LEGISLATIVE SUMMARY

The California Legislature was quite active as its summer recess approached. Amongst other things, the California Legislature passed, and Governor Gavin Newsom signed a new law (SB 657) that will enable employers to provide telecommuting employees with mandatory notices by electronic mail, in addition to posting at the workplace. In other words, this law clarifies employers need not require telecommuting employees to physically post copies of these notices in their offices at home. The fact this relatively modest step passed unanimously hopefully reflects the Legislature's awareness of the challenges employees, employers, and human resource professionals face in applying arguably outdated laws in a dramatically changing workplace environment.

As expected, several other employment-related bills continue to move forward, including bills that would:

- Amend the Fair Employment and Housing Act (FEHA) to allow employers to provide a voluntary hiring preference for veterans (SB 665).
- Expand the California Family Rights Act (CFRA) to allow time off to care for a "parent-in-law" (AB 1033)
- Amend the CFRA and California's Paid Sick Leave Law to allow time off to care for a "designated person" (AB 1041).
- Prohibit confidentiality provisions in a settlement agreement involving any form of harassment or discrimination (SB 331), and
- Expand from two years to four years the retention period for certain employment records (SB 807).

The Legislature will return from summer recess on August 16, 2021 to continue working on these bills before the September 10, 2021 deadline to send bills to Governor Newsom.

In the interim, below is an overview of the key pending employment bills.

NEW LAWS

Telecommuting Clarifications for Posting and Employee Acknowledgments (SB 657)

Various Labor Code provisions require that the employer post notices in conspicuous places at the physical workplace. Responding to questions about whether these posting obligations also apply in the homes of telecommuting employees, this law adds new Labor Code section 1207 to allow employers to distribute these notices by email with the document or documents attached. However, this email distribution to telecommuting employees does not relieve employers of their obligation to physically post required posters in the workplace.

This law passed unanimously, and the substantive committee comments suggest an increased legislative recognition that telecommuting will remain post-pandemic, and that additional laws may be needed to address these new challenges.

PENDING BILLS

Harassment/Discrimination/Retaliation

Veterans' Hiring Preference for Private Employers (SB 665)

While the FEHA presently allows employers to grant a hiring preference in favor of Vietnam War-era veterans and as a defense against sex discrimination claims, this bill (entitled the Voluntary Veterans' Preference Employment Policy Act) would update and expand this exemption for almost all veterans (regardless of when served) and as a defense against all FEHA discrimination claims. Such a preference would be deemed not to violate any state or local equal employment opportunity law, including the FEHA, if used uniformly and not established for purposes of unlawfully discriminating against any group protected by the FEHA.

"Veterans" would be defined as any person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and was discharged or released under conditions other than dishonorable. Employers would be permitted to require a veteran to submit a United States Department of Defense Form 214 to confirm eligibility for this preference.

Employers adopting such a preference policy would also need to report this policy to the DFEH and annually report to the DFEH the number of veterans hired under this policy and any demographic information about those veterans that the employer is already required to report under its EEO-1. The DFEH would also need to report this information to the Legislature along with the number of discrimination claims received regarding an employer's usage of this preference policy.

This new preference provision would expire on January 1, 2028.

Similar bills (AB 160, AB 353, and AB 1383) have unanimously passed the Assembly before stalling in the Senate's Judiciary Committee in 2015, 2017, and 2019, even though similar preferences have been enacted in almost 40 other states.

Status: Unanimously passed the Senate and has unanimously passed the Assembly Labor and Employment and Veterans Affairs Committees and is pending in the Assembly Appropriations Committee.

FEHA Enforcement Changes, Including Four-Year Retention Period for Employment Records (SB 807)

This bill would amend several provisions related to the FEHA and the Department of Fair Employment and Housing Act's enforcement provisions. For instance, it would increase from two years to four years the period that employers must retain the employment records identified in Government Code section 12946 (e.g., applications, personnel, and employment referral records) after the records are created or received, or after an employment action is taken. It would also specify that upon the filing of any verified complaint under the FEHA, the employer

would be required to preserve any records and files until the later of (1) the first date after the period for filing a civil action has expired; or (2) the first date after the complaint has been fully disposed of and all administrative proceedings, civil actions, appeals, or related proceedings have terminated.

It would also amend FEHA's venue provision to allow actions involving class or group allegations on behalf of the DFEH to be filed in any county within California.

While the statute of limitations to file an initial charge with the DFEH for FEHA-related claims was recently extended to three years, this bill would amend the statute of limitations for filing other types of charges (e.g., Unruh Act, Equal Pay Act claims, etc.). It would also specify that the statute of limitations for filing a civil action is tolled upon the filing of a DFEH charge until the DFEH either files a civil action or one year after the DFEH notifies the complainant it is closing its investigation. This tolling provision would apply retroactively but would not revive already-lapsed claims.

Presently, the DFEH may enforce the FEHA by petitioning a superior court to compel compliance with the DFEH's investigation of certain employment complaints. This bill would permit the DFEH to appeal superior court decisions to the appellate courts. Continuing a trend, it would also enable a prevailing party to recover their fees and costs but limit an employer's ability to recover its fees and costs (even if a CCP 998 offer was issued) only if it proves the DFEH's appeal was frivolous or unreasonable when brought or if litigated after it became so.

While the DFEH presently may convene a dispute resolution conference, this bill would require the DFEH to do so before filing a civil action, which would also potentially toll the deadline to file a civil action.

It would also identify new procedures and deadlines related to class actions related to FEHA allegations.

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

Attorney-Client Privilege Proposed for Communications with the DFEH (SB 774)

This bill would extend the attorney-client privilege to apply to confidential communications between DFEH attorneys and complainants but would not establish an attorney-client relationship between the DFEH and the complainant. It would also require the complainant to assert the objection on the DFEH's behalf, but the privilege could not be waived without the DFEH's written consent.

Status: Passed the Senate and narrowly passed the Assembly Judiciary Committee.

Leaves of Absence/Time off/Accommodation Requirements.

CFRA-Related Clarifications (AB 1033)

In 2020, California enacted SB 1383 materially expanding the California Family Rights Act (CFRA) both in terms of covered employers (i.e., employers with five or more employees instead of the prior 50 or more employees) and the definition of "family care and medical leave" (i.e., adding grandparents, grandchildren, and siblings for whom leave may be taken to provide care). This bill cleans up or clarifies a couple of the ambiguities from last year's amendment.

For instance, while SB 1383 had included a definition for "parent-in-law," it had not otherwise included any substantive provisions related to "parents-in-law," leaving it unclear whether they were intended to be included in this new expanded definition of "family care and medical leave." AB 1033 resolves any such ambiguity by including "parent-in-law" within the definition of "family care and medical leave," meaning eligible employees at covered employers may take statutorily protected leave to care for a "parent-in-law" with a serious health condition.

A second bill (AB 1867) had enacted until January 1, 2024, a pilot program allowing small employers (i.e., between five and 19 employees) to request mediation through the Department of Fair Employment and Housing (DFEH) for any alleged CFRA-related violations. This bill would recast this program in several respects, including deleting the authorization to request mediation. Instead, it would require the DFEH, when an employee requests an immediate right to sue alleging a CFRA violation, to notify the employee of the requirement for mediation prior to filing a civil action if mediation is requested by the employee or employer. The bill would also identify various deadlines by which mediation-related activities would need to occur, including a 30-day period for a party to request mediation, and a 60-day period for the DFEH to initiate mediation following a request. The mediator would also be required to notify the employee of their ability to request information from the employer under Labor Code sections 226 (wage statements) and 1198.5 (personnel files), and to help facilitate "reasonable requests" for information to assist with mediation.

Once mediation is deemed unsuccessful or "complete" (as defined) or if mediation did not occur within 60 days, the employee could initiate a civil suit, with the statute of limitations period tolled during the pendency of these mediation efforts.

This mediation program would not apply to requests for a right to sue for violations other than under the CFRA.

Status: Unanimously passed the Assembly and has unanimously passed the Senate Judiciary and Labor Committees and is pending in the Senate Appropriations Committee.

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

Perhaps reflective of a concern that the statutory focus upon "nuclear family" relationships for leave purposes ignores modern realities and so-called "chosen families," this bill would amend

California's Family Rights Act (CFRA) and its Paid Sick Leave law to expand when the time-off provisions could be used. In this regard, it would follow the lead of several states (Oregon, Connecticut, New Jersey, and Colorado) and at least eight localities (including Los Angeles) that allow paid sick time or paid family and medical leave to cover "chosen families."

Specifically, it would amend CFRA's definition of family care and medical leave to include (beyond the seven currently identified relationships for whom leave may be taken to care) a "designated person," who need not be related by blood or legal relationship. An employee would be able to designate this individual at the time the employee requests family care and medical leave, but the employer may limit the employee to one designated person per 12-month period of family care and medical leave.

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

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

Human Resources/Workplace Policies

Expansion of Settlement Agreement Confidentiality Prohibitions, and Mandatory Time Period for Employees to Review (SB 331)

Presently, Code of Civil Procedure section 1001 precludes settlement agreement provisions restricting the disclosure of factual information related to claims of workplace harassment or discrimination based on sex. Entitled the Silenced No More Act, this bill would expand this provision to include all types of workplace harassment or discrimination, not just based on sex. It would also extend to employees who oppose harassment, discrimination, or retaliation, rather than simply those who report a complaint.

This bill would similarly amend Government Code section 12964.5, which presently precludes employers from requiring non-disparagement or non-disclosure provisions or that condition bonuses or raises upon signing an agreement restricting their ability to report unlawful acts in the workplace, including sexual harassment. This bill would extend this limitation to all types of unlawful acts, including any type of harassment or discrimination, not simply sexual harassment.

The bill would also require that non-disparagement or other contractual provisions that restrict an employee's ability to disclose information related to workplace conditions will need to include the following language: "nothing in this agreement restricts you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you believe to be unlawful."

To address one current ambiguity, this bill would also preclude employers from including confidentiality provisions in a separation or severance agreement related to unlawful acts in the workplace. It would also require that any non-disparagement provisions related to workplace conditions contain the same language from the preceding paragraph expressly permitting an employee's ability to disclose unlawful acts in the workplace, including related to harassment or discrimination or any other conduct believed to be unlawful.

However, these prohibitions will not preclude the inclusion of a general release or waiver of all claims in an employment separation agreement, provided that the release or waiver is otherwise lawful and invalid. Notably, this bill would require such employment separation agreements to notify the employee that they have the right to consult an attorney and provide the employee with a reasonable period (but not less than five business days) in which to do so. Employees would be permitted to sign the release prior to the expiration of this review period, provided their decision to do so was not induced by either (a) employer fraud, misrepresentations, or a threat to withdraw or alter the offer, or (b) by the employer offering different terms to employees who sign such an agreement before the review period expiration.

Status: Passed the Senate and has passed the Assembly Judiciary and Labor and Employment Committees and is pending on the Assembly floor.

State Agency Publication of COVID-19 Information by Worksite (AB 654)

In 2020, California enacted AB 685, which, amongst other things, imposed various notice obligations upon employers related to COVID-19, including reporting specified information to the local public health department. In turn, the State Department of Public Health is required to make this workplace industry information received from local public health departments available on its internet website to enable the public to track the number and frequency of COVID-19 cases and outbreaks by industry.

This bill would require the state agency to publicize this information in a manner that enables the public to track the number of COVID-19 cases and outbreaks by both workplace and industry, not simply industry. However, this information about active COVID-19 outbreaks would need to be removed from the State Department of Public Health's internet website after 14 days if no new cases of COVID-19 have been reported from that specific workplace.

This bill would also expand the employers exempt from the COVID-19 outbreak reporting requirement to various licensed facilities, including community clinics, adult day health centers, community care facilities and childcare facilities.

This urgency statute would take effect immediately if enacted.

Status: This bill narrowly failed passage on Assembly floor in 2021, but remains pending after a motion for reconsideration was granted. However, since it failed to meet the initial deadlines to be enacted in 2021, it probably cannot be enacted until 2022 at the earliest.

Written Disclosure Requirements of "Quotas" for Warehouse Distribution Center Employees (AB 701)

Citing concerns that "quota" requirements in large warehouses pose safety issues, this bill would require "warehouse distribution centers" (as defined) to provide to nonexempt employees, upon hire, a written description of each quota applicable to the employee. These notices will need to identify the quantified number of tasks to be performed, or materials to be produced or handled, within the quantified period and any adverse employment action that could result from not meeting the quota.

Employers would not be permitted to maintain a quota that prevents compliance with meal or rest periods or occupational health and safety laws. An employer would also be prohibited from taking any adverse action against an employee for failing to meet a quota that precludes compliance with meal or rest periods, health or safety standards, or that was not disclosed. Any time spent by an employee complying with health and safety laws would be considered time on task and productive time under the quota system. If a current or former employee believes a quota caused a violation of meal/rest periods or health/safety laws, they may request a written description of each quota applicable to them as well as their most recent 90 days of personal work speed data. Employers would need to provide this requested information within 21 calendar days from the date of the request.

As with many recent new laws, this bill would create a rebuttable presumption of retaliation for any adverse employment action taken within 90 days of an employee (a) making the first request in a calendar year for quota or personal work speed data discussed above; or (b) making complaint related to a quota alleging a violation of these provisions to the Labor Commissioner, any local or state agency, or the employer.

If an employee files a complaint with the Labor Commissioner, the Labor Commission will be required to provide written notice to each employee in the workplace regarding their rights to report specified violations and about applicable retaliation protections. Upon receiving a complaint, a state or local government entity may request or subpoena records regarding these quotas and employee work speed data. A current or former employee may also bring an action for injunctive relief to obtain compliance with these requirements and, if successful, recover costs and attorneys' fees. If the employee alleges the applicable quota precluded compliance with Cal-OSHA regulations, the employee may seek injunctive relief limited to suspension of the quota and any adverse action resulting from the quota's enforcement. For any potential PAGA actions, the employer would have the right to cure alleged violations.

Cal-OSHA would also be required to develop workplace standards designed to minimize the risk of illness and injury among employees working in warehouse distribution centers utilizing production quotas.

A related bill by this same author (AB 3056) stalled in the Senate in 2020.

Status: Passed the Assembly on a party-line vote and has passed the Senate Labor and Judiciary Committees and is pending in the Senate Appropriations Committee.

Notice Requirements Regarding State or Federal Emergencies, plus Labor Notices for Federal H-2A Visa Farm Workers (AB 857)

Labor Code section 2810.5 presently requires employers to 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 to identify the existence of either a federal or state emergency or disaster declaration applicable to the county or counties where the employee is to be employed, and that was issued within 30 days prior to the employee's first date of employment that may affect their health and safety during their employment.

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.

New Labor Code section 2810.6 bill would require all of California's H-2A visa employers to provide all H-2A farm workers a written notice of basic California labor rights on their first day of work in California or beginning 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, 2022, 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 to 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.

For employees required to work at night, the employer would be required to provide reflective garments and headlamps or other approved lighting for work areas, and to conduct safety meetings advising H-2A employees of the location of certain items, including bathrooms and rest areas.

Status: Passed the Assembly and has passed the Senate Labor and Judiciary Committees and is pending in the Senate Appropriations Committee. This bill appears heavily opposed, and a very similar bill (SB 1102) was vetoed by Governor Newsom in 2020.

Sealing of Criminal Records Regarding Felony Convictions (SB 731)

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

This bill would expand these protections in several regards. First, it would expand the court's discretionary power to provide expungement relief to all felonies, not just so-called "realigned" felonies, where certain conditions are met. Second, it would expand automatic arrest record relief – i.e., where the state DOJ reviews and seals records rather than requiring an applicant to petition for such relief – to most felony offenses provided certain criteria are present (e.g., there is no indication criminal proceedings have been initiated, at least three calendar years have elapsed since the arrest date and no conviction occurred, or the arrestee was acquitted of any charges arising from that arrest).

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

Status: Passed the Senate and has passed the Assembly Public Safety Committee and is pending in the Assembly Appropriations Committee.

<u>Wage and Hour</u>

Wage Deprivation as "Grand Theft" (AB 1003)

Labor Code sections 215 and 216 presently specify that certain wage-related violations may constitute a misdemeanor. However, to address concerns some employers are intentionally keeping tips or otherwise intended for employees, this bill would add new Penal Code section 487m providing that the intentional theft of wages (including gratuities) in an amount greater

than $950 from any one employee or $2,350 in the aggregate from two or more employees in any consecutive 12-month period may be punished as grand theft. It would define "theft of wages" to be the intentional deprivation of wages (as defined by the Labor Code), benefits or other compensation, by fraudulent or other unlawful means, with the knowledge that the wages, benefits or other compensation is due to the employee. For purposes of this new Penal Code section, independent contractors would be included within the definition of "employee," and hiring entities of independent contractors would be included within the definition of "employer."

Wages, benefits, or other compensation that are the subject of a prosecution under this new section would be recoverable in a civil action by the employee or the Labor Commissioner.

Status: Unanimously passed the Assembly and has unanimously passed the Senate Public Safety and Labor Committees and is pending in the Senate Appropriations Committee.

Labor Commissioner Liens on Real Property (SB 572)

While California law presently authorizes the Labor Commissioner to obtain a lien on real property owned by the debtor/employer to help recover amounts owed in favor of an employee, this bill would authorize the Labor Commissioner to obtain a real property lien to secure amounts due to the Commissioner under any final citation, hearing, or decision. This lien would exist for up to ten years, and the Labor Commissioner would be required to release the lien upon payment of the amount owed, including any interests and costs that lawfully accrued on the original amount owed.

Status: Unanimously passed the Senate and has unanimously passed the Assembly Labor, Judiciary, and Appropriations Committees and is pending on the Assembly floor.

Phaseout of the Sub-Minimum Wage for Employees with Developmental Disabilities (SB 639)

While California and federal labor laws presently authorize employers to pay employees with certain disabilities lower wages than other employees, including amounts below the otherwise applicable minimum wage, this bill would phase out this exemption under California law. Specifically, beginning January 1, 2022, California law would preclude any new special licenses from being issued to authorize the payment of lower wages, and beginning January 1, 2025, would prohibit employers from paying employees with disabilities less than the legal minimum wage.

While Labor Code section 1191.5 presently authorizes the Industrial Welfare Commission to issue special licenses for nonprofit organizations and authorizes a special minimum wage for covered employees, this bill would repeal this provision effective January 1, 2025.

Status: Passed the Senate with bipartisan support and has passed the Assembly Labor and Employment and Human Services Committees and is pending in the Assembly Appropriations Committee.

Limits on Employer Collections against Public Sector Employees (SB 505)

This bill would amend Labor Code section 224 to impose new requirements before a public employer could involve a third-party collection service or commence a civil action to resolve a monetary obligation owed by the employee. Specifically, unless the money obligation was owed because of fraud, misrepresentation, or theft, the public employer would need to make a good faith effort to consult with the employee to obtain a written authorization allowing the employer to deduct from the employee's wages and before involving a third-party collection service or commencing a civil action. Amongst other things, this written authorization would need to avoid placing an "undue financial burden" upon the employee, and for payments over a period of time, not withhold or divert more than 5% of the employee's monthly gross wages, unless expressly waived by an employee or another applicable legal agreement. This good faith consultation would not be considered part of the time for the employer to initiate a civil action, which shall not exceed one year from the date the consultation commenced.

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

Additional Wage and Hour Protections in the Garment Manufacturing Industry (SB 62)

In 1999, California enacted AB 633 to target wage theft in the garment industry and to create access to justice for victims. Citing concerns some manufacturers have attempted to frustrate the purpose of AB 633, including by adding layers of subcontracting, this bill is intended to strengthen the protections for garment workers.

Accordingly, it would expand the definition of garment manufacturing generally, including to add certain garment manufacturing process such as dyeing, altering a garment's design, and affixing a label.

Citing a concern that piece rate payments ensure workers receive less than the state-mandated minimum wage, this bill would prohibit employees engaged in garment manufacturing from being paid by the piece or unit, or by a piece-rate, except in certain specified circumstances. It would also impose statutory damages of $200 payable to the employee for each pay period in which the employee is paid by the piece rate.

It would also define and include "brand guarantors" for purposes of these provisions, regardless of whether the brand guarantor performs the manufacturing or simply contracts with others. It would also specify that garment manufacturers or brand guarantors will share joint and several liability with any contractor or manufacturer who violates these protections.

It would also expand from three years to four years the period that garment manufacturers must retain certain business records, and it would create certain rebuttable presumptions in the employee's favor for claims filed with the Labor Commissioner.

Status: Passed the Senate and has passed the Assembly Labor and Employment and Judiciary Committees and is pending in the Assembly Appropriations Committee.

Pay Equity for Under-Represented Groups (AB 316)

While California law presently prohibits private and public employers from paying employees lower wages than those of the opposite sex, or another race or ethnicity (except in statutorily enumerated circumstances), this bill states the Legislature's intent to enact legislation to achieve pay equity in state employment across gender, racial, ethnic, and under-represented groups. Amongst other things, it would require the California Department of Human Resources to publish a report by January 1, 2023 (and every two years thereafter) on gender and ethnicity pay equity in each classification under the Personnel Classification Plan (as defined) where there is an underrepresentation of women and minorities.

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

"High-Road Restaurant" Training and Designations for Restaurants (AB 572)

This bill would require the California Workforce Development Board (CWDB) to establish an outreach, education, and certification program related to "high-road employment policies," defined as policies that promote "equity of income and career pathways for people of color, immigrants, women and people who are transgender, nonbinary, or intersex." This program would be expected to help train restaurant employees, managers, and employees to identify and address disparities in their workforce and implement high-road employment policies. It would also have a certification component whereby restaurants that complete the training and have implemented the high-road employment policies will be designated as a "High-Road Restaurant," and provide signage or certificates these restaurants can display.

Status: Currently pending in the Assembly Appropriations Committee. However, because these provisions were only included through July 2021 amendments, this bill seems unlikely to be enacted in 2021.

AB 5 Exemptions Proposed for Certain Industries and Professions (AB 1561)

In 2019 and 2020, various laws were enacted to exempt specific industries from AB 5's "ABC Test" for worker classification purposes. Continuing this trend, AB 1561 would extend the current licensed manicurists' exemption to January 1, 2025, and extend the current exemption for certain construction industry subcontractors also to January 1, 2025. It would also expand the exemption for individuals licensed by the Department of Insurance to include claims adjusting or third-party administration and modify the exemption in the data-aggregating context.

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

PAGA Exemption for Janitorial Employees (SB 646)

This bill would create a new Labor Code section 2699.8 and exempt from the Private Attorneys General Act janitorial employees (as defined) with respect to work performed under a valid

collective bargaining agreement in effect before July 1, 2024, that governs wages, hours of work, and working conditions and contains specified other provisions (including an explicit PAGA waiver and a grievance procedure to address wage and hour issues that otherwise might invoke PAGA). This exception would expire upon the earlier of the CBA expiration or on July 1, 2024.

This bill will not preclude janitorial employees from pursuing a PAGA action if a court or administrative agency of competent jurisdiction has concluded the labor organization breached its duty of fair representation in relation to a potential PAGA claim.

The bill's author notes that it is intended to increase unionization of janitorial employees, thus ending a "race to the bottom" involving unscrupulous employers who attempt to cut labor costs. It also continues a recent trend of labor groups to obtain limited exemptions for employees working under a collective bargaining agreement. (E.g., AB 1654 (2019) [exempting certain CBA-covered employees in the construction industry].)

Status: Has passed the Assembly Labor and Employment and Judiciary Committee and is pending in the Assembly Appropriations Committee. Because this bill was only recently amended to include these provisions it will need to return to the Senate if it passes the Assembly.

State-Provided Benefits

Notice Requirement for Disqualification of Unemployment Insurance Benefits (AB 397)

Presently, an individual may be disqualified for unemployment compensation benefits if the individual willfully made false statements or representations to obtain unemployment insurance benefits. This bill would require the Employment Development Department (EDD) to provide advance written notice and an opportunity to the alleged false representations before disqualifying the individual from being eligible for unemployment compensation benefits.

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

EDD to be Bound by Appeals Board Decisions for Determining Eligibility (SB 700)

Concerned that the EDD has not been correctly applying California law when determining employee eligibility for unemployment insurance benefits (particularly in the "leasing employer" or "temporary services employer" context), this bill would require the EDD to be bound by specified California Unemployment Insurance Appeals Board decisions for all purposes related to unemployment insurance.

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

Additional Translations for Unemployment and Disability Insurance Programs (AB 401)

While the Employment Development Department (EDD) presently must provide unemployment and disability insurance information in eight languages (English and the other seven most used languages), this bill would require, commencing July 1, 2022, that the EDD provide translations of the materials in English and the other 30 top written languages used by California residents with limited English proficiency. The EDD would also have additional translation requirements to the extent a claimant's written language is not included within these 31 languages.

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

Increased Paid Family Leave Benefits (AB 123)

To address concerns the current Paid Family Leave benefits paid by the state Disability Fund are insufficient to enable many lower wage workers to take family leave, this bill would increase the weekly benefits from 60% to up to 90% of an employee's wages (subject to certain caps). These increased benefits would begin January 1, 2022.

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

Miscellaneous

Extensions of Fee Deadlines in Employment Arbitration Proceedings (SB 762)

In 2019, California enacted SB 707 requiring employers to pay arbitrator fees within thirty days of invoicing or risk allowing employees the option to return to court proceedings. This bill would require the arbitrator to provide to all parties an invoice for the full amount owed, and, absent an express contractual provision identifying a specific number of days for fee payment, require the invoice fees be paid as due upon receipt. It would also require an extension of the due date to be agreed upon by all parties, presumably to avoid having the arbitrator provide the employer an extension without the employee being aware of the delay or extension.

Status: Unanimously passed the Senate and has unanimously passed the Assembly Judiciary Committee.

Increased Cal-OSHA Enforcement of Safety Issues (SB 606)

This bill would expand Cal-OSHA's enforcement power in several respects. First, it would authorize Cal-OSHA to issue a citation to an "egregious employer" (as defined) for each willful violation, with each employee exposed to that violation to be considered a separate violation for purposes of the issuance of fines and penalties. This change would track similar powers given to the federal OSHA to stack penalties and encourage workplace safety rather than issuing a single blanket violation by such employers.

Second, regarding employers with separate places of employment, it would create a rebuttable presumption that a written policy or procedure that violates the Labor Code or Health and Safety Code constitutes an enterprise-wide violation if Cal-OSHA has evidence of violations at more than one location. If the employer failed to rebut this presumption, Cal-OSHA would be permitted to issue an enterprise-wide citation requiring enterprise-wide abatement based upon that written policy or procedure. Enterprise-wide violations would also be subject to the same penalty provision as willful or serious violations.

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

Multi-threat Protective Gear for Emergency Ambulance Employees (AB 7)

This bill would require emergency ambulance providers to provide multi-threat body protective gear to an emergency ambulance employee upon their request and to make the protective gear readily available for the requesting employee when responding to an emergency call.

Status: Passed the Assembly with bi-partisan support and has passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Agricultural Worker Protections for Wildfire Smoke (AB 73)

California law presently requires the State Department of Public health to implement various programs relating to public health, including the establishment of a personal protective equipment (PPE) stockpile for healthcare workers and essential workers (as defined) during a 90-day pandemic or other health emergency. This bill would include wildfire smoke events among health emergencies for these purposes and include agricultural workers in the definition of essential workers.

This bill would require the Division of Occupational Safety and Health by January 1, 2023, to develop and distribute air quality training and information, including related to N95 respirator safety, and require agricultural employers to periodically conduct the training.

This bill would also modify the composition of the Personal Protective Equipment Advisory Committee, including increasing the representation of labor organizations representing health care workers and essential workers (as defined).

Status: Unanimously passed the Assembly and has unanimously passed the Senate Health and Labor Committees and is pending in the Senate Appropriations Committee.

Expansion of Displaced Janitor Opportunity Act (AB 1074)

California's Displaced Janitor Opportunity Act requires contractors and subcontractors who are awarded contracts or subcontracts for janitorial or building maintenance services to retain for a period of 60 days certain employees who were employed at that site by the previous contactor/subcontractor and to offer continued employment if the retained employees'

performance is satisfactory. This bill would change this Acts name to be the Displaced Janitor and Hotel Worker Opportunity Act and essentially extend these protections to certain hotel workers.

For those purposes, it would expand the current definition of "awarding authority" to also include "guest services, food and beverage services or cleaning services." "Guest services" would be defined to include contracted work for which a majority of the employee work hours are executed on hotel premises, including front desk, bell, in-house mail delivery, telephone operation, concierge, spa, valet, maintenance, landscaping, housekeeping, laundry, room services and other turndown services, or other substantially similar positions or services, provided by hotel service employees.

Status: Narrowly passed the Assembly and has passed the Senate Labor Committee and is pending in the Senate Appropriations Committee.

Public Works Disclosures by Contractors/Subcontractors (AB 1023)

Presently, Labor Code section 1771.4 requires contractors and subcontractors working on "public works" (as defined) to furnish payroll records to the Labor Commissioner at least monthly or more frequently if specified in the applicable contract. This bill would make a contractor or subcontractor who fails to furnish these records related to its employees liable for a penalty of $100 per day, but not to exceed $5,000 per project, to be deposited in the State Public Works Enforcement Fund. The Labor Commissioner would not be able to levy these penalties until 14 days after the deadline for furnishing records and would need to ensure these penalties accrue to the actual contractor or subcontractor that failed to provide these records.

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

Foreign Labor Contractor Registration (AB 364)

While the Labor Commissioner is presently required to register and supervise foreign labor contractors who perform foreign labor contracting activities to recruit or solicit foreign workers, these requirements presently apply only to nonagricultural workers, exempting farm labor contractors and agricultural employers. This bill would repeal Business and Professions Code section 9998, thus expanding the application of the foreign labor contractor registration provisions.

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

Advisory Committee Proposed Regarding Cal-OSHA Protections Extended to Most Household Domestic Service Employees (SB 321)

This bill would require the California Division of Occupational Safety and Health to convene an advisory committee to make recommendations to Cal-OSHA or the California Legislature to

ensure the safety of household domestic service employees, and to develop voluntary industry-specific occupational health and safety guidance to educate household domestic service employees and employers. These recommendations would need to be publicly posted and submitted to the California Legislature by January 1, 2023.

***Status**:* Passed the Senate and has passed the Assembly Labor and Employment and Judiciary Committees and is pending in the Assembly Appropriations Committee. These provisions were only recently added during a very recent "gut and amend" process while pending before the Assembly Judiciary Committee, so this bill would need to return to the Senate for concurrence in these amendments.

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

This bill would provide that "technology" (as defined) shall not preclude a worker providing direct patient care from exercising independent clinical judgment regarding patient care or acting as a patient advocate. It would also prohibit employer retaliation against patient care workers who request to override health information technology and clinical practice guidelines and allow employees to file a complaint with the Labor Commissioner.

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

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

Status: Narrowly passed the Assembly and has passed the Senate Labor and Health Committee and is pending in the Senate Appropriations Committee.

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

Proposed Changes for Selecting Agricultural Labor Representatives (AB 616)

While agricultural employees presently may select their collective bargaining representatives through secret ballot election, this bill would permit these employees to also select their labor representatives by submitting a petition to the board supported by representation ballot cards signed by a majority of employees in the bargaining unit.

Secondly, while a party may presently appeal a final order regarding an unfair labor practice, this bill would require an employer who appeals orders involving make-whole, backpay, or other monetary awards to employees to post an appeal bond for the entire economic value of the order.

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

Public Employer Health Coverage During Strikes (AB 237)

Entitled the Public Employee Health Protection Act, this bill would require "covered" public employers (i.e., those that provide health/medical benefits for non-occupational illnesses) to maintain or pay an enrolled employee's health care/medical coverage during an authorized strike at the same level as if the employee had continued to work. It would also make it an unlawful practice for the covered employer to fail to collect and remit the employee's contributions to this coverage, or to maintain any policy violating these provisions or that otherwise threaten an employee's or their dependents' continued access to health or medical care during the employee's participation in a strike. The Public Employment Relations Board would be responsible for adjudicating any alleged violations of these protections.

Status: Passed the Assembly with bi-partisan support and has passed the Senate Judiciary Committee and is pending in the Senate Appropriations Committee.

Employee Information in Public Employment Context (SB 270)

Presently, certain California public employers must provide labor representatives with the names and home addresses of newly hired employees, as well as certain work information (e.g., job title, department, contact information) within 30 days of hire, and must also provide this information for all employees in a bargaining unit at least every 120 days. To address concerns public employers are not providing this information, this bill would, commencing July 1, 2022, authorize an exclusive representative to file an unfair labor practice charge provided certain conditions are first met (e.g., written notice of a violation and an opportunity to cure certain violations).

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