Employment Law

By Phyllis W. Cheng

2014: A Banner Year for Statutory Changes in Labor and Employment Law

Governor Jerry Brown signed into law more than 40 labor and employment bills, which will have significant impact upon the workplace. The legislative session's overarching theme was extending protections to persons who are not part of the traditional employer-employee relationship. Beneficiaries of the expanded protections include unpaid interns and volunteers, undocumented persons, immigrants, Medi-Cal recipients and minors.

Consistent with California's pro-worker policies, new employer responsibilities abound. For example, taking a page from the Education Code, prevention of workplace bullying will now form part of the mandatory training requirements provided by the employer, even though bullying short of harassment on a protected basis is not actionable. On the wage and hour front, employers will be expected to offer employees mandatory paid sick days, and compensate them for rest and recovery periods. Employees will also benefit from prevailing wage provisions in certain industries, expanded liquidated damages and a more liberal statute of limitations period for some claims.

Regulation of labor contractors also expanded. Employers using labor contractors to provide workers will share all legal liability with the contractors. Additionally, foreign labor contractors and foreign farm contractors will be required to register with and be regulated by the state, and violators may be subjected to monetary and criminal penalties. The legislative changes also prohibit contract provisions that waive certain civil rights claims or remedies, including the right to a judicial forum, as a condition to the provision of goods or services. The changes also require private arbitration companies to collect and publicize more data on consumer arbitrations. Finally, bills governing public employment and health care for small employers also became law.

This article provides an overview of the new labor and employment laws effective in 2015 and how they impact existing law. Unless otherwise specified, all new laws became effective January 1, 2015.

■ New Beneficiaries and Expanded Protections

Interns and Volunteers: Amendments to Government Code Section 12940

The Fair Employment and Housing Act (FEHA) requires employers, labor organizations, employment agencies and specified training programs to provide certain protections to employees and applicants for employment. FEHA's core requirements and proscriptions are set forth in Government Code section 12940. AB 1443 (Skinner) amended section 12940 to bring unpaid interns and volunteers within the scope of FEHA's anti-harassment protections. The amendment also elevated unpaid internships and other limited duration programs that provide unpaid work experience to the level of apprenticeship and training programs for purposes of antidiscrimination protection. That is, FEHA now prohibits discrimination in the selection of persons for those unpaid programs. Finally, AB 1433 amended section 12940, subdivision (*l*)(1), the religious accommodation provision, to require accommodation for persons in apprenticeship training programs, internships and programs that provide unpaid work experience.

Undocumented Holders of Driver's Licenses: Amendments to Vehicle Code Section 12801.9 and Government Code Section 12926

Under Vehicle Code section 12809.1, the Department of Motor Vehicles (DMV) must issue an original driver's license to a person who is unable to submit satisfactory proof that the applicant's presence in the United States is authorized under federal law, conditioned upon the person meeting all other qualifications for licensure and providing satisfactory proof of his or her identity and California residency. Discrimination against an individual because he or she holds a driver's license issued under section 12809.1 constitutes a violation of law, including the Unruh Civil Rights Act. AB 1660 (Alejo) amended section 12809.1 to list two additional laws violated by such discrimination—FEHA and section 11135 of the Government Code. Section 11135 is violated where a governmental authority, or agent thereof, discrimi-

nates against an individual because he or she holds a license issued under Vehicle Code section 12809.1.

Under the amendment to Section 12809.1, it is a violation of FEHA "for an employer or other covered entity to require a person to present a driver's license, unless possessing a driver's license is required by law or is required by the employer and the employer's requirement is otherwise permitted by law." (Vehicle Code § 12809.1, subd. (h)(2)(A).) The amendment also requires employers to keep driver's license information confidential. (*Id.* at subdivision (i).)

Employers should take note that AB 1660 also amended FEHA to bar discrimination on the basis of possessing a driver's license issued under Vehicle Code section 12801.9. The amendment adds a new subdivision to FEHA's definition section, Government Code section 12926, subdivision (v), which defines national origin discrimination as including possession of a section 12801.9 driver's license. However, the amendment to Vehicle Code section 12809.1 makes clear that FEHA's proscription shall not prevent an employer from complying with the federal Immigration and Nationality Act. (Vehicle Code § 12809.1, subd. (h)(2)(B).)

Slightly Expanded Rights for Immigrant Workers: Amendments to Labor Code Section 1019

Labor Code section 1019 prohibits employers from engaging in "unfair immigration-related practices" in retaliation for an employee's exercise of a right protected under the Labor Code or under local employment-related ordinances. "Unfair immigration-related practices" include, among other things, a retaliatory threat to file or the filing of a false police report. (Labor Code § 1019, subd. (b)(1)(C).) AB 2751 (Hernández) amended section 1019, subdivision (b)(1)(C), to include threatening to file or filing a false report or complaint with any state or federal agency.

Section 1019 also permits a court to order appropriate government agencies to suspend certain licenses held by the violating party for prescribed periods based on the number of violations. The amendment adds a license suspension provision for third and subsequent violations. In such cases, a court may now order the suspension of licenses for up to 90 days.

Medi-Cal Recipients: New Government Code Section 13084

The Medi-Cal program, which is administered by the State Department of Health Care Services, provides that qualified low-income persons receive health care benefits. AB 1792 (Gomez) added certain reporting and information-gathering requirements regarding the employment of Medi-Cal beneficiaries, in addition to employment-related protections for such persons. The bill repealed and added Government Code section 13084, which now requires the Department of Finance to collect from the Employment Development Department, and to publish on its website each year (beginning January 2016), information about employers who employ 100 or more Medi-Cal beneficiaries. The published information must include the total cost to the state of the Medi-Cal benefits provided to the identified employer's employees.

New section 13084 also prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who enrolls in the Medi-Cal program, and from refusing to hire a Medi-Cal beneficiary because of the person's enrollment in the Medi-Cal program. The new statute also prohibits an employer from disclosing to any person or entity that an employee receives or is applying for public benefits, unless otherwise authorized by state or federal law. (Government Code § 13084, subd. (h).)

Enhanced Protection for Minors: The Child Labor Protection Act of 2014

California law establishes a citation system for the imposition of civil sanctions against violators of the laws and regulations of the state relating to the employment of minors, and classifies citations according to the nature of the violation. AB 2288 (Hernández) added section 1311.5, the Child Labor Protection Act, to the Labor Code. The new Act authorizes treble damages to an individual who has been discriminated against in the terms or conditions of his or her employment because he or she filed a claim or civil action alleging a violation of employment laws that arose while the individual was a minor. Additionally, the new Act subjects a specified class of violations of employment laws relating to the employment of minors to a civil penalty. The Act also requires tolling of the statute of limitations for claims arising under the Labor Code until the person allegedly aggrieved attains majority.

■ Anti-Bullying Training

FEHA provides that certain employment practices are unlawful, including sexual harassment of employees.

In addition, every employer must act to ensure a workplace free of sexual harassment by implementing certain minimum requirements, including displaying sexual harassment information posters at the workplace and obtaining and making available an information sheet on sexual harassment.

For several years now, FEHA has mandated that employers of 50 or more employees provide at least two hours of training and education regarding the prevention of sexual harassment to all supervisory employees once every two years. AB 2053 (Gonzalez) AB 2053 amended the statute to require that the above-described training and education include the prevention of "abusive conduct." (Gov. Code § 12950.1, subd. (b).) The amended statute defines abusive conduct as: "[c]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious." (Gov. Code § 12950.1, subd. (g)(2).) It is significant to note that the amendment does not make workplace bullying itself actionable.

■ Changes to Wage and Hour Laws

Paid Sick Days: The Healthy Workplaces, Healthy Families Act of 2014

AB 1522 (Gonzalez) established the Healthy Workplaces, Healthy Families Act of 2014. (Labor Code § 245, *et seq.*) The Act requires employers, beginning July 1, 2015, to provide employees with paid sick days. The paid sick days will accrue at a rate of no less than 1 hour for every 30 hours worked, and employees will be entitled to use accrued sick days beginning on the 90th day of employment. (Labor Code § 246, subds. (b), (c).) The leave can be used for the employee's own illness or that of the defined family member, or for purposes related to an employee's having been the victim of a specified crime. (Labor Code § 246.5, subd. (a).) Employers who have paid time off policies that comply with specified requirements are not required to provide additional paid sick days. (Labor Code § 246, subd. (e).)

Employers may limit an employee's use of paid sick days to 24 hours or three days in each year of employment. Further, while employers must allow the carryover of accrued paid sick days, they may cap accrual at six days or 48 hours. (Labor Code § 246, subds. (d), (i).) The Act prohibits employers from requiring an employee, as a condition of using paid sick days, to find a replacement worker to cover for the employee. (Labor Code § 246.5, subd. (b).) The Act also makes it unlawful for an employer to discriminate or retaliate against an employee who requests paid sick days or otherwise exercises rights under the Act. (Labor Code § 246.5, subd. (c).)

Employers must also satisfy specified posting, notice and recordkeeping requirements. The notice requirements include providing written notice with each employee's paycheck of the amount of paid sick leave available. A poster containing information about the right to paid sick leave must be displayed by January 1, 2015. (Labor Code §§ 246, subd. (h), 247, 247.5.)

The Labor Commissioner has power to enforce the Act, including by investigating alleged violations, ordering relief for aggrieved parties, and imposing penalties. The Act also authorizes both the Labor Commissioner and the Attorney General to bring a civil action for alleged violations to recover specified relief for aggrieved employees as well as certain civil penalties and attorney's fees, costs, and interest. (Labor Code § 248.5.)

"Recovery periods" Are Counted as Hours Worked

California law prohibits an employer from requiring an employee to work during a meal period, rest period, or "recovery period." (Labor Code § 226.7.) Further, existing wage orders of the Industrial Welfare Commission (IWC) require that a rest period be counted as hours worked, for which there shall be no deduction from wages.

SB 1360 (Padilla), amended Labor Code section 226.7 to provide that a rest or recovery period mandated pursuant to state law shall be counted as hours worked, for which there shall be no deduction from wages. (Labor Code § 226.7, subd. (d).) The provision is declaratory of existing law. (*Ibid.*)

Prevailing Wage Law

Prevailing Wages Must be Paid for Post-construction Phases of the Job

California law requires employers to pay workers employed on public works projects at least the prevailing wage as determined by the Director of the Department of Industrial Relations (DIR).. The term "public works" is defined, for purposes of prevailing wage requirements, as including construction, alteration, demolition, installation, or repair work done under contract and paid in whole or in part out of public funds. The term "construction" includes work performed during the design and preconstruction phases of construction. (Labor Code § 1720, subd. (a)(1).)

AB 26 (Bonilla), amended Labor Code Section 1720, subdivision (a)(1), to include in the definition of "construction," work performed during the post-construction phases of construction, including, but not limited to, all cleanup work at the jobsite.

Changes to the Law Regarding Notice of Assessment of a Project as a "Public Work" for Purposes of Determining Application of Prevailing Wage Law

The Labor Code authorizes the Labor Commissioner to issue a civil wage and penalty assessment to a contractor or subcontractor if, after an investigation, the commissioner determines there has been a violation of the law regulating public works projects, including prevailing wage law. The period for service of such assessments is tolled for the period of time required by the Director of the DIR to determine whether a project is a public work, as specified. Prior law, with respect to the determination of whether a project is a public work, required a person filing a notice of completion of the project to also provide notice to the Labor Commissioner, and required the awarding body or political subdivision accepting a public work to provide to the Labor Commissioner notice of that acceptance, as specified.

SB 266 (Lieu) amended Labor Code section 1741.1 to instead require that the body awarding the contract for a public work furnish, within 10 days after receipt of a written request from the Labor Commissioner, a copy of the valid notice of completion for the public work or a document evidencing the awarding body's acceptance of the public work on a particular date, whichever occurs later, in accordance with specified provisions. The amendment also requires the awarding body to notify the appropriate office of the Labor Commissioner if, at the time of receipt of the Labor Commissioner's written request, there has been no valid notice of completion filed by the awarding body in the office of the county recorder, and no document evidencing the awarding body's acceptance of the public work on a particular date. If the awarding body fails to timely furnish the Labor Commissioner with the applicable document, the new law requires that the period for service of assessments be tolled until the Labor Commissioner's actual receipt of the applicable document. (Labor Code § 1741.1, subd. (b).)

The Labor Code Section 203 "Waiting Time" Penalty Applies to Certain Employees in the Entertainment Industry

California law imposes a penalty of up to 30 days' wages upon an employer who willfully fails to timely pay wages to an employee who is discharged or who quits (the "waiting time" penalty). Aggrieved former employees may file a civil suit to recover the penalty. (Labor Code § 203.) The law also permits specified employees working in the entertainment industry and their employers to enter into a collective bargaining agreement to establish a time limit for payment of wages after an employee is discharged or laid off. (Labor Code § 201.9.) AB 2743 (Committee on Labor and Employment) amended Labor Code Section 203 to allow those entertainment industry employees to file suit for the civil penalty where the employer willfully violates the time limit for payment of wages established pursuant to the collective bargaining agreement.

Minimum Wage Violations Can Expose Employers to the Section 203 "Waiting Time" Penalty

The Labor Code authorizes the Labor Commissioner to investigate and enforce statutes and orders of the IWC that, among other things, specify the requirements for the payment of wages by employers. Both criminal and civil penalties for violations of statutes and orders of the commission regarding payment of wages are authorized. The Labor Commissioner is also authorized to recover liquidated damages for an employee who brings a complaint alleging payment of less than the minimum wage fixed by an order of the commission or by statute.

Under Labor Code section 1197.1, the Labor

Commissioner can issue a citation against any employer who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission. The citation can include a civil penalty, the payment of restitution of wages, and payment of liquidated damages to the employee. As noted above, a "waiting time" penalty may also be imposed upon an employer for the willful failure to timely pay wages of an employee who resigns or is discharged. (Labor Code § 203.) AB 1723 (Nazarian) amended Labor Code section 1197.1 to include the Section 203 penalty among the damages, penalties and restitution recoverable for a minimum wage violation.

The Statute of Limitations for Liquidated Damages Claims is the Same as That for Minimum Wage Claims

An employee is authorized to bring a civil lawsuit against his or her employer for the unpaid balance of wages or compensation owed to that employee. An employee may also seek recovery of liquidated damages equal to the unpaid wages plus interest in a court action alleging payment of less than the state minimum wage. (Labor Code § 1194.2.) AB 2074 (Hernández) amended Labor Code section 1194.2 to provide that a suit for liquidated damages may be filed at any time before the expiration of the statute of limitations for bringing the underlying action alleging payment of less than the state minimum wage.

■ Labor Contracting

"Client Employer" Liability Under New Labor Code Section 2810.3

California law prohibits a person or entity from entering into a contract for labor or services with a construction, farm labor, garment, janitorial, security guard, or warehouse contractor, if the person or entity knows or should know that the contract or agreement does not include sufficient funds for the contractor to comply with laws or regulations governing the labor or services to be provided. To provide further protections to certain persons, AB 1897 (Hernández) added a new section to the Labor Code. The new section, 2810.3, requires a "client employer" to share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for the payment of wages and the failure to obtain valid workers' compensation coverage. Section 2810.3 also prohibits client employers from shifting to the labor contractor legal duties or liabilities under workplace safety provisions with respect to workers provided by the labor contractor.

A "client employer" is defined as a business entity that obtains or is provided workers to perform labor within the usual course of business from a labor contractor, except as specified. (Labor Code § 2810.3, subd. (a)(1)(A).) A "labor contractor" is defined as an individual or entity that supplies workers, either with or without a contract, to a client employer to perform labor within the client employer's usual course of business. (Labor Code § 2810.3, subd. (a)(3).) Section 2810.3 excepts from the definition of "labor contractor" specified nonprofit, labor, and motion picture payroll services organizations and third parties engaged in an employee leasing arrangement, as specified. Additionally, the new law does not prohibit client employers and labor contractors from mutually contracting for otherwise lawful remedies for violations of its provisions by the other party.

Under section 2810.3, a client employer or labor contractor must provide to a requesting enforcement agency or department, and make available for copying, information within its possession, custody, or control required to verify compliance with applicable state laws. The Labor Commissioner, the Division of Occupational Safety and Health, and the Employment Development Department are authorized to adopt necessary regulations and rules to administer and enforce the provisions of the new statute. Section 2810.3, subdivision (m) provides that a waiver of the statute's provisions is contrary to public policy, void, and unenforceable.

Foreign Labor Contractors: Amendments to Business & Professions Code Sections 9998.1-9998.11

Federal law permits certain aliens to engage in employment in the United States under specified conditions. California law regulates the services of foreign labor contractors with regard to contracts, recruitment procedures and representations, and information as to terms and conditions of employment. Any person who violates or induces a violation of the latter provisions is guilty of a misdemeanor. In addition, any person aggrieved by a violation of these provisions is authorized to bring an action for injunctive relief or damages, or both, and may recov-

er damages, costs, and reasonable attorney's fees, in an amount not less than $500. (See generally Bus. & Prof. Code § 9998, et seq.)

The Division of Labor Standards Enforcement (DLSE) in the Department of Industrial Relations, under the direction of the Labor Commissioner, is empowered to enforce and administer the licensing and supervision of foreign labor contractors.

SB 477 (Steinberg) amended the foreign labor contractors statutes in a number of ways. The amended law defines "foreign labor contracting activity" as "recruiting or soliciting for compensation a foreign worker who resides outside of the United States in furtherance of that worker's employment in California, including when that activity occurs wholly outside the United States. 'Foreign labor contracting activity' does not include the services of an employer, or employee of an employer, if those services are provided directly to foreign workers solely to find workers for the employer's own use." (Bus. & Prof. Code § 9998.1, subd. (b).) A "foreign labor contractor" is a person who performs foreign labor contracting activity, as defined, with some exceptions. (Bus. & Prof. Code § 9998.1, subd. (d).)

On and after July 1, 2016, foreign labor contractors must register with the Labor Commissioner. (Bus. & Prof. Code § 9998.1.5.) To register with the commissioner, foreign labor contractors must meet a number of requirements, including the disclosure of specified information, the payment of filing and registration fees, and the posting of a surety bond. The Labor Commissioner is authorized to enforce and administer the registration and supervision of foreign labor contractors, and to adopt regulations or policies and procedures to implement these provisions. The new law prohibits a person from knowingly entering into an agreement for the services of a foreign labor contractor that is not registered with the commissioner. (Bus. & Prof. Code § 9998.2, subd. (c).)

The amendments also include the following requirements and prohibitions:

a) Beginning July 1, 2016, persons knowingly using the services of foreign labor contractors to obtain foreign workers must disclose specified information to the commissioner. (Bus. & Prof. Code § 9998.2.)

b) A foreign labor contractor must disclose in writing to each foreign worker who is recruited for employment certain information, as specified. (Bus. & Prof. Code § 9998.2.5, subd. (a).)

c) A foreign labor contractor may not assess a fee or cost to a foreign worker for foreign labor contracting activities. (Bus. & Prof. Code § 9998.2.5, subd. (c).)

d) A foreign labor contractor may not charge a foreign worker with any costs or expenses not customarily assessed against similarly situated workers; may not require a foreign worker to pay any costs or expenses prior to commencement of work; and may not charge more than market rate for housing. (Bus. & Prof. Code § 9998.2.5, subd. (d).)

e) A foreign labor contractor may not change the terms of the contract originally provided to and signed by the foreign worker, unless the foreign worker is provided at least 48 hours to review and consider the changes, and unless the worker gives specific, voluntary consent to the changes. (Bus. & Prof. Code § 9998.2.5, subd. (e).)

The new law authorizes a civil penalty for violations, authorizes the Labor Commissioner or a person aggrieved by a violation to bring an action for injunctive relief or damages, or both, and authorizes recovery of damages, costs, and reasonable attorney's fees, including enforcement of liability against the bond deposited with the Labor Commissioner. (Bus. & Prof. Code § 9998.8.) The law also exempts a person from joint and several liability, and from misdemeanor liability, for an act or omission by a foreign labor contractor if the foreign labor contractor was registered with the Labor Commissioner as of the first day of the engagement. (§ 9998.8, subds. (a), (d).)

Farm Labor Contractors: Amendments to Labor Code Sections 1684, 1685, 1690, 1690.1 and 1697

Farm labor contractors are required to be licensed by the Labor Commissioner and to comply with specified employment laws. Such requirements include that a farm labor contractor must pay a license fee to the Labor Commissioner, and continuously appropriate a portion of the fee revenues for enforcement and verification purposes. Any person who violates farm labor contractor requirements is guilty of a mis-

demeanor.

SB 1087 (Monning), amended various provisions of the Labor Code pertaining to farm labor contractors. Under these amendments, a license to operate as a farm labor contractor will not be granted to a person who, within the preceding three years, has been found by a court or an administrative agency to have committed sexual harassment of an employee, or who, within the preceding three years, employed any supervisory employee whom he or she knew or should have known has been found by a court or an administrative agency, within the preceding three years of his or her employment with the applicant, to have committed sexual harassment of an employee. (Labor Code § 1685, subd. (c).)

The Labor Commissioner is authorized to revoke, suspend, or refuse to renew a farm labor contractor's license under specified circumstances, including that the licensee or an agent of the licensee violated or failed to comply with certain laws. (Labor Code § 1685, subd. (c).) SB 1087 amended Labor Code section 1690 to authorize the Labor Commissioner to revoke, suspend, or refuse to renew a farm labor contractor's license if the licensee has been found by a court or an administrative agency to have committed sexual harassment of an employee, or has employed a supervisory employee whom he or she knew or should have known has been found by a court or an administrative agency, within the preceding three years, to have committed sexual harassment of an employee. (Labor Code § 1690, subd. (g).)

Section 1685, subdivision (c), and section 1690, subdivision (g) each include an exculpatory clause for employers who obtain a signed statement from their supervisory employees stating that they have not been found by a court or administrative agency within the past three years to have committed sexual harassment. The Labor Commissioner has prepared a mandatory form for this purpose, available at http://www.dir.ca.gov/dlse/Supervisory_Employee_Sexual_Harassment_Disclosure_Statement.pdf. Persons who obtain the signed statement will be deemed to have no knowledge of a prior sexual harassment adjudication.

The new law further requires an applicant for licensure as a farm labor contractor to execute a written statement attesting that the person's supervisorial employees have been trained in the prevention of sexual harassment, as provided. (Labor Code § 1684, subd. (a)(8).) A bond must also be deposited with the Labor Commissioner conditioned upon compliance with, and payment of all damages occasioned by failure to comply with the provisions of FEHA pertaining to workplace harassment, as specified. (Labor Code § 1684, subd. (a)(3)(D).) The amendments also authorize certain license fees in the Farmworker Remedial Account which are continuously appropriated, to be used to satisfy claims for damages for violations of provisions prohibiting unlawful workplace harassment, as specified. (Labor Code § 1684, subd. (a)(4).)

California law requires an applicant for licensure as a farm labor contractor to have taken a written examination that demonstrates knowledge of current laws and regulations concerning farm labor contractors. The Labor Code amendments require that the examination cover laws and regulations concerning sexual harassment in the workplace. (Labor Code § 1684, subd. (a)(5).) Applicants for licensure must also now participate in at least nine hours of educational classes each year, including at least one hour of sexual harassment prevention training. (Labor Code § 1684, subd. (c).)

Under Labor Code section 227, an employer who has made permissible withholdings from an employee's wages but who willfully fails to remit the withholdings to the proper agency commits a crime. Pursuant to SB 1087, Labor Code section 1690.1 now requires the Labor Commissioner to refuse issuance or renewal of a farm labor contractor license until the amount of any delinquency under section 227 is fully paid.

Labor Code section 1697, subdivision (c) provides that any farm labor contractor who engages in farm labor contracting activities after his or her license has been suspended or revoked is guilty of an offense punishable by a fine and imprisonment. Prior to the passage of SB 1087, the statutory fine was not less than $1,000 but not exceeding $5,000. SB 1087 changed the amount of the fine to not less than $10,000.

■ Arbitration

No Waiver of the Right to Litigate Civil Rights Violations: Amendments to Civil Code Sections 51.7, 52, 52.1

The civil rights provisions contained in Civil Code sections 51.7, 52 and 52.1 guarantee all persons within the jurisdiction of this state the right to be free from violence, or intimidation by threat of violence,

because of political affiliation, or on account of a position in a labor dispute, or because of sex, race, color, religion, ancestry, national origin, disability, or medical condition, or because another person perceives them to have one or more of those characteristics. Violations are redressable by various means, including (a) a private civil action, (b) a complaint filed with the Department of Fair Employment and Housing (DFEH), and (c) proceedings by public prosecutors.

AB 2617 (Weber) amended sections 51.7, 52 and 52.1 to prohibit any person from requiring a waiver of the protections afforded under those provisions, including a waiver of the right to file a civil lawsuit or DFEH complaint, as a condition of entering into a contract for the provision of goods or services. (See Civil Code §§ 51.7, subd. (b); 52, subd. (i); 52.1, subd. (*l*).). The new law does permit knowing and voluntary waivers, in writing, as long as such a waiver is expressly not made as a condition of entering into the contract. (Civ. Code § 51.7, subd. (b)(3).) Any person seeking enforcement of a waiver has the burden of proving that the waiver was knowing and voluntary and was not made as a condition of the contract. (*Id.* at subd. (b)(5).) Whether the amendments to sections 51.7, 52 and 52.1 will survive a preemption attack under the Federal Arbitration Act remains to be seen. (See, e.g., *Iskanian v. CLS Transport Los Angeles, LLC* (2014) 59 Cal. 4th 348 (discussing broadened scope of FAA preemption under *AT&T Mobility, LLC v. Concepcion* (2011) 563 U.S. ___).)

Private Arbitration Companies: New Disclosures Required Under Code of Civil Procedure Section 1281.96

Code of Civil Procedure section 1281.96 requires a private arbitration company involved in consumer arbitration cases to collect and make certain information regarding those cases available to the public via the arbitration company's website. AB 802 (Wieckowski) amended section 1281.96 to require private arbitration companies to collect and post additional information, including, among other things, the following: whether the arbitration was demanded pursuant to a pre-dispute arbitration clause; whether the nonconsumer party initiated the arbitration; which type of consumer issue the dispute involved, including employment; and the number of times the nonconsumer party has been a party to an arbitration or mediation administered by the company. (C.C.P. § 1281.96, subds. (a)(1)-(11).)

■ Public Sector Employment

School Employees

Dismissal for Egregious Misconduct

California law prohibits termination of a permanent public school employee except for one or more of the causes enumerated in Education Code section 44932. Those causes include immoral conduct. Under an amendment to section 44932, enacted pursuant to AB 215 (Buchanan), "immoral conduct" includes "egregious misconduct," defined exclusively as "immoral conduct that is the basis for an offense described in Section 44010 or 44011 of [the Education Code, or in Sections 11165.2 to 11165.6, inclusive, of the Penal Code." (Education Code § 44932, subd. (a)(1).) The referenced Education and Penal Code sections describe sex offenses, controlled substance offenses, neglect, child injury and endangerment, unlawful corporal punishment and child abuse.

Notice of Employer's Intended Changes to Scope of Representation

Government Code section 3543.2 gives public school employee organizations the right to represent their members in their relations with public school employers, and limits the scope of representation to matters relating to wages, hours of employment, and other terms and conditions of employment, as defined. (Gov. Code § 3543.2, subd. (a)(1).) All other matters are reserved to the public school employer and may not be a subject of meeting and negotiating. A new subdivision, added pursuant to AB 1611 (Bonta), requires public school employers to give reasonable written notice to the exclusive negotiating representative when they intend to make any change to the matters within the scope of representation so that the exclusive representative will have a reasonable amount of time to negotiate the proposed changes with the employer. (Gov. Code § 3543.2, subd. (a)(2).)

Community College Employees

Completion of Contract Years 2, 3, and 4; Use of Leave Time in Computation

Under Education Code section 87605, a faculty member of a community college shall be deemed to have completed the first contract year if the faculty member provides service for 75% of the first academic

year. Under section 87606, the terms and conditions governing the employment relationship must be set forth in an employment contract. A new subdivision, added to section 87606 by the passage of AB 675 (Fong), requires that the employment contract specify the percentage of the academic year that the faculty member must serve in order to be deemed to have completed the 2nd, 3rd, and 4th contract years. (Educ. Code § 87605, subd. (b).) The new subdivision also provides that time spent on a leave of absence may be included in computing service time, if the faculty member has spent sufficient time working during the year to allow for an appropriate job evaluation. (*Ibid.*) Counsel should note that the new provision regarding leaves of absence may conflict with Education Code section 87776, which provides that "time spent on any unpaid leave of absence shall not be included in computing the service required as a prerequisite to attainment of, or eligibility for, tenure."

30 Days Leave of Absence for Birth or Adoption

Pursuant to AB 1606 (Chávez), sections 87784.5 and 88207.5 have been added to the Education Code. These provisions allow academic and probationary or permanent classified community college employees to use up to 30 days of paid leave per school year to care for a new child.

State Employment: Application Information to be Communicated by Email

Currently, Government Code section 18934 requires every applicant for examination for state employment to file an application with the Department of Human Resources or an appointing power designated by the department. AB 1820 (Mullin) amended, repealed and added section 18934 commencing on July 1, 2017. On that date the law will require the Department of Human Resources or the designated appointing power, whenever it receives an application for examination that was filed online, to: (1) provide the email address of the Department or the designated appointing power to the applicant, (2) contact the applicant using email instead of postal mail, unless the applicant specifically requests otherwise, and (3) inform the applicant that he or she will be provided with employment inquiry notifications and his or her score and rank on the examination via email, unless the applicant specifically requests to be notified by postal mail.

■ Volunteer Emergency Rescue Personnel: Employees Who Are Health Care Providers Must Notify Employer of Designation and Deployment

Labor Code section 230.3 prohibits an employer from discharging or in any manner discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. Section 230.3, subdivision (c), exempts from this prohibition a public safety agency or provider of emergency medical services if, as determined by the employer, the employee's absence would hinder public safety or emergency medical services. The passage of AB 2536 (Mullin) amended subdivision (c) to require that an employee who is a health care provider, as defined, notify his or her employer at the time the employee becomes designated as emergency rescue personnel and when the employee is notified that he or she will be deployed as a result of that designation. (Labor Code § 203.3, subd. (c)(2).)

■ Occupational Safety and Health: Immediate Report by Email Now Permitted

Labor Code section 6409.1, which is part of the California Occupational Safety and Health Act, requires every employer to file with the Department of Industrial Relations a complete report of every occupational injury or occupational illness of each employee, as specified. Additionally, the employer must immediately report the injury or illness by telephone (or telegraph). AB 326 (Morrell) amended Labor Code section 6409.1, subdivision (b), to require that the immediate report be made by telephone or email.

■ Health Care Coverage

The "Grandmothering Act": Passage of SB 1446 Gives Small Employers Another Year to Transition to ACA Compliant Health Insurance Policies

The federal Patient Protection and Affordable Care Act (PPACA) mandated various health care coverage market reforms with respect to plan years on or after January 1, 2014. Initially, the PPACA required that all noncompliant policies be cancelled at the end of 2014. The PPACA's grandfather clause exempted plans that were in effect on March 23, 2010, the date of the PPACA's enactment. However, significant changes made to a plan jeopardized a plan's

grandfathered status. Loss of grandfathered status, and failure to meet the requirements for grandfather status, exposed countless individual and small group plans to potential cancellation at the end of 2014. Regulations issued under PPACA addressed the problem by granting "transitional relief" to certain health insurance coverage in the individual and small group market. The transitional relief exempts that coverage from certain PPACA requirements, allowing insurers to reissue noncompliant plans. The transitional relief is only available as authorized by state law. California lawmakers responded by enacting SB 1446, as an emergency measure effective on July 7, 2014.

SB 1446 (DeSaulnier) added section 1367.012 to the Health and Safety code, and section 10112.300 to the Insurance Code. These sections allow a small employer health care service plan contract or a small employer health insurance policy that was in effect on December 31, 2013, and still in effect as of the effective date of the bill's enactment (July 7, 2014), and that does not qualify as a grandfathered health plan under PPACA, to be renewed until January 1, 2015, and to continue to be in force until December 31, 2015. These sections exempt those plan contracts and policies from various provisions of state law that implement the PPACA, and require that the contracts and policies be amended to comply with those provisions by January 1, 2016. Essentially, this gives non-grandfathered plans of small employers another year to comply with the PPACA.