LIEBERT CASSIDY WHITMORE

LEGISLATIVE ROUNDUP

Yearly news and developments in employment law and labor relations
for California Public Agencies

2020

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The Legislative Roundup is a compilation of bills, presented by subject, which were signed into law and have an impact on the employment and employment related issues of our clients. Unless the bills were considered urgency legislation (which means they went into effect the day they were signed into law), bills are going into effect on January 1, 2021, *unless otherwise noted. Urgency legislation will be identified as such.*

WORKERS' COMPENSATION

SB 1159 – Presumes COVID-19 Qualifies For Workers' Compensation If Employees Test Positive Within 14 Days Of Reporting To Work, Or After A Workplace Outbreak (Urgency Bill Effective Immediately On September 17, 2020).

SB 1159 amends existing workers' compensation laws to address the impact of employees who contract COVID-19 and the extent that such illness is considered industrial, and therefore entitles the employee to workers' compensation benefits.

SB 1159 is an urgency bill which became effective immediately upon the Governor's approval of the law on September 17, 2020.

Employees injured in the course and scope of employment are generally entitled to receive workers' compensation benefits for their injuries. Existing law establishes a series of specific injuries and illnesses for certain public safety employees that are presumed to be industrial in nature and therefore qualify them for workers' compensation benefits immediately, unless an employer can provide sufficient information to indicate that the injury or illness is non-industrial.

Recognizing the unique challenges posed by the global coronavirus (COVID-19) pandemic, SB 1159 now creates a similar presumption for illness or death resulting from COVID-19 in the following three ways:

1. Codifies Executive Order N-62-20, issued by Governor Newsom on May 6, 2020, and expands the workers' compensation presumption to **ANY** employee who reported to their place of employment between March 19 and July 5, 2020, and who tested positive for or was diagnosed with COVID-19 within the following 14 days.
2. Extends this presumption beyond July 6, 2020, for fire fighters, peace officers, fire and rescue coordinators, and certain kinds of health care and health facility workers, including in-home supportive services providers that provide services outside their own home. For health

facility employees other than those who provide direct patient care, and other than custodial employees in contact with COVID-19 patients, the presumption does not apply if the employer can show the employee did not have contact with a COVID-19 positive patient within the 14-day period.

3. Creates a similar presumption for all other employees who work for an employer with five or more employees, and who test positive for COVID-19 within 14 days after reporting to their place of employment, if the positive test occurred during an "outbreak" at the employee's specific work place. For purposes of this presumption, an "outbreak" exists if within 14 calendar days one of the following occurs at a "specific place of employment" (which excludes the employee's home):

    - If the employer has 100 employees or fewer at a specific place of employment, 4 employees test positive for COVID-19;
    - If the employer has more than 100 employees at a specific place of employment, 4% of the number of employees who reported to the specific place of employment test positive for COVID; or
    - A specific place of employment is ordered to close by a local public health department, the State Department of Public Health, the Division of Occupational Safety and Health, or a school superintendent due to a risk of infection with COVID-19

For purposes of administering this "outbreak" presumption, the bill requires employers to report to their workers' compensation claims administrator in writing within three business days when they know or reasonably should know that an employee has tested positive for COVID-19, along with other relevant information.

The Workers' Compensation Appeals Board (WCAB) is bound by these presumptions unless presented with controverted evidence to dispute the presumption. Workers' compensation awarded for covered COVID-19 related illness or death includes full hospital, surgical, medical treatment, disability indemnity, and death benefits. The bill also makes a claim relating to a COVID-19 illness presumptively compensable, as described above, after only 30 days, rather than the typical 90 days.

However, SB 1159 requires an employee to exhaust any COVID-19 related supplemental paid sick leave benefits (e.g., FFCRA's Emergency Paid Sick Leave or California's supplemental paid sick leave under AB 1867) and meet certain certification requirements before receiving temporary disability benefits or an industrial injury leave of absence.

In addition, the effective timeframe for workers' compensation benefits under SB 1159 based on illness or death due to COVID-19 is limited, as the law will remain in effect only until January 1, 2023. After that date, the law will sunset and be repealed unless extended further by the Legislature.

SB 1159 also requires the Commission on Health and Safety and Workers' Compensation to conduct a study of the impact of COVID-19 on the workers' compensation system, to deliver a preliminary report to the Legislature and Governor by December 31, 2021, and to deliver a final report to the legislature by April 30, 2022.

As SB 1159 is now law, employers need to be vigilant and prepared to respond to any indication that an employee has contracted COVID-19 and should coordinate with their workers' compensation insurance carriers and claims adjusters to establish best practices for reporting and responding to potential workers' compensation claims based on COVID-19.

(SB 1159 adds Sections 77.8, 3212.86, 3212.87, and 3212.88 to the Labor Code.)

EMPLOYEE AND WORKPLACE SAFETY

AB 685 – Expands Cal/OSHA Enforcement Powers And Enacts Stricter Health And Safety Rules Relating To COVID-19.

In response to the COVID-19 pandemic and its impact on maintaining a safe workplace, AB 685 amends the Labor Code in several areas to require employers to adhere to stricter occupational health and safety rules and empowers Cal/OSHA with expanded enforcement powers to address such standards as follows.

A. New COVID-19 Employer Notice and Reporting Requirements

AB 685 requires employers to comply with certain reporting requirements and provide the following four notices related to potential COVID-19 exposures in the workplace **within one business day** of being informed of the potential exposure:

1. New COVID-19 Employer Notice and Reporting Requirements

If an employer or the employer's representative receives a notice of a potential exposure to COVID-19 in the workplace by a "*qualifying individual,*" the employer must provide a written notice to all employees, and to the employers of subcontracted employees, who were present at the same worksite within the infectious period (as defined by the State Department of Public Health), stating that they may have been exposed to COVID-19.

For purposes of this requirement, a "qualifying individual" means a person who can establish any of the following requirements:

- The individual has a laboratory-confirmed case of COVID-19;
- The individual has a positive COVID-19 diagnosis from a licensed health care provider;
- The individual is subject to a COVID-19 related isolation order issued by a public health official; or
- The individual has died due to COVID-19, as determined by the County public health department.

The notice must be sent in a manner the employer normally uses to communicate employment-related information. This can include personal service, email, or text message so long as it can be reasonably anticipated that employees will receive notice within the one business day requirement. The notice must be in both English and the language understood by the majority of employees.

2. Potential COVID-19 Exposure Notice to Exclusive Representative of Represented Employees

If the affected employees who are required to receive the COVID-19 exposure notice include represented employees, the employer must send the same notice to the exclusive representative of any affected bargaining unit.

3. Notice of COVID-19 Related Benefits and Employee Protections

An employer must also provide all affected employees and the exclusive representative, if any, with information regarding any COVID-19-related benefits or leave rights under federal, state, and local laws, or pursuant to employer policy, as well as the employee's protections against retaliation and discrimination.

4. Notice of Safety Plan in Response to Potential COVID-19 Exposure

Finally, the employer must notify all employees, the employers of subcontracted employees, and any exclusive representative, of the employer's plans for implementing and completing a disinfection and safety plan pursuant to guidelines issued by the federal Centers for Disease Control.

Failure to comply with these four requirements may subject the employer to a civil penalty. AB 685 also prohibits employers from requiring employees to disclose medical information except as required by law, and prohibits employers from retaliating against an employee for disclosing a qualifying case of COVID-19.

In addition, where employers are notified of a number of cases that meet the definition of a COVID-19 "*outbreak*" as defined by the California Department of Public Health (CDPH), the employer must also notify the applicable local public health agency **within 48 hours** of the names, number, occupation, and worksite of any "qualifying individuals" related to the "*outbreak.*"

An "*outbreak*" is currently defined by CDPH as "three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households." (See CDPH's "COVID-19 Employer Playbook – Supporting a Safer Environment for Workers and Customers – available online at https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf).

CDPH is also required to make workplace statistics received from local health departments under this provision – other than personally identifiable employee information – available on its website, such that members of the public can track the number of cases and outbreaks by industry.

These new COVID-19 notice and reporting requirements apply to all private and public employers, with two exceptions:

1. Health facilities, as defined in Section 1250 of the Health and Safety Code, are exempt from reporting an "outbreak" within 48 hours as described above;

2. The notice requirements do not apply to exposures by employees whose regular duties include COVID-19 testing or screening or who provide patient care to individuals who are known or suspected to have COVID-19, unless the "qualifying individual" is also an employee at the same worksite.

B. Cal/OSHA Will Be Authorized to Shut Down a Workplace, Operation, or Process that Creates an Imminent Hazard Due To COVID-19 Exposure Risk

Under current law, whenever Cal/OSHA finds that a place of employment or specific equipment in the workplace creates an imminent hazard to employees, Cal/OSHA has the authority to prohibit entry into the affected part of the workplace or to prohibit the use of the dangerous equipment in the workplace.

AB 685 expands and clarifies Cal/OSHA's authority within the context of COVID-19 related issues in the workplace. Under AB 685, if Cal/OSHA finds that a workplace or operation/process within a workplace exposes employees to a risk of COVID-19 infection and thereby creates an imminent hazard to employees, Cal/OSHA now has authority to prohibit entry to the workplace or to the performance of such operation/process. If Cal/OSHA uses its authority to apply such a workplace restriction, it must then provide the employer with notice of the action and post that notice in a conspicuous place at the worksite. Any restrictions imposed by Cal/OSHA must be limited to the immediate area where the imminent hazard exists and must not prohibit any entry into or operation/process within a workplace that does not cause a risk of infection. In addition, Cal/OSHA may not impose restrictions that would materially interrupt "critical government functions" essential to ensuring public health and safety functions, or the delivery of electrical power or water.

This expanded authority sunsets on January 1, 2023, and will be repealed automatically on that date unless further extended by the Legislature.

C. Amends Cal/OSHA Procedures for "Serious Violation" Citations Relating to COVID-19

Currently, before Cal/OSHA can issue a citation to an employer alleging a "serious violation" of occupational safety and health statutes or regulations, it must make a reasonable attempt to determine and consider whether certain mitigating factors were taken by an employer to rebut the potential citation. Cal/OSHA satisfies this requirement by sending an employer a description of the alleged violation at least 15 days before issuing a citation, and provides the employer an opportunity to respond. Even if an employer does not provide information in response to Cal/OSHA's inquiries, an employer is still not precluded from presenting such information at a later hearing to contest the citation.

AB 685 modifies this procedure until January 1, 2023 as applied to serious violation citations Cal/OSHA issues related to COVID-19. For COVID-19-related serious violation citations, Cal/OSHA is not obligated to provide an alleged violation at least 15 days prior to issuing the citation to allow an employer the opportunity to respond and can instead issue the citation immediately. The employer would still be able to contest the citation through the existing Cal/OSHA appeal procedures.

D. Impact of AB 685 on Employers

Because AB 685 is not effective until January 1, 2021, employers have some time to prepare for its new notice and reporting requirements. Employers should review and revise their existing procedures related to notification of COVID-19 exposures in the workplace in order to ensure they are ready to comply with the new notice and reporting requirements imposed by AB 685 once it becomes effective.

(AB 685 amends Sections 6325 and 6432 of and adds Sections 6325 and 6409.6 to the Labor Code.)

AB 2537 And SB 275 – Impose Requirements On General Acute Care Hospital Employers And Other Healthcare Employers Regarding Personal Protective Equipment.

During the COVID-19 global pandemic, health care facilities in California quickly experienced a severe supply shortage of personal protective equipment (PPE), such as surgical masks, respirators, and eye protection. The resulting shortage led health care employers in some cases to require their employees to ration and even re-use PPE. AB 2537 and SB 275

were enacted to protect healthcare workers from the spread of infectious diseases and to ensure an adequate supply of PPE to prepare for the future public health emergencies. The two bills impose a number of requirements on public and private health care employers.

AB 2537 applies to any public or private sector employer that employs workers to provide direct patient care in a general acute care hospital. SB 275 has a broader scope and **also** applies to employers that employ workers in a skilled nursing facility, a medical practice that is operated or maintained as part of an integrated health system or health facility, or a licensed dialysis clinic.

Both bills codify existing law by specifying that covered health care employers must supply PPE to any employees who provide direct patient care, or who provide services that directly support patient care in a general acute care hospital, and must ensure that employees actually use the PPE supplied to them.

In addition, AB 2537 requires general acute care hospital employers to maintain a stockpile of specific types of PPE, in which any single-use equipment must consist of unexpired, new equipment. The bill also imposes certain reporting requirements relating to the stockpiling and consumption rate of PPE. SB 275 requires the State to maintain a similar stockpile for emergency use, as well as imposing additional stockpiling and reporting obligations on covered health care employers beginning January 1, 2023.

(AB 2537 adds Section 6403.3 to the Labor Code. SB 275 adds Section 13101021 to the Health and Safety Code and adds Section 6403.1 to the Labor Code.)

LEAVES OF ABSENCE AND BENEFITS

AB 1867 – Provides "COVID-19 Supplemental Paid Sick Leave" To Public Employees Exempted From The Federal Families First Coronavirus Response Act's (FFCRA) Emergency Paid Sick Leave (EPSL) Benefits.

AB1867 adds Labor Code Section 248.1, which provides up to 80 hours of COVID-19 related supplemental paid sick leave (COVID-19 Supplemental Paid Sick Leave) for "emergency responder" and "health care provider" employees exempted from the Emergency Paid Sick Leave (EPSL) benefits under the Families First Coronavirus Response Act (FFCRA).

In addition to providing COVID-19 supplemental sick leave to "emergency responders" and "health care providers," AB 1867 also provides this leave to private sector employers with 500 or more employers, who were also excluded from the federal law, and codifies the governor's previously-issued executive order (No. N-51-20) providing similar paid leave and handwashing requirements for food sector workers. AB 1867 also establishes a separate small employer family leave mediation pilot program for smaller employers who are now subject to the California Family Rights Act (CFRA) based on its expansion under SB 1383. We have included summary of this part of the bill as part of the summary of SB 1383 below.

As a budget trailer bill, this bill became law immediately upon the Governor's signature on September 9, 2020 and its supplemental paid sick leave provisions became effective 10 days later on September 19, 2020.

Qualifying Conditions for Receipt of COVID-19 Supplemental Paid Sick Leave

As applied to public employers, this new Labor Code Section 248.1 entitles "emergency responder" and "health care provider" employees who have been exempted from the FFCRA's EPSL paid sick leave benefits to instead receive COVID-19 Supplemental Paid Sick Leave if the employee is unable to work for any of the following three (3) reasons, which are generally modeled after the EPSL:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;

2. The employee is advised by a health care provider to self-quarantine or self-isolate due to concerns related to COVID-19; or

3. The employee is prohibited from working by the employer due to concerns related to the potential transmission of COVID-19.

The first two qualifying conditions under AB 1867 mirror those provided for EPSL under the FFCRA. The third qualifying condition is slightly different from any qualifying condition for EPSL provided under the FFCRA, and would allow a covered

employee to qualify for COVID-19 Supplemental Paid Sick Leave if the employer directs the employee not to report to work for reasons related to COVID-19.

Importantly, the COVID-19 Supplemental Paid Sick Leave does not provide any statutory entitlement to supplemental paid sick leave for the other EPSL-related reasons under the FFCRA where the affected employee is either:

- Caring for an individual who is subject to a federal, state, or local quarantine or isolation order or has been advised by a health care provider to self-quarantine; or
- Caring for their son or daughter whose school or place of child care is closed for reasons related to COVID-19.

Benefits under COVID-19 Supplemental Paid Sick Leave

Just as with EPSL, employees who qualify to receive COVID-19 Supplemental Paid Sick Leave will be entitled to up to 80 hours of such paid leave if they are full-time employees and work at least 40 hours per week. Part-time employees will be entitled to a prorated amount of such leave based on their normally scheduled work hours over a two-week period. However, if the part-time employee does not have a normal work schedule, the paid sick leave entitlement will be based on the amount of hours that is 14 times their average daily schedule as determined by hours worked over the preceding six month period. In the same manner as EPSL, employees who qualify to receive COVID-19 Supplemental Paid Sick Leave will be compensated for each hour of such leave at their "regular rate of pay" up to $511 per day and $5,110 in the aggregate.

For active duty firefighters who were scheduled to work more than 80 hours in the two weeks preceding the date upon which the employee took COVID-19 Supplemental Paid Sick Leave, AB 1867 provides that such employees will be entitled to COVID-19 Supplemental Paid Sick Leave equal to the total number of hours that the individual was scheduled to work in the preceding two weeks. However, the same paid compensation limits of $511/day and $5,110 in the aggregate still apply.

AB 1867 expressly provides that COVID-19 Supplemental Paid Sick Leave is to supplement, and not run concurrent to, paid sick leave entitlements provided to employees under the Paid Sick Leave Law (Labor Code Section 246). Therefore, where an employee qualifies for COVID-19 Supplemental Paid Sick Leave, the employer should not reduce the amount of other statutory paid sick leave that the employee earned or accrued under Labor Code Section 246 or by the employer's alternative accrual methodology.

Some employers exempted "emergency responders" and/or "health care providers" from receiving EPSL under the FFCRA, but then provided the exempted employees a comparable benefit to leave and compensation by contractual agreement. For such employers, AB 1867 expressly provides that the employer may attribute the supplemental benefits provided under that agreement for the purpose of satisfying the requirements of Labor Code Section 248.1.

For employers that provided leave for such qualifying conditions, but not compensation, AB 1867 provides that such employers may retroactively provide for such compensation now in order to satisfy their obligations to provide employees both leave and compensation.

The supplemental paid sick leave benefits provided under AB 1867 expire on December 31, 2020 or the date of expiration for the benefits provided under the Emergency Paid Sick Leave Act should the federal government extend such benefits, whichever is later.

(AB 1867 adds Section 12945.21 to the Government Code, adds Section 113963 to the Health and Safety Code, adds Sections 248 and 248.1 to the Labor Code, and amends Section 248.5 of the Labor Code.)

SB 1383/AB 1867 – Expands CFRA Family And Medical Leave To Smaller Employers And Expanding Overall Uses Of CFRA Leave; Creates Small Employer Family Leave Mediation Pilot Program.

SB 1383 significantly expands the California Family Rights Act (CFRA) family and medical leave law under Government Code Section 12945.2 by now applying it to all private sector employers with 5 or more employees and all public sector employees, adding the ability to care for a serious health condition of more family members, and eliminating other previous restrictions on the use of CFRA leave. By doing so, this means that CFRA will now deviate further from the federal Family Medical Leave Act (FMLA) that it otherwise generally ran concurrently with, and could potentially create entitlements for

employees under both laws for up to 24 weeks of protected leave in a 12-month period under certain circumstances.

A. CFRA Leave is Now Applicable to All Employees Who Work for a Public Employer and for Private Sector Employers With Five or More Employees

Currently, CFRA only applies to private sector employers with 50 or more employees, and to all public agencies. However, any employee – including public sector employees – could only qualify to take CFRA leave if their worksite had 50 or more employees in a 75-mile radius. As a result, only those public agencies with 50 or more employees in a 75-mile radius would have employees who could qualify for CFRA leave. This matched the FMLA standard, which uses the same definitions.

In addition to lowering the private sector employer threshold to 5 or more employees and still including all public agencies as an "employer," SB 1383 also eliminates the 50 or more employees in a 75-mile radius definition for an employee to qualify for CFRA leave. The impact on this for smaller public agencies with less than 50 employees, is that they now must provide CFRA leave to all of their qualified employees. A public employee now only has to meet the following criteria in order to qualify for CFRA leave:

- Worked for the employer for at least 12 months of service (can be nonconsecutive work for employer over a 7-year period, except that any military leave time while employed counts towards this 12 months of service); and

- Worked at least 1,250 hours in the 12-month period prior to taking CFRA leave.

Therefore, any public agencies with less than 49 employees who were not previously covered under CFRA are now covered once this law becomes effective on January 1, 2021 and will have to provide qualified employees the following leave entitlements:

- Up to 12 weeks of unpaid family and medical leave for qualifying purposes in a 12-month period;

- Continuation of health insurance benefits at the same level as if the employee had been continuously employed during the CFRA leave; and

- Right to reinstatement to the employee's same or comparable job position to the extent that the employee would have remained in that position if they had been continuously employed during the CFRA leave.

Because of SB 1383's expansion of CFRA leave to private sector employers with 5 or more employees and all public sector employers, the existing New Parent Leave Act (NPLA) that became law in 2018 and provided CFRA-like bonding leave rights to smaller employers with 20-49 employees under Government Code Section 12945.6 is being repealed as it is no longer needed.

While the federal FMLA remains unchanged and still does not apply to smaller private employers and public agencies with less than 50 employees, CFRA leave will now apply to such agencies effective January 1, 2021.

B. Expanded Uses of CFRA Leave

The other major impact of SB 1383 that is applicable to all employers – including those that have already been covered under CFRA – is the expansion of the types of leave that can be used under CFRA.

Under SB 1383, CFRA leave to care for a family member with a serious health condition has been expanded to include more family members of the qualified employee. Covered family members now include *grandparent, grandchild, and sibling* – in addition to the existing parent, child, spouse, or registered domestic partner. This brings CFRA in line with both California's Paid Sick Leave Law (Labor Code Sections 245, et. seq. – effective January 1, 2015) and the revisions to California's Family Sick Leave law (Labor Code Section 233 – effective January 1, 2016), which already includes these family members. However, this change also expands CFRA's deviation from the FMLA, which does not cover leave to care for a grandparent, grandchild, sibling, or registered domestic partner.

In an interesting twist, SB 1383 also adds a definition of "parent-in-law" to CFRA, but does not reference the term anywhere else in the statute and therefore does not actually provide an employee a new right to take CFRA leave to care for the serious health condition of a parent-in-law. It is unclear at this time if future legislation may expand CFRA leave to also cover an employee taking leave to care for a parent-in-law with a serious health condition.

In addition, SB 1383 eliminates the previous restrictions under CFRA, which indicated that an employee could not take leave to care for their adult child over 18 years of age with a serious health condition unless that child was incapable of self-care because of a physical or mental disability. This restriction had mirrored the FMLA's definition of "child," but now will deviate from that FMLA standard and allow a qualified employee to take CFRA leave to care for an adult child who has a serious health condition.

In a move that now brings CFRA more in line with FMLA, SB 1383 also is adding "qualifying exigency" leave related to the covered active duty or call to covered active duty for an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces. This generally mirrors the FMLA's "qualifying exigency" family military leave that was added in 2008, and only slightly expands it beyond the FMLA to also include an employee's registered domestic partner who is in the United States Armed Forces.

With SB 1383's new additions to CFRA leave use, a qualified employee can take CFRA leave for one of the following reasons (with the new additions in **bold text**):

- Leave for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee;
- Leave to care for a child **(including an adult child over 18 years of age)**, parent, **grandparent, grandchild, sibling**, spouse, or registered domestic partner who has a serious health condition;
- Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions; or
- **Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces.**

The end result here is that CFRA qualified employees will now have the ability to use CFRA leave for more reasons, including some that will not run concurrently with FMLA.

C. Other Significant Changes to CFRA

Finally, SB 1383 also makes two additional significant changes to the terms and conditions of CFRA leave that will also deviate from the FMLA:

- Eliminates the existing restriction in CFRA that allows an employer who employs both ***parents*** to limit their total amount of CFRA leave for both individuals to a total of 12 weeks for bonding with a newborn child, adopted child or foster care placement. The FMLA has a similar provision allowing such a limitation of a total of 12-weeks for bonding leave where both ***spouses*** are employed by the same employer. As a result of this change, where both parents are employed by the same employer and take CFRA bonding leave, they are now both entitled to a total of 12 weeks individually for such leave.
- Eliminates the "key employee" exception to an employee's right to reinstatement. Currently under CFRA (which mirrors the FMLA), there is a very limited "key employee" exemption that allows an employer the ability to deny reinstatement to an employee who takes CFRA leave where the employee is among the highest paid 10% of the employer's employees, the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer, and where the employer notifies the employee of its intent to deny reinstatement. SB 1383 now eliminates this limited "key employee" exemption and requires an employer to provide a right to reinstatement to all employees. Following this change, the only other permissible defenses for an employer to deny a right to reinstatement is where the employee's employment would have otherwise ceased or been modified independent of the CFRA leave (e.g., layoff, reduction in hours or disciplinary action unrelated to CFRA leave), or where the employee fraudulently took CFRA leave when they did not otherwise qualify for the leave. The burden is on the employer to establish both such defenses.

D. Small Employer Family Leave Mediation Pilot Program (AB 1867)

In a companion budget trailer bill to SB 1383, AB 1867 establishes a small employer family leave mediation program, for employers between 5 and 19 employees. This pilot program would allow a defined small employer or employee who is newly covered under the expanded CFRA to request mediation to resolve an alleged CFRA violation within 30 days of receipt of a right-to-sue notice based on such violation. If an employer or employee requests mediation, the employee is prohibited from pursuing a civil action until the mediation is complete. In exchange, the employee's statute of limitation on claims will be tolled until the mediation is complete.

This provision of AB 1867 will take effect when SB 1383 does on January 1, 2021, and will automatically sunset on January 1, 2024.

E. Impacts of SB 1383's Changes to CFRA on Its Interaction With FMLA

Because SB 1383 makes significant changes to CFRA, a number of these changes also create a greater potential for an employee who is covered under both FMLA and CFRA to have their leaves not run concurrently, and therefore be entitled to a greater amount of protected leave.

With SB 1383's changes, an employee's CFRA leave does not run concurrently with FMLA under the following circumstances (with the expanded reasons in **bold text**):

- Leave due to pregnancy related conditions – *which is considered a "serious health condition" under FMLA* – is generally not considered a "serious health condition" under CFRA unless the employee has already exhausted their separate Pregnancy Disability Leave (PDL) entitlement under California Government Code Section 12945;
- Leave to care for a serious health condition of a registered domestic partner, **adult child who is not incapable of self-care, grandparent, grandchild, or sibling;**
- **Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's registered domestic partner in the United States Armed Forces**; and
- Leave to care for an employee's parent, child, spouse or "next of kin" who is a covered servicemember with a serious injury or illness for up to 26 weeks under FMLA *(although, CFRA leave may run up to 12 weeks to the extent such leave also qualifies as leave to care for a parent, child or spouse with a serious health condition).*

The impact of these expanded leave areas where CFRA leave does not run concurrently with FMLA is that a qualified employee may be therefore be able to receive up to 12 weeks of CFRA leave and a separate 12 weeks of FMLA leave – *for a total of 24 weeks of protected leave* – in a 12-month period. For example, if a qualified employee takes 12 weeks of CFRA leave to care for a grandchild with a serious health condition (something that is not covered under FMLA), that employee would then still have 12 weeks of FMLA leave available in the relevant 12-month period. As a result, SB 1383 will create more scenarios where an employee can be out on a protected unpaid leave of absence with continued health insurance benefits and a guaranteed right to reinstatement for up to 24 weeks in a 12-month period.

F. Employer Preparations for SB 1383

Because SB 1383 is not effective until January 1, 2021, employers do have some time to prepare for its changes. Here are some suggested preparations that employers should make:

- For smaller private sector employers with 5-49 employees and smaller public agencies with less than 50 employees who have not been previously covered under CFRA, it is important to modify existing policies and procedures to provide for CFRA leaves of absence. CFRA is a very complex law and there are a number of specific issues such as application of accrued paid leaves, concurrent use of SDI/PFL benefits, medical certifications, and specific employee notice requirements that must be properly implemented. Supervisors and Human Resources staff should be trained on the application of CFRA leaves and applicable forms and procedures should be implemented so the agency is prepared to provide CFRA leaves to qualified employees upon the implementation of this new law.
- For larger employers with 50 or more employees who have already been covered under CFRA (and FMLA), revisions should be made to existing FMLA/CFRA leave policies to incorporate these revisions to CFRA. In addition, employers should

examine how they track FMLA and CFRA leaves to ensure they properly track when such leaves run concurrently or separately, as referenced above. Supervisors and Human Resources staff should also be trained on the changes to CFRA and the new qualifying uses of the leave.

It is also important to note that the existing CFRA regulations promulgated by the Department of Fair Employment and Housing (DFEH) (2 C.C.R. §§ 11087-11097) are drafted to the existing CFRA law and will have sections that are inconsistent with the changes made under SB 1383. Until the DFEH's Fair Employment and Housing Council can propose and implement revisions to these regulations in accordance with the changes made by SB 1383, employers should be cautious in their reliance on such regulations and seek legal counsel to ensure compliance with the law.

(SB 1383 amends Sections 12945.2 and 12945.6 of the Government Code. AB 1867 adds Section 12945.21 to the Government Code.)

AB 2017 – Clarifies That The Designation Of Sick Leave As Protected Sick Leave Under Labor Code 233 Is Solely At the Employee's Discretion.

Prior to 2016, Labor Code Section 233 provided employees an entitlement and protection to use accrued and available sick leave (including paid time off (PTO) leave that can be used for sick leave purposes) in an amount no less than that accrued over a six-month period in a calendar year to care for a parent, child, spouse, or registered domestic partner who was sick. This law was frequently referred to as the "kin care" law.

Following the 2015 implementation of the Paid Sick Leave Law (Labor Code Section 245, et. seq.) and its protections for additional sick leave uses (including the employee's own need to use sick leave), Labor Code Section 233 was amended in 2016 to broaden its protections to any sick leave use covered under the Paid Sick Leave Law. Instead of just being limited to protecting sick leave use to care for a family member who is sick, Section 233 expanded those protections to the following sick leave uses provided in the Paid Sick Leave Law:

- Diagnosis, care, or treatment of an existing health condition of, or preventive care for an employee;
- Diagnosis, care, or treatment of an existing health condition of, or preventive care for an employee's family member (parent, parent-in-law, child, spouse, registered domestic partner, grandparent, grandchild, or sibling); or
- For various specific purposes as provided in Labor Code Sections 230 and 230.1 for an employee who has been the victim of domestic violence, sexual assault, or stalking.

One unintended drawback of this expansion is that the sick leave use now protected under Labor Code Section 233 is not just limited to care for covered family members as was the case with the prior version of the law. As a result, where the first one-half of an employee's annual sick leave accruals (e.g., the first 48 hours of sick leave where 96 hours are accrued annually) used were protected under Section 233, if such protected sick leave was used for the employee's own need for sick leave, any additional sick leave used later in the calendar year to care for a covered family member would be technically unprotected.

To address this issue, AB 2017 amends Labor Code Section 233 to allow employees the sole discretion to specify whether to designate used sick leave as being taken for one of these protected reasons under the law. For example, an employee can now indicate that sick leave taken for their own illness not count towards the one-half of their annual sick leave accruals protected under Labor Code Section 233, so the employee can then have such protected sick leave available later for other purposes. In such circumstances, any sick leave not designated by an employee for protection under Labor Code Section 233 would then be technically unprotected and subject to the impacts of an employee's absenteeism policies and procedures.

Employers should review and revise their sick leave policies to determine how they apply the protections of Labor Code Section 233 towards an employee's sick leave use during a calendar year to incorporate the new ability for an employee to designate such sick leave use as protected under this law. In addition, employers should also implement sick leave tracking procedures to better differentiate between an employee's sick leave use that is designated as protected under Labor Code Section 233 versus any such other sick leave used by the employee.

(AB 2017 amends Section 233 of the Labor Code.)

AB 2399 – Makes Technical And Clarifying Changes To Paid Family Leave Provisions For Qualifying Exigence Leave Related To Active Duty Military Service.

In 2018, SB 1123 was signed into law and expanded California's Paid Family Leave (PFL) wage replacement benefits program administered by the EDD to also provide such benefits to include time off to participate in a "qualifying exigency" related to covered active duty or a call to covered active duty for an individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States. Such "qualifying exigency" leave is one of the leave of absence entitlements already made available to covered employees under the federal Family and Medical Leave Act (FMLA). AB 2399 makes several technical and clarifying amendments to this law, including the addition of a list of "qualifying exigencies" and definitions of covered military members who would create a "qualifying exigency" to qualify an employee for PFL benefits.

It is important to remember that PFL is not an actual leave of absence entitlement, but rather a wage replacement benefit that covered employees can use while out of work for a specified reason. As applied to "qualifying exigency" leaves of absence, any such leave of absence entitlement would be covered under FMLA or the California Family Rights Act (CFRA) [as revised by SB 1383]. In addition, public employers are excluded by default from PFL, but can opt-in either as a full entity or by bargaining unit. Therefore, these PFL benefits are only provided to public sector employees whose agencies have opted into the PFL program.

(AB 2399 amends Sections 3302 and 3307 of the Unemployment Insurance Code.)

AB 2992 – Expands Labor Code Sections 230 And 230.1 Protections For Any Employee Who Is A Victim Of A Crime, Or Whose Immediate Family Member Is Deceased As A Direct Result Of Crime.

Currently, Labor Code Section 230 prohibits employers from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking, to allow such employees to take time off to obtain legal relief to help ensure their health, safety, and welfare, or that of their child. For employers with 25 or more employees, Labor Code Section 230.1 also currently extends these leave protections for several additional specified purposes directly relating to an incident of domestic violence, sexual assault, or stalking, including seeking medical attention, psychological counseling, or certain social services. In addition, California's Paid Sick Leave Law (Labor Code §§ 245, et. seq.) also allow for the use of paid sick leave for victims of domestic violence, sexual assault, or stalking for the reasons noted in Labor Code Sections 230 and 230.1.

AB 2992 now extends eligibility for these protections under Labor Code Sections 230 and 230.1 to a broader category of employees who are a "victim," defined as:

- A victim of stalking, domestic violence, or sexual assault;
- A victim of a crime that caused physical injury, or that caused mental injury and a threat of physical injury;
- A person whose immediate family member is deceased as the direct result of a crime.

The bill also makes corresponding changes to the types of counseling and social services that are eligible for leave protection. The bill does not, however, provide a clear definition of when a family member's death is the "*direct result of a crime*."

In an interesting twist, AB 2992 did not amend the provisions of the Paid Sick Leave Law to use the expanded definition of "victim" for paid sick leave purposes. Accordingly, only victims of domestic violence, sexual assault, or stalking are entitled to use statutory paid sick leave for the purposes set forth in Labor Code Sections 230 and 230.1. However, Labor Code Section 230.2 does allow a victim or an immediate family member of a victim of a that is a serious or violent felony to use sick leave to attend judicial proceedings related to that crime. For other crime victims, employers can likely require that leave taken for these purposes is unpaid if the employee does not have other paid leave available.

Employers should review and revise their policies and procedures to incorporate this expanded definition of "victim" for purposes of Labor Code Section 230 and 230.1 and ensure that supervisors and managers are aware of these expanded protections for employees.

(AB 2992 amends Sections 230 and 230.1 of the Labor Code.)

PUBLIC SAFETY

AB 846 – Amends Peace Officer Screening Standards And Job Descriptions To Eliminate Bias And Emphasize Community Policing.

AB 846 is a police reform bill that broadens the minimum standards for peace officers to screen for an applicant's biases during the hiring process. In addition, AB 846 requires law enforcement departments to review and revise peace officer job descriptions and law enforcement recruiting practices to emphasize community-oriented policing.

Under Government Code Section 1031, peace officers are required to meet certain minimum standards, including undergoing an evaluation that finds them to be free from any physical, emotional or mental condition that might adversely affect their exercise of peace officer powers. AB 846 now amends Section 1031 to specify that such disqualifying condition includes any bias based on race or ethnicity, gender, nationality, religion, disability, or sexual orientation.

The bill also requires the Commission on Peace Officer Standards and Training (POST) to study and update its regulations and associated peace officer screening materials by January 1, 2022 to incorporate the identification of explicit and implicit bias based on race or ethnicity, gender, nationality, religion, disability, or sexual orientation.

In addition, AB 846 requires every law enforcement agency that employs peace officers to review their job descriptions used in the recruitment and hiring of peace officers to make changes to emphasize community-based policing, community interaction, and collaborative problem solving, while de-emphasizing the paramilitary aspects of the job. However, the bill clarifies that this provision is not intended to alter the job duties of peace officers.

In response to AB 846, law enforcement agencies should begin reviewing their peace officer hiring procedures and look for further guidance from POST to incorporate these new prohibitions on explicit and implicit biases. In addition, law enforcement agencies should review and revise their peace officer job descriptions to incorporate community-based policing, community interaction, and collaborative problem solving.

(AB 846 amends Section 1031 of the Government Code, adds Section 1031.3 to the Government Code, and adds Section 13651 to the Penal Code.)

AB 1196 – Prohibits The Use By Peace Officers Of Any Choke Hold Or Carotid Restraint.

In another police reform bill, AB 1196 eliminates the use of any choke hold or carotid restraint technique by law enforcement. The bill prohibits any state or local law enforcement agency from authorizing the use of a carotid restraint or choke hold by any peace officer employed by that agency. The bill defines a choke hold as any defensive tactic or force option involving direct pressure applied to a person's trachea. It also defines a "carotid restraint" as any restraint, hold, or other defensive tactic that applies pressure to the sides of a person's neck in order to subdue or control that person, that involves a substantial risk of restricting blood flow, and that may render the person unconscious.

While a number of law enforcement agencies have already prohibited the use of these techniques, AB 1196 now creates a uniform statewide policy that will become effective on January 1, 2021. Law enforcement agencies that have not yet prohibited their peace officers from using choke holds or the carotid restraint should take action to implement this prohibition in order to comply with this new law.

(AB 1196 adds Section 7286.5 to the Government Code.)

AB 1506 – Requires Attorney General To Investigate Officer-Involved Shootings That Result In The Death Of An Unarmed Civilian, And Establishes A Police Practices Division Within The State DOJ To Review Law Enforcement Agencies' Use-Of-Force Policies On Request.

Enacted as another police reform bill in response to several highly publicized incidents involving the use of deadly force by law enforcement officers, AB 1506 increases the level of the California Attorney General's oversight over local law enforcement's use of deadly force, and does so in two distinct ways.

Currently, the Attorney General has discretionary authority to conduct investigations of officer-involved shootings. Now, AB 1506 requires a state prosecutor from the Attorney General's office to investigate any incidents where an officer-involved shooting resulted in the death of an unarmed civilian – defined as any person not in possession of a deadly weapon. AB 1506 authorizes the assigned state prosecutor to do the following as part of their investigation:

- Investigate and gather facts related to the officer-involved shooting;

- Prepare and submit a written report that must include a statement of facts, a detailed analysis and conclusion for each issue under investigation, and – if applicable – recommendations to modify the policies and practices of the law enforcement agency in question; and

- Initiate and prosecute a criminal action against the officer if criminal charges are warranted.

The bill also requires the Attorney General to maintain a public website where these officer-involved shooting investigations are posted, subject to redaction for information that is required by law to be kept confidential.

Beginning July 1, 2023, AB 1506 also requires the Attorney General to operate a Police Practices Division within the Department of Justice. The purpose of this new Division is to review a local law enforcement agency's policies regarding the use of deadly force upon request of the agency. As part of the Division's review, it will make specific and customized policy recommendations based on recommended best practices to the local law enforcement agency.

As an important note, AB 1506 indicates that the Attorney General is required to implement this new law "*subject to an appropriation for this purpose by the Legislature*." The significance of this bill language is that the Attorney General is not yet technically required to implement this new law until the Legislature can appropriate the funding to do so – something that has not yet happened. As a result, the implementation of this new law may be delayed until the Legislature provides for the necessary appropriation of funding.

(AB 1506 adds Section 12525.3 to the Government Code.)

AB 1945 – Defines "First Responder" For Purposes Of The California Emergency Services Act.

AB 1945 amends the California Emergency Services Act (CESA) to add a formal definition of "first responder" for purposes of this law, and includes public safety dispatchers and telecommunicators in that definition. AB 1945 provides that for purposes of the CESA, a "first responder" is any employee of a state or local public agency who provides emergency response services, including any peace officer, firefighter, paramedic, emergency medical technician, public safety dispatcher, or public safety telecommunicator.

However, the application of this definition of "first responder" is limited only in application to CESA. The bill expressly specifies that the designation of these professions as "first responders" does not by itself confer any rights to public safety retirement benefits. In a similar fashion, AB 1945 does not modify workers compensation benefits for safety employees (e.g., Labor Code Section 4850), nor does it impact federal wage and hour laws (e.g., FLSA) for safety employees.

(AB 1945 adds Section 8562 to the Government Code.)

AB 2655 – Prohibits "First Responders" From Photographing A Deceased Person At The Scene Of An Accident Or Crime Except For Official Purposes.

AB 2655 makes it a criminal misdemeanor for a first responder who responds to the scene of an accident or crime to take photographs of a deceased person by any means, including either a personal electronic device or one belonging to the employing agency, except if the picture is taken for an official law enforcement purpose or to advance a genuine public interest. The bill makes this offense punishable by a fine of up to $1,000.

AB 2655 was drafted in response to reports that some first responders who responded to the death of former NBA player Kobe Bryant inappropriately circulated images of the scene for personal reasons. The bill was therefore enacted to protect the privacy of mourning families, the dignity of the deceased, and the public trust in first responders.

For purposes of this new law, a "first responder" is defined as a state or local peace officer, firefighter, paramedic, emergency medical technician, rescue service personnel, emergency manager, coroner, or employee of a coroner. The bill also requires that any agency that employs first responders must notify its employees of this prohibition on January 1, 2021.

To assist law enforcement agencies in reviewing a first responder's personal electronic device as part of a criminal investigation of this new law, AB 2655 also allows law enforcement to get a search warrant to seize property or items that contain evidence that a violation of this prohibition has occurred. However, the ability to obtain such a search warrant is limited only to a criminal investigation under this law and does not allow law enforcement to search for or seize evidence for only departmental policy violations.

In preparation for the implementation of AB 2655, law enforcement agencies need to notify their first responders of this new prohibition.

(AB 2655 adds Section 647.9 to and amends Section 1524 of the Penal Code.)

SB 480 – Prohibits Law Enforcement From Wearing Uniforms Resembling Military Uniforms.

SB 480 prohibits any department or agency other than the Department of Fish and Wildlife that employs peace officers from authorizing or allowing its employees to wear any uniform that is "substantially similar" to a uniform used by the armed forces or a state militia.

Under the bill, a uniform is "substantially similar" to a uniform used by the armed forces or a state militia, and therefore prohibited, if it resembles an official uniform of the United States Armed Forces or a state active militia closely enough that an ordinary person might believe the person wearing the uniform is a member of the armed forces or state militia.

However, a uniform is not "substantially similar" to a uniform used by the armed forces or a state militia if it includes at least two of three specified components:

1. A badge or star (or a facsimile thereof) mounted on the chest area;
2. A patch on one or both sleeves displaying the insignia of the employing agency or entity; and
3. The word "Police" or "Sheriff" prominently displayed across the back or chest area of the uniform.

Separately, SB 480 also prohibits law enforcement agencies from authorizing or allowing employees to wear a uniform made with a camouflage print or pattern.

The bill specifies that the prohibitions apply to any personnel who are assigned to uniformed patrol, uniformed crime suppression, or uniformed duty at any event – including protests and demonstrations, or similar disturbances.

However, these prohibitions do not apply to members of a Special Weapons and Tactics (SWAT) team, sniper team, or tactical team when engaged in a tactical response or operation.

Law enforcement agencies should review their current peace officer uniforms and make necessary adjustments to ensure compliance with these new requirements.

(SB 480 adds Section 13655 to the Penal Code.)

INDEPENDENT CONTRACTORS

AB 2257 – Amends, Clarifies, And Expands Exemptions To AB 5's "ABC Test" For Determining Independent Contractor Status. (Urgency Bill Effective Immediately On September 4, 2020).

In 2018, the California Supreme Court issued its decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*), and applied a stricter "ABC" test for determining the status of an independent contractor under the Wage Orders. In response, the Legislature passed AB 5 last year (effective January 1, 2020) to codify this new "ABC" test in the Labor Code and Unemployment Insurance Code for purposes of employment, workers' compensation coverage, and eligibility for unemployment insurance benefits. AB 5 also included a number of exceptions to the application of the "ABC" test for certain types of work that could then be governed by the older and more flexible multifactor standard established in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

AB 2257 is clean-up legislation to AB 5, and amends certain exceptions to the "ABC" test, in addition to reorganizing its statutory structure in the Labor Code so it is easier to comprehend.

AB 2257 was designated an urgency bill, and so became effective immediately upon Governor Newsom signing it into law on September 4, 2020.

First, AB 2257 reorganized the provisions in the previous Labor Code Section 2750.3 that were added by AB 5, and separated them out into new Labor Code Sections 2775-2787.

AB 2257 also amended the "business-to-business" exemption to the "ABC" test that was a part of AB 5 to now expressly include public agencies – something that was unclear previously. This exemption allows contracting relationships between

a "business service provider" providing contracted services to a "contracting business" to be governed under the *Borello* standards instead of the "ABC "Test." However, the amended language still does not list public agencies in the types of entities that can constitute a "business service provider." Thus, there is still an open question whether the business-to-business exemption would apply in situations where one public agency provides services under contract to another.

AB 2257 also makes the following additional changes to some of the eligibility criteria for the "business service provider" exemption:

- Currently, the business service provider must provide services directly to the contracting business rather than to customers. AB 2257 modifies this restriction to clarify that it **does not** apply if the business service provider's employees are solely performing services under the name of the business service provider and the business service provider regularly contracts with other businesses.

- Specifies that a contract with a business service provider must include the payment amount, rate of pay, and the due date for the payment.

- Allows for a residence to qualify as the separate business location of the business service provider.

- Previously, AB 5 required that the business service provider "*actually*" contract with other businesses and provide similar services. AB 2257 changes this requirement to require only that the business service provider "*can*" contract with other businesses.

- Clarifies that the business service provider may use proprietary materials of the contracting agency that are necessary to perform the services of the contract.

AB 2257 also amends the requirements for several other *Borello* exemptions AB 5 created for specific professions and occupations, and created several additional occupation-specific *Borello* exemptions. For example, AB 2257 exempts individuals who provide underwriting inspections and other services for the insurance industry, a manufactured housing salesperson, people engaged by an international exchange visitor program, consulting services, animal services, competition judges, licensed landscape architects, specialized performers teaching master classes, registered professional foresters, real estate appraisers and home inspectors, videographers, photo editors, translators, feedback aggregators, and a variety of occupations in the music industry. It also no longer requires that freelance writers, photographers, and editors limit their work to no more than 35 submissions per year to each putative employer.

Finally, AB 2257 adds several cross-references to the amended "ABC" test to the statutes governing personal income tax and other employment-related taxes.

Even with this clean-up legislation, the application of the more stringent "ABC" test for independent contractors or whether one of the *Borello* exemptions may apply is a very fact-specific analysis. Employers should seek legal counsel to review these law as applied to determining whether an individual is an independent contractor or employee.

(AB 2257 repeals Section 2750.3 of the Labor Code, adds Sections 2775 through 2787 to the Labor Code, amends Sections 17020.12 and 23045.6 of the Revenue and Taxation Code, and adds Sections 18406, 21003.5, and 61001 to the Revenue and Taxation Code.)

WAGE AND HOUR / WHISTLEBLOWER CLAIMS

AB 1947 – Extends Deadline On Claims Before The Labor Commissioner To One Year, And Provides Attorneys' Fees In Successful Labor Code Section 1102.5 Whistleblower Retaliation Proceedings.

Currently, any person who has a claim against an employer under the Labor Code that is under the jurisdiction of the Division of Labor Standards Enforcement (DLSE or Labor Commissioner) has six months from the occurrence of the violation to file the claim. AB 1947 now extends the deadline for filing a complaint from six months to **one year** from the occurrence of the violation. This change may have minimal impact on public employers because many provisions of the Labor Code do not apply to them. Nonetheless, for those more limited claims under the Labor Code that the Labor Commissioner does have jurisdiction over public employers, the impact of this change is that current and former employees will now have more time to file any such applicable claims.

AB 1947 also adds a provision to Labor Code Section 1102.5 that authorizes courts to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of that law's "whistleblower" protections that prohibit an employer from retaliating against an employee who discloses suspected violations of law to a government or law enforcement agency.

(AB 1947 amends Sections 98.7 and 1102.5 of the Labor Code.)

AB 2588 – Requires A General Acute Care Hospital Employer To Indemnify Both Employees And Applicants For Employment Providing Direct Patient Care For The Cost Of Any Employer-Provided Or Employer-Required Educational Program Or Training.

Labor Code Section 2802 generally requires all employers to pay for or reimburse any costs necessary for workers to perform their job duties, and costs incurred by a worker in carrying out the directions of their employer. AB 2588 was enacted in response to practices by some health care employers requiring employment applicants to pay out of pocket for training programs mandated by the employer as a condition of full time employment. AB 2588 ends this practice by applying Section 2802's reimbursement requirements to any expense or cost of employer-provided or employer-mandated educational or training for employees providing direct patient care at a general acute care hospital, as well as applicants for such employment. This includes residency programs, orientations, and competency validations.

However, AB 2588 does not require reimbursement for the cost or expense of meeting the requirements for any license, registration, or certification necessary to legally work in a particular position. Nor does it require reimbursement for costs or expenses of any education or training the employee or applicant voluntarily undertakes.

Furthermore, AB 2588 provides that in any civil action brought to enforce this provision, a prevailing plaintiff is entitled to reasonable attorney's fees.

General acute care hospitals should review their required educational programs and trainings for employees and applicants and make any necessary adjustments to either directly cover the cost of such programs or provide compliant reimbursement procedures for any costs or expenses incurred by a covered employee or applicant.

(AB 2588 adds Section 2802.1 to the Labor Code.)

SB 1384 – Authorizes The Labor Commissioner To Represent Claimants Who Are Financially Unable To Afford Legal Counsel In Arbitration Proceedings Arising From Claims Within The Commissioner's Jurisdiction.

Currently, in a superior court proceeding challenging a Labor Commissioner decision, the Labor Commissioner has discretion to represent a claimant who is unable to afford their own counsel and has requested such representation. In addition, if the claimant is only seeking to uphold an amount awarded by the Labor Commissioner and is not objecting to any part of the Commissioner's order, the Labor Commissioner must represent the claimant in the superior court proceeding.

SB 1384 now expands the Labor Commissioner's discretion to represent a claimant who is unable to afford their own counsel such that it also includes arbitration proceedings that are applicable to the claim in lieu of a judicial forum. In addition, SB 1384 also provides that any claimant who is unable afford legal counsel and who has a claim normally adjudicated by the Commissioner that is now subject to arbitration can have the Labor Commissioner represent them in the arbitration. In such cases, the Labor Commissioner, upon request, must represent such a claimant who is unable to afford counsel if the Labor Commissioner determines that the claim has merit after conducting an informal investigation.

Finally, SB 1384 requires that any petition to compel arbitration of a claim pending before the Labor Commissioner be served on the Labor Commissioner. The bill then gives the Labor Commissioner the authority to represent the claimant in any such proceedings to determine the enforceability of the arbitration agreement.

While the impact of this bill may be minimal to public employers based on the Labor Commissioner's limited jurisdiction over public employee claims, this could still apply to public employees unable to afford legal counsel who do have a valid claim and are subject to a mandatory arbitration agreement of such claims.

(SB 1384 amends Section 98.4 of the Labor Code.)

UNEMPLOYMENT INSURANCE

AB 1731 – Temporarily Streamlines Application Process For Employers To Participate In The Unemployment Insurance Work Sharing Program. (Urgency Bill Effective Immediately On September 28, 2020).

Currently, employers who are facing an economic downturn have the option to participate in the Employment Development Department's (EDD) Unemployment Insurance Work Sharing program as a temporary alternative to layoffs. The work sharing program allows an employer to reduce an employee's hours in lieu of layoff and allow the employee to receive partial unemployment benefits, even if the reduction of hours and compensation would not otherwise make them eligible for such benefits. However, this EDD program is not frequently used by employers because the application process can be administratively burdensome by requiring the submission of a detailed written plan to the EDD that can then take several days to be approved.

In response to the economic uncertainty following the COVID-19 pandemic, the Legislature enacted AB 1731 to minimize the risk of widespread layoffs and increase the use of this work sharing program by streamlining the application process. Under AB 1731, any work sharing plan application submitted by eligible employers between September 15, 2020, and September 1, 2023 is automatically deemed approved for one year unless the employer requested a shorter plan.

As an urgency bill, AB 1731 became effective immediately upon Governor Newsom signing it into law on September 28, 2020.

(AB 1731 amends Section 1279.5 of and adds Sections 1279.6 and 1279.7 to the Unemployment Insurance Code.)

LABOR RELATIONS

AB 79 – Adds More Specific Requirements For Union Access To Enrollment Orientation For New IHSS Providers (Budget Trailer Bill Effective Immediately On June 29, 2020).

On June 29, 2020, California Governor Gavin Newsom signed into law the State Budget and its accompanying budget trailer bills. Included among these budget trailer bills, AB 79 changes how and when a recognized labor union can make a presentation to prospective in-home supportive services (IHSS) providers at the time the provider first enrolls with the relevant county agency, public authority, or non-profit consortium.

As a budget trailer bill, AB 79 became effective immediately upon the Governor's approval of the bill on June 29, 2020.

Currently, union representatives must be granted access to the new provider orientation to make a presentation of up to thirty minutes. Previously, the law required the county and union, on request by either party, to negotiate regarding the details of the union's access rights.

AB 79 removes the negotiation element, and instead dictates specific terms for such orientation access. AB 79 specifies that the union must be allowed to give its presentation at the beginning of the orientation. It also requires a county, prior to scheduling a new provider orientation, to provide the union with at least 10 days advance notice of the planned time, date, and location of the orientation. If the union notifies the county within three business days that it is unavailable for the planned orientation, AB 79 requires the county to make reasonable efforts to reschedule the orientation so the union can attend, so long as rescheduling would not delay the provider enrollment by more than 10 business days. Prior to the orientation, AB 79 also requires the county to provide the union with each prospective provider's name, address, and home telephone number, personal cellular telephone number (if known), and personal email address (if known).

In addition, AB 79 adds language to the Welfare and Institutions Code prohibiting counties from discouraging prospective providers from attending, participating, or listening to the union's orientation presentation, but specifies that prospective providers may choose not to participate in the union's presentation. This additional language is not a

significant change in the law, as the anti-interference provisions of the Meyers-Milias-Brown Act already covered the prohibited conduct.

(AB 79 amends Section 12301.24 of the Welfare and Institutions Code.)

AB 2850 – Expands The Jurisdiction Of The Public Employment Relations Board To Include Labor Relations At The San Francisco Bay Area Rapid Transit District.

Currently, the San Francisco Bay Area Rapid Transit District (BART), is not under the jurisdiction of the Public Employment Relations Board (PERB) in relation to its labor relations obligations.

AB 2850 changes this by now bringing BART under that PERB's jurisdiction to administer and enforce its applicable labor provisions of the BART Act. The bill adds a number of additional provisions to these statutes mirroring those found in other labor relations statutes like the Meyers-Milias-Brown Act. AB 2850 is another example of the Legislature's move to expand the jurisdiction of PERB in the past few years.

(AB 2850 adds Sections 28848, 28849, 28856, 28857, 28858, 28860, 28861, 28862, and 28862 to and amends Sections 28850 and 28851 of the Public Utilities Code.)

CRIMINAL BACKGROUND CHECKS

SB 905 – Prohibits DOJ LiveScan Background Checks From Requiring Certain Applicants To Provide A Residence Address, And Expands LiveScan Access To FBI Background Checks.

Currently, employers with applicants seeking a license, employment, or volunteer position where the applicant would have supervisory or disciplinary power over a minor, can request a LiveScan background check from the California Department of Justice (DOJ) showing the applicant's conviction record and any arrest pending adjudication involving specific offenses. SB 905 clarifies that such a LiveScan background check request must include the applicant's fingerprints, but cannot require the applicant to disclose their residence address.

SB 905 also expands LiveScan background checks to enable all authorized agencies and entities who get such background checks from the DOJ to also include background check information from the Federal Bureau of Investigation (FBI). Previously, only certain entities could receive FBI background checks as part of the DOJ LiveScan background check.

(SB 905 amends Sections 11105 and 11105.3 of the Penal Code.)

EMPLOYMENT SETTLEMENT AGREEMENTS

AB 2143 – Makes Clarifying Changes To Law Prohibiting No-Rehire Provisions In Employment Settlement Agreements.

Last year's AB 749 (effective January 1, 2020) prohibited settlement agreements from containing a provision that restricts an employee from obtaining future employment with the employer (frequently referred to as a "no re-hire" clause) if that employee has filed a claim or civil action against the employer. However, AB 749 provided an exception to this restriction on no re-hire clauses in settlement agreements where the employer made a good faith determination that the aggrieved person engaged in sexual harassment or sexual assault.

AB 2143 makes several clarifying changes to this law as follows:

- Expands the sexual harassment/sexual assault exception to also allow no re-hire clauses in situations where the employer determined the employee engaged in any criminal conduct.
- Requires that the good faith determination of sexual harassment, sexual assault, or any criminal conduct be made **and documented** before the aggrieved person filed the claim or civil action against the employer, thus preventing employers operating in bad faith from making an after-the-fact determination of such misconduct.
- Finally, the law now also requires that the aggrieved person files their claim or complaint against the employer in good faith, thus, avoiding the potential for an employee filing an unfounded complaint just to invoke the protections of this law and avoid a no re-hire clause.

Although AB 2143 further clarifies the application of these exceptions to the prohibition on no-rehire clauses in employment settlement agreements, the burden is still on the employer to meet the qualifications and establishment of "good faith" determinations for the reasons noted above in order to use a no re-hire clause. Employers looking to invoke such an exception should therefore do so cautiously, and we recommend consulting legal counsel to assist in making such determinations.

(AB 2143 amends Section 1002.5 of the Code of Civil Procedure.)

RETIREMENT

AB 2101 – Amends County Employees' Retirement Law To Allow Purchased Service Credit After Parental Leave And Military Leave And Require Service Reinstatement For Terminated Employees Who Win Reinstatement On Appeal.

AB 2101 is an omnibus clean-up bill relating to the Public Employees' Retirement Law (PERL), the Teachers' Retirement Law (TRL), and the 1937 Act County Employees' Retirement Law (CERL). While AB 2101 makes numerous technical and conforming changes to the PERL and CERL, it substantively amends the CERL in the following three areas:

1. Parental Leave Credit: Adds a new provision to the CERL allowing members of a county retirement system who return to active service following a period of unpaid parental leave to purchase service credit for the duration of the absence upon payment of the contributions they would have made during that period, with interest.

2. Military Leave Credit: Adds a similar provision allowing members of a county retirement system to purchase service credit for an unpaid leave of absence for military service, consistent with the employee's rights under the federal Uniformed Services Employment and Reemployment Rights Act of 1994, and repeals an older inconsistent provision.

3. Impact of Reinstatement Following Involuntary Termination: Adds a provision stating that a person who takes a service retirement following an involuntary termination, and who is later reinstated to the same position pursuant to an administrative or judicial appeal, is reinstated from retirement as if there were no intervening period of retirement. Such a person is required to repay any retirement allowance earned during the period of retirement, and is required to pay pension contributions on any award of back pay. This change makes the CERL consistent with the rules on this issue under the PERL.

(AB 2101 amends Sections 22106.2, 22119.5, 22144.3, 22156.1, 22170.5, 22501, 22509, 22711, 22714, 22717, 22718, 24204, 25025, 26113, 26801, 26803, 26804, 26808, 26810, and 27204 of, adds Sections 23011 and 26303.7 to, and repeals Section 22151 of the Education Code. It also amends Sections 20230, 20731, 22772, 22960.95, 22970.85, 31465, 31627.1, 31627.2, 31631.5, 31641.45, 31646, 31662.2, 31670, 31672, 31672.1, 31672.2, 31672.3, 31706, 31760.1, 31760.2, 31765, 31765.1, 31776.3, 31781.1, 31781.2, 31785, 31785.1, 31786, 31786.1, 31787, 31787.5, 31855.3, and 75088.3 of, adds Sections 31454.7 and 31680.10 to, repeals Sections 31649.5, 31649.6, 31650, and 31651 of, and repeals and adds Section 31649 of the Government Code.)

AB 2967 – Prohibits Public Agencies From Amending Their Contract With CalPERS To Selectively Exclude Groups Of Employees.

Under existing law, a public agency that has a contract with the California Public Employees' Retirement System (CalPERS) to provide retirement benefits is generally required to cover all its employees under the contract, except for employees who are excluded from CalPERS membership by law, or groups of employees that CalPERS agrees to exclude. Current law allows an agency to seek a contract amendment to exclude specific groups of future employees.

AB 2967 was enacted in response to a city in California that recently withdrew from a regional firefighting authority and decided instead to re-establish its own fire department in an effort to save costs. As part of those cost-saving measures, it sought to save of pension costs by excluding its new firefighters from the City's CalPERS contract and instead providing them with a defined contribution plan instead.

In an effort to prevent CalPERS agencies from taking such action in the future, AB 2967 restricts member agencies' ability to selectively exclude groups of employees in any contract entered into, amended, or extended on or after January 1, 2021.

The bill replaces a provision of the Public Employees' Retirement Law that allowed agencies to exclude groups of future employees from CalPERS membership by way of a contract amendment with an explicit prohibition on doing so. However, it clarifies that where a contract already excludes groups of employees, an amendment that enumerates or clarifies that exclusion without expanding it is not prohibited. AB 2967 also adds a provision expressly stating that membership is compulsory for all employees included under a contract.

(AB 2967 amends Sections 20460 and 20502 of the Government Code.)

BROWN ACT

AB 992 – Clarifies That The Brown Act Does Not Prohibit Elected Officials From Discussing With The Public Matters Within The Agency's Jurisdiction On Social Media.

AB 992 is a bill intended to bring the provisions of the Brown Act more in line with the realities of political discourse in the age of social media.

Currently, the Brown Act generally requires meetings of the legislative body of any public agency to be noticed in advance and open and accessible to the public. The Act defines a "meeting" as any gathering, including by telecommunication, of a majority of the members of any legislative body to hear, discuss, deliberate, or take action on any item that is within the jurisdiction of that agency. The Brown Act also prohibits members of legislative bodies from engaging in "serial communications," whereby a majority of the members of the legislative body discuss, deliberate, or take action by means of a series of communications between themselves, either directly or through intermediaries. In recent years, these provisions have raised questions about what type of activity elected officials can engage in on social media, which – if the Brown Act is read strictly – could create a number of potential pitfalls for elected officials.

AB 992 adds a new exception to the ban on "serial communications," stating that it does not prevent a member of a legislative body from engaging in conversations on a social media platform that is open and accessible to the public if:

- The purpose of those communications is to answer questions, provide information to the public, or solicit information from the public; and
- A majority of the members of that legislative body **do not** discuss agency business of a specific nature among themselves.

The bill specifically prohibits a member of a legislative body from responding directly to any communication made, posted, or shared by another member of that body regarding any matter within the agency's jurisdiction.

This provision will remain in effect until January 1, 2026, at which time it will automatically sunset unless the Legislature extends it further.

(AB 992 amends Section 54952.2 of the Government Code.)

BENEFITS

AB 276 – Conforms State Law To Federal CARES Act Increase On The Amount That May Be Borrowed Against A Qualified Employer Retirement Plan Without An Adverse Tax Penalty.

This bill brings California's tax treatment of retirement account loans in line with the federal Coronavirus Aid, Relief and Economic Security Act (CARES Act). The CARES Act was an economic relief package passed by Congress and signed into law by President Trump in March. The economic relief package includes many provisions to help Americans with the economic impacts of the COVID-19 pandemic. One such provision allows qualified borrowers impacted by COVID-19 to borrow up to $100,000 from qualified employer retirement plans (such as 401(k), 403(b), 457(b) or 401(a) plans), without facing a federal income tax penalty. This is an increase from the standard limit of $50,000. This bill applies these same rules to California's personal income tax laws, allowing qualified borrowers impacted by COVID-19 to borrow up to $100,000 from a qualified employer retirement plans without facing an adverse tax penalty under state law.

(AB 276 amends Section 17085 of the Revenue and Taxation Code.)

BUSINESS AND FACILITIES

AB 713 – Creates A New Healthcare-Related Exemption From The California Consumer Privacy Act. (Urgency Bill Effective Immediately On September 25, 2020).

In 2018, California lawmakers passed the California Consumer Privacy Act (CCPA), giving California residents a number of consumer privacy rights, including the right to find out what personally identifying information for-profit companies are collecting about them, to opt out of having such information collected, and to have that information deleted.

The *CCPA only applies to for-profit companies* doing business in California, that: (a) have annual gross revenues in excess of $25 million; or (b) receive or disclose the personal information of 50,000 or more Californians; or (c) derive 50 percent or more of their annual revenues from selling California residents' personal information.

Although public agencies are not required to comply with the CCPA, when contracting with covered companies public agencies should ensure that the obligations and risks of the CCPA rest squarely with the for-profit company. Specifically, where a public entity contracts with a for-profit company and that company will be collecting information relating to the public agency, make sure to include contract provisions that require the for-profit company to comply with all applicable privacy laws, including the CCPA.

We also recommend tracking changes in this area of law, to help in understanding what may be expected of vendors. For example, AB 713 creates a new healthcare-related exemption from certain requirements in the CCPA out of concerns that the CCPA was adversely impacting health care research and operations. Under the new exemption, information is not subject to the CCPA if it meets both of the following requirements in Civil Code Section 1798.146(4):

1. The information is de-identified in accordance with the de-identification requirements in the Privacy Rule promulgated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as set forth in 45 C.F.R. § 164.514; and
2. The information is "derived from patient information that was originally collected, created, transmitted, or maintained by an entity regulated by" HIPAA, California's Confidentiality of Medical Information Act (CMIA), or the Federal Policy for the Protection of Human Subjects, often referred to as the Common Rule.

This new de-identification exemption is in addition to, and separate from, the CCPA's current language which also excludes from its scope certain de-identified information, though the definition for de-identification is different in the CCPA than it is in the HIPPA. Thus, AB 713 now provides an alternative basis to argue that patient information that has been de-identified for HIPAA purposes is also exempt from the CCPA.

The new de-identification exemption is subject to conditions. For example, AB 713 prohibits re-identification, except for specific purposes such as treatment or billing purposes. The bill also requires that contracts for the sale or license of de-identified patient information include specific provisions prohibiting the purchaser or recipient from re-identifying the information and limiting re-disclosure of the information to third parties.

AB 713 also highlights that public agencies need to keep an eye on developments in privacy laws, as this is a continually changing area of law. For example, AB 713 was passed as urgency legislation (which allowed it to go into effect immediately upon the Governor's signature) in response to concerns about Proposition 24, an initiative on this November's ballot. If passed, Proposition 24 will create the California Privacy Rights and Enforcement Act (CPREA) to replace the CCPA. Supporters of the proposition say that the CPREA will give consumers even more control over their personal data and make it harder for the Legislature to change privacy laws. Accordingly, AB 713 was preemptively passed in an attempt to preserve exemptions for medical information, just in case Proposition 24 impacts the CCPA's pre-existing exemptions for de-identified information.

All of this potential change highlights that public agencies need to be on high alert for amendments, changes and modifications to the CCPA and other California privacy laws, to ensure that they or their vendors are in compliance with this continually evolving area of the law.

(AB 713 amends Section 1793.130 of the Civil Code and adds Sections 1798.146 and 1798.148 to the Civil Code.)

AB 1281 – Extends Exemption, From January 1, 2021 To January 1, 2022, For Certain Information Relating To Employees And Business-To-Business Communications From Provisions Of The California Consumer Privacy Act.

In 2018, California lawmakers passed the California Consumer Privacy Act (CCPA), giving California residents a number of consumer privacy rights, including the right to find out what personally identifying information for-profit companies are collecting about them, to opt out of having such information collected, and to have that information deleted.

The *CCPA only applies to for-profit companies* doing business in California, that: (a) have annual gross revenues in excess of $25 million; or (b) receive or disclose the personal information of 50,000 or more Californians; or (c) derive 50 percent or more of their annual revenues from selling California residents' personal information.

Although not covered by the law, public agencies that contract with a for-profit company who will be collecting information relating to their operations, should make sure to include contract provisions that require for-profit companies to comply with all applicable privacy laws, including the CCPA. We also recommend tracking changes in this area of law, to help in understanding what may be expected of vendors and what expectations employees and community members may have with respect to their privacy, as this is a rapidly and constantly changing area of law.

For example, the CCPA includes an exemption from its provisions for information collected by a business about a natural person in the course of the person acting as a job applicant, employee, owner, director, officer, medical staff member, or contractor of a business. Also exempted is personal information reflecting a written or verbal communication or a transaction between the business and a natural person who is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, nonprofit, or government agency, and whose communications or transaction with the business occur solely within the context of the business conducting due diligence regarding, or providing or receiving a product or service to or from that company, partnership, sole proprietorship, nonprofit, or government agency.

These exemptions were set to sunset on January 1, 2021. However, in November, the voters will vote on Proposition 24, which, if enacted, would amend the CCPA by, among other things, extending these sunsets by two years, to give stakeholders additional time to assess whether certain business transactions should be exempted and how to protect employee privacy. Contingent on that Proposition not passing in November, AB 1281 extends the exemptions by an additional year to January 1, 2022, to give stakeholders more time to assess these issues, regardless of the outcome of Proposition 24.

(AB 1281 amends Section 1798.145 of the Civil Code.)

AB 1286 – Requires Companies Distributing Shared Mobility Devices, Such As Scooters And Bicycles, To First Enter Into An Agreement With The City Or County In Which They Want To Leave The Mobility Devices For Use And Requires Cities And Counties To Adopt Rules Governing The Use Of Such Devices By January 1, 2021.

This bill seeks to establish statewide requirements applicable to scooters, bikes, and other devices that may be rented via mobile apps by members of the public. The bill refers to these devices as "shared mobility devices," which are defined as an "electrically motorized board," "electric bicycle," "or other similar personal transportation device . . . made available to the public by a shared mobility service provider for shared use and transportation in exchange for financial compensation via a digital application or other electronic or digital platform."

The bill requires providers to enter into an agreement with, or obtain a permit from, the city or county where the devices will be used. Among other things, the agreement or permit must require the provider to maintain commercial general liability insurance with coverage of no less than one million dollars ($1,000,000) for each occurrence for bodily injury or property damage and no less than five million dollars ($5,000,000) aggregate for all occurrences during the policy period. The insurance cannot exclude coverage for injuries or damages to the rider caused by the provider.

Cities and counties must also adopt rules for the operation, parking, and maintenance of shared mobility devices. Such rules may be adopted by ordinance, agreement, or permit terms. Cities and counties that have authorized shared mobile device providers to operate before January 1, 2021, must adopt such rules by January 1, 2022. Cities and

counties that authorize a provider to operate on or after January 1, 2021, must adopt such rules before a provider may offer any shared mobility device for rent or use within the limits of the city or county.

(AB 1286 adds Section 2505 to the Civil Code.)

AB 1929 – Authorizes Counties Statewide To Implement Systems For Internet-Based Mandated Reporting Of Non-Emergency Suspicions Of Child Abuse And Neglect.

In 2015, Governor Jerry Brown signed SB 478 which established a five-year pilot program authorizing up to 10 county welfare agencies to develop programs for internet-based reporting of child abuse and neglect. The systems could only be used by certain mandated reporters, such as peace officers and teachers, and only for certain non-emergency reports. The pilot program is scheduled to sunset as of January 1, 2021. This bill, AB 1929, expands the pilot project created by SB 478 statewide, removes the sunset date, and removes the pilot project's limitations on which mandated reporters may use an internet-based reporting system, instead, allowing any mandated reporter to use it, while continuing restrictions relating to emergency reporting.

Specifically, AB 1929 allows any county welfare agency to develop a program for internet based reporting of child abuse and neglect, so long as the system does all of the following:

- Restricts the reports of suspected child abuse or neglect to reports indicating that the child is not subject to an immediate risk of abuse, neglect or exploitation and that the child is not in imminent danger of severe harm or death;
- Includes standardized safety assessment qualifying questions in order to obtain necessary information required to assess the need for child welfare services and a response, and, if appropriate, redirect the mandated reporter to perform a telephone report;
- Requires a mandated reporter to complete all required fields, including the identity and contact information of the mandated reporter, in order to submit the report; and
- Has appropriate security protocols to preserve the confidentiality of the reports and any documents or photographs submitted through the system.

In a county where an internet-based system is active, a mandated reporter may use that system instead of the initial telephone report and the mandated reporter does not have to submit the written follow-up report. However, if they use the internet-based system, they are required to cooperate, as soon as possible, with the agency on any requests for additional information if needed to investigate the report.

AB 1929 also requires the California Department of Social Services to oversee internet-based reporting through the issuance of written directives and requires each county that implements an internet-based system to hire an evaluator to monitor the implementation of the program and submit evaluations to CDSS during the first two years of implementation

(AB 1929 amends Section 11166.02 of the Penal Code and Section 10612.5 of the Welfare and Institutions Code.)

AB 2231 – Defines "De Minimis" For The Purposes Of Determining When A Public Subsidy Provides To A Private Development Projects Is So "De Minimis" As To Not Subject The Development To Prevailing Wage Requirements.

Current law requires that not less than the general prevailing rate of per diem wages be paid to all workers employed on a "public works" projects. The prevailing wage is higher than the minimum wage and varies by region and craft. Current law also includes various exceptions to the prevailing rate requirement, including when the state or a political subdivision reimburses a private developer or subsidizes the costs of a private development, so long as the reimbursement or subsidy is "de minimis in the context of the project." (Labor Code §1720) Current law, however, does not include a definition for "de minimis," though the Department of Industrial Relations has a policy of designating any subsidy or reimbursement in excess of 2% of the total project costs more than de minimis, making the project a public works subject to the prevailing wage requirements.

AB 2231 fills this gap in the law by providing a definition for "de minimis." AB 2231 states that a "public subsidy is de minimis if it is both less than six hundred thousand dollars ($600,000) and less than 2 percent of the total project cost." A public subsidy is also de minimis if the project "consists entirely of single-family dwellings" and the subsidy "is less than 2 percent of the total project cost."

AB 2231's new definition does not apply to a project that was advertised for bid, or a contract that is awarded, before July 1, 2021.

(AB 2231 amends Section 1720 of the Labor Code.)

AB 2311 – Requires Public Agencies To Provide Notice To Contractors When Public Works Project Requires The Use Of A Skilled And Trained Workforce.

Certain public works projects require that a public entity obtain an enforceable commitment from a bidder, contractor or other entity that it will use a skilled and trained workforce. Public agencies can also require that a bidder, contractor or other entity use a skilled and trained workforce to complete a contract or project.

AB 2311 is intended to address a problem of contractors not having advanced notice of when a skilled and trained workforce is required for a project. AB 2311 now requires a public entity to include in all bid documents and construction contracts, a notice that the project is subject to the skilled and trained workforce requirements. AB 2311 further provides that the failure of a public entity to provide such a notice does not excuse the public entity or the bidder, contractor or other entity from the obligation to use a skilled or trained workforce to complete the project, if such a requirement is imposed by statute or regulation.

(AB 2311 amends Section 2600 of the Public Contracts Code and adds Section 2600.5 to the Public Contracts Code.)

SB 1003 – Extends Qualified Immunity To Public Agencies To Persons Using Wheeled Recreational Devices At Skate Parks, Other Than Skateboards, Subject To Certain Conditions.

Existing law provides qualified immunity to public agencies and public employees for injuries suffered by individuals engaged in "hazardous recreational activities," which the law identifies as an activity "that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator," such as rock climbing. (Gov. Code Section 831.7.) In the 1990s, skateboarding at a facility or park owned or operated by a public entity was categorized as a hazardous recreational activity for which public agencies could receive qualified immunity, so long as (1) the person riding the skateboard was 12 years of age or older and engaged in a stunt, trick, or luge riding and (2) the public agency prohibited riding at the skate park unless that person is wearing a helmet, elbow pads, and knee pads. (Health and Safety Code § 115800). A public agency could meet the second requirement at a facility not supervised on a regular basis by: (1) adopting an ordinance that requires a person riding a skateboard to wear a helmet, elbow pads, and knee pads; and (2) posting signs giving reasonable notice about these safety requirements and warning persons that noncompliance will subject them to citation.

This bill extends that same qualified immunity, subject to the same requirements, to injuries arising from the use of "other wheeled recreational devices." "Other wheeled recreational devices" are defined as "nonmotorized bicycles, scooters, inline skates, roller skates, or wheelchairs being used for recreational purposes."

Other wheeled recreational devices were previously added to the law in 2015, but a sunset date on the addition lapsed on January 1, 2020 without any extension. This bill once again extends the qualified immunity afforded to public agencies in connection with skateboarding to other wheeled devices, but this time without a sunset provision.

(SB 1003 amends Health and Safety Code Section 115800.)

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