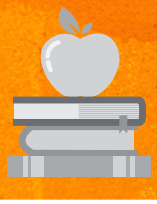
LCW 2021

PRIVATE EDUCATION LEGISLATIVE ROUNDUP



The Private Education Legislative Roundup is a compilation of bills, presented by subject, which were signed into law and have an impact on the employment and student related issues of our clients. Unless the bills were considered urgency legislation (which means they went into effect the day they were signed), bills are effective January 1, 2022. Urgency legislation will be identified as such. Several of the bills summarized below apply directly to independent and private schools, colleges and universities. Bills that do not directly apply are presented either because they indirectly apply, may set new standards that apply or would generally be of interest to our independent and private education clients.

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EMPLOYEES

FAMILY & MEDICAL CARE LEAVE

AB 1033 – Expands CFRA To Protect Leave Taken To Care For A Parent-In-Law; Changes Mediation Requirements For Suits Against Certain Small Employers.

Assembly Bill 1033 (AB 1033) makes various changes to the Moore-Brown-Roberti Family Rights Act, commonly known as the California Family Rights Act (CFRA), which is a part of the Fair Employment and Housing Act (FEHA). Broadly, CFRA gives eligible employees a right to take up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave, including leave to care for a parent, spouse, and other listed family members.

Leave to Care for Parent-in-Law

In 2020, Senate Bill 1383 expanded the list of family members that an employee can take leave to care for. That bill added the term "parent-in-law" to the definition section of the CFRA, but omitted parents-in-law from the actual, substantive list of covered family members. That omission left employers uncertain about whether they are required to provide employees time off under the CFRA to provide care for a parent-in-law. AB 1033 now clarifies that employees can take protected leave to care for a parent-in-law.

Changes to Small Employer Family Leave Mediation Program

AB 1033 amends certain provisions regarding the small employer family leave mediation pilot program established in 2020's Assembly Bill 1867, which requires mediation through the California Department of Fair Employment and Housing (DFEH) before an employee can sue certain small employers with between 5 and 19 employees for alleged violations of the CFRA.

The current process allows a covered small employer or the employee to request mediation after the DFEH issues a right to sue letter. 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 limitations on claims is tolled until the mediation is complete.

AB 1033 revises several procedural aspects of the pilot program, including the following:

1. When an employee requests an immediate right to sue letter for a CFRA claim, the DFEH must notify the employee in writing that if either party requests mediation, mediation must be completed prior to filing suit.

2. The employee must contact the DFEH's dispute resolution division prior to filing a lawsuit and to indicate whether they are requesting mediation.

3. If DFEH receives a request to mediate from either party within 30 days, it shall initiate the mediation within 60 days of DFEH's receipt of the request or the receipt of the notification by all named respondents, whichever is later.

4. Once mediation has been initiated, the mediator must notify the employee no later than 7 days before mediation of certain statutory rights to request certain employment-related information, and must help facilitate other reasonable requests for information.

In addition, if a covered small employer does not receive the required mediation notification due to the employee's failure to contact the DFEH prior to filing suit, AB 1033 provides that the employer is entitled, on request, to a stay of any pending civil action or arbitration until the mediation is complete or deemed unsuccessful.

AB 1033 does not amend the existing sunset date for the mediation pilot program, which will expire automatically on January 1, 2024.

(AB 1033 amends Section 12945.2 and 12945.21 of the Government Code.)

HARASSMENT, DISCRIMINATION, & RETALIATION

SB 331 – Expands Existing Restrictions Against Employment-Related Non-Disparagement Agreements And Non-Disclosure Clauses In Settlement Agreements.

In 2019, the Legislature adopted several laws that restricted the use of "non-disclosure" provisions in employment related agreements. Those existing restrictions prohibit any provision in a settlement agreement that prevents the disclosure of information related to claims regarding certain forms of sexual assault, sexual harassment, workplace harassment or discrimination based on sex, failure to prevent workplace harassment or discrimination based on sex, or retaliation for reporting workplace harassment or discrimination based on sex. Existing law also makes it unlawful for an employer, as a condition of continued of future employment, or in exchange for a raise or bonus, to sign a non-disparagement agreement or other document that purports to restrict the employee's right to disclose such information. Senate Bill 331 (SB 331) expands these provisions.

Under SB 331, a settlement agreement may not contain a provision that prevents or restricts disclosure of factual information related to a claim filed in a civil or administrative action regarding any form of discrimination based on protected classifications. SB 331 also expands the restrictions on employment-related non-disparagement or non-disclosure agreements in several ways:

1. Such agreements are now unlawful to the extent it has the purpose or effect of denying an employee's right to disclose information about unlawful acts in the workplace, not only if the agreement actually purports to deny such rights.

2. Any contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must include the following statement, or substantially similar language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

In addition, SB 331 prohibits an employer from including any provision that prohibits the disclosure of information about unlawful acts in the workplace in an agreement related to an employee's separation from employment, except in a negotiated settlement agreement to resolve an underlying claim filed by an employee in court, before an administrative agency, in an alternative dispute resolution forum, or through an employer's internal complaint process. For this exception to apply, the agreement must be voluntary, deliberate, and informed, the agreement must provide consideration of value to the employee, and the employee must be given notice and an opportunity to retain an attorney or be represented by an attorney.

(SB 331 amends Section 1001 of the Code of Civil Procedure, and Section 12964.5 of the Government Code.)

SB 807 – Modifies DFEH's Procedures For Enforcing Civil Rights Laws, Extends Employer Retention Requirement For Specified Employment Records.

Under existing law, the California Fair Employment and Housing Act (FEHA), establishes the Department of Fair Employment and Housing (DFEH) to enforce civil rights laws with respect to housing and employment. The FEHA makes certain discriminatory employment and housing practices unlawful, and authorizes a claimant to file a verified complaint with the DFEH. The FEHA requires the DFEH to investigate administrative claims, and to attempt to resolve disputes through alternative dispute resolution (ADR). If ADR fails and the DFEH finds the claim has merit, the FEHA authorizes the DFEH director to bring a civil action in the name of the DFEH on behalf of the claimant within a specified amount of time.

Senate Bill 807 (SB 807) authorizes the DFEH and a party under DFEH investigation to appeal adverse superior court decisions regarding the scope of DFEH's power to compel cooperation in the investigation within 15 days after the adverse decision. SB 807 further directs courts to give precedence to the appeal and to make a determination on the appeal as soon as practicable after the notice of appeal is filed. SB 807 authorizes courts to award attorney's fees and costs to the prevailing party in the action, except for a prevailing defendant, unless the court determines that the DFEH's petition was frivolous when filed or that the DFEH continued to litigate the matter after it clearly became frivolous.

SB 807 also extends the employer record retention requirement from two to four years when a complaint has been filed.

SB 807 changes the deadlines by which some complaints for violations of civil rights laws must be filed with the DFEH. Under current law, the FEHA prohibits filing a complaint with the DFEH alleging certain civil rights violations one year after the unlawful practice occurred. The FEHA prohibits filing a complaint alleging a sexual harassment claim that occurred as part of a professional relationship three years after the unlawful practice occurred.

SB 807 also tolls the statute of limitations, including retroactively, but without reviving lapsed claims, for filing a civil action based on specified civil rights complaints under investigation by DFEH until:

a) The DFEH files a civil action for the alleged violation; or

b) One year after the DFEH issues written notice to a complainant that it has closed its investigation without electing to file a civil action for the alleged violation.

SB 807 also authorizes the DFEH or counsel for a complainant to serve a verified complaint on the entity alleged to have committed the civil rights violation by any manner specified in the Code of Civil Procedure.

Moreover, SB 807 enables the DFEH to bring an action to compel cooperation with its discovery demands in any county in which the DFEH's investigation takes place, or in the county of the respondent's residence or principal office.

Further, SB 807 authorizes the DFEH to bring a civil action to enforce the FEHA in any county where:

a) The unlawful practices are alleged to have been committed;

b) Records relevant to the alleged unlawful practices are maintained and administered;

c) The complainant would have worked or had access to public accommodation but for the alleged unlawful practice;

d) The defendant's residence or principal office is located; or

e) If the civil action includes class or group allegations on behalf of DFEH, in any county in the state.

SB 807 tolls the deadline for DFEH to file a civil action while a mandatory or voluntary dispute resolution is pending.

SB 807 clarifies that, for any employment discrimination complaint treated by the DFEH as a class or group complaint, the DFEH must issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

SB 807 also removes a provision of the FEHA prohibiting a complainant from commencing a civil action with respect to an alleged discriminatory housing practice that forms the basis of a civil action brought by DFEH.

(SB 807 amends Sections 12930, 12946, 12960, 12961, 12962, 12963.5, 12965, 12981, and 12989.1 of the Government Code.)

WORKPLACE HEALTH & SAFETY

SB 606 – Expands Cal/OSHA's Power To Enforce And Penalize Enterprise-Wide Or Egregious Violations.

Under existing law, the California Division of Occupational Safety and Health (Cal/OSHA) has a statutory duty to (1) promulgate workplace safety standards that employers in California must adhere to; and (2) respond to worker complaints and investigate worksites where there is evidence of safety standard violations, and, if necessary, penalize employers who fail to meet standards. Senate Bill 606 (SB 606) was enacted to mirror federal OSHA regulations that allow for heightened penalties for "egregious" safety violations at the state level.

SB 606 creates a rebuttable presumption that a Cal/OSHA violation committed by an employer that has multiple worksites is enterprise-wide if the employer has a written policy or procedure that violates Cal/OSHA rules and regulations, in most circumstances, or Cal/OSHA has evidence of a pattern or practice of the same violation committed by that employer involving multiple worksites. The bill also authorizes Cal/OSHA to issue an enterprise-wide citation requiring enterprise-wide abatement if the employer fails to rebut this presumption, and increases the penalties for enterprise-wide violations to the same level as willful or repeated violations.

SB 606 also defines certain categories of "egregious" violations where Cal/OSHA will be required to issue a citation, rather than just a non-compliance notice. A violation is defined as egregious if any of the following are true:

1. The employer intentionally, through conscious and voluntary action or inaction, made no reasonable effort to eliminate a known violation.
2. The violations resulted in worker fatalities, a worksite "catastrophe" resulting in hospitalization of three or more employees, or a large number of illnesses or injuries.
3. The violations resulted in persistently high rates of worker injuries or illnesses.
4. The employer has an extensive history of prior violations of this part.
5. The employer has intentionally disregarded their health and safety responsibilities.
6. The employer's conduct as a whole shows bad faith in their duties to maintain a safe workplace.
7. The employer has committed a large number of violations, which undermines significantly the effectiveness of any safety and health program that may be in place.

SB 606 requires Cal/OSHA to treat each instance of an employee exposure to an egregious violation to be considered a separate violation, allowing Cal/OSHA to stack cumulative penalties for widespread or ongoing safety violations.

SB 606 also expands Cal/OSHA's investigatory powers, authorizing Cal/OSHA to issue an investigative subpoena if an employer fails to promptly provide requested information, and to enforce the subpoena if the employer fails to comply within a reasonable period of time.

(SB 606 amends Sections 6317, 6323, 6324, 6429, and 6602 of, and adds Sections 6317.8 and 6317.9 to, the Labor Code.)

COVID-19

AB 645 – Modifies Employer Obligations For Reporting Workplace COVID-19 Exposures And Outbreaks.

Assembly Bill 645 (AB 645) modifies existing reporting requirements for employers regarding instances of COVID-19 exposures and outbreaks in the workplace. The bill, which was enacted on October 5, 2021, was designated an urgency statute and took effect immediately, and will remain in effect until January 1, 2023.

Employers have an existing obligation to report COVID-19 exposures at a "worksite" to all employees at that site and to each employee organization, if any, that represent such employees, as well as to report outbreaks at the "worksite" to the local health department. An "outbreak" is defined as three or more COVID-19 cases among employees in an "exposed group" (i.e., all employees at a work location, working area, or a common area at work, where an employee COVID-19

case was present at any time during the high-risk exposure period) within a 14-day period. AB 654 significantly narrows the definition of "worksite" for reporting purposes.

Under prior law, "worksite" was broadly defined to include "the building, store, facility, agricultural field, or other location where a worker worked during the infectious period." This definition did not account for large worksites where many employees could work simultaneously without having direct or indirect exposure to one another.

The new definition for "worksite" excludes (1) buildings, floors, or other locations of the employer that a qualified individual did not enter; (2) locations where the worker worked by themselves without exposure to other employees; and (3) a worker's personal residence or alternative work location chosen by the worker when working remotely. The first exclusion is particularly important to employers because now employers must only report COVID-19 exposures in areas where employees actually work and where there is potential for exposure.

As a result of this amendment, employers may send fewer, but more targeted, notices to employees in the event of a workplace exposure. Specifically, an employer will need to determine which employees were in the specific "worksite," and send those employees notices as opposed to sending the notices to all employees in the building. Employers will also have to send fewer "outbreak" notices to the local health department because there is a reduced likelihood that there will be three COVID-19 cases in the same "worksite" under the revised and more limited definition.

Moreover, the AB 653 provides 17 types of facilities exempted from reporting requirements. Those include child day care facilities that meet the definition under the California Child Day Care Facilities Act.

(AB 654 amends Sections 6325 and 6409.6 of the Labor Code.)

WAGES, HOURS, & WORKING CONDITIONS

SB 639 – Phases Out The Subminimum Wage Certificate Program.

Under existing law, the Division of Labor Standards Enforcement (DLSE) is permitted to issue a person who is mentally or physically disabled, or both, a special license authorizing employers to hire such person for one year or less, at a wage below the state-wide minimum wage. The DLSE is required to fix a special minimum wage for the licensee, which may be renewed on a yearly basis. This law was originally enacted due to fears that people with disabilities would be disadvantaged if employers had to pay comparable wages to employees with and without disabilities.

Senate Bill 639 (SB 639) was enacted due to Legislative findings that despite the existence of these licenses, and despite people with disabilities often earning significantly less than minimum wage, unemployment rates among people with disabilities remains disproportionately high. For this reason, taking the lead of a number of other states, SB 639 phases out the subminimum wage certificate program, and prohibits new special licenses from being issued after January 1, 2022. Under SB 639, a special license can only be renewed for existing license-holders who meet benchmarks described in a multiyear phase out plan, to be developed by the State Council on Developmental Disabilities with input from various stakeholder organizations. The bill aims to ensure any disabled employee is paid no less than minimum wage by January 1, 2025.

In addition, SB 639 adds a sunset provision to Section 1191.5 of the Labor Code, which currently authorizes the DLSE to issue a special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to allow employment of qualified disabled employees at subminimum wage without requiring individual licenses of those employees. Under SB 639, Section 1191.5 will be repealed as of January 1, 2025.

(SB 639 amends Section 1191 of, and amends and repeals Section 1191.5 of the Labor Code.)

SB 657 – Permits Employers To Distribute Legally-Required Notices By Email, In Addition To Physical Posting.

Existing law requires employers to post a variety of information in the workplace related to employees' wages, hours, and working conditions. Generally, these notices are designed to alert employees of their rights under federal and state law, including information on how they may go about reporting a workplace violation or filing a complaint with the appropriate state agency, and provide information about the state minimum wage, state laws regarding harassment and discrimination, health and safety rules, and whistle blower protection, among others.

Senate Bill 657 (SB 657) provides when an employer is required to physically post information in the workplace, the employer may email the information to the employee as well as in an attached document in addition to physically posting the information in the workplace. The bill expressly does not alter the employer's obligation to physically display the required posting.

(SB 657 adds Section 1207 to the Labor Code.)

MANDATED REPORTER TRAINING

AB 506 – Imposes Mandated Reporter Training And Prevention Policy Requirements On Youth Service Organizations.

Assembly Bill 506 (AB 506) requires administrators, employees, and regular volunteers of youth service organizations to complete training in child abuse and neglect identification and training in child abuse and neglect reporting, which may be completed through the online mandated reporter training provided by the Office of Child Abuse Prevention in the State Department of Social Services. A "youth service organization" is an organization that employs or utilizes the services of persons who, due to their relationship with the organization, are mandated reporters. Mandated reporters include, but are not limited to, individuals in the following positions: teachers; teacher's aides and assistants; instructional aides; day camp administrators; administrators and employees of youth centers, youth recreation programs, and youth organizations; and licensees, administrators, and employees of licensed community care or child daycare facility. A "regular volunteer" is a volunteer who is 18 years of age or older and who has direct contact with, or supervision of, children for more than 16 hours per month or 32 hours per year through their volunteer work with the youth service organization.

AB 506 further requires a youth service organization to develop and implement child abuse prevention policies and procedures, including, but not limited to, both of the following:

1. Policies to ensure the reporting of suspected incidents of child abuse to persons or entities outside of the organization, including the mandated reporting required pursuant to the California Child Abuse and Neglect Reporting Act (CANRA).

2. Policies requiring, to the greatest extent possible, the presence of at least two mandated reporters whenever administrators, employees, or volunteers are in contact with, or supervising, children.

AB 506 also requires youth service organizations to complete a background check consistent with Penal Code Section 11105.3 of all administrators, employees, and regular volunteers to identify and exclude any persons with a history of child abuse. The bill further authorizes an insurer to request information from a youth service organization demonstrating compliance with the requirements of AB 506 before writing liability insurance for the youth service organization.

AB 506 takes effect on January 1, 2022.

(AB 506 adds Section 18975 to the Business and Professions Code.)

STUDENTS

STUDENT RECORD RESTRAINING ORDERS

SB 24 – Requires Private Schools, Childcare Facilities, Summer Camps, And Other Organizations To Comply With And Develop Protocols To Comply With Restraining Orders Limiting Access To Children's Records And Information.

Senate Bill 24 (SB 24) enacts Calley's Law, a law that authorizes, beginning on January 1, 2023, a court to issue an order restraining a party – likely a parent or legal guardian – from accessing records and information pertaining to the health care, education, daycare, recreational activities, or employment of a minor child.

SB 24 also requires an "essential care provider," such as a private school, daycare facility, or other similar organization that frequently provides essential care services to children, to develop on or before February 1, 2023, protocols to comply with a restraining order they may receive under Calley's Law. Similarly, SB 24 requires a "discretionary services organization," which includes any organization that provides nonessential services to children, such as recreational activities, entertainment, and summer camps, or a minor's place of employment to develop protocols to comply with a restraining order they may receive under Calley's Law within 30 days of the date it receives its first restraining order.

The protocols must, at a minimum, (1) designate the appropriate personnel responsible for receiving the protective order; (2) establish a means of ensuring that the restrained party is not able to access the records or information; and (3) implement a procedure for submission of a copy of an order and for providing the party that submits the copy of the order with documentation indicating when, and to whom, the copy of the order was submitted.

In the event a parent or legal guardian presents a court order under Calley's Law, the essential care provider or a discretionary services organization is prohibited from releasing information or records pertaining to the minor child to the restrained party.

(SB 24 adds Section 6323.5 to the Family Code.)

FREE MENSTRUAL PRODUCTS

AB 367 – Encourages Private Colleges And Universities To Provide Free Menstrual Products.

Assembly Bill 367 (AB 367) enacts the Menstrual Equity for All Act of 2021, which encourages private universities, colleges, and institutions of higher learning to stock an adequate supply of free menstrual products (i.e., menstrual pads and tampons) at no fewer than one designated and accessible central location on each campus, and to post a notice about the availability of free menstrual products. AB 367 was enacted to address the effects associated with inadequate menstrual support among young people, particularly among low-income people, such as health and psychosocial issues, emotional distress, physical infection, disease, and absenteeism from school. AB 367 takes effect on January 1, 2022.

While the bill does not ***require*** compliance from private universities, colleges, and institutions of higher learning, it does ***encourage*** voluntary compliance. Therefore, private universities, colleges, and institutions of higher learning may choose whether to comply with AB 367. AB 367 does not apply to private K-12 schools.

(AB 367 amends, repeals, and adds Section 35292.6 of, and adds Section 66027.7 to the Education Code.)

ENROLLMENT AGREEMENTS

AB 272 – Allows Minors To Disaffirm Provisions In Enrollment Agreements That Waive Right To Bring Or That Require Arbitration Of Criminal Sexual Assault Or Criminal Sexual Battery Claims.

Assembly Bill 272 (AB 272) authorizes a minor to disaffirm a provision in an educational institution's enrollment agreement to the extent the provision is construed to waive a legal right, remedy, forum, proceeding, or procedure arising out of a criminal sexual assault or criminal sexual battery on that minor, regardless of whether a parent or legal guardian has signed the enrollment agreement on the minor's behalf. The bill applies only to enrollment agreements for public or private schools maintaining a kindergarten or any of grades 1 through 12. AB 272 expressly states that a minor's act to disaffirm an offending provision does not affect the validity or enforceability of any other provisions in the enrollment agreement.

AB 272 defines "criminal sexual assault" and "criminal sexual battery: consistent with their definitions under the California Penal Code. AB 272 impacts the enforceability of an arbitration provision and a waiver/release provision in an enrollment agreement as to claims brought by the minor who has disaffirmed such provisions. However, it is unclear whether and if so, to what extent, AB 272 impacts the enforceability of an arbitration provision or a waiver/release provision in an enrollment agreement as to claims brought by a parent or legal guardian who signed the agreement on the minor's behalf.

AB 272 takes effect on January 1, 2022. The practical impact of AB 272 is that K-12 schools with arbitration and/or waiver/release provisions in their enrollment agreements will need to evaluate the agreements and consider revising them next year.

(AB 272 adds Section 1002.7 et seq. to the California Code of Civil Procedure.)

CONTRACTS WITH MINORS

AB 891 – Clarifies That A Representation By A Minor That The Minor's Parent Or Legal Guardian Has Consented Is Not Sufficient To Obtain Parental Consent For Contract Formation Purposes.

Assembly Bill 891 (AB 891) provides that a representation by a minor that the minor's parent or legal guardian has consented shall not be considered to be consent for purposes of contract formation. The bill is intended to address circumstances where parental consent is required before a company may interact with a minor online or enter into binding contracts with a minor, and parental consent is obtained by having the minor affirm that the minor's parent consented. Instead, this bill attempts to make clear that the consent must be obtained directly from a parent.

(AB 891 adds Section 1568.5 to the Civil Code.)

AB 104 – Encourages Private Postsecondary Institutions To Accept Pass/Fail Grade Changes Under Certain Circumstances.

Assembly Bill (AB 104) requires school districts, county offices of education, and charter schools to comply with new requirements in three specific areas:

1. Implementation of a pupil retention policy and protocol for pupils who received deficient grades in half of their coursework during the academic year of 2020-21 and who were in grades 9-11;

2. Allow parents, guardians or education rights holder of a pupil, or a pupil who is 18 years or older and who was enrolled in a high school course during the 2020–21 school year to apply to the pupil's school district, county board of education, or charter school to change the letter grade for that course to a Pass or No Pass grade on the pupil's transcript;

3. Pupils in their 3rd and 4th year of high school who are not on track to graduate in 4 years in the 2020-21 or 2021-22 school year, must be given the

opportunity to complete the statewide coursework required for graduation, which may include allowing the pupil a 5th year of instruction.

While the California State University is ***required*** to accept the grade change, the University of California and private postsecondary institutions are merely ***encouraged*** to accept the grade change. Private postsecondary institutions are required to notify the State Department Education as to whether they will accept the changed transcripts for admission purposes.

AB 104 was an urgency statute, which means it was effective upon approval by the governor. This bill became law on July 1, 2021.

(AB 104 adds Sections 48071, 49066.5, and 51225 to the Education Code; this bill was an urgency bill and became effective immediately.)

AB 1407 – Changes Existing Graduation Requirements For Nursing Programs To Require Nursing Students Complete One Hour Of Implicit Bias Training.

The Board of Registered Nursing (the Board) is responsible for establishing the requirements to approve a nursing school and nursing program.

Assembly 1407 (AB 1407) expands current law by requiring approved nursing schools and nursing programs to require students complete a one-hour training of implicit bias as a graduation requirement. The training must consist of direct participation. The bill prohibits this new graduation requirement from being construed to require a curriculum revision or to affect the licensing or endorsement requirements established by the Nursing Practice Act.

Starting January 1, 2023, the bill requires licensees who are within the first two years of receiving their license to complete a one-hour training of direct participation in implicit bias through a Board approved continuing education provider.

The one-hour training must include the following subject matters to satisfy this requirement:

- Identification of previous or current unconscious biases and misinformation.
- Identification of personal, interpersonal, institutional, structural, and cultural barriers to inclusion.
- Corrective measures to decrease implicit bias at the interpersonal and institutional levels, including ongoing policies and practices for that purpose.
- Information on the effects, including, but not limited to, ongoing personal effects, of historical and contemporary exclusion and oppression of minority communities.
- Information about cultural identity across racial or ethnic groups.
- Information about communicating more effectively across identities, including racial, ethnic, religious, and gender identities.
- Discussion on power dynamics and organizational decision-making.
- Discussion on health inequities within the perinatal care field, including information on how implicit bias impacts maternal and infant health outcomes.
- Perspectives of diverse, local constituency groups and experts on particular racial, identity, cultural, and provider-community relations issues in the community.
- Information on reproductive justice.

(AB 1407 amends Sections 2786 and 2811.5 of the Business and Professions Code.)

GOVERNANCE, BUSINESS, & FACILITIES

CALIFORNIA PRIVATE POSTSECONDARY EDUCATION ACT OF 2009

SB 802 – Revises And Recasts Provisions Of The California Private Postsecondary Education Act Of 2009.

Senate Bill 802 (SB 802) revises and recasts certain provisions of the California Private Postsecondary Education Act of 2009 (Act), which provides for oversight and regulation by the Bureau for Private Postsecondary Education (Bureau), a division of the Department of Consumer Affairs, of private entities with a physical presence in California that offer postsecondary education to the public for an institutional charge.

SB 802 broadens the definition of "postsecondary education" under the Act from a formal institutional educational program whose "curriculum" is designed primarily for students who completed or are beyond the age of secondary education, to a formal institutional educational program whose "instruction" is designed primarily for those students. SB 802 further revises the definition of "educational program" to exclude from the Act a course of 32 hours of instruction or less that is not designed to lead to employment.

The Act expressly excludes "continuing education" programs, educational programs for members of a bona fide trade, business, professional, or fraternal organization, and other types of instruction and programs as enumerated in the Act. SB 802 revises the definition of "continuing education" to include instruction that does not lead to a degree in subjects that licensees are required to take solely for the purpose of continued licensure, or to enhance their skills and knowledge within their particular profession, occupation, trade, or career field. SB 802 also clarifies that institutions cannot qualify for the bona fide trade, business, professional, or fraternal organization exemption by sponsoring their own educational programs directly or through an affiliated or corporate entity of the institution and that requires student membership for these educational programs.

The Act requires the Bureau to adopt by regulation minimum operating standards for institutions that are subject to the Act's provisions, including a standard that requires accreditation for degree-granting institutions. SB 802 allows the Bureau to extend the accreditation deadlines under certain conditions.

The Act further requires a covered institution to obtain approval from the Bureau before making certain substantive changes to its operations. SB 802 expands the types of substantive changes that require the Bureau's approval to include changes to an institution's educational programs related to clock and credit hours or distance learning, and those relating to an institution's participation in certain federal student aid programs.

The Act authorizes the Bureau to suspend, revoke, or place on probation an institution's approval to operate for violations of the Act that result in actual student harm. SB 802 clarifies the Bureau's authority to suspend an institution's educational programs and to suspend, revoke, or place on probation an institution's approval to operate.

SB 802 further extends the operation of the Act from January 1, 2022, by one year until January 1, 2023.

(SB 802 amends Sections 94827, 94837, 94857, 94874, 94880, 94885.1, 94885.5, 94889, 94894, 94937, and 94950 of the Education Code.)

FUNDRAISING & DONATIONS

AB 488 – Enacts California's First Attempt At Regulating Online Crowdfunding And Other Online Charitable Fundraising Platforms.

Assembly Bill 488 (AB 488) amends the California Supervision of Trustees and Fundraisers for Charitable Purposes Act (Act). Broadly speaking, the Act requires any person or entity that holds charitable property or solicits donations for charitable purposes in California to register with the California Attorney General (AG) and to annually file certain disclosures and other reports with the AG, subject to some exceptions from registration and reporting; for example, for religious organizations or educational institutions. The AG uses these reports to investigate and litigate cases of charity fraud and mismanagement of charities. However, the Act does not explicitly address whether and how the AG may oversee online and website based fundraising platforms that have exploded in use and popularity. AB 488 is intended to address that lack of oversight by creating a legal framework that regulates "charitable fundraising platforms" and "platform charities."

This new regulatory framework goes into effect on January 1, 2022. In the meantime, schools working with fundraisers who have significant online or web-based practices should confirm that the fundraisers are aware of AB 488 and are taking steps to determine if it applies to their operations and, if so, how to comply with AB 488's new requirements.

<u>What are "charitable fundraising platforms" and "platform charities"?</u>

AB 488 defines a "charitable fundraising platform" (CFPs) as "any person, corporation, unincorporated association or other legal entity that uses the internet to provide an internet website, service, or other platform to persons in this state, and performs, permits, or otherwise enables acts of solicitation to occur." A "platform charity" (PC) is a charitable organization that facilitates acts of solicitation on a charitable fundraising platform. These broad definitions encompass most consumer-facing websites that facilitate the receipt of online donations, as well as websites advertising that a portion of the purchase price from the sale of goods or services will be donated to specified charities. Also covered are websites that invite customers to add a donation during check-out or take other actions to trigger donations. According to one legislative analysis, examples include Amazon, Benevity, Charity Navigator, CrowdRise, eBay, Facebook, GoFundMe, Google, GuideStar (Candid), Lyft, Overstock, and PayPal.

Notably excluded from the definition of CFPs is "a charitable organization's own platform that solicits donations only for itself." Accordingly, a nonprofit/educational institution's own website would not fall within this definition.

The drafters of AB 488 were aware that these definitions could encompass other types of fundraisers, already covered by the Act, such as commercial co-venturers (e.g., for-profits that partner with nonprofits to provide a portion of a sale to a charity). Accordingly, there are extensive provisions of the law carving out and explaining, for example, when a fundraiser will be treated as a CFP or as a co-venture.

What are the new rules governing charitable fundraising platforms and platform charities?

AB 488 goes into effect on January 1, 2022. In the meantime, the AG is charged with preparing regulations to implement the following key provisions of AB 488:

- Registration and Reporting. CFPs and PCs must register with the AG and then annually submit reports to the AG. The reports will include information, as specified in the AG's coming regulations, sufficient for the AG to determine whether charitable funds have been properly solicited, received, held, controlled, or distributed in compliance with the Act.

- Required Disclosures. CFPs must disclose to potential donors: (1) who will receive the donations; (2) if applicable, explanation identifying the circumstances under which a recipient charity may not receive certain funds; (3) the length of time it takes for the CFP to send the donation to a recipient charity; (4) the fees or other amounts (if any) deducted from or added to the donation; and (5) whether or not the donation is tax-deductible.

- Written Consent from Charity Slated to Receive Donations. AB 488 requires CFPs and PCs to obtain the written consent of any recipient charity before using its name in a solicitation, unless the following circumstances are met: (1) the platform only includes certain information about the recipient charity (e.g., the recipient charity's name, contact information, website, EIN, and publicly available information from the recipient's informational tax returns); (2) the platform conspicuously discloses, before persons can complete a donation, that the recipient charity has not provided consent and has not reviewed or approved the content generated by individuals engaging in peer-to-peer charitable fundraising; (3) the platform promptly removes any recipient charity from its list upon written request from the charity; and (4) the platform does not require that a recipient charity consent as a condition of accepting donated funds.

- Segregation of Fund & Accounting for Fees. CFPs and PCs must hold charitable funds raised in a separate account or accounts from other funds belonging to the CFP or PC and must promptly send the donations to recipient charities with an accounting of any fees imposed for processing the funds.

- Soliciting Only for Charities in Good Standing. CFPs and PCs may only facilitate solicitations or receive donations for charitable organizations in good standing. "Good standing" means charitable organization's state or federal tax-exempt statuses have not been revoked and the organization is permitted to operate by the AG.

- Prompt Distribution of Donations. For CFPs and PCs that make donations based on purchases or other activity performed on the platform, the donations must be sent out at least quarterly, subject to a requirement that the CFPs and PCs receive a minimum amount of donations (which may not exceed ten dollars). Donations or grants must be sent after four consecutive quarters regardless of any established minimum amount. AB 488 also authorizes the AG to establish regulations regarding the maximum length of time CFPs and PCs may take to send the donated funds to a charity.

(AB 488 amends Sections 12581, 12586.1, 12587, 12598, 12599, and 12599.1 of the Government Code and adds Section 12599.9 and 12599.10 to the Government Code.)

AB 1267 – Allows Nonprofits To Engage In Commercial Co-Ventures With Alcoholic Beverage Distributors Or Sellers.

A commercial co-venture is a fundraising tool where a nonprofit engages with a for-profit entity to raise funds for the nonprofit through the sale and promotion of commercial goods and services. Under the California Alcohol Beverage and Control Act, an ABC licensee (e.g., a distributor or seller of alcoholic beverages) is prohibited from giving a premium, gift, or free goods in connection with the sale and distribution of any alcoholic beverage. The Department of Alcohol Beverage Control had taken the position that this prohibition under the ABC Act makes it unlawful for an ABC licensee to advertise that a portion of the purchase price of an alcoholic beverage will be donated to a specific nonprofit. As a result, nonprofits have been unable to engage in commercial co-ventures with for-profit entities that sell or distribute alcoholic beverages. AB 1267 removes this barrier, at least until December 31, 2025, when the bill is set to sunset, unless extended by the Legislature.

AB 1267 authorizes certain manufacturers, distributors, or sellers of alcoholic beverages to donate a portion of the purchase price of an alcoholic beverage to a nonprofit charitable organization in connection with the sale or distribution of an alcohol beverage. The co-venture agreement with the nonprofit must abide by the following limitations: (1) the donation must relate to the sale of sealed alcohol beverages; (2) the promotion or advertisement of the donation shall not directly encourage or reference the consumption of alcoholic beverages; and (3) a donation shall not benefit a retail ABC licensee or benefit a nonprofit charitable organization established for the specific purpose of benefiting the employees of retail ABC licensees and the advertisement or promotion of a donation shall not, directly or indirectly, advertise, promote or reference any retail licensee.

Nonprofit schools and educational institutions that are interested in potentially taking advantage of this new exception and are exploring entering into a commercial co-venture agreement, should consult with legal

counsel to advise as to whether the planned co-venture agreement complies with the requirements of AB 1267. Schools should also first determine whether such a co-venture agreement with an ABC licensee is consistent with the school's values and any Gift Acceptance Policy adopted by the governing body.

(AB 1267 amends Section 25600 of the Business and Professions Code.)

GOVERNANCE

AB 663 – Provides Additional Flexibility To Educational Institutions That Are Nonprofit Corporations On Conducting Business During An Emergency Such As A Pandemic.

Assembly Bill 663 (AB 663) was adopted to address constraints in existing corporate governance laws (identified in the wake of COVID-19) that prevented corporations, including nonprofit corporations, from flexibly responding to the pandemic. For example, under existing law, corporations are allowed to modify their governance procedures, but only to the extent needed to engage in "ordinary business operations or affairs," even though the very nature of an emergency may cause a corporation to engage in activities outside its normal course of business. Other areas of existing law prevent nonprofit corporations with members from conducting meetings solely through remote technologies like Zoom, if one member objects to not having the option for physical attendance at the meeting.

To address these constraints, AB 663 includes a number of provisions intended to provide corporations with greater flexibility to respond to emergencies, including COVID-19, and to take greater advantage of modern technologies, like Zoom, in conducting meetings.

Of particular importance for educational institutions that are nonprofit corporations (including either as public benefit nonprofit corporations or religious nonprofit corporations) are the following changes made by AB 663:

- The definition of emergency was expanded to include an "epidemic, pandemic, or disease outbreak," a state of emergency proclaimed by the President of the United States, and an attack within the state on public security. Already included in the definition are natural disasters (e.g., fires), emergency proclamations of the Governor, and manmade disasters (e.g., terrorist attacks), and attacks from outside the state.

- In the event of an emergency, now a nonprofit corporation may (subject to the provision of any emergency bylaw provisions) "take any action that [the nonprofit's board of trustees] determines to be necessary or appropriate to respond to the emergency, mitigate the effects of the emergency, or comply with lawful federal and state government orders," except, if the nonprofit corporation has statutory members, the board may not unilaterally take any action that would require the vote of the members, unless the required vote of the members was obtained prior to the emergency.

- For nonprofit corporations with statutory members, AB 663 allows the corporation to send the members a notice about a membership meeting or send the members a report using any electronic communication (e.g., email) if "the board determines it is necessary or appropriate because of any emergency," even if the nonprofit has not obtained written consent from any or all of the members to communicate with the members using electronic communications.

- Finally, for nonprofit corporations with statutory members, AB 663 states that a corporation may conduct a membership meeting solely by electronic transmission, electronic video screen communication, conference telephone, or other means of remote communication (e.g., Zoom) if (a) all the members consent, or (b) the board determines it is necessary or appropriate because of an emergency as defined under the Corporations Code.

(Amends Sections 207, 212, 600, 601, 5140, 5151, 5152, 5510, 5511, 7140, 7151, 7152, 7510, 7511, 7511, 9140, 9151, 9152, 9411, 12320 12331, 12332, 12460, and 12461 of the Corporations Code.)

FOOD SERVICE & CAFETERIAS

AB 1276 – Excludes Private Schools From New Rules Prohibiting Food Facilities From Providing Single-Use Utensils Or Condiments, Unless Specifically Requested By The Consumer.

Assembly Bill 1276 (AB 1276) prohibits a food facility from automatically providing customers (whether they are eating on-site or ordering delivery) with single-use plastic straws, single-use food-ware accessories (e.g., chopsticks, utensils, coffee stirrers) or standard condiments packaged for single use (e.g., hot sauce and ketchup packets), unless specifically requested by the consumer. Additionally, single use food-ware accessories and standard condiments may no longer be packaged in a bundled manner that prevents a consumer from only taking one type of single-use food-ware accessory or one type of desired condiment. The purpose of this bill is to reduce the use of and waste generated by single-use food service products.

These new requirements do not apply to correctional institutions, health care facilities, residential care facilities, and private school cafeterias.

(AB 1276 amends Sections 42270, 42271, 42272, and 42273 of the Public Resources Code.)

NONPROFITS DAY

ACR 80 – Makes June 23 "California Nonprofits Day."

Through this measure, the Legislature declared June 23, 2021, as California Nonprofits Day in recognition of the importance of nonprofit organizations to the economy and well-being of California. In making this declaration, the Legislature celebrated, among other things, the fact that California's nonprofit community includes houses of worship, universities and preschools, local theaters and world-class symphonies, after-school sports leagues and senior day centers, health clinics, and other types of organizations that attract people to California and that support the well-being of Californians. The Legislature recognized that California nonprofit organizations are trusted institutions that exist to provide services to the needy and vulnerable, improve quality of life, express community values, and promote social change.

CONSTRUCTION CONTRACTS

SB 727 – Expands Existing Direct Contractor Liability Arising From A Subcontractor's Violation Of Wage And Hour Laws To Include Liquidated Damages And Penalties When The Subcontractor Fails To Meet Certain Payroll Monitoring And Corrective Action Requirements.

Senate Bill 727 (SB 727) makes significant changes to Labor Code Section 218.7, under which a direct contractor taking on a project for the erection, construction, alteration, or repair of a building, structure, or other private work, may be held liable for unpaid wages, benefits, or contributions that any tier subcontractor owes to its workers.

Labor Code Section 218.7 allows direct contractors to require subcontractors to provide certain payroll records so that the direct contractor can evaluate the subcontractor's compliance with wage and hour laws. The direct contractor may withhold payments until the subcontractor provides those records. In order to withhold payments, the direct contractor must specify in its contract with the subcontractor, what specific documents and information that the subcontractor is required to provide.

SB 727 provides that Labor Code Section 218.7 shall only apply to contracts entered into between January 1, 2018 and December 31, 2021. Contracts entered into on or after January 1, 2022 will be subject to the new Labor Code Section 218.8.

Under Section 218.8, a direct contractor on private work projects continues to be liable for any debt owed to a wage claimant incurred by a subcontractor acting under the direct contractor. However, a direct contractor's liability now extends to penalties and liquidated damages if the direct contractor had knowledge of the subcontractor's failure to pay the specified wage or benefit owed by a subcontractor to a worker performing labor on the project. In order to avoid such penalties and liquidated damages, the direct contractor must:

1. Monitor the payment of subcontractor wages by periodic review of payroll records.

2. Upon becoming aware of a failure to pay wages, the direct contractor must take diligent corrective action to halt or rectify the failure, including withholding payments from the subcontractor.

3. Prior to making final payment to the subcontractor, the direct contractor must obtain an affidavit from the subcontractor affirming that all workers have been properly paid.

In order for the direct contractor to be able to meet these requirements, Section 218.8 requires that a subcontractor provide payroll records for its employees working on the project upon request. Section 218.8 further requires the subcontractor to provide the direct contractor with information including the project name, name and address of the subcontractor, the contractor with whom the subcontractor is under contract (for lower tier subcontractors), anticipated start date, duration, and estimated journeymen and apprentice hours, and contact information for its subcontractors on the project upon request.

Section 218.8 also carriers over the direct contractor's right to withhold as "disputed," all sums owed if a subcontractor does not timely provide the information required above. However, a direct contractor must specify the documents and information that they will require from the subcontractor.

There exists no private right of action under Labor Code Section 218.8 against a direct contractor by a subcontractor's employees and the statute includes a number of rules on when and how the Labor Commissioner must notify a direct contractor about a violation.

For schools, universities, and colleges embarking on construction projects, they should be sure to confirm that their direct contractors are aware of these developments in the law and that they are including appropriate provisions in their subcontracts and procedures to protect against liability under Section 218.8. Failing to do so could result in substantial disruptions to projects. Schools and colleges should also include provisions in their contracts with direct contractors requiring them to assume and indemnify them from all liability arising out of or connected with Section 218.8.

(SB 727 amends Section 218.7 of the Labor Code and adds Section 218.8 to the Labor Code.)

ARBITRATION

SB 762 – Requires That Arbitration Providers, Such As AAA And JAMS, Provide Parties To Employment Or Consumer Arbitration Matters With Timely Invoices And Requires That Any Time Period Specified In A Contract Of Adhesion For The Performance Of An Act Must Be Reasonable.

Senate Bill 762 (SB 762) adds a requirement to the law that arbitration providers in consumer or employee arbitrations, such as AAA or JAMS, must immediately provide an invoice to all parties to the arbitration for any fees and costs required before the arbitration can proceed. The invoice must state the full amount owed and the date that payment is due. To avoid delay, absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt.

The purpose of this law is to close a gap with respect to the payment of fees and costs for arbitration. Current law states that if the drafter of the arbitration agreement does not pay all fees and costs due before the arbitration can proceed within 30 days of the due date for paying those fees and costs, the drafting party is in material breach of the arbitration agreement and the other party to the agreement may elect to proceed with the arbitration or bring the case in court. However, existing law does not impose any requirements on when an arbitrator must send invoices or whether and how the payment's due date must be disclosed. This gives rise to a question as to when a party is actually past due on a payment, which in turn causes ambiguity as to when a party is 30 days late and therefore in material breach of the arbitration agreement. This bill attempts to address that problem by establishing when an arbitration provider must send an invoice, as well as requiring the invoice to contain the total amount due and the due date.

This bill further provides that, where an arbitration agreement does not establish a time frame for paying an arbitration invoice, the payment is due upon receipt. Additionally, this bill requires all parties to an arbitration to agree to a payment extension before the arbitration provider, such as AAA or JAMS, will allow a payment extension. Finally, this bill adds a code section addressing the time to perform under contracts of adhesion (which includes many arbitration agreements), stating that any time for performance of an act set forth in a contract of adhesion must be reasonable.

(SB 762 adds Section 1657.1 to the Code of Civil Procedure and amends Sections 1281.97 and 1281.98 of the Code of Civil Procedure.)

Train the Trainer Program

Become a Certified Harassment Prevention Trainer for your Organization!

LCW Train the Trainer sessions will provide you with the necessary training tools to conduct the mandatory AB 1825, SB 1343, AB 2053, and AB 1661 training at your organization.

California Law requires employers to provide harassment prevention training to all employees. Every two years, supervisors must participate in a 2-hour course, and non-supervisors must participate in a 1-hour course.

QUICK FACTS:

- Trainers will become certified to train both supervisors and non-supervisors at/for their organization.
- Attendees receive updated training materials for 2 years.
- Pricing: $2,000 per person. ($1,800 for ERC members).

Upcoming Dates:

Via Zoom

November 29, 2021

9:00 AM - 4:00 PM

INTERESTED?

To learn more about our program,
please visit our website below
or contact Anna Sanzone-Ortiz at 310.981.2051
or asanzone-ortiz@lcwlegal.com.

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