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2017 Legislative Forecast – Written Materials

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LEGISLATIVE SUMMARY

The 2017 legislative session is heating up, with key committee votes expected prior to the April 28th deadline for policy committees to vote on fiscal bills. A number of significant employment bills remain pending and facing key votes shortly, including bills that would:

- Require employers to offer hours to existing non-exempt employees before hiring new employees (AB 5);
- Prohibit employers from inquiring about salary history during the hiring process (AB 168);
- Require larger employers to collect and publish information concerning gender pay differences for exempt employees (AB 1209);
- Preclude employers from inquiring about criminal convictions until after a conditional offer of employment (AB 1008);
- Require employers with more than 20 employees to provide up to 12 workweeks of parental leave (SB 63);
- Prohibit employers from responding to federal immigration agency requests or assisting with "immigration worksite enforcement actions" unless certain conditions are met (AB 450);
- Prohibit employers from discriminating based on an employee's reproductive health decisions (AB 569);
- Enable private employers to grant hiring preferences to veterans (AB 353 and AB 1477);
- Increase to $47,476 the salary threshold level for the overtime exemption (AB 1565);
- Amend the Private Attorneys' General Act (PAGA) to limit potential civil claims and recoverable damages (AB 281, AB 1429 and AB 1430); and
- Enact so-called "right-to-work" legislation prohibiting compelled contribution to labor organizations (AB 1174).

Looking ahead, all bills have until April 28, 2017 to pass the policy committees and until June 2, 2017 to pass the original house of origin, so many amendments are possible and particularly for the "spot bills" identified at the end of this report. In the interim, below is a summary of and status update for the pending employment bills of general application:

PENDING STATEWIDE BILLS

Extending San Jose's Opportunity to Work Ordinance State-Wide (AB 5)

In the November election, San Jose's voters passed the "Opportunity to Work Ordinance" (Measure E) which essentially requires San Jose employers with more than 35 employees to: (1) offer hours of work to existing qualified part-time employees before hiring new staff, (2) keep records of their compliance with the Ordinance, and (3) refrain from retaliation against employees who exercise their rights under the Ordinance. The San Jose Ordinance took effect March 13, 2017 and the San Jose Board of Equality Assurance has recently posted FAQ's, "Suggested Steps for Employers," Notices and Hardship Exemption forms: https://www.sanjoseca.gov/index.aspx?NID=5360

This bill would enact on a state-wide basis a version of the San Jose Ordinance that is fairly similar but also with some distinct differences. If enacted, employers with more than 10 employees in the state would be required to offer additional hours of work to *existing* qualified non-exempt employees with the skills and experience to perform the work *before* hiring additional employees or subcontractors. In this respect, this version would apply more broadly since the San Jose version is limited to employers with 35 or more employees. Whether an employee is "qualified" to be offered the additional hours is determined by the employer's "good faith and reasonable judgment" and hours must be distributed using a "transparent and nondiscriminatory process." Employers would not be required to offer employees work hours if the acceptance of such offer would require payment of overtime under any law or collective bargaining agreement. However, employers would also not be prohibited from offering such additional hours even if it resulted in overtime compensation, if the employer elected to do so.

Notably, while San Jose's Ordinance permits an employer to apply for a hardship exemption if these requirements are impossible, futile or impracticable, AB 5 does not appear to contain such an exemption.

Employers would also be required to retain all of the following: (1) for any new hire of an employee or subcontractor, documentation that the employer offered additional hours of work to existing employees prior to hiring the new employee or subcontractor; (2) work schedules of all employees; (3) if applicable, the written statement of an employee subject to welfare to work programs and (4) any other record or documents that the employer must maintain to demonstrate compliance with this section.

This law would also prohibit discrimination or retaliation against employees who attempt to enforce its provisions. However, the retaliation provision is currently worded extremely broadly to include adverse employment actions (e.g., termination, discipline, suspension) as well as informing another employer that the person has engaged in protected activities under this section, or reporting or threatening to report the actual or suspected citizenship or immigration status of an employee or family member because the employee exercised a right under this section.

As with other laws proposed by this bill's author, it would allow these provisions to be waived in a collective bargaining agreement provided that such waiver is explicitly set forth in the agreement in clear and unambiguous terms.

Continuing another recent trend, employers would also be required to post a notice that the Division of Labor Standards Enforcement (DLSE) will develop concerning these provisions. This poster would need to be posted "in a conspicuous place where it may be read by employees during work hours and in all places where notices to employees are posted physically and electronically."

The DLSE will be tasked with enforcing this section, and developing rules and regulations to carry out its provisions. The DLSE "may" also issue guidelines to encourage employers to create training opportunities that permit employees to perform work for which the employer can be expected to have a need for additional hours of work.

Employees would be permitted to file a complaint for violations with the DLSE to recover a to-be-determined civil penalty, or a civil complaint for damages and reasonable attorney's fees.

Status: Scheduled to be heard in the Assembly Labor and Employment Committee on April 19, 2017.

New Rules Regarding Federal Agency "Immigration Worksite Enforcement Actions" (AB 450)

Work-related immigration topics have been a particular legislative priority recently, and this wide-ranging bill continues that trend and highlights the current tension between California and the federal government related to immigration. Amongst other things, it would limit California employers from voluntarily complying with federal immigration authorities, impose new notice requirements,

enact many new statutory penalties and provide greater Labor Commissioner access to the worksite.

For instance, new Labor Code section 90.1 would, "except as otherwise required by federal law," prohibit employers or their agents from providing access to a federal government immigration enforcement agent to a place of labor without a properly executed judicial warrant. Similarly, new Labor Code section 90.2 would, "except as otherwise required by federal law," prohibit an employer or their agents from providing a federal immigration enforcement agency access to the employer's employment records, including I-9 forms, without a subpoena. Both new sections would authorize the California Labor Commissioner to recover civil penalties ranging from $10,000 to $25,000 from the employer or agent for each violation.

New Labor Code section 90.25 would require employers that receive notice of an "immigration worksite enforcement action" to provide written notice to each employee and their representative of this impending enforcement action. "Immigration worksite enforcement action" is defined to include audits or inspections of I-9 Forms or other employment records, worksite investigations, worksite interviews, worksite raids or any other immigration worksite enforcement action by a federal immigration agency. This notice would need to be delivered within 24 hours of the employer learning of the impending worksite enforcement action, and would need to be delivered by hand if possible, and if not possible, by mail and email (if known) in the language the employer normally uses for notices. This notice would need to include: (1) the name of the federal immigration agency conducting the immigration worksite action; (2) the date the employer received notice; (3) the nature of the worksite enforcement action, if known; (4) a copy of the notice the employer received about the enforcement action; and (5) any other information the Labor Commissioner deems material and necessary.

Once again except as required by federal law, the employer's notice obligations would continue after the enforcement action is concluded. Within 24 hours of receiving notice regarding the results of the immigration worksite enforcement audit, the employer would need to comply with the same notice procedures to advise each affected employee of: (1) a description of all deficiencies or other items identified in the federal immigration audit; (2) the time period for correcting any potential deficiencies identified; (3) the date/time of any meetings with the employer to correct the deficiencies; (4) the employee's right to be represented during this meeting; and (5) any other information the Labor Commissioner deems material and necessary.

Employers who fail to provide this advance notice or the post-enforcement action notices to all affected employees would be subject to civil penalties ranging from $10,000 to $25,000. Unlike the statutory penalties in proposed new Labor Code sections 90.1 and 90.2 against employers who provide improper access, these statutory penalties would not be required if the federal agency had specifically directed the employer not to provide notice to an affected employee.

In addition to notifying potentially affected employees about an impending "immigration worksite enforcement action," new Labor Code section 90.8 would also require, except as prohibited by federal law, employers notify the Labor Commissioner within 24 hours of learning of an impending worksite enforcement action. If that occurs, the employer will also be required to provide the Labor Commissioner access to the worksite, and the Labor Commissioner would then have the discretion to conduct an investigation under Labor Code section 90.5 regarding minimum labor standards requirements. The Labor Commissioner would also have the right to ensure employer compliance with all health and safety requirements, and the Chief of the Division of Occupational Safety may inspect a workplace inspection authorized under Labor Code section 6314.

In those situations where a federal immigration agent appears at "or near" the employer without advance notice, the employer shall immediately notify and provide access to the Labor Commissioner. Failure to notify the Labor Commissioner, except where directed by the federal agency or if otherwise prohibited by federal law, will result in statutory penalties ranging from $10,000 to $25,000 for each violation.

While present during a federal immigration worksite enforcement action, the Labor Commissioner may notify affected employees they have (1) the right to remain silent; (b) the right to speak to a lawyer before answering questions; and (c) the right to speak to his or her foreign consulate.

This new law would also impose new limits on an employer's ability to conduct self-audits even outside the presence of a federal immigration agency. New Labor Code section 90.9 would require the employer, except as required by federal law, to notify the Labor Commissioner before conducting a self-audit or inspection of I-9 forms and before checking the employee work authorization documents of a current employee at a time or in a manner not required by federal law. Once again, the employer would need to provide access to the Labor Commissioner, presumably to monitor the self-audit, and the Labor Commission would be authorized to inspect for additional labor standards issues. Failure to provide this

notice would also subject the employer to statutory penalties from $10,000 to $25,000 except where a federal agency or a federal statute prohibited notifying the Labor Commissioner.

In 2016, the Legislature enacted SB 1001 and new Labor Code section 1019.1 prohibiting employers from engaging in various actions while determining the employment eligibility of an applicant or employee (e.g., refusing docs that appear reasonably genuine, requiring more or different documents, etc.). This bill would enact new Labor Code section 1019.2 to prohibit employers or their agents from checking the employment eligibility of a current employee, including conducting a self-audit or inspection of I-9 Forms, at a time or in a manner required under federal law. As with section 1019.1, new section 1019.2 would authorize the Labor Commissioner to recover civil penalties ranging from $10,000 to $25,000 per violation.

Lastly, and seemingly unrelatedly, new Labor Code section 98.85 would authorize the Labor Commissioner, if it determines an employee complainant or witness is needed regarding an investigation related to wages, compensation, the return of tools or a discrimination charge, to issue a certification to the employee complainant or witness that they have submitted a valid complaint or are cooperating in an investigation.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

Job-Protected "Parental Leave" Bill Re-introduced (SB 63)

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

Unlike the California Family Rights Act (CFRA, Government Code section 12945.2) and the Family Medical Leave Act (FMLA), which apply only to employers with more than 50 employees, this bill would define "employer" as either (a) an entity employing 20 or more persons within 75 miles of the worksite where an employee (presumably seeking leave) is employed "to perform services for a wage or salary;" or (b) the state of California or any of its political or civil subdivisions, except for specified school districts. However, as with CFRA and

the FMLA, an employee would need to have worked more than 12 months for the employer, and to have worked at least 1,250 hours during the previous 12-month period.

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

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

Employers would also be required to maintain and pay for medical coverage under a group health plan for an eligible employee during the duration of the parental leave, not to exceed twelve weeks over the course of a 12-month period, commencing on the date the parental leave commences, and at the level and conditions that would have existed if the employee continued working. Notably perhaps, SB 63 does not contain the language contained in CFRA authorizing the employer to recover these medical premiums if the employee failed to return from leave, if certain conditions are present.

It also provides that if the employer employs two employees who are entitled to leave for the same event otherwise entitling them to "parental leave," the employer may, but is not required to, grant simultaneous leave to both employees. However, and again in contrast with the CFRA, SB 63 does not contain language suggesting that where both parents work for the same employer, the employer may limit the overall leave to the maximum amount a single employee could use.

Lastly, it provides this leave shall run concurrently with parental leave taken under Education Code section 44977.5 for certain certificated school employees.

This bill is nearly identical to last year's version which Governor Jerry Brown vetoed, except that this year's version proposes 12 weeks of leave compared to six. It is expected to be heavily opposed once again.

Status: Passed the Senate's Labor and Industrial Relations and Judiciary Committees and referred to the Appropriations Committee, with no hearing yet scheduled.

Prohibition on Salary History Inquiries (AB 168)

This bill would add new Labor Code section 432.3 to preclude employers from inquiring orally or in writing, personally or through an agent, about salary history information of an applicant, including about compensation and benefits. It would also require private employers, upon reasonable request, to provide to an applicant the pay scale for a position.

A similar bill (AB 1676) was introduced last year, before being modified to instead amend the Equal Pay Act to state that prior salary history by itself would not be a defense to an equal pay-related claim. Similar prohibitions on salary history inquiries have already passed in Massachusetts, Philadelphia and the District of Columbia and are pending in other states and municipalities.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

"Ban the Box" Bill (AB 1008)

In 2013, California enacted a law (AB 218) precluding state agencies and cities from inquiring about or using information related to criminal conviction history except in specified instances. Citing the emerging national trend, this bill would amend the Fair Employment Housing Act to preclude private employers from inquiring about an applicant's criminal record or conviction history until after a conditional employment offer is made, and would impose new notice and disclosure requirements if this information is sought.

Specifically, new Government Code section 12952 would preclude employers from including on employment applications any question seeking the disclosure of an applicant's criminal history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made. It would also preclude during any background checks the consideration or

dissemination of the following specific items: (a) arrests not followed by conviction; (b) referral to or participation in a pretrial or post-diversion program; (c) convictions that have been sealed, dismissed, or expunged pursuant to law; (d) misdemeanor convictions for which no jail sentence can be imposed, or infractions; and (e) misdemeanor convictions for which three years have passed since the date of conviction or felony convictions for which seven years have passed since conviction. It would also prohibit employers from interfering with or restraining the exercise of any right provided under this new section. These limitations would not apply to any position for which a state or local agency is required by law to conduct a criminal history background check, or to any position within a criminal justice agency.

Before denying a position based upon this history, the employer would also need to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position. Employers would need to consider at least all of the following: (a) the nature and gravity of the offense; (b) the time that has passed since the offense and completion of any sentence; and (c) the nature of the job held or sought. Employers would also be specifically directed to conduct this individualized assessment consistent with the Equal Employment Opportunity Commission's 2012 Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions.

If an employer makes a preliminary decision to deny employment, the employer must provide written notice of this intent to the applicant and provide all of the following: (a) the conviction that is the basis for the denial; (b) a copy of the conviction history report, if any; (c) examples of mitigation or rehabilitation evidence the applicant may voluntarily provide; and (d) notice of the applicant's right to respond and the deadline for doing so.

The applicant will then have at least ten business days to respond before a final employment decision can be made. This response can consist of a challenge to the conviction or evidence of mitigation/rehabilitation evidence, including (a) that one year has passed since release from a correctional institution without subsequent conviction; (b) compliance with the terms and conditions of probation or parole; or (c) any other evidence of mitigation/rehabilitation, including letters of reference.

Employers would need to consider the applicant's response before making a final decision, and consistent with the "individualized assessment" standard, not disqualify an applicant that has showed evidence of rehabilitation or mitigation. However, if an employer does make a final decision to deny an applicant in whole

or in part upon prior conviction history, the employer must notify the employee in writing of the following: (a) the final denial or disqualification; (b) any existing procedure to challenge this decision; (c) whether the applicant is eligible for other positions with the employer; (d) the earliest day the applicant may reapply; and (e) the right to file a complaint with the Department of Fair Employment Housing.

Status: Scheduled to be heard in the Assembly Labor and Employment Committee on May 3, 2017.

Veterans' Hiring Preference for Private Employers (AB 353 and AB 1477)

These largely similar bills attempt to address the higher-than-normal unemployment rate for returning veterans. Accordingly, new Government Code section 12958 would authorize employers to extend a preference during hiring decisions to honorably discharged veterans. Employers would be permitted to require a veteran to submit United States Department of Defense Form 214 to confirm eligibility for this preference. Section 12958 further specifies that such a preference shall be deemed not to violate any state or local equal employment opportunity law, including the FEHA.

Government Code section 12940(a)(4) presently provides that using veteran status in favor of Vietnam-era veterans shall not constitute sex discrimination. These bills would broaden this exemption by removing the references to "sex" and to "Vietnam-era veterans," and provide that FEHA's discrimination provisions would not affect an employer's ability to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference policy in accordance with new section 12958.

A similar bill (AB 1383) unanimously passed the Assembly before stalling in the Senate in 2016, and similar preferences have been enacted in 32 states.

Status: AB 353 unanimously passed the Assembly's Veterans Affairs Committee and has been referred to the Labor and Employment Committee to be heard on April 19, 2017. AB 1477 has been referred to the Assembly's Veterans Affairs and Labor and Employment Committees but no hearings have been scheduled yet.

Expanded Protections for Military Service Members (AB 1710)

Military and Veterans Code section 394 presently prohibits any discrimination against an officer, warrant officer or enlisted member of the military or naval

forces of the state or the United States because of that membership, including with respect to employment. This bill would expand these prohibitions to include not only the denial of or disqualification from employment, but also the "terms, conditions or privileges of that service member's employment.

Status: Referred to the Assembly's Veterans Affairs and Judiciary Committees, and scheduled to be heard in the Judiciary Committee on April 18, 2017.

Prohibition on Reproductive Health Discrimination (AB 569)

This bill would add Labor Code section 2810.7 to prevent employers from taking any adverse employment action based on the use of any drug, device or medical service related to reproductive health by an employee or an employee's dependent. It would also prohibit employers from requiring an employee to sign a waiver or other document that purports to deny any employee the right to make his or her own reproductive health care decisions, including the use of a particular drug, device or medical services. Employers that provide employee handbooks would need to include notice of the employee's rights and remedies under this new section.

Status: Passed the Assembly's Labor and Employment Committee and scheduled to be heard in the Assembly's Judiciary Committee on April 25, 2017.

Rest Period Rules for Emergency Medical Service Providers (AB 263)

This bill would add multiple new Labor Code provisions regarding the rights and working conditions of emergency medical service workers. Specifically, new Labor Code section 226.9 would identify "rest period" rules specific to such emergency medical service workers. While it would retain the generally applicable rule requiring 10-minute rest breaks for every four hours worked, it would specify that the employees must be relieved of all duties and cannot be made to remain on call. It would permit employers to interrupt a rest period and require the employee resume work if either the employer receives an emergency call which requires the emergency vehicle lights and siren to be activated, or an unforeseeable, natural or man-made disaster. If the rest period is interrupted for either of these reasons, the employer shall pay one hour of pay at the regular rate and provide an equivalent rest period as soon as practicable during, and also identify on the itemized wage statement the amount owed for interrupted rest periods.

New Labor Code section 226.10 would include corresponding provisions relating to meal periods, but also specify that its provisions apply regardless of any written agreements for "on duty" meal periods, and would also require employers to maintain accurate time records relating to meal periods and interruptions.

Status: To be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

On-Call Rest Periods for Emergency Medical Service Employees (AB 817)

This bill would amend Labor Code section 226.7 to allow emergency medical service provides to require employees to monitor and respond to pages, radios, station alert boxes, intercoms, cell phones or other communication methods during rest or recovery periods without penalty, to provide for the public health and welfare. Any mandated rest or recovery period interrupted for emergency response purposes shall be re-scheduled.

This bill deems itself declaratory of existing law and would potentially apply retroactively if enacted.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

Gender Pay Differential Reporting Requirements (AB 1209)

Reflecting the ongoing legislative focus on gender-related pay differentials, this bill would enact new Labor Code section 2810.7 and impose new reporting obligations on employers that are required to file a statement of information with the Secretary of State and have more than 250 employees. Specifically, employers would need to collect information relating to both the difference between the median and mean salary of male and female exempt employees, and between male and female board members. Employers would also need to publish this information by July 1, 2020 on a publically available website, and then update and republish it annually by July 1st of the following year. Employers would also need to submit this collected information to the California Secretary of State.

Status: To be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

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

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

Status: To be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

Increased Salary Threshold for Overtime Exemption (AB 1565)

Presently, the salary threshold for being exempt from overtime is $43,680 for employers with 26 or more employees, and $41,600 for employers with 25 or fewer employees, and these levels will increase annually as the recently-enacted five-step minimum wage increase take effect (SB 3). This bill would add new Labor Code section 514.5 to set the overtime exemption salary level at $47,476 annually (or $3,956 monthly), which is the amount proposed in the stayed DOL overtime regulations. This new salary threshold level would govern for overtime purposes until surpassed by the generally applicable formula for overtime purposes in California (i.e., twice the minimum wage for full-time employment), which is currently slated to occur in January 2019 for employers with 26 or more employees, and in January 2020 for employees with 25 or fewer employees.

Notably perhaps, at least for now, AB 1565 does not distinguish on the basis of employer size, so potentially all employers would be immediately subject to the $47,476 threshold level if enacted.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

PAGA Reforms Proposed Again (AB 281, AB 1429 and AB 1430)

California's Private Attorneys General Act (Labor Code section 2699, *et seq.)* (PAGA) authorizes aggrieved employees to initiate civil actions to recover specified civil penalties for enumerated Labor Code violations. Responding to

concerns such PAGA claims are filed too easily, these bills would amend PAGA in several respects.

For instance, AB 281would limit aggrieved employees to recover civil penalties only for violations that actually injured the employee. Second, it would expand the Labor Code violations that would first afford employers an opportunity to cure before civil suit to include all such violations other than health and safety violations. Third, it would expand the cure period from 33 to 65 calendar days.

AB 1429 would amend PAGA to limit civil actions solely to violations of Labor Code sections 226 [wage statements], 226.7 [meal/rest period provisions], 510 [overtime] and 512 [meal periods], and would require the employee to follow certain procedures before bringing an action. It would also cap the civil penalties recoverable under PAGA to $10,000 per claimant, and would require the superior court to review any penalties sought as part of a settlement agreement.

AB 1430 would require the Labor and Workforce Development Agency to investigate alleged violations and to issue either a citation or determine if there is a reasonable basis for a civil action. An aggrieved employee would only be permitted to commence a civil action upon receipt of notice that there is a reasonable basis for a civil action, or the agency fails to timely provide such notification.

Status: All three bills have been referred to the Assembly's Labor and Employment and Judiciary Committees, but no hearings yet scheduled.

New Rules for Gratuities (AB 1099)

While Labor Code section 351 currently identifies various rules regarding the payment of gratuities to employees, this bill would add new Labor Code section 352 regarding the payment of gratuities by debit card. This new section would require that certain specified employers (see below) that permit a patron to pay for services performed by an employee by debit or credit card to also accept a debit or credit card for payment of the gratuity. It would also provide that payment of the gratuity by a patron using a credit card must be made to the employee not later than the next regular payday following the date the patron authorized the credit card payment.

For purposes of this new section, "employer" would be limited to (1) hotels, (2) employers in the car washing and polishing industry, (3) establishments licensed

under the Barbering and Cosmetology Act, (4) massage establishments, (5) restaurants, and (6) organizations that use online-enabled applications to connect workers with customers to provide labor services.

Governor Brown vetoed a similar, but narrower, bill in 2016 (SB 896) that would have applied to nail salons.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

Payday Rules for Barbers and Cosmetologists (SB 490)

While Labor Code section 204 identifies generally applicable payday rules, this bill would enact new Labor Code section 204.11 to identify rules relating to the payment of commission wages paid to employees licensed under the Barbering and Cosmetology Act. If enacted, commission wages paid to such employees would be due and payable twice during each calendar month on pre-designated paydays. Wages paid to that employee for which the license is required and when paid as a percentage of a flat sum portion of the sums paid to the employer by the client recipient of such services, constitute commissions provided that the employee who is paid, in every pay period in which hours are worked, a regular hourly rate of at least two times the state minimum wage rate in addition to commissions paid. The bill further provides that the employer and employee may agree on a commission in addition to the base hourly rate.

Status: Unanimously passed the Senate's Labor and Industrial Relations Committee, and referred to the Appropriations Committee but no hearing has been scheduled yet.

Partial Affirmative Defense Proposed for Relying upon Division of Labor Standards Enforcement's Guidance (SB 524)

Responding to employer concerns some Labor Code provisions are vague or that interpretations change, this bill proposes new Labor Code section 98.73, which would provide a partial affirmative defense to employers who relied in good faith upon the Division of Labor Standards Enforcement's (DLSE) guidance.

Under this section, employers who requested, obtained, and complied with a DLSE opinion letter would not be liable for costs or subject to punishment for a violation of an employment statute or regulation if they demonstrate they were acting in

good faith when the violation occurred. To establish this good faith defense, the employer would need to prove that: (1) it previously sought an opinion letter or enforcement policy from the DLSE; (2) it relied upon and conformed to the applicable opinion letter or enforcement policy published by the DLSE; and (3) it provided true and correct information to the DLSE in seeking the opinion letter or enforcement policy. This partial affirmative defense would apply even if after the alleged violation or omission occurred the opinion letter or enforcement policy relied upon had been modified, rescinded, or deemed invalid, but this defense would not apply to violations occurring after such a nullification.

An employer satisfying these elements would be immune from certain civil and criminal penalties and costs, but would still be required to make restitution for lost wages to the employee. An employer asserting such a defense would also be required to post an undertaking with the reviewing court or administrative body in an amount equal to the reasonable estimate of alleged unpaid wages resulting from the employer's reliance upon the DLSE's advice.

If enacted, this defense would apply to all actions and proceedings that commence on or after January 1, 2018. A very similar bill (AB 2688) stalled in 2014.

Status: To be heard in the Senate's Labor and Industrial Relations Committee on April 26, 2017.

Expanded Harassment Training for Farm Labor Contractors (SB 295)

While California presently provides that farm labor contractor licenses will not be issued unless the applicant certifies certain employees have received sexual harassment training, this law would expand these requirements. For instance, it would require that training for each agricultural employee be in a language understood by the employee. It would also require a licensee, as part of their application, to provide the Labor Commissioner with a complete list of sexual harassment training materials and resources utilized to provide sexual harassment training to the agricultural employees in the preceding year. It would also require the licensee to identify the total number of agricultural employees who received sexual harassment training, and for the Labor Commissioner to publish the total number of agricultural employees trained the previous calendar year.

Status: Unanimously passed the Senate's Labor and Industrial Relations Committee, and referred to the Appropriations Committee but no hearing yet scheduled.

Human Trafficking Training for Hotel/Motel Employees (SB 270)

Continuing the Legislature's recent emphasis on targeting human trafficking, this bill would amend Civil Code section 52.6 to require hotels or motels providing lodging services to train employees on the signs of human trafficking and how to contact law enforcement agencies. It would also require the Department of Justice to develop an approved training program for use by hotels and motels and post it on its website and would authorize the Department to approve a private program, as specified. By January 1, 2019, this training would need to be incorporated into the initial training process for all new employees, and for all employees who did not receive an initial training.

Status: To be heard in the Senate Judiciary Committee on April 18, 2017.

Whistleblower Protections for Legislative Employees (AB 403)

Known as the Legislative Employee Whistleblower Protection Act, this bill would prohibit interference with the right of legislative employees to make protected disclosures of ethics violations and would prohibit retaliation against employees who have made such protected disclosures. It would also establish a procedure for legislative employees to report violations of these prohibitions to the Legislature, and would impose civil and criminal liability on an individual violating these protections.

Status: This bill unanimously passed the Assembly Judiciary Committee, and will soon be referred to the next committee. It also appears very similar to AB 1788 which unanimously passed the Assembly before stalling in the Senate's Appropriations Committee.

Cure Period for Non-Serious OSHA Violations (AB 442)

This bill would add new Labor Code section 6334 to provide "small businesses" and "microbusinesses" a 30-day cure period for non-serious violations before the Division of Occupational Safety and Health (DOSH) may commence an enforcement action. This 30-day correction period would commence upon effective service by DOSH upon the employer or where written notice is served during an inspection by DOSH. This notice of a correctable non-serious violation shall be an informal enforcement action and shall not constitute a first violation or an earlier violation supporting a subsequent finding of a repeat violation or an admission of guilt by the employer.

For purposes of this new section, "small business" and "microbusiness" would have the same definitions as Government Code section 14837, and "nonserious violation" would mean any violation that is not classified as a serious violation under Title 8 of the California Code of Regulations.

Status: To be heard in the Assembly Labor and Employment Committee on April 19, 2017.

Illness and Injury Prevention Program Disclosures (AB 978)

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

Responding to concerns that many employees, particularly non-English speaking employees, are unaware of an employer's IIPP, this bill would amend Labor Code section 6401.7 and, impose new disclosure requirements regarding these IIPPs. For instance, new subsection (e)(2) would require employers who receive a written request from a current employee or their authorized representative to provide a paper or electronic copy of the IIPP (including all required attachments) within five business days free of charge. The employer would be permitted to designate in writing the "authorized representative" to whom such requests should be directed. A similar bill (AB 2895) stalled in 2016.

Status: Passed the Assembly Labor and Employment Committee and pending in the Appropriations Committee, but no hearing yet scheduled.

"Right to Work" Protections from Union Membership (AB 1174)

Echoing the trend in other states, this bill would amend Labor Code section 922 to prohibit a person from requiring an employee, as a condition of employment, to contribute financial support to a labor organization or any charity sponsored by a labor organization. This bill would not apply to any employment contract entered into prior to January 1, 2018, and would not apply to certain enumerated federal employees.

Status: Scheduled to be heard in the Assembly's Labor and Employment on April 19, 2017.

Individual Alternative Workweek Schedules for the "Holiday Season" (AB 1173)

While California authorizes "alternative workweek schedules" whereby non-exempt employees can work up to ten hours daily without receiving overtime, it is often difficult to obtain the two-thirds work-unit approval required under Labor Code section 510. This bill would create a "holiday season" exception (from November to January) to enable individual non-exempt employees in the "retail industry" to request an "employee-selected flexible work schedule" providing for workdays up to ten hours within the forty-hour workweek, and would allow the employer to implement this schedule without the obligation to pay overtime compensation for those additional hours in a workday. Employers would be required to pay overtime at the rate of one-and-a-half times the regular rate for daily hours worked in excess of ten hours, and double-time for work performed in excess of twelve hours per workday and in excess of eight hours on a fifth, sixth or seventh day in the workweek.

Status: Referred to the Assembly's Labor and Employment Committee but no hearing yet scheduled.

Expanded Labor Commissioner Powers (SB 306)

While Labor Code section 98.7 authorizes the Labor Commissioner to investigate discrimination and retaliation claims and order certain relief after an investigation and determination, this bill would authorize the Labor Commissioner to seek immediate temporary injunctive relief during an investigation and before a determination is made. Specifically, upon finding reasonable cause to believe an employer has engaged in or is engaging a violation, the Labor Commissioner would be authorized to petition the superior court for appropriate temporary or preliminary injunctive relief. The court would be authorized to award such relief, and may consider not only the harm resulting directly to an individual, but also the "chilling effect" on other employees asserting their rights in determining whether temporary injunctive relief is appropriate.

Notably, if the employee has been discharged or faced adverse action for raising a claim of retaliation or asserting rights under any law under the Labor Commissioner's jurisdiction, the court shall order appropriate injunctive relief on a

showing of reasonable cause. This bill does not identify the injunctive relief available, but presumably it could include reinstatement or a stay on the adverse employment action. This injunction would remain in effect until the Labor Commissioner issues a determination or completes it review, whichever is longer, and the injunctive relief would not be stayed during an employer's appeal.

This bill would also amend section 98.7(c) to provide that if the Labor Commissioner successfully prosecutes an enforcement action, the court "shall" award the Labor Commissioner its reasonable attorney's fees and costs against the employer. This section would also specify that the Labor Commissioner would not need to recover a monetary award to be deemed successful for this purpose, and that it would be deemed successful if the court awards "any relief."

Presently, the Labor Commissioner must enforce a determination through a civil action. However, new Labor Code section 98.74 would enable the Labor Commissioner, if it determines a violation has occurred, to issue a citation to the person responsible for the violation, directing that person to cease the violation and to take actions necessary to remedy the violation, including rehiring or reimbursement of lost wages and posting notices. Employers who willfully refuse to comply with a final order under this section, including failing to reinstate or post notices, would be subject to a civil penalty of $100 per day up to a maximum of $20,000.

Lastly, this bill would amend Labor Code section 1102.5, which authorizes employees to file civil actions related to whistleblowing, to seek temporary or preliminary injunctive relief under proposed new Labor Code section 1102.62. Under this section, the employee could petition for injunctive relief, which the court could order as it deems just and proper.

Status: Scheduled to be heard in the Senate's Judiciary Committee on April 18, 2017.

Sleep Time for Domestic Workers (SB 482)

This bill would amend Labor Code section 1454 regarding live-in domestic workers who are required to be on-duty for 24 or more consecutive hours. It would authorize the domestic worker and the employer to agree, in writing, to exclude from hours worked a bona fide regularly scheduled sleeping period of not more than eight hours for uninterrupted sleep if the employee has eight hours free of duty and is available for continuous, uninterrupted sleep, and the employer

otherwise complies with this section. If the sleeping period is interrupted by an emergency, only time spent working during the emergency would constitute hours worked. However, absent a written agreement, the hours available for sleep will constitute hours worked. This bill is nearly identical to SB 1344 which stalled in 2016.

Status: Referred to the Senate's Labor and Industrial Relations Committee but no hearing yet scheduled.

Labor Commissioner Tracking of "Piece Rate" Recovery (SB 391)

In 2015, California enacted two versions of Labor Code section 226.2 (one effective from 2016 to 2021, and one effective from 2021 onward) enumerating rules relating to "piece rate" payments, and enumerating an affirmative defense to employers who had previously paid under an alternative method and essentially wished to take advantage of a temporary safe harbor through the Labor Commissioner's office provided certain steps were taken. This bill would amend section 226.2 to require the Labor Commissioner to post information on the commissioner's website regarding the success of this program. For instance, the Labor Commissioner would be required to post information regarding payments made to the commissioner, the total number of employees located for whom the commissioner collected payments and the amounts remitted to those employees, and the balance remaining from the amounts paid to the commissioner after remitting payments to these employees.

Status: Referred to the Senate Labor and Industrial Relations Committee, but no hearing yet scheduled.

Original Contractor Liability for Subcontractor Labor Code Violations (AB 1701)

This bill would enact new Labor Code section 218.7 and impose liability upon director contractors with construction contacts with the state for any debt owed to a wage claimant incurred by a subcontractor acting at any tier. The direct contractor would be liable for any wage, fringe or other benefit payment or contribution, including interest and state tax payment owed to a wage claimant, but would not include penalties or liquidated damages unless otherwise provided by law. It would also authorize the wage claimant to sue directly or through the Labor Commissioner or district attorney, and would also prohibit the direct contractor from attempting to evade this law's requirements.

Status: To be heard in the Assembly's Labor and Employment Committee on May 3, 2017.

Workers' Compensation Exceptions for Victims of Terrorism or Workplace Violence (AB 44)

This bill would exempt medical treatment for employees or first responders who sustain physical or psychological injury as a result of an act of terrorism or workplace violence from the generally applicable utilization review and independent medical review processes for Workers Compensation claims. Instead, it would provide for an expedited proceeding before the Workers' Compensation Appeals Board to resolve disputes regarding treatment. The bill would apply retroactively to the employees and first responders injured in the San Bernardino terrorist attack of December 2, 2015, and any other employees or first responders injured by an act of terrorism or violence in the workplace that occurs prior to January 1, 2018.

It would also amend Labor Code section 4656 to identify physical or psychological injury arising from an act of terrorism or violence in the workplace to the list of injuries for which aggregate disability payments may be made for not more than 240 compensable weeks within a 5-year period from the date of injury (as opposed to the generally applicable rule of 104 weeks within a 2-year period from the date of injury).

For purposes of this bill, "act of terrorism" would be defined as the "unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." "Violence in the workplace" would be defined as "an assault against a person with a firearm or other dangerous weapon that results in serious bodily harm or psychological injury."

Status: Scheduled to be heard in the Assembly's Insurance Committee on April 19, 2017.

Workers' Compensation Coverage Applies Regardless of Immigration Status in Residential Dwelling Context (AB 206)

California's Workers' Compensation provisions (specifically Labor Code section 3351) already define "employee" broadly, including "aliens and minors." (Labor

Code section 3351(a).) Within this broad definition, Labor Code section 3351(d) presently provides that this definition of "employee" includes persons employed by owners or occupants of residential dwellings, including for the care and supervision of children. This bill would modify subsection (d) to specify that this particular provision related to residential dwellings "applies without regard to immigration status."

This bill would also expand the scope of Workers' Compensation protections by eliminating the current exclusion from coverage contained in Labor Code section 3352(h) for employees who were employed or contracted to be employed for less than 52 hours. If so amended, this particular exclusion, which in turn modifies the residential dwelling coverage provision in section 3351 (discussed above), would still apply to any individual employed or contracted to be employed for wages of not more than one hundred dollars.

Status: To be heard in Assembly's Insurance Committee on April 19, 2017.

Workers' Compensation Liability for Unauthorized Medical Treatments (AB 221)

While California's Workers' Compensation system generally requires employers to provide all medical services reasonably required to treat work-related injuries, this bill would impose some limits. Specifically, it would amend Labor Code section 4600 to provide that for claims of occupational disease or cumulative injury filed on or after January 1, 2018, neither the employee nor the employer shall be liable for payment of medical treatment unless one of the following conditions has occurred: (1) the employer authorized the treatment; (2) the employer has "accepted" the injury for which the treatment is sought; (3) the appeals board finds the injury for which treatment was provided was compensable; or (d) an agreed medical examiner or a qualified medical examiner has determined the claimed disease or injury was caused, in whole or in part, by the employment.

Similarly, it would amend Labor Code section 4903 to provide that an employer shall not be liable for any medical liens related to treatment unless one of those conditions were met, or the parties agree to a settlement by compromise and release and the amount of compromise and release, exclusive of the costs of treatment, is $25,000 or more.

Status: Referred to the Assembly Insurance Committee, but no hearing yet scheduled.

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

While Workers' Compensation's definition of "employee" includes most officers and directors of private corporations, it presently excludes officers and directors of quasi-public or private corporations (as defined) who own at least 15% of the issued stock and signs a sworn written waiver of their status and intent to waive workers' compensation protections. This bill would amend Labor Code section 3352 and expand this exception to such officers or directors who own at least 10% (rather than the current 15%) of outstanding stock and executes a written waiver. It would also expand this exception to owners of certain professional corporations that execute a written waiver of their workers compensation rights and state under penalty of perjury that they are covered by a health insurance policy or health care service plan.

Status: To be heard in the Senate's Labor and Industrial Relations Committee on April 26, 2017.

Mandatory Annual Disbursement of Supplemental Right-to-Work Disbursements (AB 553)

Within California's Workers' Compensation system, there is a $120,000,000 fund designed to provide supplemental return-to-work payments intended to compensate those injured workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. This bill would amend Labor Code section 139.48 to require the Administrative Director to distribute the $120,000,000 annually to eligible workers (as specified) and would require, commencing with the end of the 2017 calendar year, that any remaining program funds available after these supplemental payments are made be distributed pro rata to those eligible workers, subject to a $25,000 limit per calendar year. It would prohibit attorneys' fees from being allowed out of any of the payments paid to workers from this program, and prohibit a person from collecting a fee or commission for providing assistance to a worker who applies for benefits under this program.

Status: To be heard in the Assembly's Insurance Committee on April 19, 2017.

Restoring Unemployment Insurance Benefits Eligibility for "Trade Disputes" (AB 306)

This bill would repeal Unemployment Insurance Code section 1262 which provides that an individual is ineligible for unemployment compensation benefits if they left work because of a trade dispute. Instead, and to the contrary, it would also amend Unemployment Code section 1256 to state that an employee will be deemed to have left their most recent work with good cause (and thus eligible for unemployment insurance benefits) if they were prohibited from performing work by the employer due to a trade dispute regarding wages, hours or other conditions of employment. An employee would also be deemed to have left their most recent work with good cause if they left during a bona fide strike of more than 50 percent of the bargaining unit employees in a refusal to perform work or services for the employer.

Status: Referred to the Assembly's Insurance Committee, but no hearings yet scheduled.

Workforce Development Task Force (AB 1111)

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

Status: To be heard in the Assembly's Jobs, Economic Development and Economy Committee on April 25, 2017.

Attorneys' Fees for CBA-Related Motions to Compel Arbitration (AB 1017)

Labor Code section 1128 presently provides that in the private employment context, the court shall award attorney's fees to a prevailing party on a motion to compel arbitration absent substantial and credible issues presented about whether the dispute was subject to arbitration. This bill would extend this remedy to both public and private employment.

Status: To be heard in the Assembly's Public Employees, Retirement and Social Security Committee on April 19, 2017.

Health Facility Whistleblower Protections (AB 1102)

This industry-specific bill would amend Health and Safety Code section 1278.5 to prohibit "health facilities" from discriminating or retaliating against employees who refuse an assignment or change in assignment that would violate statutorily-enumerated staffing requirements, including nurse-to-patient ratios.

Status: Passed the Assembly's Health Committee, and scheduled to be heard in the Assembly's Judiciary Committee on April 18, 2017.

Minimum Wage for Health Professionals/Interns (AB 387)

This bill would expand the definition of "employer" in the minimum wage provision (Labor Code section 1182.12) to include a person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of a person engaged in a period of supervised work experience to satisfy requirements for licensure, registration or certification as an allied health professional. "Allied health professional," in turn, would share the same definition as in Section 295p of Part F of Subchapter V of Chapter 6A of Title 42 of the United States Code.

Status: Passed the Assembly's Labor and Employment Committee and referred to the Appropriations Committee, but no hearing yet scheduled.

Resident Apartment Manager Wages (AB 543)

This bill would amend Labor Code section 1182.8 to expand the resident manager exemption from Industrial Welfare Commission Orders, and allow an employer who does not charge the resident manager rent, pursuant to a written agreement, to apply up to one-half of the fair market value of the apartment to meet the employer's minimum wage obligations.

Status: Scheduled to be heard in the Assembly's Labor and Employment Committee on April 19, 2017.

OSHA Training Requirement for Commercial Cannabis Providers (AB 1700)

This bill would require that applicants for a state license under the Medical Cannabis Regulation and Safety Act or the Control Regulate and Tax Adult use of Marijuana Act of 2016 meet certain OSHA training standards. Specifically, under

amended Business and Professions Code section 19322, applicants that do not have a collective bargaining agreement expressly governing certain provisions (including wages and hours of work) must certify that they employ or will employ within one year of receiving a license an employee who has completed an OSHA 30-hour general industry course based on federal OSHA regulations.

Status: Referred to the Assembly's Labor and Employment Committee but no hearing has been scheduled.

REMAINING "SPOT BILLS" TO WATCH

To meet the February 17th bill introduction deadline, legislators introduced a number of currently non-substantive "place holder" bills that will likely be materially amended shortly and in advance of key committee votes (so-called "spot bills"). "Spot bills" potentially worth tracking include: proposed amendments to the Equal Pay Act (AB 1388), PAGA (AB 945 and AB 1045), the Fair Employment and Housing Act (AB 1702), meal periods (SB 753), DLSE enforcement (AB 1704), alternative workweek schedules (AB 1241 and SB 662) and payment of wages (AB 1703).