CALIFORNIA LEGISLATIVE SUMMARY

The arrival of summer means the mid-point of the 2020 Legislative Session, with bills beginning to move from the first legislative chamber to the second before the brief legislative recess. Not surprisingly, there are a number of significant employment bills, including many dealing with COVID-19 issues, which have continued to advance. These include bills that would:

- Amend California's "family and medical leave" law (CFRA) and Paid Sick leave related to time off for public health emergencies or states of emergency (AB 3216);
- Expand the CFRA to apply to employers with one or more employees (SB 1383);
- Expand workers' compensation coverage, including to presume employees who contract COVID-19 are covered (AB 664/SB 1159/AB 196);
- Amend AB 5, including expanding the exempted professional services and industries (AB 1850/AB 2257);
- Expand California's Paid Family Leave benefits to employees who need time off related to COVID-19 purposes (SB 943);
- Establish a "right of recall" for laid off employees from private employers (AB 3216);
- Require larger employers to annually submit "pay data reports" to the DFEH (SB 973)l
- Require employers provide 10 days of bereavement leave (AB 2999); and
- Impose new notice requirements for H2-A employers related to emergency or disaster declarations (SB 1102).

Looking ahead, the Legislature will likely take a brief summer recess before returning to try and pass bills before the August 31st deadline to send them to Governor Newsom.

In the interim, listed below is an overview, arranged largely by subject matter, of the key employment bills currently pending, and beginning with the recently-introduced COVID-19 proposals.

PENDING BILLS

COVID-19-Related Proposals

Omnibus Leave Proposal Regarding CFRA, PDL, PFL and Paid Sick Leave (AB 3216)

Introduced by the author of California's Paid Sick Leave law (AB 1522), this wide-ranging bill would expand California's Family Rights Act (CFRA) and the paid sick leave law, and also enact a new "right of recall" for certain private employers and amend various other laws. Each of these proposed changes is discussed below.

CFRA and PDL Changes

Currently, the CFRA requires employers with 50 or more employees to provide up to 12 weeks of unpaid time off for "family care and medical leave" to eligible employees (e.g., those who have

12 months of service with the employer and have worked at least 1,250 hours in the preceding 12-month period). As originally introduced, this bill would have expanded CFRA to apply to all employers regardless of size, materially expanded the family members for whom leave could be taken (e.g., adding grandparents, grandchildren and siblings), and expanded many of CFRA's definition (e.g., "child" would apply regardless of age or dependency, "parents" would include "parents in law," etc.).

As recently amended, the bill deletes most of those proposed expansions and definitional changes (which are now included in separately pending SB 1383 [discussed below]), and instead primarily expands CFRA's "family and medical leave" entitlement to address public health or other declared emergencies on a moving forward basis. In this regard, it attempts to build upon the federal Families First Coronavirus Response Act (FFCRA) and Governor Newsom's Executive Orders for certain industries by expanding these leave rights and protections to apply beyond simply "COVID-19" and to not have them expire at the end of 2020.

Accordingly, "family care and medical leave" would be expanded to also include leave to care for a child, parent or spouse for whom the employee is responsible for providing care if such family member's school or place of care has been closed, or the care provider of such family member is unavailable due to a state of emergency.

Echoing the FFCRA and several local municipal supplemental time off provisions, "family care and medical leave" would also include time off needed because of an employee's ability to work or telework due to a state of emergency involving any of the five following circumstances: (i) being subject to a federal, state or local quarantine order, including a shelter-in-place or stay-at-home order; (ii) being advised to self-quarantine by a health care provider due to exposure to the disease that is the subject of the state of emergency; (iii) experiencing symptoms of the disease that is the subject of the state of emergency and seeking a diagnosis; (iv) being a member of a vulnerable population at high risk of severe illness from the disease that is the subject of the state of emergency according to the Centers for Disease Control and Prevention; or (v) living with or being responsible for providing care for a family member who is a member of a vulnerable population and is at high risk of severe illness from the disease that is the subject of the state of emergency according to the Centers for Disease Control and Prevention.

"State of emergency" would be specifically defined, but including "the existence of conditions of disaster or extreme peril to the safety of persons and property within the state or within the territorial limits of a county, city and county, or city" that the Governor has declared a public health or state of emergency. "Public health emergency" would be defined as a "health-related emergency declared by a local, state or federal authority."

While most of the other CFRA-related provisions would largely remain intact (except to conform throughout regarding these definitional changes), it would also preclude employers from requiring certification from a health care provider for emergency leave due to a state of emergency and medical certification is not feasible. Instead, the employer may require the

employee's self-certification or attestation that the leave was due to the state of emergency, and medical certification was not feasible.

Paid Sick Leave Changes

This bill would also amend California's Paid Sick Leave law (Labor Code section 245 *et seq.*) in several respects. First, would expand the current purposes for which the general paid sick leave entitlement could be used. Specifically, along with the current usage entitlement for the care of the employee or their family members or for certain crimes (e.g., domestic violence, stalking, etc.), the employee would also allowed to use paid sick leave for the following additional reasons: (1) the employee is subject to a federal, state or local public health order related to a public emergency, including an employee who has been told to remain at home because they are in a high-risk population; (2) the employee needs to care for a family member subject to the just-described order; (3) if the employee needs to care for a child or family member that they responsible for caring for if the child or family member's school or place of care has been closed or their normal care provider is unavailable due to a state of emergency; (4) for an employee whose place of employment is closed by the employer or by a public health official due to a state of emergency; or (5) the employee is subject to a federal, state or local evacuation order related to a state of emergency.

Second, it would also create a new and longer entitlement during a "public emergency." Specifically, in the case of a "public health emergency" (as defined), employers would need to provide at least 56 hours or seven days of paid sick leave (and for part time employees an amount equivalent to their regular schedule in a ten day period) that employees could use for any of the paid sick leave purposes related to a "state of emergency" (i.e., those new circumstances mentioned in the preceding paragraph). Notably, this emergency paid sick leave would be available immediately (i.e., no 30 day employment requirement, or 90 days of employment before usage), and would also be available to in-home support service workers, as well as those otherwise excluded from the general definition of employee for paid sick leave purposes in section 245.5(a) (e.g., CBA-covered employees, flight crew members, city/state employees).

"State of emergency" and "public health emergency" for paid sick leave purposes would have the same definition as used in the CFRA amendments discussed above.

As with the CFRA amendments, employers would not be able to require medical certification to use paid sick leave due to a "state of emergency," but could require within a reasonable time that the employee provide a self-certification that the leave request related to a "state of emergency."

This bill also provides that it would not preclude local government agencies from enacting ordinances providing greater amounts of "emergency" paid sick leave, but that paid sick leave days provided under this new emergency leave provision would run concurrently with any paid sick leave available under local or federal law.

As noted, and in contrast to the FFCRA, these new paid sick leave provisions would not expire at the end of 2020 but would remain in effect not only for any potential "second wave" of COVID-19, but also for any other qualifying "state of emergency" or "public health emergency."

Right of Recall

This bill would also expand statewide many of the provisions recently enacted in the City of Los Angeles' Right of Recall Ordinance and the Worker Retention Ordinance. Accordingly, proposed new Labor Code section 2810.8 would require covered employers (as defined, but generally including airport employers, qualified hotels and event center employers) to notify its laid off employees about job positions that become available that the employee previously held or is or could be qualified for. The employer would need to offer those positions based on a preference system outlined in the law, and would need to allow 10 business days for the employee to accept or decline the offer. Employers who decide to hire someone other than a laid-off employee would need to provide written notice to the laid-off employee identifying the reasons for the decision. Employees would be permitted to file a Labor Commissioner complaint or a civil action if these requirements are not followed.

The "retention" provisions would protect workers' jobs upon a change in ownership or control and require the incumbent business employer to provide a list of its workers to the successor employer, who must then initially hired from this list. In this regard, these worker retention provisions are very similar to the Los Angeles ordinance and to those enacted statewide in 2015 (AB 359) for the grocery industry upon a change in ownership or control.

Paid Family Leave/Unemployment Insurance

While employees seeking unemployment compensation disability benefits must normally submit medical certification, this requirement would be eliminated and self-certification would suffice in the event of a state of emergency. The self-certification would need to include all of the following: (1) the disability of the claimant or the serious health condition of the family member that warrants the claimant's care is related to the state of emergency; (2) obtaining a certificate is not feasible due to the state of emergency; and (3) the estimated duration of the disability or serious health condition.

Status: This bill passed the Assembly on largely a party-line vote and is pending in the Senate.

Paid Family Leave Expansion for COVID-19 Purposes (SB 943)

This bill would, until December 31, 2020, allow Paid Family Leave wage replacement benefits for workers who take time off to care for a child whose school has been closed due to the COVID-19 virus outbreak, or is caring for a special needs child or adult due to the outbreak. Individuals would also only be eligible if they satisfy all of the following criteria: (a) the individual has made a claim for temporary disability benefits; (b) the individual has filed required certifications; and (c) the individual's employer employs 500 or more employees or fewer than 50 employees.

The additional costs of this extension would be funded from the State's General Fund.

If enacted, it would take effect immediately as an urgency statute.

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

Workers Compensation Coverage for Employees (SB 1159)

This bill would define "injury" for workers compensation coverage to include any employee with a COVID-19-related illness under certain circumstances. Specifically, an employee's COVID-19-related illness would be included within workers' compensation coverage if all of the following applied: (1) the employee tested positive for or was diagnosed with COVID-19 within 14 days after a day that the employee performed labor at the employer's place of employment (not including an employee's home or residence) at the employer's direction; (2) this day of labor occurred between March 19, 2020 and July 5, 2020; and (3) the diagnosis was made by a licensed physician and confirmed by further testing within 30 days of the date of diagnosis. Such COVID-19-related illnesses that develop or manifest during this employment would be entitled to a rebuttable presumption (as defined) to have arisen out of the course and scope of employment.

This bill would also require an employee to exhaust any paid sick leave benefits available in response to COVID-19 before any temporary disability benefits or other benefits due under certain workers' compensation provisions would be payable. If no such paid sick leave is available, the employee would be immediately entitled (i.e., no waiting period would apply) to temporary disability benefits.

Status: Passed the Senate Labor and Appropriations Committees and is pending on the Senate floor.

Workers' Compensation Coverage for "Essential" Workers (AB 196)

This bill would define "injury" for workers compensation purposes to include industries/occupations deemed essential by Governor Newsom's Executive Order of March 19, 2020 (unless specifically exempted by this bill) and to include COVID-19 that develops or manifests itself during a person's employment. For those enumerated occupations, it would create a conclusive presumption that for "injuries" arising after March 4, 2020, the injury arose from the course and scope of employment.

Status: Pending in the Senate Labor Committee, and because this bill was substantively amended to include these current provisions in the Senate, it would need to return to the Assembly for concurrence.

Workers' Compensation Coverage for COVID-19 Injuries for First Responders (AB 664)

This bill would also define "injury" for workers compensation coverage purposes to include certain state and local firefighting personnel, peace officers, certain hospital employees and

certain fire and rescue services coordinators who work for the Office of Emergency Services to include being exposed to or contracting COVID-19 or other communicable diseases as part of a state or local emergency declaration. This bill would create a conclusive presumption (as specified) such injury arose out of the course and scope of employment, and exempt these provisions from the normal apportionment requirements. It would establish specific rules related to compensation of such injuries, including full medical treatment, quarantine costs, reimbursement for personal protective equipment and disability and death benefits.

If enacted, this urgency bill would take effect immediately.

Status: Pending in the Senate Labor Committee, and because this bill was substantively amended to include these current provisions in the Senate, it would need to return to the Assembly for concurrence.

Notice Requirements Regarding State or Federal Emergencies, plus Labor Notices for Federal H-2A Visa Farm Workers (SB 1102)

Labor Code section 2810.5 presently requires employers provide notices to most employees upon hire identifying certain statutorily-enumerated items (e.g., rate of pay, regular paydays, employer name, etc.). This bill would also require these notices identify the existence of either a federal or state emergency or disaster declaration that may affect their health and safety during their employment in California.

The federal H-2A program provides a temporary federal visa to farm workers admitted into the United States for work in the agricultural industry, including in California. While the federal H-2A workers are covered by many federal, state and local labor laws and are provided a "job order" summarizing some applicable federal laws, this bill attempts to address concerns that this job order does not identify key worker protections under California law.

Accordingly, new Labor Code section 2810.6 bill would require all of California's H-2A's visa employers provide to all H-2A farm workers a written notice of basic California labor rights on their first day of work in California or beings work for another employer after being transferred by an H-2A or other employer. The California Labor Commissioner would be required to develop by January 2, 2021, a template that H-2A employers may use to comply with these notice requirements, and the Labor Commissioner will have the discretion to decide whether this template will be included as part of the notices presently required under Labor Code section 2810.5.

This template would include in a separate and distinct section a "Summary of Key Legal Rights of H-2A Workers Under California Law," detailing many California labor rights, including the right to meal and rest periods, overtime, prohibited deductions, sexual harassment requirements and anti-retaliation protections.

Echoing the proposed changes to Labor Code section 2810.5 regarding generally applicable hiring notices, section 2810.6 would also require this notice identify any federal or state emergency or

disaster declarations that may affect this H-2A employment. It would also prohibit any retaliation against H-2A employees who raise questions about such declarations.

To the extent any such disaster or emergency declaration would require additional steps regarding housing, required toilets, handwashing stations, drinking water and heat working conditions, the H-2A employer would be required to notify the H-2A employee of these changes, and would be prohibited from retaliating against any H-2A employee who inquired about these changes.

Employers would also be required to notify every H-2A employee of any federal or state emergency or disaster declaration within seven days of it being issued that may affect the H-2A employee's health or safety. Employers would also be prohibited from retaliating against H-2A employees that raise questions about the declaration's requirements or recommendations.

Status: Passed the Senate on a largely party-line vote and is pending in the Assembly.

COVID-19 Specific OSHA Standards for Agricultural Employers and Employees (AB 2043)

This bill would require California's Occupational Safety and Health Standards Board to disseminate to agricultural employers "best practices" for COVID-19 prevention, consistent with the division's guidance or in coordination with other state agencies, including the guidance document entitled "Cal-OSHA Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees." It would also require agricultural employers to implement the provisions of this guidance documents as they are published and updated by the division. These provisions would be repealed on the later date of the Governor's revocation of the emergency declaration or January 1, 2022.

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

Leaves of Absence/Time off/Accommodation Requirements

CFRA and PDL Expansions to Apply to All Employers (SB 1383

The California's Family Rights Act (CFRA, Government Code section 12945.2) is the state law equivalent of the Family Medical Leave Act and allows eligible employees to take up to 12 workweeks of job-protected leave for certain specified reasons (e.g., to bond with a newborn child, to care for the serious health condition of the employee or family member). While the CFRA presently requires the employee work at least 1,250 hours in the 12 month period preceding such a leave (thus mirroring the FMLA), this bill would eliminate the 1,250 hours of service and the 12 months of service, and require only the employee have 180 days of service with the employer to qualify for up to 12 weeks of job protected leave. It would also drop from 50 employees to one employee the threshold number of employees for an employer to be subject to CFRA, thus applying it to every employer in California. Because this new threshold would essentially apply to almost all employers, there would also no longer be a requirement for an employer have 50 employees within 75 miles of the employee's worksite to entitle the

employee to a CFRA leave.

This bill would also expand the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken to provide care. For instance, while "family care and medical leave" presently includes the serious health condition of a child, spouse or parent of an employee, this bill would expand this list to include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner" who has a serious health condition. The bill would make corresponding changes including these individuals for whom the employer may request medical certification to support the employee's request for leave to care for a serious health condition.

The definition of "child" would also expand to include a child of a domestic partner or person to whom the employee stands in loco parentis, and would eliminate the current requirement the child be under 18 years of age or an adult dependent child.

The bill also would define "grandparent," "grandchild," "sibling" and also "parent-in-law," suggesting that if enacted, this bill contemplates allowing time off for parents-in-law even though not currently specifically enumerated in the definition of "family care and medical leave."

The definition of "family care and medical leave" would also be expanded to include "qualifying exigencies" related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child or parent in the United States Armed Forces.

This bill would also delete a current CFRA provision that provides if both parents are employed by the same employer and are otherwise entitled to leave, the employer would not be required to grant leave that is greater than 12 weeks for the birth, adoption or foster care of a child.

While CFRA currently allows an employer to refuse reinstatement to the same or comparable position under certain conditions, this bill would delete those provisions, thus essentially guaranteeing reinstatement.

In 2017, California enacted the New Parent Leave Act (SB 63, Government Code section 12945.6) requiring employers with 20 or more employees to provide up to 12 weeks leave to bond with a child. Because SB 1383 would essentially supersede this law by expanding job protected leave for the same purpose to even smaller employers, it would repeal Government Code section 12945.6. Accordingly, the dramatically-expanded CFRA would now govern parent leave.

Lastly, while the current Pregnancy Disability Leave Law (PDL, Government Code section 12945) currently applies to employers with five or more employees, these amendments would expand the PDL to apply to employers with one or more employees (essentially all employers).

This bill is very similar to SB 135 which stalled in the Senate in 2019.

Status: Pending on the Senate floor.

"Kin Care" Amendments (AB 2017)

This bill would amend California's so-called "kin care" statute (Labor Code section 233) to specify that the designation of sick leave for kin care purposes shall be made at the sole discretion of the employee. The author states it is intended to ensure the employee, not the employer, gets to designate how sick leave is credited and to preclude situations where an employer charges a sick day against kin care purposes, thus reducing the amount of kin care usage available for later purposes.

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

Bereavement Leave (AB 2999)

Entitled the Bereavement Leave Act of 2020, this bill would require employers to provide up to 10 days of bereavement leave upon the death of a spouse, child, parent, sibling, grandparent, grandchild or domestic partner (as these terms are defined either in this or other specified Labor Code sections). The days of bereavement leave would not need to be consecutive, but would need to be completed within three months of the date of the person's death. The bereavement leave would be unpaid (unless the employer has an existing bereavement leave policy), but an employee may use otherwise accrued or available vacation, personal leave, or compensatory time off.

This law would apply to all employers (regardless of size) and to all employees (regardless of amount of time employed with the employer. However, it would not apply to employees covered by a collective bargaining agreement including specified provisions.

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, 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 be required to maintain the confidentiality of employees requesting this leave and to treat any documentation obtained as confidential and not disclosed except where required by law.

An employee who believes they have been discriminated or retaliated against for exercising their bereavement leave rights would be entitled to file either a complaint with the Labor Commissioner or a civil complaint. A prevailing employee would be entitled to reinstatement, actual damages, as well as attorneys' fees and costs.

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

Protected Time-Off Proposals (AB 2992)

Labor Code section 230 presently prohibits discrimination against and enumerates various protections for employees who need to take time off for various purposes, including because of jury duty (subsection (a)), appearing in court, including because a victim of a crime (subsection (b)), or for victims of domestic violence, sexual assault or stalking who are seeking legal relief

(subsection (c)). This bill is intended to essentially extend these time-off leave provisions from applying to only victims of certain enumerated serious crimes and instead apply broadly to almost all victims of violent crime.

Accordingly, it would expand the definition of victim for many of its provisions to include any of the following: (1) victims of stalking, domestic violence or sexual assault; (2) a victim of a crime that caused physical injury or that caused mental injury and a threat of physical injury; (3) the immediate family member of a person who is deceased as the direct result of a crime; or (4) for purposes of subsection (b) [appearing in court in response to a subpoena or court order], any person against whom any crime has been committed.

Currently existing subsection (c) prohibits discrimination or retaliation against employees who are a "victim" and takes time off to obtain legal relief, including a TRO or other injunctive relief for the health or safety of them or their child. Current subsection (d) requires the employee provide advance notice where feasible, and identifies the following forms of acceptable certification to justify the absence: (1) a police report; (2) a court order; or (3) documentation from enumerated health care providers, medical professionals or domestic violence counselors. This bill would add to this third category "victim advocate" defined as an individual providing services to victims "under the auspices or supervision" of either an agency or organization providing services to victims , or a court or law enforcement/prosecution agency.

It would also add a fourth catch-all category of acceptable documentation that "reasonably verifies" the crime or abuse occurred, including a written statement from the employee or an individual acting on their behalf, certifying the absence is authorized under section 230 or section 230.1.

It would also identify a new definition of "crime" and "immediate family member" for purposes of section 230.

While section 230 applies to employers of all sizes, Labor Code section 230.1 prohibits employers with 25 or more employees from discriminating against victims of sexual assault, domestic violence or stalking who take time off for additional purposes (e.g., seeking medical attention, obtaining services from certain agencies, obtaining psychological counseling, participating in safety planning). This bill would largely incorporate the above-described changes to section 230, including its expanded definition of "victim" (i.e., broader than simply domestic violence, sexual assault or stalking) and the expanded certification for unforeseen absences.

It would also expand the purposes for which the time off could be taken, expanding it from the current requirements the services relate to sexual assault, domestic violence or stalking, and instead apply for any qualifying "crime" or abuse.

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

"Qualifying Exigency" Changes for Paid Family Leave Purposes (AB 2399)

California's Paid Family Leave program currently provides wage replacement benefits for employees who take time off for certain specified purposes, including a "qualifying exigency" related to specified family member's covered active duty in the United States Armed Forces. This bill would revise the definitions of "care recipient," "care provider" and "family care leave" for purposes of the qualifying exigency provisions. It would also define the term "military member," including for purposes of these revised definitions relating to qualifying exigencies. It would also make conforming changes related to the documentation requirements of a qualifying exigency.

This has been introduced as a Committee Bill suggesting it has bipartisan support and no recorded opposition.

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

Harassment/Discrimination/Retaliation

DFEH Unveils On-Line Harassment Training Video for Non-Supervisory Employees

In 2018, California materially expanded its so-called AB 1825 harassment training in two respects: (1) requiring employers with five or more employees (rather than the previous fifty or more employees) provide harassment training; and (2) requiring it be provided to both supervisory and non-supervisory employees (rather than the previous requirement of supervisors only). Following further amendment in 2019, Government Code section 12950.1 presently requires this harassment training be provided by January 1, 2021 except for employees trained in 2019 who will not need to be trained again until the required refresher training two years after the most recent training.

This section also requires the DFEH to develop or obtain on-line harassment training courses that employers may use to satisfy their mandatory training obligations for the supervisory and non-supervisory employees. In May, the DFEH announced that its one hour on-line training course for non-supervisory employees is now available online. The DFEH describes this program as interactive and optimized for mobile devices and accessible for persons with disabilities. The DFEH's course is also available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese and Korean. Finally, it also includes instruction on how sexual harassment may interact with other forms of discrimination, and includes training on gender identity, gender expression and sexual orientation.

The DFEH's on-line training video that employers may use for supervisory employee training is expected to be released shortly.

FEHA Protections for Drug Rehabilitation Programs (AB 882)

While Labor Code section 1025 presently requires employers with 25 or more employees to reasonably accommodate an employee who voluntarily enters an alcohol or drug rehabilitation program, this bill would include additional discrimination protections in the Fair Employment and Housing Act, which applies to employers with five or more employees. Specifically, it would

amend the definitions of "physical disability" and "mental disability" for purposes of FEHA's discrimination protections to include a person who has completed or is the process of completing a rehabilitation program to end illegal drug use. These definitions would also include someone erroneously regarded as engaging in illegal drug use. However, these changes would not preclude an employer from adopting or administering reasonable policies or procedures, including drug testing, designed to ensure that the individual who has completed or is completing a drug rehabilitation program is no longer engaging in the illegal use of drugs.

The bill's author states it is intend to align California law with the federal Americans with Disabilities Act, and to incorporate FEHA regulations suggesting past drug addiction can be a disability.

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

Harassment Training for Minors in Entertainment Industry (AB 3175)

This industry-specific bill would require that, before an entertainment work permit is issued to minors, the parents of minors aged 14 to 17 years must complete sexual harassment training provided by the DFEH or other legally-compliant training and convey this information to the minor.

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

Training Exemption for Minors in the Entertainment Industry (AB 3369)

This bill would clarify that otherwise mandatory sexual harassment training for minors in the entertainment industry would remain governed by Labor Code section 1700.52 rather than Government Code section 12950.1.

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

Independent Contractors/Worker Classification

AB 5 Amendments for Various Additional Industries and Professional Services, including Photographers, Freelance Writers and the Music Industry (AB 1850)

Enacted in 2019, AB 5 codified and expanded the so-called *Dynamic* ABC Test to determine work classification relationships, and also contained a staggering number of exemptions for various professional services and industries, which would instead be governed by the prior *Borello* test. Almost immediately it was clear that further amendments would be needed both to address additional industries and relationships, and to clarify AB 5's language.

Drafted by AB 5's author, this bill would revise several of the exemptions currently contained in Labor Code section 2750.3, and add further exemptions.

For instance, it would enact an entirely new subsection (proposed subsection (g)) related to various music industry occupations in connection with the creating, marketing, promoting or distributing sound records or musical compositions, which would be governed by *Borello* rather than the ABC Test. These would include: (a) recording artists (but with some exceptions); (b) songwriters, lyricists and composers; (c) managers of recording artists; (d) record producers; (e) musical engineers and mixers; (f) musicians (with some exceptions); (g) vocalists (with exceptions); (h) photographers working on recording photo shoots, album covers and other publicity purposes; and (i) independent radio performers.

However, as the above notes, there would be numerous carve outs to these exemptions, and there would be new limitations applicable to collective bargaining agreements and organizing rights within the music industry.

While new subsection (g) would govern the creation of sounds recordings in the music industry, new subsection (h) would instead govern "single engagement live performance events," and have them governed by *Borello* under certain enumerated circumstances. The rules regarding these "live performance events" are quite detailed so the reader is encouraged to review proposed subsection (h) if potentially applicable.

One of the more controversial aspects of AB 5 was its rules regarding both photojournalists/still photographers and freelance writers/editors/cartoonists, and the limitation of only 35 submissions to any "putative employer" to qualify for an exemption to the ABC Test. This bill would delete the current statutory exemptions for these particular "professional services" and replace them with new statutory exemptions that remove the 35 submission/project cap and use alternative criteria to determine when *Borello* should apply. Broadly summarized, photojournalists/still photographers and freelance writers/editors/cartoonists/translators who (a) work under a contract containing certain terms; (b) are not replacing an employee performing the same work at the same volume; (c) do not primarily perform the work at the hiring entity's business location; and (d) the individual is not restricted from performing work for more than one hiring entity.

Further, this bill would also amend the so-called "professional services" exemption in current subsection (d) by adding "specialized performers" hired by a performing arts company or organization to teach a "master class" (as defined) for no more than one week.

The so-called "referral agency" exemption in section 2750.3(c) currently exempts from the ABC Test relationships between a referral agency and a service provider that satisfy statutorily-enumerated conditions. This bill would add "youth sports coaching" to the definition of "referral agencies" whose relationships with service providers are not governed by the ABC Test. Simply summarized, "youth sports coaching" would mean sports coaches for training and engaging in athletic activity and competition for children under 18 years of age, but would not coaches contracted with a public school.

Within this referral agency exemption, it would also expand current the definition of "tutor."

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

Music Industry, Photojournalist and Other Exemptions (AB 2257)

Also authored by AB 5's author, this backstop bill would make nearly identical changes to AB 5 for the music industry, photographers and freelance journalists, etc. It would also amend several provisions or definitions within Labor Code section 27450.3, including regarding "commercial fisherman" and "travel agent services." It appears this bill was introduced as a backup version of AB 1850 to extent some of the broader provisions of AB 1850 prevent its enactment.

This urgency bill would take effect immediately if enacted.

Status: Unanimously passed the Assembly and is pending in the Senate.2043

Wage and Hour

Annual Pay Data Reports (SB 973)

Evincing the ongoing feud between California and the federal government, this bill would essentially enact the proposed Obama administration regulations for revised EEO-1 reporting that the Trump Administration challenged in 2017. The bill's author states it is intended to force large California employers to undertake self-audits of their pay structures and then report these results to enable the state to monitor the overall progress toward achieving pay equity.

Accordingly, beginning March 31, 2021, and annually thereafter by this same deadline, private employers with 100 or more employees that are required to submit an annual EEO-1 will be required to submit "pay data reports" for the prior calendar year (i.e., the "Reporting Year") to the Department of Fair Employment and Housing (DFEH), which can also then share this report with the Division of Labor Standards Enforcement (DLSE) upon request. The pay data report would need to include very specific information enumerated in proposed new Government Code section 12999, including the number of employees by race, ethnicity and sex in the following job categories: (a) executive or senior level officials and managers; (b) first or mid-level officials and managers; (c) professionals; (d) technicians; (e) sales workers; (f) administrative support workers; (g) craft workers; (h) operatives; (i) laborers and helpers; and (j) service workers.

Employers would also need to identify the number of employees, identified by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. For this particular purpose, the employer shall calculate the employee's earnings as shown on the IRS Form W-2 for each "snapshot" (i.e., during a single pay period of the employer's choice between October 1st and December 31st of the Reporting Year) and for the entire Reporting Year, regardless of whether the employee worked the entire calendar year.

For employers with multiple establishments, the employer shall submit a report for each establishment and a consolidated report that includes all employees.

This bill would permit, but not require, employers to include a section providing any "clarifying remarks" regarding any of the information provided. Employers required to file an EEO-1 report with the EEOC or other federal agency containing the same information may comply with this new reporting requirement by submitting the EEO-1 to the DFEH, provided it contains the same or substantially similar data required by this bill.

The information submitted to the DFEH would also need to be made available in a format that would enable the DFEH to search and sort the information using readily available software.

The bill would require the department to maintain these pay data reports for at least 10 years. However, it would be unlawful for any DFEH officer or employee to publicize any "individually identifiable information" obtained through these reports prior to the initiation of any Equal Pay Act or FEHA claim. "Individually identifiable information" would be defined as "data submitted pursuant to this section that is associated with a specific person or business."

Similarly, individually identifiable information submitted to the DFEH through these reports would be considered confidential information and not subject to the California Public Records Act. However, the DFEH would be able to develop and publish annually aggregate reports based on the information provided so long as these aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

If the DFEH does not receive the required report, it may seek an order requiring employer compliance and shall be entitled to recover its enforcement costs (i.e., likely attorneys' fees).

This bill would also authorize the DFEH to "receive, investigate, conciliate, mediate and prosecute complaints" alleging equal pay violations under Labor Code section 1197.5. However, the DFEH would be required to coordinate with the DLSE and the DIR to enforce these provisions.

Very similar bills were introduced by the same author in 2018 (SB 1284) and 2019 (SB 171) but stalled in the Assembly after passing the Senate.

Status: Passed the Senator Labor and Appropriations Committees and is pending on the Senate Floor.

Expanded Statute of Limitations and Attorneys' Fees Recovery for Labor Code Violations (AB 1947)

This bill would amend two Labor Code provisions to make it easier or more enticing for plaintiffs to file retaliation claims. First, it would amend Labor Code section 98.7 to extend from six months to one year the period for a person to file a retaliation complaint with the Labor Commissioner.

Second, it would amend California's whistleblower statute (Labor Code section 1102.5) to allow a judge to award reasonable attorneys' fees to a prevailing plaintiff. Notably, in continuance of a recent trend, this amendment would specifically only identify a plaintiff as being able to recover, presumably to preclude a prevailing defendant to recover even if the claims were frivolous.

Similar bills (AB 2946 and AB 403) failed passage in the Assembly in 2018 and 2019.

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

Labor Commissioner Involvement in Arbitration of Wage Claims (SB 1384)

This bill would enable an employee who cannot have his wage claims determined by the Labor Commissioner because of an arbitration agreement with their employer to request the Labor Commissioner to represent them in the arbitration proceeding. The Labor Commissioner shall represent the employee if they are unable to afford counsel and the Labor Commissioner determines, upon conclusion of an informal investigation, that the claim has merit.

It would also require the petition to compel arbitration of a claim pending before the Labor Commissioner be served upon the Labor Commissioner. Upon the employee's request, the Labor Commissioner shall have the right to represent the employee in proceedings to determine enforceability of the arbitration agreement, either in court or with the arbitrator.

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

Online Tracking of Wage Claims and Annual Data (AB 3053)

This bill would take effect July 1, 2021 and require the Labor Commissioner to update its website to develop a portal whereby "aggrieved employees" could submit and track their claims, and submit requested documents.

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

Wage and Hour Rules for Warehouse Distribution Center Employees (AB 3056)

Responding to concerns that workers at warehouse distribution centers (as defined) employed under a quantified performance quota are being cheated, this bill would establish various new wage and hour protections specifically for such employees. Specifically, it would prohibit such a "quota" (as defined) system that counts against the quota reasonable time spent (a) accessing and using a restroom or adequate hydration; (b) documenting or reporting an employer's violation of the Labor Code; or (c) taking any legally mandated rest, recovery or meal period.

It would also require employers to pay overtime to employees for any period during which the employee was assigned or required to perform work in excess of the baseline quota.

It would also authorize the DLSE to enforce these provisions and to adopt regulations to implement these provisions.

Status: Passed the Assembly Labor on a largely party line vote and is pending in the Senate.

Secretary of State Involvement Regarding Outstanding Wage Judgments and Local Enforcement of Wage Statutes (AB 3075)

California's Corporation Code requires certain business entities file articles of incorporation containing statutorily-enumerated information. This bill would require filers for the these articles of incorporation sign a statement under penalty of perjury that there are no outstanding judgments issued by the Division of Labor Standards Enforcement or a court for any violation of a wage order or the Labor Code.

Also, while Labor Code section 1206 presently states that the Labor Code is intended to establish minimum protections and penalties, this bill would specifically authorize local jurisdictions to enforce labor standards regarding wages that are at least as strict as the Labor Code.

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

Expanded Liability for Garment Manufacturers (SB 1399)

Enacted in 1999, AB 633 sought to prevent wage theft in the garment industry by making those who contracted for garment manufacturing liable as guarantors for the unpaid wages and overtime incurred in making their garments. This bill responds to concerns garment manufacturers have attempted to sidestep this liability by adding more layers between the entity requesting the work and those actually performing it. This bill amends the Labor Code to make clear that a person contracting to have garments made is liable for unpaid minimum wage and overtime wages to the workers who manufacture the garments regardless of how many layers of contracting that person may use. It would also impose new document retention requirements upon garment manufacturers. It would also create a presumption of employment for any claims filed with the Labor Commissioner if the worker provides labels with the garment manufacturers name or brand.

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

Extension for Petroleum Facility Rest Period Rules (AB 2479)

This bill would amend Labor Code section 226.75 and extend until January 1, 2026, the exemption from the generally-applicable rest period rules for specified employees holding safety-sensitive positions at petroleum facilities (as defined) if certain requirements are met.

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

<u>Human Resources/Workplace Policies</u>

Amendments Regarding Settlement Agreement Provisions for Future Employment (AB 2143)

In 2019, California enacted AB 749 to generally prohibit settlement agreement provisions limiting an "aggrieved employee's" ability to work for the settling employer. This bill would amend these

prohibitions in two respects. First, it would require the aggrieved employee to have filed the initial complaint "in good faith." Second, while the current prohibition against "no rehire" provisions contains an exception if the employer has made a good faith determination the aggrieved employee engaged in sexual harassment or sexual assault, this bill would expand this exception to include "or any criminal conduct" but also require this good faith determination of the alleged disqualifying conduct be made and documented before the aggrieved employee filed a complaint.

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

Wellness Program Requirements (AB 648)

Entitled the Wellness Program Protection Act, this bill would enact various prohibitions and requirements for health care service plans, insurers and employers. As to employers, this bill would enact new Labor Code section 436 to prohibit employers from requiring employees to participate in a wellness program as a condition of employment, or from retaliating against an employee either because the employee elected not to participate in the wellness program, or based on data collected through the wellness program about the employee.

An employer would also be prohibited from sharing personal information or data collected through a wellness program, and would be required to comply with state and federal privacy laws for any information collected through a wellness program.

The employer would also be required to post on its internet website a written explanation about the wellness program, including a description of the data collection process and which data will be collected, and the employee's rights concerning the wellness program under state and federal law. The employer would also be limited to collecting, disseminating and using only the employee's personal information reasonably necessary to operate the wellness program, and will be required to destroy any personal information received if the employee terminates their participation or upon the conclusion of a wellness program. However, these restrictions on collecting and the requirement to destroy would not apply to certain instances (as defined) involving publicly available information or de-identified and aggregated information used for certain purposes.

Employees would also have the right to obtain a copy of their records, including any personal information collected by the employer pertaining to a wellness program, in a format accessible to the employees, and to challenge the completeness and accuracy of any records.

These provisions would apply, to the extent applicable, to any entity the employer contracts with to administer or operate a wellness program on the employer's behalf.

Employees would have the ability to file a complaint with the Labor Commissioner within six months after any violations, and persons who violate these provisions would be guilty of an infraction.

These provisions would not apply to certain wellness programs administered by licensed health care professionals, and would not limit or restrict the disclosure of personal information by an employer if otherwise required by law.

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

Human Resources Required to Report Child Abuse (AB 1963)

The Penal Code's Child Abuse and Recovery Act requires statutorily-enumerated "mandated reporters" to report whenever they, in their professional capacity or within the scope of their employment, observe a child they know or reasonably suspect has been the victim of child abuse or neglect. If a mandated reporter fails to report a known or reasonably suspected case of child abuse or neglect, they face misdemeanor liability, including statutory penalties and potential jail time.

This bill would amend Penal Code section 11165.7 to expand the list of mandated reporters to include human resources professionals for businesses that employ minors.

It would also add, for purposes of reporting sexual abuse (rather than simply child abuse or neglect) persons whose duties require direct contact with, and supervision of, minors in the performance of the minors' duties in the workplace. This duty for supervisors to report sexual abuse would not obviate their obligation to also report child abuse or neglect if the individual is working in another capacity that would otherwise make them a mandated reporter.

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

Miscellaneous

Cal-OSHA Protections for Household Domestic Service Employees (SB 1257)

This bill would remove the current exclusion for household domestic service employees from the California Occupational Safety and Health Act (Cal-OSHA), which governs health and safety in working conditions. It would require the Cal-OSHA head to convene an advisory committee to evaluate whether there is a need to develop industry-specific regulations related to household domestic service.

It would also establish a protocol for Cal-OSHA representatives to investigate complaints of alleged serious violations in workplaces that are residential dwellings. It would also require the residential dwelling "employer" to investigate and, if needed, correct the violation and reports its efforts to Cal-OSHA, and to provide copies of all correspondence received from Cal-OSHA to the domestic service employee.

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

Expanded Unemployment Insurance Benefits for Family Members of In-Home Supportive Services (AB 1993)

While Unemployment Insurance Code section 631 presently excludes from coverage most family members working for another family member, this amendment would include services performed by an individual in the employ of their parent, child or spouse if that individual is providing services through the In-Home Supportive Services program.

Unemployment Insurance Code section 702.5 also presently authorizes an "employment unit" for whom services are performed that do not constitute employment under the insurance code for some purposes to elect that the services constitute employment for purposes of disability compensation. This bill would specify that purposes of computing these disability benefits and contributions, these individuals would be treated as individuals whose services ordinarily constitute employment under these particular provisions.

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

Prevailing Wage Definition of "Locality" (AB 2231)

California law requires that a so-called "prevailing wage" be paid on "public works" (as defined) that are financed by public funds, but exempts private development projects where the public funding is "de minimis" This bill would define "de minimis" as both less than $500,000 and less than 2% of the total project cost.

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

Personal Protective Equipment for Direct Care Workers (AB 2537)

This bill would require public and private employers of workers who provide direct patient care to supply those workers with personal protective equipment necessary to comply with DIR regulations regarding aerosol transmissible diseases and ensure their usage. It would also require the employer to ensure the employee uses the personal protective equipment supplied to them.

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

Retaliation Protections for "Domestic Work Employees" (AB 2658)

Labor Code section 6311 presently precludes retaliation against employees who refuse to work in unsafe work environments. This bill would expand these protections from the current "employment in household domestic service" to "domestic work employees" (as defined).

Status: Passed the Assembly with strong bipartisan support and is pending in the Senate.

Safety Devices for Emergency Ambulance Employees (AB 2092)

This bill would require emergency ambulance employers to notify emergency ambulance employees of their right to request safety devices and safeguards at the beginning of the employee's shift.

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

Educational Training Costs for Direct Patient Care Employees (AB 2588)

This bill would prevent employers from requiring applicants for employment that provides or seeks direct patient care to incur the costs of required educational programs or training.

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

Public Sector

School Employee Pay during Natural Disasters or Evacuation Orders (AB 805)

This bill would prohibit school districts from requiring certificated or classified employees to use sick, vacation or other paid leave if the school is forced to close because of a natural disaster or an evacuation order, or if the employee is unable to report to work because they reside in an area affected by a natural disaster or an evacuation order.

Status: Unanimously passed the Assembly and is ending in the Senate Rules Committee.

Union Protections for UC Employees (AB 3096)

This bill would authorize employee organizations to bring a claim before the Public Employment Relations Board regarding concerns the UC Regents discouraged or deterred union members. It would also authorize a prevailing employee organization on such claim to recover a statutory penalty of $1,000 for each affected employee and attorneys' fees and costs.

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

Employee Information for Public Employers (SB 1173)

Various public sector laws (e.g., the Meyers-Milias Brown Act) require covered public employers to provide certain labor representatives with information about newly-hired employees (e.g., names/addresses, job titles, etc.) within a certain amount of time following hire. This bill would generally authorize an exclusive representative to file an unfair labor practices charge with the Public Employment Relations Board for violating these requirements, and authorize civil penalties.

Status: Narrowly passed the Senate Labor and Appropriations Committees and is pending on the Senate floor.