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CALSHRM LEGISLATIVE REPORT

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As discussed in the April newsletter, the COVID-19 pandemic turned out to be the only thing capable of stopping (albeit briefly) the California legislature, as it forced an unexpected recess from March 20, 2020 through May 4, 2020. However, the Legislature is back in session, albeit with some modified deadlines, including that all bills must pass the Legislature by August 31, 2020. (Under normal circumstances, the Legislative Calendar would specify the deadline for each chamber to pass the pending bills, but it now appears the Legislature will simply use a single date for all bills).

This pandemic and the resulting truncated schedule has significantly modified the legislative agenda in several respects. First, it required many legislators to materially cull down their legislative wish list, and significantly reduce the number of bills generally and employment laws specifically being considered this session. Second, it has shifted the focus from further AB 5 amendments (initially nearly 40 such bills proposed) to COVID-19-related items, particularly for time off from work, paid family leave benefits and potential workers' compensation changes. These recently-introduced COVID-19 measures include that would:

- Expand California's "family and medical leave" law (CFRA) to include all employers, regardless of size, and expand the family members for whom leave may be taken (AB 3216);
- Expand California's paid sick leave law both to allow usage for closures due to state emergencies and to also require employers provide ten paid sick days for "emergency leave: (AB 3216);
- Amend Labor Code section 230.8 to expand the protected time-off related for employees affected by school/childcare closures (SB 1383);
- Expand workers' compensation coverage to include COVID-19 illness for first responders, critical workers and essential workers (AB 664/SB 1159/AB 196);
- Expand California's Paid Family Leave benefits to employees who need time off related to COVID-19 purposes (SB 943);
- Establish a "right of recall" for laid off employees from private employers (AB 3216); and
- Impose new notice requirements for H2-A employers related to emergency or disaster declarations (SB 1102).

In addition to these COVID-19 bills, there are a number of other employment bills pending, including to require larger employers to provide annual pay data reports (SB 973), require employers provide 10 days of bereavement leave (AB 2999), and further amend AB 5, including expanding the exempted professional services and industries (AB 1850). These bills have all survived an initial crucial substantive committee vote, and will now move forward but must pass the Legislature by August 31st.

In contrast, a number of other bills that would have repealed, delayed or further materially amended AB 5 either failed initial key committee votes, or seemingly have been pulled from further consideration, presently leaving only the bill authored by AB 5's author (AB 1850) still pending. It remains to be seen if some of these other AB 5 –related bills may be reasserted later, including via the so-called "gut and amend" process, or be substantively included in AB 1850 as it proceeds through the legislative process.

Finally, in a helpful agency development, the Department of Fair Employment and Housing has now made available the on-line training video employers may use to train their non-supervisory employees regarding harassment to meet the current January 1, 2021 deadline. The DFEH has also announced the on-line training video for supervisor harassment training should be available shortly.

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

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COVID-19-Related Proposals

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

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

CFRA and PDL Changes

While CFRA presently only applies to employers with 50 or more employees and has an exception unless there are 50 employees within 75 miles of the employee's worksite, this bill would replace these requirements and also expand the basis for CFRA leave generally. Specifically, rather than providing 12 weeks of leave if the employer has 50 employees, this bill would amend CFRA to provide "family care and medical leave" regardless of employer size, and would delete the current language precluding CFRA leave if there are fewer than 50 employees within 75 miles of the employee's worksite.

It would also expand the definition of "family care and medical leave" in several respects. First, while the CFRA presently allows leave to care for a parent or spouse, these amendments would allow leave to care for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner with a serious health condition. While "child" is presently defined as someone under 18 years of age or an adult dependent child, these amendments would remove these limitations essentially allowing leave to care for a child regardless of their age or dependency, and would also include a child of a domestic partner. "Parent" would also be expanded to include "parent-in law," while "sibling" would be broadly defined to include a person "related by blood, adoption or affinity through a common legal or biological parent." "Serious health condition" would also be expanded to include "compliance with a state of emergency order or public health directive."

Second, "family care and medical leave" would also include time off because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, parent or child.

Third, "family care and medical leave" would also include leave to care for the previously enumerated family members for whom the employee is responsible for providing care if such family member's school or place

of care has been closed, or the care provider of such family member is unavailable due to a state of emergency.

In addition to expanding "family care and medical leave," this bill would also require employers to provide up to 12 workweeks leave in any 12-month period for emergency leave. "Emergency leave" would be defined as family care and medical leave because of a "state of emergency" (as defined, but including "the existence of conditions of disaster or extreme peril to the safety of persons and property within the state or within the territorial limits of a county, city and county, or city" that the Governor has declared a public health emergency).

Notably, while CFRA often runs concurrently with the FMLA, this bill would specify that the employee would be entitled to 12 additional workweeks for emergency leave beyond the FMLA or the "family care and medical leave" under the CFRA. It specifies that the aggregate amount of this leave (except for time taken due to pregnancy/medical conditions) shall not exceed 24 workweeks in a 12-month period.

Notably also, while it incorporates the CFRA's reinstatement provisions, and the circumstances would not be required, this bill would also impose new obligations upon employers where the failure to return to work was due to the continuation or onset of an otherwise qualifying serious health condition, "or other circumstances beyond the control of the employee" (including a continued state of emergency. In that case, once the employee notifies the employer they are ready to return, the employer must do both of the following: (1) make reasonable efforts to restore the employee to an equivalent position (as defined); (2) make reasonable efforts for one year after the leave expired to contact the employee if an equivalent position becomes available. The employee would also be entitled to invoke the FEHA's reasonable accommodation obligations.

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

This bill would also then delete the New Parent Leave Act (Gov. Code section 12945.6) which just took effect on January 1, 2020.

This bill would also expand the Pregnancy Disability Leave Act (Gov. Code section 12945) to apply to employers with one or more employees, rather than the current five or more employees.

<u>Paid Sick Leave Changes</u>

This bill would also amend California's Paid Sick Leave law (Labor Code section 245 *et seq.*) in several respects. First, would expand the current purposes for which the general paid sick leave entitlement could be used. Specifically, along with the current usage entitlement for the care of the employee or their family members or for certain crimes (e.g., domestic violence, stalking, etc.), the employee would also allowed to use paid sick leave for the following: (1) if the employee is subject to a federal, state or local public health

order related to a public emergency, including an employee who has been told to remain at home because they are in a high-risk population; (2) the employee needs to care for a family member subject to the just-described order; (3) if the employee needs to care for a child or family member that they responsible for caring for if the child or family member's school or place of care has been closed or their normal care provider is unavailable due to a state of emergency; (4) for an employee whose place of employment is closed by the employer or by a public health official due to a state of emergency; or (5) the employee is subject to a federal, state or local evacuation order related to a state of emergency.

Second, it would also create a new and longer entitlement to "emergency leave." Specifically, in the event the Governor declares a state of emergency (as defined), employers would need to provide 80 hours or ten days of paid sick leave (and for part time employees an amount equivalent to their regular schedule in a ten day period) for so-called "emergency leave." Notably, this emergency paid sick leave would be available immediately (i.e., no 30 day employment requirement, or 90 days of employment before usage), and would also be available to in-home support service workers, as well as those otherwise excluded from the general definition of employee for paid sick leave purposes in section 245.5(a) (e.g., CBA-covered employees, flight crew members, city/state employees).

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

This bill also provides that it would not preclude local government agencies from enacting ordinances providing greater amounts of "emergency" paid sick leave.

Right of Recall

This bill would also require employers (as defined) to notify its laid off employees about job positions that become available that the employee previously held or is or could be qualified for. The employer would need to offer those positions based on a preference system outlined in the law, and would need to allow 10 business days for the employee to accept or decline the offer. Employers who decide to hire someone other than a laid-off employee would need to provide written notice to the laid-off employee identifying the reasons for the decision. Employees would be permitted to file a Labor Commissioner complaint or a civil action if these requirements are not followed.

Paid Family Leave/Unemployment Insurance

While employees seeking unemployment compensation disability benefits must normally submit medical certification, this requirement would be eliminated and self-certification would suffice in the event of a state of emergency.

It would also remove some of the certification requirements needed for paid family leave purposes. For instance, it would remove the current requirement that there be no other family member currently willing and able to care for the family member. It would also eliminate the ability of employers to require the

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employees to first take two weeks of earned but unused vacation prior to receiving family temporary disability insurance benefits.

Status: This bill passed the Assembly Labor and Employment Committee and is pending in the Assembly Appropriations Committee.

Expanded Time-Off Protections for School-Related Closures (SB 1383)

Presently, Labor Code section 230.8 requires employers with 25 or more employees to provide up to 40 hours of unpaid time off for an employee who is a parent (as defined) of a child (as defined) to (1) enroll in school or participate in school-related activities; or (2) to address a child care or school emergency. This bill would expand these requirements to all employers (regardless of size).

It would also expand the "emergency" situation to include a school closure pursuant to a state of emergency declared by a federal, state or local government agency. Time off pursuant to this emergency situation would not be limited to 40 hours and may be extended to the duration of the emergency.

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

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

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

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

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

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

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

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

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

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

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

If enacted, this urgency bill would take effect immediately.

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

Workers Compensation Coverage for Critical Workers (SB 1159)

This bill would define "injury" for workers compensation coverage to include illness or injuries for "critical workers" that result from exposure to COVID-19 under certain circumstances. Presently, "critical workers" would be broadly defined to include any public sector or private sector employee employed to combat the spread of COVID-19, and the bill appears to contemplate that these workers would subsequently be explicitly identified. It would also create a rebuttable presumption (as defined) that an injury or illness that manifests itself while a critical worker is employed arose out of or in the course of the employment.

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

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

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

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

Accordingly, new Labor Code section 2810.6 bill would require all of California's H-2A's visa employers provide to all H-2A farm workers a written notice of basic California labor rights on their first day of work in California or beings work for another employer after being transferred by an H-2A or other employer. The California Labor Commissioner would be required to develop by January 2, 2021, a template that H-2A

employers may use to comply with these notice requirements, and the Labor Commissioner will have the discretion to decide whether this template will be included as part of the notices presently required under Labor Code section 2810.5.

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

Echoing the proposed changes to Labor Code section 2810.5 regarding generally applicable hiring notices, section 2810.6 would also require this notice identify any federal or state emergency or disaster declarations that may affect this H-2A employment. It would also prohibit any retaliation against H-2A employees who raise questions about such declarations.

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

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

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

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

This bill would require California's Occupational Safety and Health Standards Board to develop by January 1, 2021 occupational standards to prevent infection by agricultural workers and employees of COVID-19. It would also require agricultural workers to implement to implement the provisions of the document entitled "Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees" once issued by Cal-OSHA. These provisions would be repealed on the later date of the Governor's revocation of the emergency declaration or January 1, 2022.

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

Leaves of Absence/Time off/Accommodation Requirements

"Kin Care" Amendments (AB 2017)

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

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

Bereavement Leave (AB 2999)

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

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

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

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

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

Protected Time-Off Proposals (AB 2992)

Labor Code section 230 presently prohibits discrimination against and enumerates various protections for employees who need to take time off for various purposes, including because of jury duty (subsection (a)), appearing in court, including because a victim of a crime (subsection (b)), or for victims of domestic violence, sexual assault or stalking who are seeking legal relief (subsection (c)). This bill is intended to essentially extend these time-off leave provisions from applying to only victims of certain enumerated serious crimes and instead apply broadly to almost all victims of violent crime.

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

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

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

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

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

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

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

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

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

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

Status: Unanimously passed the Assembly Insurance Committee.

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Paid Family Leave Changes in Proposed Budget

Governor Newsom's budget includes several "trailers," including one to significantly amend the California Family Rights Act, and the Pregnancy Disability Leave Law, in a manner somewhat similar to AB 3216 (discussed above). As a result of these proposed expansions, the recently-enacted New Parental Leave Act (NPLA) would be repealed, as its provisions would be incorporated elsewhere.

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

Similarly, while the California's Family Rights Act (CFRA, Government Code section 12945.2) currently applies to employers with 50 or more employees, these amendments would extend CFRA to employers with one or more employees in the state. Because this new threshold would essentially apply to almost all employers, there would also no longer be a requirement for an employer have 50 employees within 75 miles of the employee's worksite to entitle the employee to a CFRA leave.

It would also expand the definition of "family care and medical leave" by changing the list of individuals for whom leave could be taken to provide care. For instance, while "family care and medical leave" presently includes the serious health condition of a child, spouse or parent of an employee, this bill would expand this list to include a "child, parent, grandparent, grandchild, sibling, spouse, domestic partner, or designated person," who has a serious health condition. The bill would make corresponding changes including these individuals for whom the employer may request medical certification to support the employee's request for leave to care for a serious health condition. Similarly, it would make corresponding changes to include these additional family members for whom the employee shall not use sick leave in connection with those individual's serious health condition, unless mutually agreed to by the employer and the employee.

The definition of "child" would also expand to include a child of a domestic partner or a person to whom the employee stands in loco parentis. Similarly, the bill would also enable an employee to take leave for the birth, or the placement of a child in connection with the adoption or foster care of a child, if an employee has identified the child as their designated person.

These amendments would define grandparent as "a parent of the employee's parent", and would define "grandchild as a "child of the employee's child." The definition of parent would be expanded to include "parent-in-law" which, in turn, would be defined as "the parent of a spouse or domestic partner." Sibling would be defined as "a person related to another person by blood, adoption, or affinity through a common legal or biological parent."

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

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As a result of these expansions to the PDL and CFRA, the recently enacted New Parental Leave Act (NPLA, Government Code section 12956.6 [requiring family-related leave for employers with 20 or more employees]), would be repealed in its entirety.

This trailer includes many of the changes proposed by SB 135, which stalled in 2019, and the currently pending AB 3216.

Harassment/Discrimination/Retaliation

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

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

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

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

FEHA Protections for Drug Rehabilitation Programs (AB 882)

While Labor Code section 1025 presently requires employers with 25 or more employees to reasonably accommodate an employee who voluntarily enters an alcohol or drug rehabilitation program, this bill would include additional discrimination protections in the Fair Employment and Housing Act, which applies to employers with five or more employees. Specifically, it would amend the definitions of "physical disability" and "mental disability" for purposes of FEHA's discrimination protections to include a person who has completed or is the process of completing a rehabilitation program to end illegal drug use. These definitions would also include someone erroneously regarded as engaging in illegal drug use. However, these changes would not preclude an employer from adopting or administering reasonable policies or procedures, including drug testing, designed to ensure that the individual who has completed or is completing a drug rehabilitation program is no longer engaging in the illegal use of drugs.

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

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

Harassment Training for Minors in Entertainment Industry (AB 3175)

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

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

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

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

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

Independent Contractors/Worker Classification

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

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

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

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

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

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

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

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

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

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

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

Music Industry, Photojournalist and Other Exemptions (AB 2257)

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

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

PENDING BILLS

Wage and Hour

Annual Pay Data Reports (SB 973)

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

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

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

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

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

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

Similarly, individually identifiable information submitted to the DFEH through these reports would be considered confidential information and not subject to the California Public Records Act. However, the DFEH

would be able to develop and publish annually aggregate reports based on the information provided so long as these aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

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

This bill would also authorize the DFEH to "receive, investigate, conciliate, mediate and prosecute complaints" alleging equal pay violations under Labor Code section 1197.5. However, the DFEH would be required to coordinate with the DLSE and the DIR to ensure only one department is investigating or taking enforcement actions in response to the same operative set of facts.

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

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

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

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

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

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

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

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

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

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

PENDING BILLS

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

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

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

It would also require the Labor Commissioner to post on its website an annual report containing specified information, including the amount of wages recovered and the amount of penalties transferred to the general fund.

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

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

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

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

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

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

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

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

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

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

PENDING BILLS

Expanded Liability for Garment Manufacturers (SB 1399)

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

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

Extension for Petroleum Facility Rest Period Rules (AB 2479)

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

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

Human Resources/Workplace Policies

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

In 2019, California enacted AB 749 to generally prohibit settlement agreement provisions limiting an "aggrieved employee's" ability to work for the settling employer. This bill would amend these prohibitions in two respects. First, it would require the aggrieved employee to have filed the initial complaint "in good faith." Second, while the current prohibition against "no rehire" provisions contains an exception if the employer has made a good faith determination the aggrieved employee engaged in sexual harassment or sexual assault, this bill would expand this exception to include "or any criminal conduct" but also require this good faith determination of the alleged disqualifying conduct be made and documented before the aggrieved employee filed a complaint.

Status: Unanimously passed the Assembly Judiciary Committee and is pending on the Consent Calendar.

Wellness Program Requirements (AB 648)

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

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

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

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

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

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

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

Status: Pending in the Assembly Appropriations Committee.

Human Resources Required to Report Child Abuse (AB 1963)

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

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

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

PENDING BILLS

Status: Passed the Assembly Safety Committee and is ending in Assembly Appropriations.

<u>Miscellaneous</u>

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

This bill would remove the current exclusion for household domestic service employees from the California Occupational Safety and Health Act (Cal-OSHA), which governs health and safety in working conditions. It would also establish a protocol for Cal-OSHA representatives to investigate complaints of alleged serious violations in workplaces that are residential dwellings. It would also require the residential dwelling "employer" to investigate and, if needed, correct the violation and reports its efforts to Cal-OSHA, and to provide copies of all correspondence received from Cal-OSHA to the domestic service employee.

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

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

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

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

Status: Unanimously passed the Assembly Insurance Committee and is pending in Assembly Appropriations.

Prevailing Wage Definition of "Locality" (AB 2231)

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

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

Personal Protective Equipment for Direct Care Workers (AB 2537)

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

PENDING BILLS

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

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

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

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

Safety Devices for Emergency Ambulance Employees (AB 2092)

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

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

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

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

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

Public Sector

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

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

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

Union Protections for UC Employees (AB 3096)

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

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

PENDING BILLS

Employee Information for Public Employers (SB 1173)

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

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