CALIFORNIA LEGISLATIVE SUMMARY

The 2019 California Legislative Session drew to a close with the expiration of the September 13th deadline to pass bills and forward them to Governor Gavin Newsom. Overall, this session was quite active as there have already been several bills already signed into law, including laws to:

- Delay the new harassment training deadlines for smaller employers and non-supervisory employees from January 1, 2020 to January 1, 2021 and to clarify that employees who received sexual harassment training in 2018 need not be re-trained in 2019 (SB 778);
- Amend the Fair Employment and Housing Act to preclude racial discrimination related to hairstyles (SB 188);
- Update the requirements and procedures for reporting serious workplace injuries (AB 1804 and AB 1805).
- Require employers provide additional notices related to deadlines for flexible spending accounts (AB 1554); and
- Prohibit employers from requiring employees to bring their mail in election ballots to work (AB 17).

The legislature also passed and forwarded to the governor a number of employment-related bills, including bills to:

- Prohibit mandatory pre-employment arbitration agreements for FEHA and/or Labor Code violations (AB 51);
- Amend the Labor Code to preclude discrimination or retaliation against sexual harassment victims and their family members (AB 171);
- Extend the statute of limitations for FEHA claims from one to three years (AB 9) and for Labor Code claims from six months to two years (AB 403);
- Codify the California Supreme Court's *Dynamex* ruling regarding independent contractors while identifying various exemptions (AB 5);
- Require employers to provide up to an additional thirty days of unpaid leave for organ donations (AB 1223);
- Further expand workplace lactation accommodation requirements (SB 142);
- Amend the California Consumer Privacy Act to temporarily exclude information gathered by employers in the employment context (AB 25); and
- Prohibit so-called "no rehire" provisions in employment-related settlement agreements (AB 749).

Governor Newsom has until October 13, 2019 to sign or veto these bills.

There were also some bills that stalled, including one that would require employers to submit annual pay data reports to the DFEH (SB 171), and another that would impose FEHA liability on employers for contractor harassment (AB 170).

Below is an overview of the laws already enacted in this session followed by an overview of the employment bills Governor Newsom is considering, grouped largely by subject matter.

NEW LAWS

Delay of and Clarification for New Sexual Harassment Training Deadlines (SB 778)

In 2018, California unanimously enacted SB 1343, which extended so-called AB 1825 harassment training in two material respects: (1) it required employers with five or more employees (rather than 50 employees) to provide this training; and (2) it required employers to train both supervisors and non-supervisory employees. However, as the contemplated January 1, 2020 compliance date approaches, several ambiguities have arisen including whether employees trained in 2018 need to be retrained in 2019 and when training must be provided to non-supervisory employees after their hire.

Governor Newsom has signed SB 778 and it is immediately effective. SB 778 modifies or clarifies California's new harassment training requirements contained in Government Code section 12950.1 in three respects. First, it extends the deadline for most employers to comply with the new harassment training requirements from January 1, 2020 to January 1, 2021. This extension will provide additional time for those larger employers who previously trained their supervisors to train their non-supervisory employees, and for smaller employers to train both their supervisory and non-supervisory employees. As a practical matter, it also provides additional time after the DFEH training materials are published in late 2019 for employers to determine whether to use them or to develop their own training modules.

Second, the new January 1, 2021 deadline removes the prior concern that supervisors trained in 2018 must be retrained in 2019 to meet the 2020 deadline. It also specifically provides that employers who provide legally-sufficient training in 2019—whether to comply with the previously announced January 1, 2020 deadline or because they simply still wish to do so earlier—will not be required to provide any further refresher training or education until two years thereafter. Further, it specifies that moving forward, employers must provide this sexual harassment training and education to each California employee once every two years.

Third, SB 778 specifies that non-supervisory employees must be trained within six months of hire, thus harmonizing it with a similar rule requiring supervisors be trained within six months of assuming a supervisory position.

Please note, while SB 778 extends the initial training compliance deadline in Government Code section 12950.1(a) applicable to most employers, it does not appear to affect the training requirements contained in subsection (h) applicable to seasonal, temporary or other employees hired to work for less than six months, or to migrant and seasonal agricultural workers. Thus, while the employees covered by subsection (a) (which is most employees) must now be trained "by January 1, 2021," those employers subject to these more industry specific subsections must still comply with their particular training requirements beginning "January 1, 2020." As a practical matter, while almost all employees in California will need to be trained in 2020 (unless trained in 2019) to meet the new January 1, 2021 deadline, employers subject to these more specific industry-specific requirements may need to provide their training earlier in 2020 to meet the specific time frames applicable to them (e.g., within the first 30 days after hire or within 100 hours worked for seasonal, temporary or other employees hired to work for less than six months).

This law is immediately effective due to its urgency clause.

FEHA Amendments for "Protective Hairstyles" (SB 188)

Responding to concerns that many existing dress and grooming codes have a disparate impact on African Americans, this new law amends the definition of "race" under FEHA to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." Protective hairstyles, in turn, is defined as "including, but is not limited to, such hairstyles as braids, locks, and twists."

According to the bill's author, this provision invalidates: (1) dress/grooming provisions that explicitly preclude such hairstyles; and (2) facially neutral dress/grooming provisions that employers enforce by precluding such hairstyles.

New York City recently adopted similar guidelines to protect the rights of employees to maintain natural hair or hairstyles closely associated with their racial, ethnic or cultural identities, including the same specific protections for locks, twists and braids. https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf

This law takes effect January 1, 2020.

Employer Notices Regarding Flexible Spending Accounts (AB 1554)

Responding to concerns that employees are forfeiting funds not spent by year-end for flexible spending accounts, this law requires employers to notify employees participating in a flexible spending account (including dependent care flexible spending accounts, health flexible spending accounts, or adoption assistance flexible spending accounts) of any deadlines to withdraw funds before the plan year ends. Employers must provide this notice by two different

forms, one of which may be electronic, and may consist of the following non-exclusive means: (1) email; (2) telephone; (3) text message; (4) postal mail; or (5) in-person notification.

This law takes effect January 1, 2020.

Updated OSHA Requirements for Reporting Serious Occupational Injuries (AB 1804)

While employers presently must submit a report of serious injury, illness or death to the Division of Occupational Safety and Health by telephone or email, this law deletes the "or email" requirement and instead directs the employer to use "a specified online mechanism established by the Division" for reporting purposes, or a telephone. This proposed change flows from concerns that employer reports via email may omit details, hampering OSHA investigations. However, until the online mechanism is available, the employer may continue to use telephone or email.

This law takes effect January 1, 2020.

Changes to OSHA's Definition of "Serious Injury or Illness" (AB 1805)

To align California reporting laws with the currently more expansive federal law, this law recasts slightly the definitions of "serious injury or illness" and "serious exposure" for purposes of triggering an employer's duty to notify the Division of Occupational Safety and Health. For instance, it removes the 24-hour minimum time requirement for qualifying hospitalizations (other than for medical observation or diagnostic testing), and includes the loss of an eye as a qualifying injury and include amputation (rather than loss of a body member). The term "serious exposure" is also re-defined to include exposure to a hazardous substance creating a "realistic possibility" (rather than the current "substantial probability") that death or serious physical harm in the future could result from the actual hazard created by the exposure.

This law takes effect January 1, 2020.

Wage Payment Rules for "Print Shoot" Employees (SB 671)

This industry-specific law creates special final wage deadlines for "print shoot employees," defined as an individual hired for a period of limited duration to render services relating to or supporting a print shoot. Modeled upon similar rules for other motion picture industry employees, new Labor Code section 201.6 provides that a print shoot employee is entitled to receive payment of the wage earned and unpaid at the time of termination by the next regular payday (as defined), rather than immediately. The employer may mail these wages to the employee or make them available at a location specified by the employer in the county where the employee was hired or performed labor.

This law is effective immediately.

Precluding Employer Voter Intimidation (AB 17)

Entitled the Voter Protection Act, this law adds new Election Code section 14002 to preclude employers from requiring or requesting that an employee bring their vote by mail ballot to work or cast their vote by mail ballot at work. However, it does not prohibit an employer from encouraging an employee to vote. The Secretary of State or any public prosecutor with jurisdiction may seek civil fines up to $10,000 per violation against any employer who violates these protections.

This law takes effect January 1, 2020.

Employing Infants in the Entertainment Industry (AB 267)

This law amends Labor Code section 1308.8 and extends its current requirements for infants under the age of one month working "on any motion picture set or location" to the "entertainment industry" more broadly. Specifically, it precludes infants under the age of one month from working in the entertainment industry (as defined) absent certification from a physician or surgeon board certified in pediatrics as to the infant's medical ability to withstand the potential risks of such employment.

This law takes effect January 1, 2020.

BILLS SENT TO GOVERNOR NEWSOM

Harassment/Discrimination/Retaliation

Extended Statute of Limitations for FEHA Complaints (AB 9)

Government Code section 12960 presently requires employees to file an administrative charge with the DFEH within one year from the date an unlawful employment practice occurs. This bill would extend this deadline from one year to three years, but retain a one-year limitations period for filing Unruh Act-related claims against businesses. It would also make conforming changes to the provision allowing employees an additional period up to 90 days if they first obtain knowledge of the facts of the alleged unlawful practice after the limitations period had expired. This extended limitations period would not revive already lapsed claims, and would define "filing a complaint" as filing an intake form with the DFEH, with the operative date of a subsequently-filed verified complaint relating back to the filing of the intake form.

It would also amend section 12965 to clarify that the DFEH's one-year period to investigate an employee's complaint and decide whether to bring a civil action starts from the filing of a verified complaint, rather than simply an intake form.

A nearly identical bill (AB 1870) passed the Legislature but was vetoed by then-Governor Jerry

Brown.

Labor Code Protections for Sexual Harassment and Presumption of Post-Harassment Complaint Retaliation (AB 171)

Labor Code section 230 presently precludes all employers from discriminating or retaliating against victims of domestic violence, sexual assault or stalking, if the victim provides notice to the employer of the status or the employer has actual notice of this status.

This bill would amend this section to similarly preclude discrimination or retaliation against victims of "sexual harassment" (as defined by the Fair Employment and Housing Act in Government Code section 12940(j).) In this regard, while the FEHA presently precludes retaliation against someone who has made a sexual harassment complaint, this bill would enact and extend Labor Code retaliation protections to someone who is a sexual harassment victim (but may not have made a complaint) if the employer knew about the harassment.

Commencing July 1, 2020, AB 171 would also create a rebuttable presumption of unlawful retaliation if, within 90 days of the employee providing notice of or the employer learning of their status as a victim of sexual assault, domestic violence, sexual assault or sexual harassment, the employer discharges, threatens to discharge, demotes, suspends or takes any other adverse action against the employee. An employer would have the ability to rebut this presumption by evidence the employer had a non-retaliatory business reason for the adverse employment action. However, in those circumstances where an employer has authorized certain individuals or entities to receive a report confidentially, that individual or entity's knowledge will not be imputed to the employer for purposes of the 90-day presumption of retaliation.

"Employer" would be broadly defined to mean any person employing another under any appointment or contract of hire, and to include the state, political subdivisions and municipalities.

These changes were proposed as part of AB 3081 which then-Governor Jerry Brown vetoed in 2018.

Private Civil Action for Violations of Labor Code Section 230 (AB 1478)

This bill would also amend Labor Code sections 230 and 230.1 relating to time off from work due to unexpected events, and expand an employee's ability to bring a private civil action for violations of this provision without having to exhaust administrative remedies. Specifically, it would make clear that an employee may directly file a private action without first involving the Labor Commissioner for any violations regarding an employee's (1) ability to take time off for jury duty; (2) status as a crime victim; (3) ability to take time off to seek legal aid because of a

sexual assault, domestic violence or stalking; (4) status as a victim of sexual assault, domestic violence, or stalking; or (5) request for reasonable accommodation related to sexual assault, domestic violence or stalking. However, since the employee also has the option to file a complaint with the Labor Commissioner, if the employee files a civil action based on the same or similar facts as a charge also filed with the Labor Commissioner, the Labor Commissioner would have the discretion to close their investigation.

Continuing a recent trend, these amendments would authorize only a "prevailing employee" to recover their attorneys' fees and costs. The court would also be able to award "any other relief" that the court deems would effectuate the purpose of these protections, including reinstatement, front and back pay, and emotional distress.

Harassment Training for Janitorial Service Workers (AB 547)

Known as the Janitor Survivor Empowerment Act, this bill would enact specific harassment training rules related to the janitorial service industry, including requiring peers to provide direct training on harassment prevention for janitors. It would also require employers, upon request, to provide a copy of all training materials used during the training and require employers to use a qualified organization from the list maintained by the Department of Industrial Relations.

Employers would need to maintain records for three years identifying the names and addresses of all employees engaged in rendering janitorial services for the employer.

"Employer" would mean any person employing at least one covered worker or otherwise engaged by contract, subcontract or franchise agreement for providing janitorial services by one or more covered workers.

FEHA Enforcement by Los Angeles (SB 218)

Government Code section 12993(c) presently states the FEHA is intended to occupy the entire field of regulation regarding discrimination in employment and housing, meaning that municipalities are preempted from enacting their own ordinances on these subjects. Citing concerns about delayed DFEH enforcement, this bill would essentially remove this preemption provision as to Los Angeles County, thus allowing it to both enforce the statewide FEHA provisions and enact its own employment antidiscrimination laws. Los Angeles would also be permitted to establish its own administrative agencies and penalties for enforcement purposes. Los Angeles would also be able to increase employee protections above the FEHA, including prohibiting conduct not presently prohibited, but it could not decrease FEHA's protections or conflict with the FEHA such as by requiring conduct that the FEHA prohibits.

For enforcement purposes, Los Angeles may create its own agency and authorize remedies

beyond those available under the FEHA. Los Angeles and the DFEH would be able to establish dual filing relationships, meaning a charge filed with one is automatically filed with the other to preclude the employee from having to file in multiple places. Regarding potential federal claims, the local agency would have the ability to either enter into a dual-filing relationship with the EEOC, or to notify the employee about their federal rights and deadlines in case the employee would need to file separately with the EEOC. However, an employee would not need to first file with the County of Los Angeles before filing with the DFEH or EEOC, and a charge first filed with the DFEH or EEOC would extinguish the ability to subsequently file with Los Angeles.

This bill appears to be based upon recommendations made by a DFEH Advisory Board after a similar bill (SB 491) was vetoed by then-Governor Jerry Brown. Notably, when originally introduced, it would have enabled any municipality to enforce FEHA and to enact its own discrimination ordinances, but subsequent amendments limited this exception to only Los Angeles County.

Harassment Poster Requirement for Educational Institutions (AB 543)

While the Education Code presently requires educational institutions to display its sexual harassment policy in a prominent location, this bill would expand these notice protections to include not only employees, but also students. Accordingly, it would require each educational institution to create and conspicuously display a poster notifying pupils of the institution's written policy on sexual harassment. As with many other poster requirements, this bill specifies many of the formatting requirements for this poster but otherwise directs that it contain "age appropriate" and "culturally relevant" information.

Targeting "Implicit Bias" in Certain Industries (AB 241-242)

AB 242 would develop new implicit bias training for members of the judicial branch. Specifically, all court staff who interact with the public would be required take two hours of implicit bias training every two years. The Judicial Council will be tasked with developing this training. The California State Bar would also be tasked with adopting regulations regarding mandatory MCLE training for attorneys to include implicit bias training for each MCLE compliance period beginning January 31, 2023 and thereafter.

AB 241 would require the Board of Registered Nursing and the Physician Assistant Board to develop by January 1, 2022 regulations regarding implicit bias in treatment, and require associations (i.e., education providers, etc.) to comply with these provisions.

Wage and Hour

Codification of *Dynamex's* "ABC" Test for Independent Contractors (AB 5)

In 2018, the California Supreme Court issued its landmark decision in *Dynamex Operations West, Inc. v. Superior Ct.* (2018) 4 Cal.5th 903 articulating a new legal test (the so-called "ABC Test") for determining whether someone is an independent contractor or an employee. This ruling dominated the current legislative session, and it appears likely there will be additional legislative developments in future years as employee and employer groups continue to negotiate future changes. Broadly speaking, AB 5 would state the Legislature's intent to codify the *Dynamex* decision, thus protecting it from legislative or judicial rollback, while also enacting several additional significant changes.

First, new Labor Code section 2750.3 would make clear that *Dynamex's* ABC Test for independent contractors applies to all provisions of the Labor Code, the Industrial Welfare Commission's Wage Orders or the Unemployment Insurance Code unless those provisions discussing an "employee" specifically contain an alternative definition. Thus, an individual providing labor or services shall be considered an employee absent all of the following "ABC" factors being met: (A) the person is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

In this regard, it both codifies *Dynamex's* "ABC Test" generally, and then expands it beyond simply the Wage Orders at issue in *Dynamex* to also apply to the Labor Code and the Unemployment Code. However, to the extent any provision of the Labor Code, Wage Order or Unemployment Insurance Code presently have different definitions of "employer," "employee," or "independent contractor," then AB 5 would not affect those more specific provisions. A court would also have the discretion to apply the so-called pre-existing *Borello* standard for classification purposes if the court determines the "ABC Test" cannot be applied to a particular context based upon grounds other than these more specific definitions of "employer," "employee" and independent contractor" currently existing in the Labor Code, Wage Order or Unemployment Insurance Code.

Due to the significant opposition to *Dynamex*'s holding, AB 5 also contains many significant potential exceptions from the ABC Test.

First, subsection (b) specifically enumerates various occupations that would remain governed by the *Borello* standard rather than the ABC Test., provided they are listed in this subsection and satisfy the accompanying definitions or standards. These occupation-specific exemptions include: (1) persons or organizations licensed by the Department of Insurance (as specified); (2) a physician and surgeon dentist, podiatrist, psychologist, or veterinarian licensed by the State of California (as specified) performing professional or medical services to or by a health care entity (as defined), unless covered by a collective bargaining agreement; (3) "licensed professionals"

such as lawyers, architects, engineers, private investigators or accountants with an active license from the State of California; (4) a securities broker-dealer or investment advisor or their agents and representatives registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority or State of California (as specified); (5) a direct sale representative as described in Unemployment Insurance Code section 650, so long as the conditions for exclusion from employment under that section are met; (6) until January 1, 2023, for commercial fisherman (as defined) working on an American vessel; and (7) until January 1, 2021, newspaper distributors and newspaper carriers (as defined).

Next, subsection (c) provides that the *Borello* standard rather than the ABC Test will apply for "professional services" provided the individual (which can include a sole proprietorship or business entity) (a) performs specifically-enumerated services and (b) satisfies the six-factor test below. These "professional services" may include: (1) marketing (as defined, including to meant the contracted work is original and creative, and depends on the individual's invention, imagination or talent); (2) human resources administrator (as defined, including to mean the contracted work is predominantly intellectual and varied); (3) travel agent services (as defined); (4) graphic design; (5) grant writer; (6) fine artist; (7) enrolled agents licenses by the United States Department of the Treasury; (8) payment processing agents through independent sales organizations; (9) photographers or photojournalists (except motion picture employees) who did not provide licensed content submissions to the putative employer more than 35 times per year; (10) freelance writers, editors, editors or newspaper cartoonists who did not provide "submissions" (as defined) to the putative employer more than 35 times per year; and (11) until January 1, 2022, licensed estheticians, manicurists, barbers or cosmetologists who satisfy additional enumerated criteria (e.g., set own rates and set own hours, etc.).

For this "professional services" exemption to apply, the hiring entity must also demonstrates that all of the following factors are satisfied: (1) the individual maintain a business location which may be the individual's residence, separate from the hiring entity (although the individual could choose to also perform services at the hiring entity's location); (2) for work performed more than six months after AB 5 takes effect, the individual has a business license in addition to any required professional license or permits for them to practice in their profession; (3) the individual has the ability to set or negotiate their own rates for the services performed; (4) the individual has the ability to set their own hours aside from the project completion date and reasonable business hours; (5) the individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds themselves out to potential customers as available to perform the same types of work; and (6) the individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

Next, subsection (d) would exempt from new Labor Code section 2750.3 and *Dynamex*'s

holding the following professions governed by the California Business and Professions Code: (1) real estate licensees licensed by the State of California (as defined); and (2) repossession agencies licensed under Business and Professions Code section 7500.2 (provided other enumerated factors are also present).

Subsection (e) then enumerates a potential exception for bona fide "business to business" contracting relationships in which case the *Borello* test would apply to the "business service provider" provided the contracting business satisfies the test enumerated in this subsection. Specifically, the contracting business must establish all of these criteria: (1) the business service provider is free from the control and direction of the contracting business entity in connection with the work performance, both under the contract and in fact; (2) the business service provider is providing services directly to the contracting business rather than the contracting business's customers; (3) the contract with the business service provider is in writing; (4) the business service provider has any business licenses or business tax registrations required in the jurisdiction where the work is performed; (5) the business service provider maintains a business location separate from the business or work location of the contracting business; (6) the business service provider is customarily engaged in an independently established business of the same nature as that involved in the work performed; (7) the business service provider actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity; (8) the business service provider advertises and holds itself out to the public as available to provide the same or similar services; (9) the business service provider provides its own tools, vehicles and equipment to perform the services; (10) the business service provider can negotiate its own rates; (11) consistent with the nature of the work, the business service provider can set its own hours and work location; and (12) the business service provider is not performing the type of work for which a license is required from the Contractor's State License Board.

Notably, this "business to business" exception would only potentially apply to a business entity and not to an individual worker who performs labor or services for a contracting business. The ABC Test would apply to determine whether an individual working for a business service provider is an employee or an independent contractor of the business service provider.

Finally, subsections (f), (g) and (h) enumerate potential exemptions from the ABC Test (in which case the *Borello* standard would govern) for construction industry subcontractors (as defined), "referral agencies" (as defined) and in the "motor club" context. Please note, each of these three potential industry-specific exemptions contain their own criteria and definitions which should be consulted further if the reader believes they might otherwise apply.

An ongoing debate exists whether the original *Dynamex* holding clarified or changed the law and, thus, whether it applies retroactively. AB 5 attempts to answer this question by specifically providing that its codification of *Dynamex* in new Labor Code section 2750.3 (as

least as to wage order and Labor Code violations) is simply declaratory of existing law. However, for the various exemptions subsections contained in subsections (b) through (h) (discussed above), AB 5 states that the exemptions shall apply retroactively to existing claims and actions "to the maximum extent permitted by law." AB 5 also states that its provisions, including the potential exceptions from the general application of *Dynamex*, shall not permit an employer to reclassify anyone from an employee to an independent contractor as of January 1, 2019.

Lastly, and perhaps partially in response to business entities who refuse to accept *Dynamex*, AB 5 authorizes particular law enforcement officers (e.g., the Attorney General and some city attorneys) to pursue injunctive relief "to prevent the continued misclassification of employees as independent contractors." Thus, in addition to the significant monetary liability flowing from misclassification, this provision seemingly potentially permits the State of California to force non-compliant employers to reclassify independent contractors as employees.

Expanded Statute of Limitations and Attorneys' Fees Recovery for Labor Code Violations (AB 403)

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 two years 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.

Status: Passed the Legislature and has been sent to Governor Newsom. A virtually identical bill (AB 2946) failed passage in the Assembly in 2018.

Expanded Remedies for Pay Day Violations (AB 673)

Labor Code section 210 governs the penalties available if an employer violates the rules regarding "pay days," and currently authorizes statutory penalties of $100 for any initial violation (and $200 for each subsequent violation) for late payment of wages. However, section 210 presently authorizes only the Labor Commissioner to recover this penalty, with a percentage shall being paid to the Labor and Workforce Development Agency.

Responding to concerns that the current remedy of penalties only recoverable by the Labor Commissioner is an insufficient deterrent, this bill would amend section 210 to specify that this

penalty may be recovered either by the employee as a statutory penalty pursuant to Labor Code section 98, or by the Labor Commissioner under Labor Code section 98.3. This bill initially proposed allowing an employee a private right of action, but this was deleted by amendment to remove some opposition to the bill.

Alternatively, the employee could also recover the civil penalty through a Private Attorneys General Act action, but they could recover statutory penalties under these provisions and under PAGA for the same violation.

In 2017, the California Legislature enacted Labor Code section 204.11 identifying specific payday rules for barbers and cosmetologists licensed under the Barbering and Cosmetology Act, but did not at that time amend section 210 to identify statutory penalties if an employer violated those industry-specific payday rules. Accordingly, AB 673 would also amend section 210 to fix that omission.

Enforcement Mechanisms for Labor Commissioner Citations Relating to Retaliation Complaints (SB 229)

In 2017, California enacted SB 306 to provide greater protections against retaliation after filing a wage-related claim, including authorizing the Labor Commissioner to issue citations and obtain injunctive relief addressing retaliation concerns during the investigative process. This bill is intended to build upon SB 306, by aligning the process for enforcement, review, and appeals with the existing process the Labor Commissioner uses for unpaid wage claims (e.g., contained in Labor Code sections 98, 98.1 and 98.2).

For instance, while SB 306 had authorized the Labor Commissioner to issue citations, it had not expressly created an enforcement mechanism for these citations. Accordingly, SB 229 proposes a process through which the Labor Commissioner may convert an unpaid monetary citation or order into a money judgment. It also sets forth how the Labor Commissioner can convert any non-monetary orders (e.g., reinstatement, etc.) into judicial orders.

It also provides greater detail about how an employer facing a Labor Commissioner order for unlawful retaliation may challenge it in superior court through a petition for a writ of mandate. Notably, while an employer bond for judicial review purposes must include the amounts owed for the underlying violations (e.g., minimum wages, lost wages, overtime compensation, etc.), this bond currently need not include penalties and accrued interest. Concerned that this omission left an employee not fully compensated if the superior court affirms the Labor Commissioner's award, SB 306 would require the appeal bond to also include penalties, interest and any other monetary relief.

Leaves of Absence/Time Off-Related Laws

Increased Leave Time for Organ Donation Purposes (AB 1223)

Since 2010, Labor Code section 1510 has required private and public employers to allow employees to take a paid leave of absence of up to 30 business days within a one-year period for the purpose of donating an organ to another person, and up to five business days for bone marrow donations. This bill would require private and public employers to grant an employee an additional unpaid leave of absence of up to 30 business days within a one-year period for organ donations. As with the prior leaves for organ or bone marrow donation purposes, the one-year period for this extended unpaid leave for organ donation purposes would be measured from the date the employee's leave begins and shall consist of 12 consecutive months.

State employers would be required to grant an employee who has exhausted all sick leave an additional unpaid leave of absence up to 30 business days in a one-year period for organ donation purposes.

To further encourage organ donations, this bill would prohibit certain insurance policies issued or renewed after January 1, 2020 from denying coverage, limiting the amounts or types of coverage, or charging different rates because the insured is a living organ donor.

Alternative Paid Family Leave Forms (AB 406)

This bill would require the Employment Development Department, beginning January 1, 2025, to distribute the application for "Paid Family Leave" in all non-English languages spoken by a substantial number of non-English speaking applicants. This bill seeks to address an inconsistency in that many brochures and notices for Paid Family Leave are in various languages but the application itself is presently only in English.

Conforming CFRA Change for "Flight Crew" Employees (AB 1748)

This bill would amend the CFRA to conform to the FMLA service requirement for airline flight employees. Accordingly, under new subsection (u) to Government Code section 12945.2, flight deck or cabin crew members of an air carrier will be eligible for CFRA leave if they have 12 months of service, they have worked or been paid for 60% of the applicable monthly guarantee or equivalent annualized over the preceding 12-month period, and the employee has worked or been paid for a minimum of 504 hours during the preceding 12 months. The DFEH would also be authorized to adopt regulations to calculate leave available to flight crew employees under these provisions.

Paid Maternity Leave for School and Community College Employees (AB 500)

This bill would require the governing body for school districts, charter schools and community colleges to provide at least six weeks' paid leave for a certificated employee or an academic employee due to pregnancy, miscarriage, childbirth and recovery from those conditions. This leave may begin before and continue after childbirth if the employee is actually disabled by pregnancy, childbirth or related condition.

Recruiting/Onboarding/Background Checks

Prohibition on "No Rehire" Provisions (AB 749)

Continuing the recent trend of legislatively limiting settlement agreement provisions, this bill would prohibit any settlement agreement related to an employment dispute from preventing or restricting the "aggrieved person" from obtaining future employment with the employer against whom the claim was filed, or any parent company, subsidiary, division, affiliate, or contractor of the employer. Any such provision in an agreement entered into or after January 1, 2020 shall be deemed void as a matter of law and against public policy.

An "aggrieved employee" would be the person who has filed a claim against the person's employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer's internal complaint process.

However, this bill would not preclude the employer and aggrieved person from making an agreement to end a current employment relationship. It would also not preclude provisions restricting the aggrieved person from future employment with the settling employer if the employer has made a good faith determination the person engaged in sexual harassment or sexual assault. The inability to contractually preclude an employee from being rehired would also not require the employer to employ or rehire a person if there is a legitimate non-discriminatory or non-retaliatory reason for terminating the relationship or refusing to rehire the person.

Preventing "Document Servitude" (AB 589)

To combat so-called "document servitude," this bill would prohibit employers from knowingly destroying, concealing, removing, confiscating or possessing an employee's passport, immigration document, or other actual or purported government identification document, for the purposes of committing trafficking, peonage, slavery, involuntary servitude, or a coercive labor practice. While federal law already prohibits employers from withholding or destroying immigration or identification documents for trafficking purposes, new Labor Code section 1019.3 would create a state law equivalent with new penalties and requirements. Accordingly, it would provide that violations of this prohibition would be a misdemeanor and subject the

employer to a $10,000 penalty, in addition to any otherwise available civil or criminal penalty. The Labor Commissioner would also be authorized to issue a citation if it determines a violation has occurred.

Employers would need to post a notice concerning these new protections conspicuously at the place of work if practicable, or otherwise where it can be seen as employees come and go to their places of work, or at the office or nearest agency for payment kept by the employer. This notice shall specify the rights of an employee to maintain custody and control of the employee's own immigration documents, and that the withholding of immigration documents by an employer is a crime. The notice shall also include the following specific language: "If your employer or anyone is controlling your movement, documents, or wages, by using direct or implied threats against you or your family, or both, you have the right to call local or federal authorities, or the National Human Trafficking Hotline at 888-373-7888."

New Labor Code section 1019.5 would also require the DLSE to develop and make available to employers by July 1, 2021 the "Worker's Bill of Rights" containing the following information: (1) the employee's right to retain their immigration and identification documents and the employer's inability to take these documents except for employment eligibility verification purposes; (2) the employee's right to be paid the mandatory minimum wage established by law or agreed to in an employment contract, whichever is higher; (3) the right to live where the employee chooses unless living in employer-provided housing is agreed upon as a lawful condition of employment and living on the premises is customary or necessary to the duties of employment; (4) the right not to be subject to debt bondage in lieu of being paid wages owed to the employee; and (5) the right to call local or federal authorities, or the national Human Trafficking Hotline at 888-373-7888 if the employer or anyone else is controlling the employee's movement, documents or wages, or using direct or implied threats against the employee or the employee's family. The DLSE will make this notice available in English and the 12 languages most commonly spoken in California by non-English speaking people or people with limited English language proficiency.

The employer would be required to provide copies of the Worker's Bill of Rights to all employees, with the timing of this delivery depending on whether the employee is hired before or after July 1, 2021. For employees hired on or after July 1, 2021, employers must provide this notice prior to verifying an employee's employment authorization. For employees hired before July 1, 2020, employers must provide the document to each employee after the DLSE makes it available. Employers would have a 30-day period to cure the failure to provide this "Worker's Bill of Rights" before any enforcement action could be taken for failing to provide this form.

Employers would be required to provide a copy in the language understood by the employee, and to obtain and retain for three years the employee's signature confirming receipt of this notice, and to provide a copy of the signed document to the employee. The employer may

comply with the language requirement either by providing the document in the language understood by the employee or, if the DFEH has not made available a version in the language understood by the employee, by having the document interpreted for the employee in the language the employee understands

California Consumer Privacy Act to Exclude Most "Employees" . . . Temporarily (AB 25)

Enacted in 2018 and taking effect in 2020, the California Consumer Privacy Act of 2018 (CCPA) will enable "consumers" to request from businesses the personal information the business collects or sells about the consumer, and to request that the business delete any personal information collected about them. Responding to concerns the broadly worded CCPA would apply to information about employees and enable them to request their employer delete information about them (e.g., a sexual harassment charge made against the employee), this bill would provide a one-year partial exclusion form the CCPA for employees acting within their scope as an employee.

Specifically, Civil Code section 1798.145(g)(1) would specify the CCPA does not apply to personal information gathered by an employer in three specific circumstances. First, it would not apply to personnel information collected by a business in the course of that person acting as a job applicant, employee, owner, director, officer, medical staff member or contractor of that business to the extent this personal information is collected and used by that business solely within the context of that person's role or former role of that business. In a similar manner, it would not apply to personnel information gathered by a business about these individuals that is either "emergency contact information" or that is necessary for the business "to retain to administer benefits" for another natural person, provided this information is collected and used solely for purposes of "having an emergency contact on file" or in the "context of administering those benefits."

However, this exception would not obviate the employer's need to provide by January 1, 2020 any notices under section 1798.100 regarding the purpose for gathering this information, and would not preclude an employee from bringing a civil action if any employer violates the CCPA generally. More importantly, because the legislature contemplates further and more long-term amendments of the CCPA to balance these employee and employer interests, this exception will expire on January 1, 2021, essentially giving the Legislature one year to craft further amendments.

Arbitration Agreements

Proposed Ban on Mandatory Arbitration for FEHA and Labor Code Claims (AB 51)

This bill responds to concerns that employers conceal sexual harassment through mandatory arbitration agreements and non-disparagement provisions. Accordingly, new Labor Code

section 432.6 would preclude employers from requiring applicants, current employees or independent contractors to agree as a condition of employment, continued employment, or the receipt of any employment-related benefit to waive any right, forum, or procedure related to any violations of the Fair Employment and Housing Act (FEHA) and the Labor Code, including the right to file a claim with a state or law enforcement agency. It would also preclude employers from threatening, retaliating, or discriminating against any employee or applicant (including terminating their application for employment) who refuses to consent to the waivers prohibited under this section. It also specifies that any agreement requiring an employee to opt out of a waiver or to take any affirmative action to preserve their rights will be considered a condition of employment.

However, it would not apply to post-dispute settlement agreements or negotiated severance agreements.

Although AB 51 does not mention arbitration specifically, the bill is clearly intended to essentially prohibit mandatory arbitration for not only FEHA claims, but also Labor Code claims. To escape a likely forthcoming preemption challenge, the bill's author states this bill does not preclude arbitration agreements for FEHA and Labor Code claims, but simply precludes employers from requiring them as a condition of employment, or retaliating against employees who choose not to agree to arbitration.

This prohibition would apply to any contracts for employment entered into, modified or extended on or after January 1, 2020. Further, prevailing plaintiffs who enforce their rights under this section would be entitled to recover their reasonable attorney's fees and injunctive relief (e.g., reinstatement, nullification of the improper contract provisions, etc.)

Lastly, new Government Code section 12953 would specify that it shall be an unlawful employment practice, thus implicating the FEHA, for an employer to violate proposed new Labor Code section 432.6.

An identical bill (AB 3080) narrowly passed the Legislature but was vetoed by then-Governor Jerry Brown. New Jersey recently joined the state of Washington in enacting similar state-wide bans on arbitration agreements for most employment disputes.

New Penalties for an Employer's Breach of Arbitration Agreement (SB 707)

This bill attempts to address concerns that after forcing an employee to compel arbitration employers are strategically failing to pay arbitration-related fees, thus stalling the proceedings. Accordingly, this bill would implement new penalties if an employer fails to pay, within 30 days of their due date, the fees to initiate or to maintain arbitration proceedings for employment or consumer claims.

New Code of Civil Procedure sections 1281.97 and 1281.98 would deem such an employer in material breach of the arbitration agreement and in default of the arbitration, thus waiving the employer's right to compel or proceed with arbitration. The employee would then have the option to withdraw the claim from arbitration and proceed in an appropriate court, or continue the arbitration but with the employer paying the employee's attorneys' fees involved with the arbitration. If the employee elects to proceed with court action, the statute of limitations would be deemed tolled during the prior pendency of the arbitration for any claims brought in arbitration or that relate back to any claim brought in arbitration. The court would also be required to order monetary sanctions against an employer deemed in breach, and have the authority to award additional sanctions, including limits on discovery, evidentiary and potentially terminating sanctions.

Miscellaneous

Lactation Accommodation Requirements (SB 142)

Even though California just amended its lactation accommodation requirements in 2018 (AB 1976) to generally require employers provide a space other than a bathroom and guidelines for temporary lactation locations, the Legislature has re-introduced a much broader bill that then-Governor Jerry Brown vetoed last year (SB 937), which the author states is intended to align California with federal law in several respects.

Amongst other things, while Labor Code section 1030 presently requires employers to provide a reasonable amount of break time to express milk, this bill would specify the employer must provide a reasonable amount of break time each time the employee needs to express milk.

Secondly, while Labor Code section 1031 presently requires the employer "make reasonable efforts" to provide a location "other than a bathroom" (following the adoption of AB 1976), this bill would require the employer to provide such a location (not simply "make reasonable efforts") and specifically enumerate many physical requirements for this location, including adopting some specific requirements in the San Francisco Lactation Accommodation Ordinance, which took effect on January 1, 2018. For instance, it would reiterate that this location shall not be a bathroom and shall be in proximity to the employee's work area, shielded from view, and free from intrusion while the employee is lactating.

It would also require that the lactation room or location comply with all of the following requirements, including that the lactation room or location: (1) be safe, clean, and free of hazardous materials (as defined in Labor Code section 6382) ; (2) contain a surface to place a breast pump and personal items; (3) contain a place to sit; and (4) have access to electricity or alternative devices (e.g., extension cords, charging stations, etc.) to operate an electric or battery-operated breast pump. Employers would also need to provide access to a sink with

running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace (or an alternative cooling device suitable for storing milk if a refrigerator cannot be provided). And it would also require that where the lactation room is a multipurpose room, the use of the multipurpose room for lactation purposes shall take precedence over other uses during the period it is in use for lactation purposes.

For employers in multi-tenant buildings who cannot provide a lactation room within its own workspace, they would be permitted to provide a shared space amongst multiple employers that otherwise complies with these requirements.

Recognizing that some employers may not be able to meet these new requirements due to operational, financial or space limitations, it would allow employers to comply by designating a temporary lactation location. Thus, it would essentially retain the "temporary lactation location" requirements enacted in 2018 (AB 1976) including that the location it is not a bathroom, is in close proximity to the employee's work area, is shielded from view, is free from intrusion while the employee is expressing milk, and otherwise complies with Labor Code section 1031.

While Labor Code section 1031 presently provides an undue hardship exemption to all employers provided they meet the standards identified, federal law limits its undue hardship exemption to employers with 50 or more employees. To align California with federal law, this bill would adopt the federal undue hardship standard. Thus, it would apply only to employers with fewer than 50 employees and require they demonstrate any of these lactation location requirements would impose an undue hardship by causing the employer significant expense or operational difficulty when considered in relation to the size, financial resources, nature or structure of the employer's business.

New Labor Code section 1034 would also require employers to develop and implement a lactation accommodation policy including the following specific provisions: (1) notice of the employee's right to lactation accommodation; (2) identification of the process to request accommodation; (3) the employer's obligations to respond to such requests; and (4) the employee's right to file a complaint with the Labor Commissioner. Employers would be required to include this policy within their handbook or sets of policies made available to employees, and to distribute to employees upon hire or when an employee makes an inquiry about or requests parental leave. Employers who cannot provide break time or a legally-sufficient lactation location shall provide a written response to an employee's accommodation request.

This bill would also add retaliation protections for employees who request lactation accommodation, and amended Labor Code section 1033 would specify that the denial of reasonable break time or adequate space to express milk shall be deemed a failure to provide a

rest period in accordance with Labor Code section 226.7. While section 1033 presently authorizes a civil penalty of $100 for each violation, this bill would specify that the Labor Commissioner may award this penalty for each day an employee is denied reasonable break time or adequate space to express milk. Employees would also be entitled to file complaints with the Labor Commissioner, in which case they could seek reinstatement, actual damages, and appropriate equitable relief.

Lastly, it would require that new building standards be developed for future construction and remodels using the San Francisco Lactation in Workplace Ordinance as a starting point.

Whistleblower Protections Expansion to State or Local Contracting Agency (AB 333)

This bill would add new Labor Code section 1102.51, extending the protections in California's whistleblowing statute (Labor Code section 1102.5) to state and local independent contractors and contracted entities tasked with receiving and investigating complaints from facilities, services and programs operated by state and local government. It would also clarify that these retaliation prohibitions apply to the state or local contracting agency.

Call Center Job Protections (AB 1677)

Entitled the Protect Call Center Jobs Act of 2019, this bill would require employers (as defined) of customer service employees working in a call center (as defined) to provide at least 120 days' notice to the Labor Commissioner before relocating the call center from California to a foreign country. If a violation occurs, the Labor Commissioner would be authorized to award a civil penalty of up to $10,000 for every day of violation. These civil penalties would also be deposited into the Labor Enforcement and Compliance Fund to help enforce these new provisions.

The Labor Commissioner will also compile and publish a list of employers providing notice regarding an intent to relocate, and the list will be made available to specified state entities. Employers appearing on the list will be ineligible for state grants, state-guaranteed loans, or tax benefits for five years after the date that the list is published, and would be ineligible to claim tax credits for five taxable years beginning on and after the date that the list is published, unless the appropriate agency waives this ineligibility.

Lastly, it would require that call center customer service work performed by a private entity for a state entity be performed in California by no later than 2021. This requirement would not preclude the contractor from temporarily utilizing a call center outside of California in a "disaster" (as defined) or for "overflow" (as defined).

Status: Passed the Legislature largely on party-line votes, and has been sent to Governor Newsom.

Prevailing Wage Expansion (AB 520)

California's prevailing wage laws require that work performed on certain public works (as defined) be paid not less than the general prevailing wage for work of a similar character in the location in which public work is performed. In turn, Labor Code section 1724 defines "locality in which public work is performed" as either the county in which the contract is awarded in some instances, and as the limits of the political subdivision in other instances. This bill would eliminate that distinction and instead define "locality in which public work is performed" as the county in which the public work is done.

Labor Code section 1720 presently exempts from the definition of "public works" certain private development projects if the political subdivision provides—directly or indirectly—a "de minimis" public subsidy. This bill would define such public subsidies as de minimis if they are both less than $500,000 and 2% of the total project bid. It would also specifically provide a public subsidy for a project that consists entirely of single family dwelling is de minimis if it is less than 2% of the total project cost.