially significant given the different requirements contained within the San Francisco and Los Angeles Fair Chance Ordinances.

Status: Passed the Assembly and Senate with some bi-partisan opposition, and has been sent to Governor Brown.

Hostile Work Environment Protections for Military Service Members (AB 1710)

Military and Veterans Code section 394 presently prohibits any discrimination against an officer, warrant officer or enlisted member of the military or naval forces of the state or the United States because of that membership, including with respect to employment. This bill would expand these prohibitions to include not only the denial of or disqualification from employment, but also the "terms, conditions or privileges" of that service member's employment. In effect, this bill is intended to ensure that military service members are protected from a hostile work environment, which one court had held they were not since the then-existing text of section 394 was limited to discrimination and retaliation claims. In this regard, this bill is also intended to provide statutory and enforcement consistency with the federal law protecting military service members (USERRA) since it already contained protections regarding "terms, conditions or privileges" and had been held to prohibit hostile work environments.

Status: Unanimously passed the Assembly and Senate, and has been sent to Governor Brown.

Prohibition on Reproductive Health Discrimination (AB 569)

This bill is intended to narrow the so-called "ministerial" exemption from FEHA for religious organizations, and to be in response to a recent case in which a religious school employee was discharged after she became pregnant although unmarried in violation of her employer's Code of Conduct. Accordingly, it would expressly reaffirm the State of California's protections of its citizens' right to privacy, and that the right to make reproductive health decisions free of interference by their employers is a matter of fundamental and substantial public policy.

To effectuate this intent, this bill would add Labor Code section 2810.7 to prevent employers from taking any "adverse employment action" against an employee, their dependent or family member for their reproductive health care decisions, including the use, timing or method of any drug, device or medical service. It would also permit an employee who suffers such an adverse employment action to seek statutory penalties under Labor Code section 98.6 as well as "other appropriate relief" including reinstatement and reimbursement of lost wages. However, it would also specify that these

protections do not create a new basis upon which employees may accrue or use benefits relating to paid or protected time off.

It would also deem "null and void" any contract or agreement, express or implied, made by an employee to waive the benefits of this new section. Employers that require compliance with an employee handbook will also be required to include notice of the employee's rights and remedies under this new section.

Status: Passed the Assembly and Senate along largely party-line votes, has been sent to Governor Brown.

Expanded Harassment Training and New Poster Requirements (SB 396)

While California presently has the most expansive non-discrimination protections for lesbian, gay, bisexual and transgender employees, this bill is intended to further publicize these protections.

For instance, while Government Code section 12950 presently requires all employers to post the DFEH's poster prohibiting sexual harassment, it does not presently require employers to post the DFEH's recently published information poster on transgender rights at work. Accordingly, this bill would amend section 12950 to require all employers to post the poster developed by the DFEH regarding transgender rights in a prominent and accessible location in the workplace.

The FEHA presently requires employers with more than 50 employees to provide at least two hours of training and education regarding sexual harassment and abusive conduct to all supervisory employees within six months of promotion and once every two years. This bill would amend Government Code section 12950.1 and require this training include the prevention of harassment based on gender identity, gender expression and sexual orientation.

Notably, the training and education would need to include practical examples inclusive of such harassment, and must be presented by trainers or educators with knowledge and expertise in those additional areas. If this bill is enacted, the DFEH foreseeably would update its regulations regarding who is a "qualified" trainer to specify the knowledge and expertise requirements regarding these additional training topics.

This bill would also amend California's Unemployment Insurance Code to specify that transgender and gender nonconforming individuals are included within the definition of "individuals with employment barriers" and therefore eligible for programs and services available under the California Workforce Innovation and Opportunity Act.

Status: This bill has passed the Legislature with some bi-partisan support, and is heading to Governor Brown.

Expanded Harassment Training for Farm Labor Contractors (SB 295)

While California presently provides that farm labor contractor licenses will not be issued unless the applicant certifies certain employees have received sexual harassment training, this law would expand

these requirements. For instance, it would require that training for each agricultural employee be in the language understood by the employee. It would also require a licensee, as part of their application, to provide the Labor Commissioner with a complete list of sexual harassment training materials and resources utilized to provide sexual harassment training to the agricultural employees in the preceding year. It would also require the licensee to identify the total number of agricultural employees who received sexual harassment training, and for the Labor Commissioner to publish the total number of agricultural employees trained the previous calendar year.

Proposed new Labor Code section 1697.5 would provide that failure to perform specified tasks related to such training would constitute a legal violation and authorize the Labor Commissioner to assess a civil penalty up to $100 for each violation. However, when enforcing this section, the Labor Commissioner shall consider whether the violation was inadvertent and may, in their discretion, decide not to penalize an employer for a first violation that was due to a clerical error or inadvertent mistake.

Status: Passed the Senate and Assembly with bi-partisan support, and has been sent to Governor Brown.

Expanded Labor Commissioner Powers (SB 306)

While Labor Code section 98.7 authorizes the Labor Commissioner to investigate discrimination and retaliation claims and order certain relief after an investigation and determination, this bill would materially expand these powers. For instance, new Labor Code section 98.7(a)(2) would permit the Labor Commissioner to commence an investigation, even without receiving a complaint, of an employer that it suspects retaliated against an individual in violation of any law under the Labor Commissioner's jurisdiction. It would also authorize the Labor Commissioner to proceed without a complaint in those instances where suspected retaliation has occurred during the course of adjudicating a wage claim under Labor Code section 98, during a field inspection pursuant to Labor Code section 90.5, or in instances of immigration-related threats in violation of sections 244, 1019 or 1019.1.

It would also authorize the Labor Commissioner to seek immediate temporary injunctive relief during an investigation and before a determination is made. Specifically, upon finding reasonable cause to believe an employer has engaged in or is engaging a violation, the Labor Commissioner would be authorized to petition the superior court for appropriate temporary or preliminary injunctive relief. The court would be authorized to award such relief, and may consider not only the harm resulting directly to an individual, but also the "chilling effect" on other employees asserting their rights in determining whether temporary injunctive relief is appropriate.

Notably, if the employee has been discharged or faced adverse action for raising a claim of retaliation or asserting rights under any law within the Labor Commissioner's jurisdiction, the court shall order appropriate injunctive relief on a showing of reasonable cause. This bill does not identify the injunctive relief available, but presumably it could include reinstatement or a stay on the adverse employment action. This injunction would remain in effect until the Labor Commissioner issues a determination or completes its review, whichever is longer, and the injunctive relief would not be stayed during an employer's appeal.

This bill would also amend section 98.7(c) to provide that if the Labor Commissioner is a prevailing party in an enforcement action under this section, the court "shall" award the Labor Commissioner its reasonable attorneys' fees and costs against the employer. It would further provide that an employer who willfully refuses to comply with a court order to reinstate/rehire an employee or to post any required notice or to cease and desist, shall also be liable for penalties up to $100 per day of non-compliance up to a maximum of $20,000. Any penalty collected pursuant to this section would be paid to the affected employee.

Presently, the Labor Commissioner must enforce a determination through a civil action. However, new Labor Code section 98.74 would enable the Labor Commissioner, if it determines a violation has occurred, to issue a citation to the person responsible for the violation, directing that person to cease the violation and to take actions necessary to remedy the violation, including rehiring or reimbursement of lost wages and posting notices. Employers would have the ability to dispute the Labor Commissioner's determination by seeking judicial review in superior court but the burden would be on the employer to bring a court action to dispute the Labor Commissioner's determination rather than upon the Labor Commissioner to bring a court action to enforce its orders. Employers who willfully refuse to comply with a final order under this section, including failing to reinstate or post notices, would be subject to a civil penalty of $100 per day up to a maximum of $20,000.

Lastly, this bill would amend Labor Code section 1102.5, which authorizes employees to file civil actions related to whistleblowing, to seek temporary or preliminary injunctive relief under proposed new Labor Code section 1102.62. Under this section, the employee could petition for injunctive relief, which the court could order as it deems just and proper. However, this temporary injunctive relief would not prohibit an employer from disciplining or terminating an employee for conduct unrelated to the retaliation claim.

Status: Narrowly passed the Senate and Assembly despite some bi-partisan opposition, and is being sent to Governor Brown.

Optional Commission Rules for Barbers and Cosmetologists (SB 490)

Responding to some recent confusion regarding the applicability of commission rules for beauty salon employees, this bill is intended to clarify that such employees may be paid by commission if certain requirements are met. Specifically, while Labor Code section 204 identifies generally applicable payday rules, this bill would enact new Labor Code section 204.11 to identify rules relating to the payment of commission wages paid to employees licensed under the Barbering and Cosmetology Act. If enacted, wages paid to such licensed employees, when paid as a percentage of a flat sum portion of the amount paid to the employer by the client recipient of such services, would constitute commissions provided that the employee is paid, in every pay period worked, a regular hourly rate of at least two times the state minimum wage in addition to commissions. Commission wages for such employees would be due and payable twice during each calendar month on pre-designated paydays. The bill further provides that the employer and employee may agree on a commission in addition to the base hourly rate.

It would also provide an employee may not be compensated for rest and recovery periods at a rate less than the employee's regular base hourly rate.

Essentially, this bill would permit commission pay for licensed professional while creating a permanent wage floor of twice the state minimum wage.

Status: Unanimously passed both the Senate and Assembly and has been sent to Governor Brown, who is expected to sign.

Illness and Injury Prevention Program Disclosures (AB 978)

The California Occupational Safety and Health Act of 1973 requires every employer to establish and maintain an effective illness and injury prevention program (IIPP). This IIPP must be in writing, except in certain circumstances, and must contain certain statutorily-enumerated items such as identifying the person responsible for the program, a training program, and specification of compliance and reporting methods.

Responding to concerns that many employees, particularly non-English speaking employees, are unaware of an employer's IIPP, this bill would amend Labor Code section 6401.7 and, impose new disclosure requirements regarding these IIPPs. For instance, new subsection (e)(2) would require employers who receive a written request from a current employee or their authorized representative to provide a paper or electronic copy of the IIPP within ten business days at no cost.

The employer would be permitted to designate the "authorized representative" to whom such requests should be directed, and to take reasonable steps to verify the identity of a current employee or his or her representative requesting a copy. An "authorized representative" would be defined as an attorney, a health and safety professional, a non-profit organization advocate or an immediate family member if asked for assistance by a current employee and who has been authorized in writing by a current employee to request and receive a copy of the written IIPP. A recognized or certified collective bargaining agent would automatically qualify as an authorized representative for purposes of this disclosure requirement.

If an employee alleges a failure to comply with these disclosure requirements, the employer may assert impossibility of performance provided this impossibility is not caused by or resulting from a legal violation.

Status: Passed the Assembly and Senate on party-line votes, and has been sent to Governor Brown. A similar bill (AB 2895) stalled in 2016.

Holding General Contractors and Subcontractors Jointly Liable for Subcontractor Labor Code Violations (AB 1701)

Continuing California's recent trend of combatting wage theft, this bill would enact new Labor Code section 218.7 to hold general contractors that contract with the state jointly liable with subcontractors at any tier for Labor Code violations. The direct contractor would be liable for any wage, fringe or other benefit payment or contribution, including interest and state tax payment owed to a wage

claimant by a subcontractor, but would generally not be liable for penalties or liquidated damages. Notably, unlike other recent wage theft statutes, this bill would not require the worker or third party to exhaust his or her options before suing the general contractor, nor would the wage claimant need to first obtain a judgment against the subcontractor; rather, the wage claimant could proceed directly against the general contractor for the subcontractor's debts.

It would also authorize the wage claimant to sue directly or through the Labor Commissioner or district attorney and would prohibit the direct contractor from attempting to evade this law's requirements. Actions under this new section would need to be brought within one year of the earliest of either: (a) recording of notice of the direct contract's completion; (b) recording of notice of cessation of work on the direct contract; or (c) actual completion of work covered by the direct contract.

Status: Passed the Assembly and Senate on party-line votes, and is being sent to Governor Brown.

Special Advocacy Services for Employees Injured by Domestic Terrorism (AB 44)

This bill responds to confusion about the applicability of workers compensation laws and reported delays for medical treatment to employees injured during the San Bernardino terrorist attack. Accordingly, it would add new Labor Code section 4600.05 to require employers to provide immediate support from a nurse case manager for employees injured in the course of employment by acts of "domestic terrorism," as defined by Title 18 of the United States Code. However, this new section would only when the Governor has declared a state of emergency in connection with acts of domestic terrorism. If such a declaration is made, an employer with a pending claim for compensation based upon the acts resulting in this declaration shall provide within three days to the claimant advising these services are available. The workers compensation administrative director shall adopt regulations related to this section and develop a notice that employers may use when needed.

Status: Unanimously passed the Assembly and Senate, and is being sent to Governor Brown.

Expanded Workers' Compensation Exception for Board of Director Members (SB 189)

This bill is intended to modify the eligibility for business owners who are also employees of those businesses to voluntarily opt out of the legal mandate that all employees be covered by workers compensation protections. While Workers' Compensation's definition of "employee" includes most officers and directors of private corporations, it presently excludes officers and directors of quasi-public or private corporations (as defined) who own at least 15% of the issued stock and sign a sworn written waiver of their status and intent to waive workers' compensation protections. This bill would amend Labor Code section 3352 and expand this exception to such officers or directors who own at least 10% (rather than the current 15%) of outstanding stock and execute a written waiver. It would also expand this exception to owners of certain professional corporations who execute a written waiver of their workers compensation rights and state under penalty of perjury that they are covered by a health insurance policy or health care service plan. It would also provide additional opt out options for members of cooperative corporations and close relatives of 10% owners of other companies.

If enacted, these changes would take effect on July 1, 2018.

Status: Unanimously passed the Senate and Assembly, and has been sent to Governor Brown.

Workforce Development Task Force (AB 1111)

Entitled the Removing Barriers to Employment Act, this bill would require the Labor and Workforce Development Agency and the Labor Commissioner to create a grant program designed to identify and assist individuals with barriers to employment.

Status: Overwhelming passed the Assembly and Senate, and has been sent to Governor Brown.

Health Facility Whistleblower Protections (AB 1102)

This industry-specific bill would amend Health and Safety Code section 1278.5, which prevents discrimination or retaliation against employees, patients or customers who complain about health care-related violations. It would increase the maximum fine for a misdemeanor violation of these provisions to $75,000.

Status: Unanimously passed the Assembly and Senate and has been sent to Governor Brown, who is likely to sign.