

# Insider's Guide to What's Happening in the California Legislature



Presented by:  
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# Today's Agenda

- Good news? – federal developments.
- Brief overview of legislative process in California.
- Pending California labor and employment bills.
- Questions?

# Let's start with some good news!

- Trump Presidency?
- Likely means some positive developments for employers at the federal level.
- At a minimum some scaling-back of Obama Administration rules and regulations.
- What's happened so far?



# United States Supreme Court



## Justice Neil Gorsuch

- Always difficult to predict how a Supreme Court Justice will rule.
- But seems he will be more pro-business in his approach to cases.



# United States Department of Labor

## Secretary Alex Acosta

- Trump's second choice.
- Last cabinet secretary confirmed.
- Waiting for lower-level appointees...
- More emphasis on compliance?



# National Labor Relations Board (NLRB)



- Trump reported to name two nominees in early June.
- Republican majority should help on:
  - Class action waivers
  - Joint employer status
  - Temporary workers
  - Quickie elections

## The “Fair Pay and Safe Workplaces” Executive Order

- President Obama issued in 2014.
- Also known as the “blacklisting rule.”
- Workplace violations reporting and prohibition on arbitration clauses.
- March 2017 – President Trump signs Joint Resolution revoking the executive order.

# OSHA



- Elimination of the “Volks” rule.
- Revocation of “Fairfax Memo.”
- Discontinuance of aggressive publicity of enforcement activity.



# FLSA Overtime Rule

- Blocked by federal judge.
- Trump Administration has twice asked for more time to decide how to respond.
- Current deadline June 2017.
- Acosta confirmation – open to some compromise increase to threshold?
- \$33,000???????



# Health Care



- ACA reform.
- American Health Care Act
- Narrow path with budget reconciliation.
- Senate deliberation.
- Conference or back to House?
- Patience...we are at inning 3 of a 9-inning game.

# Immigration?

- Two executive orders (?)
- E-Verify? (Trump budget has \$15 million to implement mandatory E-Verify).
- 10,000 new ICE agents.
- H-1B visa program review (“Buy American, Hire American”).



# Trump's Paid Parental Leave Proposal (PPL)

*Provide paid parental leave benefits.*—The Administration proposes establishing a new benefit within the Unemployment Insurance (UI) program to provide up to six weeks paid leave to mothers, fathers, and adoptive parents. States are expected to adjust their UI tax structures to maintain sufficient balances in their Unemployment Trust Fund accounts.

- Just announced Tuesday in release of budget proposals.
- Six weeks of paid parental leave.
- **Not** employer funded. Would be financed by broad revisions of UI system.
- Just a proposal at this point. Congress needs to develop and approve legislation.



So what's the *bad* news?



You still operate in **California.**



# Brief Overview of California Legislative Process



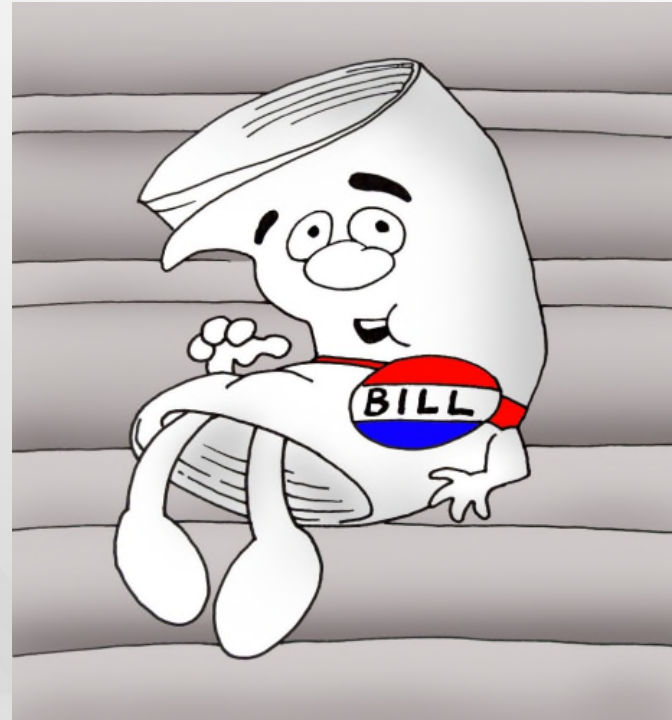
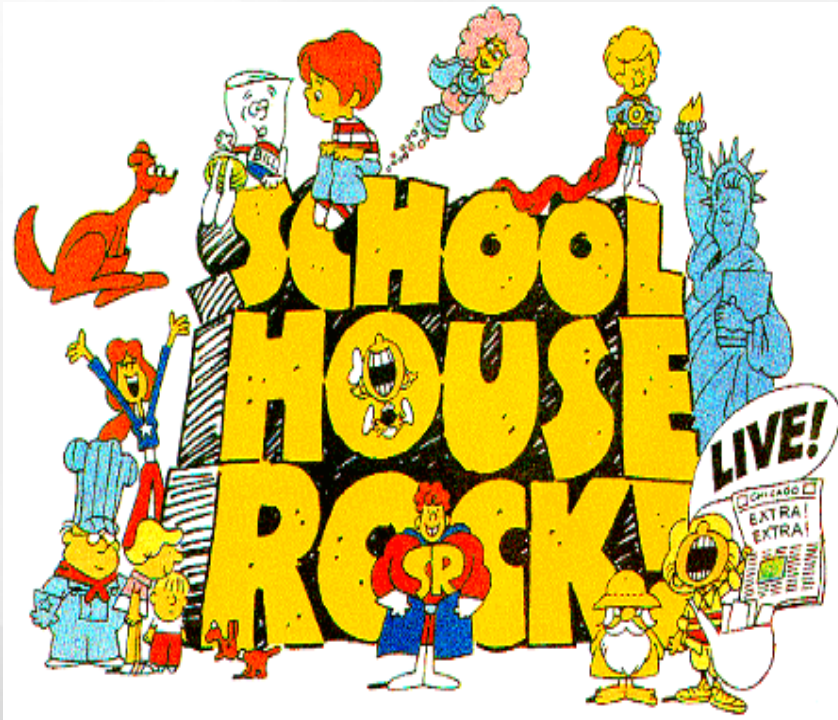


“If you like laws and sausages, you should never watch either one being made.” - Otto von Bismarck

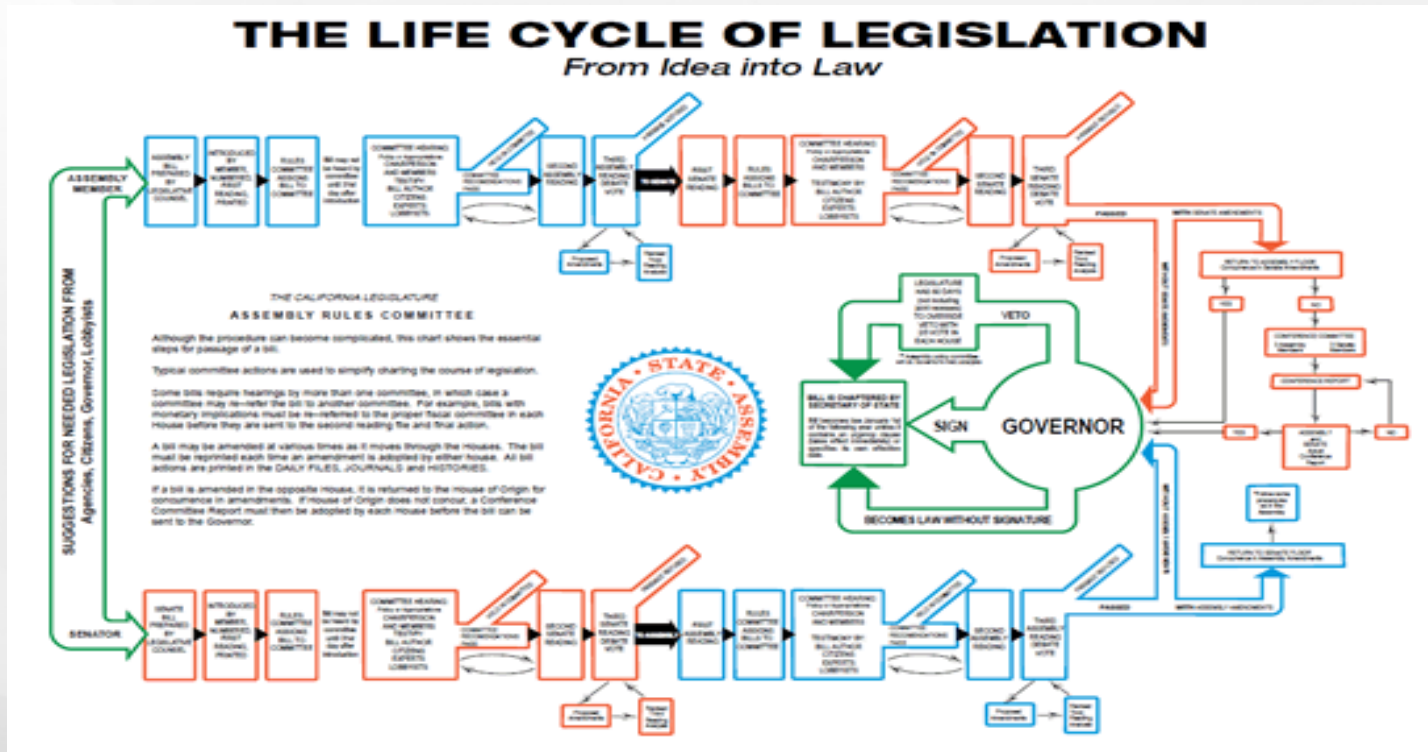




# How a Bill Becomes a Law



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- 1) Bill introduced (Leg Counsel drafts).
- 2) Referred to policy committee.
- 3) Policy committee(s).
- 4) Fiscal committee?
- 5) Floor vote.
- 6) Other house – same process all over again.
- 7) Concurrence? - Back to house of origin.
- 8) To the Governor.

# Legislative Process – General Calendar

*January-February*

- Bills introduced in house of origin.
- February 17, 2017 deadline.

*March-April*

- Bills heard in policy committees.

*May (**we are here**)*

- Bills heard in fiscal committees.
- Last week of May – floor votes.

*June-August*

- Same process in other house.

*September*

- All bills must pass both houses.
- Bills sent to Governor.



# Key Legislative Deadlines for 2017

- June 2, 2017 – last day to pass bills out of house of origin.
- September 15, 2017 – last day for any bill to be passed.
- October 15, 2017 – last day for Governor to act on bills.

## Where Do Labor Bills Come From?

*“Where do they come up with this stuff ?!?”*



# Where Do Labor Bills Come From?

- Organized labor (90%)
- Worker advocates
- Plaintiff attorneys
- Administration
- Members
- Local ordinances
- Employers



# Where Do Labor Bills Come From?

## Local Ordinances:

- Paid sick days
- Minimum wage
- Health care
- Ban the box
- “Opportunity to Work”





# Meet your Assembly Labor Committee

**Chair**

**Tony Thurmond  
(D-Richmond)**



# Meet your Assembly Labor Committee



**Vice Chair**

**Heath Flora  
(R-Modesto)**

# Meet Your Assembly Labor Committee

**Lorena Gonzalez  
Fletcher  
(D-San Diego)**



# Meet Your Assembly Labor Committee



**Matthew Harper  
(R- Huntington  
Beach)**



# Meet Your Assembly Labor Committee

**Reginald Byron  
Jones-Sawyer, Sr.  
(D-Los Angeles)**



# Meet Your Assembly Labor Committee

**Ash Kalra  
(D-San Jose)**



# Meet Your Assembly Labor Committee



**Kevin McCarty  
(D-Sacramento)**

# Let's Review That Lineup

- **Tony Thurmond** – Chair (D-Richmond)
- **Heath Flora** – Vice Chair (R-Modesto)
- **Lorena Gonzalez Fletcher** (D-San Diego)
- **Matthew Harper** (R-Huntington Beach)
- **Reginald Byron Jones-Sawyer, Sr.** (D-Los Angeles)
- **Ash Kalra** (D-San Jose)
- **Kevin McCarty** (D-Sacramento)
- ***Five Democrats vs. Two Republicans***



# Meet Your Senate Labor Committee

**Chair**

**Steven Bradford  
(D-Los Angeles)**



# Meet Your Senate Labor Committee



**Vice Chair**

**Jeff Stone  
(R-Murrieta)**

# Meet Your Senate Labor Committee

**Toni Atkins  
(D-San Diego)**



# Meet Your Senate Labor Committee



**Hannah-Beth  
Jackson  
(D-Santa Barbara)**



# Meet Your Senate Labor Committee

**Holly Mitchell  
(D-Los Angeles)**



## Let's Review That Lineup

- **Steven Bradford** – Chair (D-Los Angeles)
- **Jeff Stone** – Vice Chair (R-Murrieta)
- **Toni Atkins** (D-San Diego)
- **Hannah-Beth Jackson** (D-Santa Barbara)
- **Holly Mitchell** (D-Los Angeles)
- ***Four Democrats vs. One Republican***

# Can You Say “Stacked Deck?”



# Big Labor and Employment Bills for 2017





## AB 5 – The “Opportunity to Work” Act

- Based on San Jose Measure E.
- Requires employers with 10 or more employees in state to offer hours to existing part time employees before hiring new employees.
- Including through a staffing agency or similar entity.





## AB 5 – Lots of Questions...Few Answers.

- How do you “offer” work to existing employees? Mass email? Personally contact each employee?
- How long do you have to wait to hear?
- Bill says hours must be offered in a “transparent and nondiscriminatory” process. What does that mean?
- Can you offer hours to your “best” employee? Is that discriminatory?
- If you have employees at multiple locations, do you have to offer hours to employees at other locations too?

## AB 5 – On “Hold” for 2017



- Author has shelved this bill for the year.
- Making it a two-year bill.
- Bill not moving this year, but can be moved forward in January 2018.
- Author says she wants to see how Measure E is implemented and enforced.
- Stay tuned!

# AB 168 – No Salary History Inquiries

- Cannot seek salary history information about an applicant for employment.
- If an applicant asks for a pay scale for a position, the employer must provide it.
- Part of growing nationwide trend (Massachusetts, Philadelphia, NYC).
- 1st Amendment challenges?

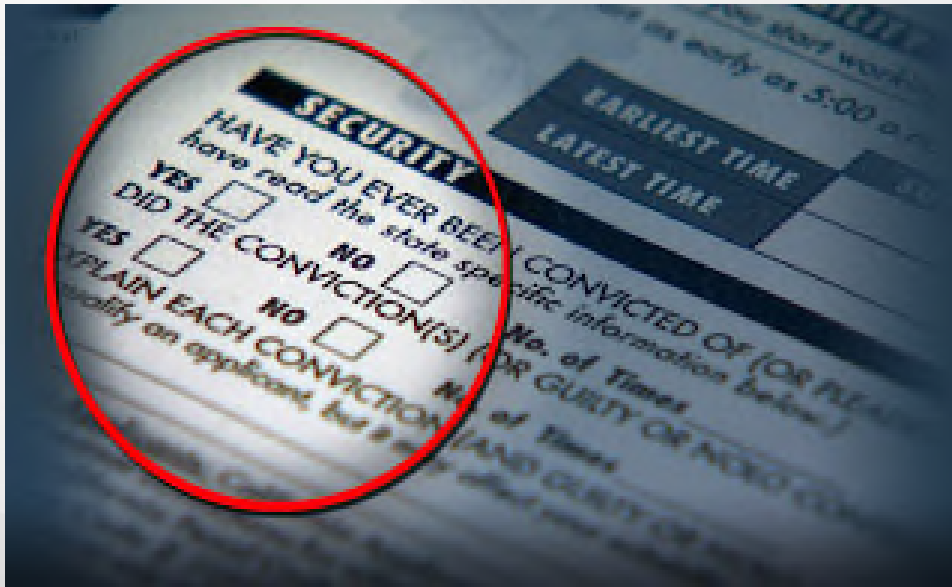


# AB 1209 – Gender Pay Differentials



- Applies to employers with 250 or more employees.
- Have to collect gender pay differentials for exempt employees and board members by each job classification or title.
- Have to report to state and publish on a website annually.
- Doesn't account for bona fide reasons for differentials.

# AB 1008 – Ban the Box



- Current state law applies only to public employers (cannot inquire about criminal history until employer determines applicant meets minimum qualifications).
- This bill would apply to all public and **private** employers.
- Based on Los Angeles ordinance.



# AB 1008 – Ban the Box

- **Cannot consider:**
  - Misdemeanor convictions more than 3 years old.
  - Felony convictions more than 7 years old.
- ***Cannot consider criminal history until a conditional offer of employment has been made.***
- **“Fair Chance Process”** - To deny employment, employer must make an **individualized assessment** that considers:
  - 1) Nature and gravity of offense.
  - 2) Time that has passed since offense.
  - 3) The nature of the job held or sought.

## AB 1008 – Ban the Box

- **Individualized assessment** must be provided to the applicant in writing.
- Applicant then has **10 days** to respond to challenge accuracy of the criminal history information or submit evidence of mitigation or rehabilitation **before the employer can make a final decision.**
- Employer must consider any response from applicant.
- If employer makes final decision to deny employment, **must notify the applicant in writing.**

# AB 1008 – Ban the Box

## Employer Dilemma

- Do I deny employment based on criminal history and risk FEHA lawsuit?

Or

- Do I hire applicant and risk liability for negligent hiring and retention?



# AB 1008 – Ban the Box

## Do “Ban the Box” Policies Do More Harm Than Good?

- At least two recent studies have indicated when employers are limited in asking about criminal history, they may resort to using race as a proxy.
- Evidence shows this may actually limit job opportunities for African-American and Latino applicants.
- Not a defensible alternative (and gives rise to discrimination claims). **Don't do this!**
- But may be something for policymakers to consider.

# New FEHC Regulations on Criminal History

- Effective **July 1, 2017**.
- Use of criminal history information may have an “adverse impact” on applicants based on protected categories (such as gender, race or national origin).
- Based largely on 2012 EEOC “guidance” that said use of criminal history may have a disparate impact on individuals in protected classifications.



# New FEHC Regulations on Criminal History

- **Step # 1 – Adverse Impact**
  - Applicant can use state or national conviction statistics.
  - Very low bar to satisfy...lots of data out there.
- **Step # 2 – Employer Rebuttal – Job Related and Business Necessity**
  - Employer must prove use of criminal history is job-related and consistent with a business necessity.
  - Must consider (1) nature and gravity of offense, (2) time that has passed since offense, and (3) nature of the job held or sought.

# New FEHC Regulations on Criminal History

- Employer must show that any “bright line” conviction disqualification policy can distinguish between applicants **or** conduct an individualized assessment.
- A “bright line” disqualification policy that considers convictions more than 7 years old is presumed to violate the law.
- **Step # 3 – Employee’s Last Bite at the Apple**
  - Even if employer can prove all of the above, employee still gets one final shot.
  - Employee can prove there is a violation if they can show employer had a **less discriminatory alternative** that meet’s the employer’s goals (narrower list of convictions or other form of inquiry).

## Relation Between AB 1008 and New FEHC Regulations



- Lots of overlap.
- Similar procedural requirements.
- But some differences and contradictions.
- Will lead to employer confusion and mistakes.
- May be good argument for Governor to veto the bill.

# AB 450 - Immigration

- Largely a response to (anticipated) actions of Trump Administration.
- Big priority bill for labor.
- The “optics” are more important than the bill content.
- Puts employers right in the middle of the immigration debate.



## AB 450 - Immigration

- Requires employer to demand a **judicial warrant** or **subpoena** before granting ICE access to worksite or records.
- Employer that receives advanced notice of ICE enforcement activity must give **written notice** to employees (and their representative).
- Employer must notify the **Labor Commissioner** of any enforcement activity (within 24 hours of notice from ICE or immediately if no notice).
- Employer must notify Labor Commissioner before conducting an I-9 **self-audit**.



## AB 450 - Immigration

- Labor Commissioner has right to come in and do a **wall-to-wall inspection** of the worksite.
- Labor Commissioner may issue a **certification** to worker stating that they are a claimant or a witness in an ongoing case.
- This is largely seen as an attempt to “manufacture” claims against the employer in an effort to stave off any deportation of workers.
- Any violation of any of the above is punishable by civil penalty of between **\$10,000 and \$25,000**.

# AB 450 – Immigration Employer Response:



"C'mon, c'mon—it's either one or the other."

# AB 1565 – Overtime Exemption Salary Threshold



## To recap:

- Obama regulation would have raised salary level to \$47,476 (current federal minimum is \$23,660).
- Federal court granted injunction stopping rule from going into effect.
- Still unclear what Trump response will be.

# AB 1565 – Overtime Exemption Salary Threshold

## California is not waiting for the feds:

- California overtime threshold must be two times the state minimum wage.
- California's current minimum wage is \$10/\$10.50 per hour (depending on the number of employees).
- Current overtime salary threshold:
  - \$43,680 (for employers with 26 or more employees)
  - \$41,600 (for employers 25 or fewer employees).
- **AB 1565**: salary must be \$47,472 (or twice minimum wage, whichever is higher) for **all** employers.



# AB 1565 – Overtime Exemption Salary Threshold

*Just speeding up the inevitable...*

Year	CA Minimum Wage	Salary Test for Overtime (Twice State Minimum Wage)	AB 1565 (Salary Test for ALL employers)
<b>2017</b>	\$10.00/hour (-25 employees)	\$41,600	n/a
	\$10.50/hour (26+ employees)	\$43,680	n/a
<b>2018</b>	\$10.50/hour (-25 employees)	\$43,680	<b>\$47,472</b>
	\$11.00/hour (26+ employees)	\$45,760	<b>\$47,472</b>
<b>2019</b>	\$11.00/hour (-25 employees)	\$45,760	<b>\$47,472</b>
	\$12.00/hour (26+ employees)	\$49,920	\$49,920
<b>2020</b>	\$12.00/hour (-25 employees)	\$49,920	\$49,920
	\$13.00/hour (26+ employees)	\$54,080	\$54,080



## AB 1565 – Overtime Exemption Salary Threshold

**Don't forget!** Overtime exemption is a “two-part” test:

- Employee must earn minimum **salary** requirement.
- Employee must perform “exempt” **duties**.
- Not sufficient to just pay someone a salary and call them “exempt.”



## AB 1099 – Debit/Credit Card “Tips”

- An employer that permits a patron to pay for services performed by an employee by debit or credit card must also accept a debit or credit card for payment of gratuity.
- Must be paid to employee by next regular payday following date patron authorized the payment.
- Only applies to the following industries – (1) hotels, (2) car washes, (3) salons licensed by Board of Barbering/Cosmetology, (4) massage establishments, (5) restaurants, and (6) online apps and platforms.

## AB 1099 – Debit/Credit Card “Tips”



- This bill is purportedly aimed at Uber (who does not allow tips by card).
- This may morph into a much larger bill dealing with the “**gig economy.**”
  - Organizing rights?
  - Portable benefits?
- ***Keep an eye on this one!***

## SB 63 – Parental Leave

- Applies to employers with **20 or more** employees with 75 miles.
- Provides for **12 weeks** of job-protected parental leave (including birth, adoption, foster care placement).
- Part of ongoing effort to extend CFRA/FMLA type requirements to smaller employers.



## SB 63 – Parental Leave

- SB 654 (2016) – only provided **6 weeks** of leave.
- Vetoed by Governor Brown:
  - *“It goes without saying that allowing new parents to bond with a child is very important and the state has a number of paid and unpaid benefit programs to provide for that leave. I am concerned, however, about the impact of this leave particularly on small businesses and the potential liability that could result. As I understand, an amendment was offered that would allow an employee and employer to pursue mediation prior to a lawsuit being brought. I believe this is a viable option that should be explored by the author.”*
- Author/sponsor do not appear to be interested in such an amendment to this bill.



## SB 258 – Cleaning Products “Right to Know” Act of 2017

- Aimed primarily at cleaning product manufacturers.
- But also impacts **employers**.
- If a cleaning product is poured into another container, the employer must ensure it is **labeled** with:
  - Name of the cleaning product.
  - List of ingredients of concern.
  - Pictogram of potential health impacts.



## SB 306 - Retaliation



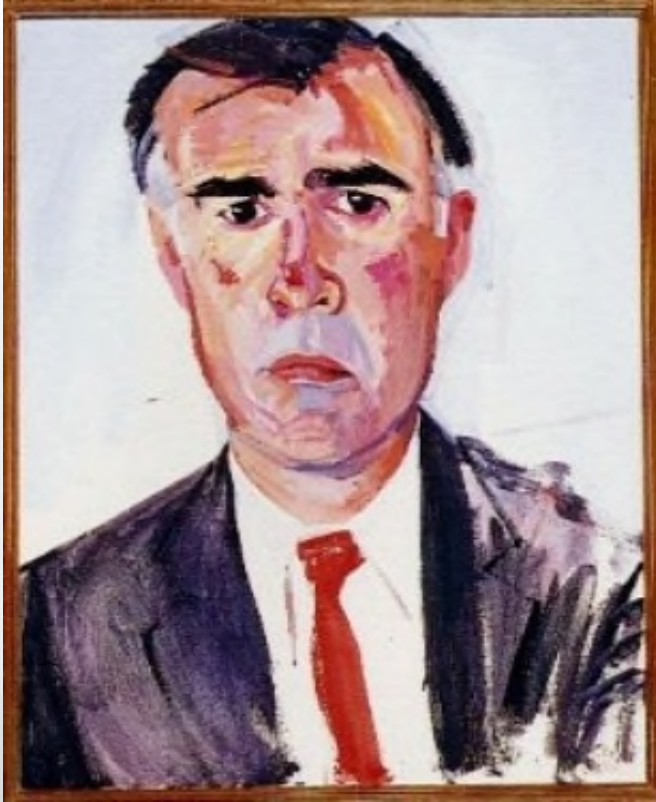
- Authorizes the Labor Commissioner to seek “**injunctive relief**” in retaliation cases.
- This would be a court order forcing the employer to **reinstate** the employee while the case was pending.
- Similar to a budget proposal put forth by Governor Brown.

# AB 353 – Veterans' Hiring Preferences

- Sponsored by SHRM.
- Provides that an employer's veterans' preference policy shall not be deemed to violate discrimination laws.
- Must be applied uniformly to hiring decisions.
- Previous version of bill met resistance over concerns about gender discrimination.



# Governor Brown's Proposed Budget



## Two Concerning Proposals:

- Lets DLSE get TRO to force you to put employee back to work pending retaliation investigation (like SB 306).
- Requires ABC, BAR and Barbering/ Cosmetology to revoke/suspend licenses for employers with unpaid judgments over 30 days.



# Governor Brown's Proposed Budget

- Employer groups actively negotiating with the Governor about these proposals.
- June 15 – budget bill must be passed by midnight.





# California Secure Choice Retirement Savings Program

- Still in implementation stage. Possible 2019 roll-out for big employers.
- Congress revoked DOL rule providing safe harbor from ERISA issues.
- CA Democratic leaders say they will still be moving forward.
- Will require further legislative action.



# Questions?



The logo for Fisher Phillips, featuring the company name in white text on a red, stylized banner.

**Fisher  
Phillips**

# Thank You



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ON THE FRONT LINES OF WORKPLACE LAW<sup>SM</sup>