



The Good, The Bad, And The Ugly: A Quick Primer On Proposed California Employment Legislation In 2017

Insights

2.23.17

With the February 17 deadline to introduce bills in the California Legislature having come and gone, now is a good opportunity to take stock of what the coming year portends for labor and employment legislation in California. In short, the message for California employers is: “hang on – it’s going to be an interesting ride.”

As a preliminary matter, it is interesting to note that the Legislature introduced 2,495 bills before the deadline, which represents an increase of approximately 200 bills over the average for the first year of a two-year legislative session. As can be expected in California, a fair number of these bills relate to labor and employment matters.

The vast majority of these proposals would impose new requirements or restrictions on California employers, although a few would propose relief for the employer community in areas like regulatory reform, increased flexibility, and efforts to rein in abuse under the Labor Code Private Attorneys General Act of 2004 (PAGA).

Common Themes For 2017

Many of the bills introduced this year revisit issues and proposals that will not be new to those who have monitored legislative activity over the last several years. These include measures to address gender pay inequity, expand employer obligations to provide family and medical leave, and “ban-the-box” efforts to restrict employer use of criminal history information. Several proposals attempt to regulate portions of the “gig” or “innovation” economy, as policymakers and stakeholders continue to struggle to determine whether and how to regulate new industries and business models.

But because this is California, there are always new proposals to keep employers on their toes. For example, Assembly Bill 5 would enact a statewide “Opportunity to Work Act” that would require employers to offer additional hours to part-time workers before they could hire or obtain new employees. Another proposal (Assembly Bill 569) would prohibit employers from discriminating against employees due to “reproductive health” decisions. Yet another proposal (Assembly Bill 199) would appear to make most residential construction projects subject to state prevailing wage law. Finally, a different measure (Senate Bill 744) ominously declares the intent of the Legislature to enact an undefined “employee right to privacy” in the California Labor Code.

California v. Trump

In addition to the issues raised above, California employers need to be cognizant of the larger political debate occurring at the federal level – in particular the tension between the Trump administration with the Republican-led Congress on the one side, and an increasingly blue California on the other. While the Trump administration may make a number of changes seen as positive by the employer community, employers here need to remember that this is still California. Employers should anticipate a California legislative and regulatory response to virtually every action taken by the Trump administration or Congress that impacts labor and employment. For every executive order rescinded or policy change made at the federal level, California employers should anticipate a Newtonian “equal and opposite reaction” here in our state.

Summary of Key Labor and Employment Proposals

With that in mind, strap on your seatbelts and get ready for this preview of some of the more significant measures related to labor and employment law that will be moving through the Legislature this year:

AB 5 (Gonzalez Fletcher) – “Opportunity to Work Act” – Based on similar proposals adopted recently in San Francisco and San Jose, this bill requires employers with 10 or more employees in the state to offer additional hours of work to part-time employees before hiring an additional employee or subcontractor (even through a staffing agency or similar entity).

AB 46 (Cooper) – Gender Pay Inequality – Provides that the California Equal Pay Act applies to both public and private employers.

AB 168 (Eggman) – Salary History Information – Prohibits an employer from seeking salary history information about an applicant for employment. This bill also requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant for employment. Previous legislative efforts in this regard have not been successful.

AB 199 (Chu) – Public Works: Residential Projects – Defines “public works” for prevailing wage law purposes to include private residential projects built on private property that are built pursuant to an agreement with the state or a political subdivision. This would have major implications for the California building industry and this is an important bill to watch.

AB 206 (Gonzalez Fletcher) – Workers’ Compensation – Day Laborers – Provides that workers’ compensation provisions of existing law apply to day laborers and individuals regardless of immigration status.

AB 238 (Steinorth) – Medical Cannabis: Distributors: Employment – Prohibits a cannabis distributor from being denied a license on the basis that it employs individuals who are not party to a collective bargaining agreement.

AB 260 (Santiago) – Human Trafficking: Hotels and Motels – Requires hotels, motels, inns, bed and breakfasts, and other locations that provide transient lodging to post an existing notice relating

to slavery and human trafficking. This bill is similar to SB 225 (Stern), also introduced this year.

AB 263 (Rodriguez) – Emergency Medical Services Workers “Bill of Rights” – Requires an employer providing EMS services to authorize and permit its employees to take rest periods. This bill also requires the Cal/OSHA Standards Board to adopt standards that require EMS providers to adopt a workplace violence prevention plan that contains prescribed elements.

AB 281 (Salas) – PAGA – This bill makes a number of reforms to PAGA. First, it extends the time period for an employer to cure certain Labor Code violations from 33 days to 65 days. Second, the bill attempts to expand the scope of the violations subject to the right to cure to include everything except health and safety violations. Third, it addresses standing requirements that have given rise to concerns by reiterating that “an aggrieved employee may be awarded civil penalties based only upon a violation by the employer actually suffered by that employee.”

AB 306 (Gonzalez Fletcher) – Unemployment Insurance: Strikes/Lockouts – Although this bill is merely a shell “spot” bill at this time, the author has publically announced that she will be amending this bill to provide eligibility for unemployment insurance benefits for striking and locked-out employees. Under existing law, employees who are unilaterally locked out by their employer are generally entitled to unemployment insurance (with certain important exceptions), but employees who strike against their employer are generally not eligible for such benefits.

AB 326 (Salas) – Barbering and Cosmetology: Domestic Violence/Sexual Assault Training – Requires the State Board of Barbering and Cosmetology to require an applicant for a license to take a one-hour training on domestic violence and sexual assault awareness.

AB 353 (Voepel) – Veterans’ Preference – Hiring Policy – Authorizes a private employer to establish and maintain a written veterans’ preference employment policy to give a voluntary preference for hiring or retaining a veteran. The granting of such a preference, in and of itself, shall not be deemed to violate local or state employment discrimination laws. This bill is identical to another bill introduced this year, AB 1477 (Brough). Both bills are similar to AB 1383 (Jones) from last year, which failed passage in the Senate Judiciary Committee.

AB 387 (Thurmond) – Minimum Wage: Health Professionals: Interns – Provides that state minimum wage law applies to employers that employ a person engaged in a period of supervised work experience to satisfy requirements for licensure, registration, or certification as an “allied health professional,” as defined.

AB 402 (Thurmond) – OSHA: Plume – Requires Cal/OSHA to convene an advisory committee to develop a regulation requiring health facilities to evacuate or remove surgical “plume” through the use of a plume scavenging system. This bill is similar to AB 2272 from last year, which was vetoed by Governor Brown.

AB 442 (Frazier) – OSHA Liability: Small Businesses and Microbusinesses – Prohibits Cal/OSHA from commencing an enforcement action for any non-serious violation where the employer is a small business (100 or fewer employees with \$10 million or less in gross receipts) or a microbusiness (25 or fewer employees with \$2.5 million or less in gross receipts), without first giving the employer written notice and 30 days to correct the violation.

AB 500 (Gomez) – Employee Codes of Conduct – Requires public and private schools that maintain an “employee code of conduct with pupils” to provide a written copy of the code of conduct to the parent or guardian of each pupil at the beginning of the year and, beginning in 2018, on the school’s website.

AB 543 (Chen) – Employment: Resident Apartment Manager Wages – Provides that if an employer does not charge a resident apartment manager rent, the employer may (by written agreement) apply up to two-thirds of the fair market value of the apartment towards their minimum wage obligation without violating provisions of the IWC Wage Orders related to credit or charges for lodging.

AB 568 (Gonzalez Fletcher) – School and Community Colleges: Paid Maternity Leave – Requires school districts and community colleges to provide paid maternity leave.

AB 569 (Gonzalez Fletcher) – Discrimination: Reproductive Health – Prohibits employers from taking adverse employment action against an employee based on the use of any drug, device, or medical service related to reproductive health by the employee or a dependent. This bill also prohibits employers from requiring workers to sign a waiver that purports to deny an employee the right to make his or her own reproductive health care decisions.

AB 570 (Gonzalez Fletcher) – Workers’ Compensation: Apportionment – Prohibits workers’ compensation apportionment from being based on pregnancy, childbirth, or other medical conditions related to pregnancy or childbirth. This bill is similar to AB 1643 (2016) and AB 305 (2015) by the same author. Both were vetoed by Governor Brown.

AB 656 (Kiley) – Unemployment Insurance Tax: Credit – This bill provides employers with a credit against income tax contributions to make up for the reduction in credit under the Federal Unemployment Tax Act due to the State of California having a debt as a result of borrowing from the Federal Unemployment Trust Account during the most recent recession.

AB 673 (Chu) – Public Transit Operators: Safety Requirements – Requires public transit operators to take into consideration recommendations and best practices developed by the union representing bus operators for the purpose of protecting bus operators from the risk of assault and by removing blind spots.

AB 676 (Limón) – Child Care and Development: OSHA Training – Requires early educators (as defined) to attend a one-time, two-hour training on OSHA risks specific to the child care profession.

AB 708 (Quirk-Silva) – OSHA Reporting – Deletes the requirement that the report of a serious injury or illness or death be reported to Cal/OSHA by telephone.

AB 815 (Cooper) – Farm Labor Contractors – Requires the Labor Commissioner to ensure that the Fresno DLSE office has sufficient resources for duties of the Farm Labor Contractor Special Enforcement Unit.

AB 831 (Patterson) – Tax Credits: Compliance – Provides a tax credit for qualified small businesses of \$25 for each hour spent on compliance with state regulations and laws.

AB 848 (McCarty) – UC and CSU Outsourcing – Brought in response to media reports about outsourcing and allegations of H1B visa misuse, this bill would prohibit the UC and CSU from allocating or expending funds for employment training for employees located in foreign countries.

AB 912 (Obernolte) – California Small Business Regulatory Fairness Act – Requires state agencies to assist small businesses in complying with the law. This bill also requires state agencies to provide for the reduction (or waiver) of civil penalties for small businesses based upon mitigating factors, including, but not limited to, that the violation did not impose an imminent health, safety or environmental threat.

AB 978 (Limón) – OSHA IPPs – This bill requires employers, upon written request, to provide a copy of the written injury and illness prevention program (required under existing law) to an employee or authorized representative. This bill is similar to AB 2895 from last year, which was not taken up on the Senate floor.

AB 1008 (McCarty) – “Ban the Box” – This bill would enact a statewide version of the “ban-the-box” ordinance recently adopted in Los Angeles. Among other things, the bill prohibits employers from asking about or considering conviction history of an applicant until a conditional offer of employment has been made, and requires employers to provide certain information to applicants and a 10-day opportunity for the applicant to submit evidence of mitigation or rehabilitation.

AB 1017 (Santiago) – Collective Bargaining Arbitration: Attorneys’ Fees – Under current law, if a party to a collective bargaining agreement prevails in a court action to compel arbitration, or to compel compliance with an arbitration decision or award, the court shall award attorneys’ fees. This bill would extend those provisions to public employers.

AB 1066 (Aguiar- Curry) – Prevailing Wage: Tree Removal – Amends the definition of “public works” for purposes of state prevailing wage law to include tree removal.

AB 1099 (Gonzalez Fletcher) – Tips: Gig Economy – This bill requires an employer who allows a patron to pay for services by debit or credit card to also accept a debit or credit card for payment of gratuity, payable not later than the next regular payday. Although this bill would apply to restaurants, nail salons, spas and any other business accepting card payments, the author has

indicated that this bill is aimed specifically at the ride-hailing industry (Uber currently does not allow patrons to pay tips to drivers via debit or credit card). It is also likely that this bill will be used as a vehicle for broader proposals related to the “gig” economy, such as the author’s unsuccessful AB 1727 from last year, which would have allowed gig economy workers to organize. This bill is definitely one to watch.

AB 1173 (Harper) – Holidays: Alternative Workweek Schedules – This bill authorizes individual alternative workweek schedules for employees in the retail industry during the holiday season. These schedules would authorize such employees to work up to 10 hours per day within a 40-hour workweek without the payment of overtime.

AB 1174 (Harper) – Right To Work – Following trends in other states and a push by Republicans in Congress, this bill would establish California as a “right-to-work” state, prohibiting an employee from being required (as a condition of employment) from being a member or contributing financial support to a union.

AB 1429 (Fong) – PAGA – This bill limits an aggrieved employee’s ability to bring a civil action under PAGA only to alleged violations of existing law related to itemized wage statements, overtime, and meal and rest periods. Previous similar proposals were unsuccessful.

AB 1430 (Fong) – PAGA – This bill provides that an aggrieved employee may bring a civil action under PAGA only after an investigation by, and receipt of notice from, the Labor and Workforce Development Agency that there is a reasonable basis for a civil action, or if the agency fails to provide timely or any notice. Previous similar proposals were unsuccessful.

AB 1434 (Allen) - Legislature – Prohibits a Member of the Legislature from simultaneously serving as an officer of a labor union.

AB 1461 (Thurmond) – Food Delivery Enterprises – This bill requires an employee of a food delivery enterprise (such as Blue Apron) who is involved in the preparation, storage or service of food as part of his or her employment to obtain a food handler card. This bill is sponsored by the United Food and Commercial Workers Union, and appears aimed at innovative food delivery enterprises that labor groups perceive as a threat to traditional grocery stores.

AB 1477 (Brough) – Veterans’ Preferences: Voluntary Policy – This bill authorizes a private employer to establish and maintain a written veterans’ preference employment policy to give a voluntary preference for hiring or retaining a veteran. The granting of such a preference, in and of itself, shall not be deemed to violate local or state employment discrimination laws. This bill is identical to another bill introduced this year, AB 353 (Voepel). Both bills are similar to AB 1383 (Jones) from last year, which failed passage in the Senate Judiciary Committee.

AB 1548 (Fong) – Cal/OSHA Penalties – Current law authorizes certain public entities (such as school districts) to apply for a refund of Cal/OSHA civil penalties if certain conditions are met. This

bill would extend that ability to other public entities, including cities, counties and special districts.

AB 1628 (Grayson) – Public Works: Independent Contractors – This bill does not yet contain substantive language, but declares the intent of the Legislature to enact legislation that would prohibit the use of independent contractors on public works projects.

SB 62 (Jackson) – Family Care and Medical Leave – Extends the family members for which leave can be taken under the California Family Rights Act (CFRA) to include grandparents, grandchildren, siblings, domestic partners, and adult children. This proposal has been tried several times over the last decade, but has never been successful.

SB 63 (Jackson) – New Parent Leave – This bill would provide up to 12 weeks of job-protected family leave to bond with a new child for employees that work for employers with 20 or more employees (as opposed to CFRA, which applies to employers with 50 or more employees). This bill is similar to the author's SB 654, which was vetoed last year by Governor Brown. Notably, that bill only provided for six weeks of job-protected leave, whereas SB 63 would authorize up to 12 weeks.

SB 158 (Monning) – Commercial Driver's License: Education – This bill would require DMV to adopt regulations related to entry-level driver training requirements for commercial drivers, including minimum hours of behind-the-wheel training (30 hours for a class A license, 15 hours for a class B license).

SB 219 (Wiener) – LGBT Long-Term Care Facility Resident's Bill of Rights – This bill would prohibit skilled nursing facilities, intermediate care facilities, and residential care facilities from taking specified actions based on a resident's actual or perceived sexual orientation, gender identity, gender expression, or HIV status, including refusing to use a resident's preferred name or pronoun.

SB 225 (Stern) - Human Trafficking: Hotels and Motels – Requires hotels, motels, inns, bed and breakfasts, and other locations that provide transient lodging to post an existing notice relating to slavery and human trafficking. This bill is similar to AB 260 (Santiago), which has also been introduced this year.

SB 270 (Atkins) – Human Trafficking: Hotels and Motels – Requires a hotel or motel that provides lodging services in the state to train its employees who are likely to interact with victims of human trafficking in recognizing the signs of human trafficking and how to report these signs to the appropriate law enforcement agency. This bill is similar to AB 1942 (C. Garcia) from last year, which was held under submission in the Assembly Appropriations Committee.

SB 295 (Monning) – Farm Labor Contractors – This bill provides that violations of specified sexual harassment training requirements applicable to farm labor contractors are violations of the Labor Code and subject to citation by the Labor Commissioner. The bill also requires sexual harassment training for each agricultural employee to be presented in a language understood by that employee.

SB 391 (Vidak) – Piece-Rate Compensation – AB 1513 from 2013 established a methodology whereby certain employers could make payments for previous liability for unpaid rest periods and nonproductive time for employees paid on a piece-rate basis, while avoiding liability for civil penalties. This bill would require the Labor Commissioner to post information on a monthly basis regarding payments made pursuant to AB 1513, including the total number of employees located for whom the Labor Commissioner has collected payments, the total amount paid to those employees, and the balance remaining.

SB 418 (Hernandez) – Public Works: “De Minimis” – Existing law provides that if public subsidies on a private development are “de minimis,” the project shall not thereby be subject to state prevailing wage requirements. However, the law does not specifically define “de minimis.” This bill would define “de minimis” to mean if it is both less than \$275,000 and less than two percent of the total project cost. Three previous legislative efforts in this regard have been attempted, but all were vetoed by Governor Brown.

SB 482 (Stone) – Sleep Time: Domestic Work Employees – This bill is brought in response to concerns over the *Mendiola v. CPS Security Solutions* decision and would authorize a live-in domestic work employee to enter into a written agreement with the employer to exclude from compensable “hours worked” a regularly scheduled period of not more than 8 hours. If the sleep period were interrupted by an emergency, only time spent working during the emergency would constitute hours worked. Since the *Mendiola* decision was issued, the home health care industry has expressed significant concerns about how the issue of compensable sleep time would impact their industry and customers.

SB 524 (Vidak) – Good Faith Defense – This bill would permit an employer to raise as an affirmative defense that, at the time of an alleged violation, the employer was acting in good faith, had sought, relied upon, and conformed with a published opinion letter or enforcement policy of the DLSE, and had provided true and correct information to the DLSE in seeking the opinion letter or enforcement policy. The bill would require any person who asserts the affirmative defense to post a bond, as specified. Similar proposals have previously been introduced but not advanced past the first policy committee.

SB 562 (Lara) – Single-Payer Healthcare System – Although this bill currently only contains intent language, this bill will serve as the vehicle for Democratic efforts to enact a single-payer healthcare system at the state level in California, in response to anticipated Congressional Republican efforts to “repeal and replace” the Affordable Care Act.

SB 603 (Glazer) – BART Strikes – Following up on an issue that was central to this election campaign in 2015, Senator Glazer has introduced this bill to prohibit BART from entering into an agreement that would limit its ability to prepare for a work stoppage or operate during a work stoppage.

SB 604 (Glazer) – BART Strikes – As a companion to the previous measure, this bill would prohibit BART employees from engaging in a strike or work stoppage if BART had maintained all the provisions of an expired contract, and that contract contained a no-strike provision.

SB 744 (Hueso) – Employee Right To Privacy – Although this bill is an empty “spot” bill for now, it states the intent of the Legislature to enact legislation amending the Labor Code to establish the “Employee Right to Privacy.”

See Spot. See Spot Run.

And guess what? The fun doesn’t end there. In addition to the bills described above, there are dozens upon dozens of empty “spot” bills that make only minor or non-substantive changes to existing law. These bills are “placeholders” for substantive language that will be added in later in the legislative process, and you can bet that many of these bills will address labor and employment issues as well. Because who doesn’t love surprises, right?

Therefore, the California employer community will need to remain vigilant throughout the legislative year to continue to monitor and track developments at the capitol.

What’s Next?

These measures will next be referred to the appropriate policy committees for hearing, which will likely occur in March and April. Most of the bills on this list will be referred either to the Assembly Committee on Labor and Employment or the Senate Committee on Labor and Industrial Relations.

If you have any questions about these legislative proposals or how they may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:

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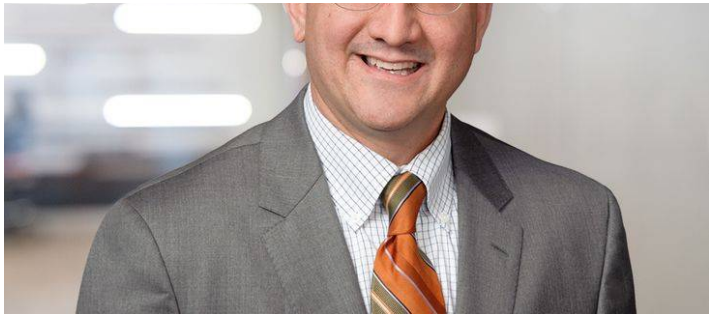
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Benjamin M. Ebbink

Partner

916.210.0400

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